UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	Civil Action
	)	No. 99-CV-02496 (GK)
Plaintiff,	)	
	)	
v.	)	Next scheduled court appearance:
	)	
PHILIP MORRIS USA INC.,	)	July 15, 2004
f/k/a PHILIP MORRIS INC., et al.,	)	
	)	
Defendants.	)	

UNITED STATES' FINAL PROPOSED CONCLUSIONS OF LAW (Volume Two)
REGARDING DEFENDANTS' AFFIRMATIVE DEFENSES

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I

THE COURT HAS DISMISSED VARIOUS AFFIRMATIVE DEFENSES

A. The RICO Claims Are Not Pre-Empted by Congress' Regulatory Regime Regarding Tobacco and Do Not Violate the Separation of Powers Doctrine or the Tenth Amendment

The Court held that the RICO claims are not within the exclusive jurisdiction of the Federal Trade Commission ("FTC"), and are not pre-empted by Congress' regulatory regime regarding tobacco products. Accordingly, the Court dismissed the following Affirmative Defenses:

Philip Morris USA Inc.: Nos. 6, 23, 24;
Altria Group, Inc.: Nos. 7, 24, 25;
R.J. Reynolds Tobacco Co.: Nos. 6, 37, 38;
Brown & Williamson Tobacco Co.: Nos. 6, 20, 22;
British-American Tobacco (Investments) Ltd. ("BATCo"): Nos. 10, 12, 22;
Lorillard Tobacco Co.: Nos. 12, 24, 25;
Liggett Group, Inc.: Nos. 3, 44, 54;
Council for Tobacco Research – USA, Inc. ("CTR"): No. 8;
Tobacco Institute: Nos. 25, 37

See United States v. Philip Morris, 263 F. Supp. 2d 72 (D.D.C. 2003) (Order #356).

Similarly, the Court held that the RICO claims and sought relief do not violate the Separation of Powers Doctrine or the Tenth Amendment. Accordingly, the Court dismissed the following Affirmative Defenses:

Philip Morris USA Inc.: Nos. 12 and 22;
Altria Group, Inc.: Nos. 13 and 23;
R.J. Reynolds Tobacco Co.: Nos. 36 and 43;
Brown & Williamson Tobacco Co.: No. 21;
BATCo: Nos. 13, 24 and 31;
Lorillard Tobacco Co.: No. 48;
Liggett Group, Inc.: No. 63;
CTR: No. 24;
Tobacco Institute: Nos. 15, 26 and 36

See United States v. Philip Morris, 2004 WL 1045768 at * 6 (D.D.C. May 6, 2004) (Order

#538); United States v. Philip Morris, 310 F. Supp. 2d 68 (D.D.C. 2004) (Order #510).

B. The RICO Claims and Sought Disgorgement Do Not Violate the Ex Post Facto Clause

The Court held that the RICO claim's inclusion of racketeering acts that occurred before RICO's effective date (October 15, 1970) and sought disgorgement did not violate the Ex Post Facto Clause because the RICO claims involve "straddle" offenses that began before RICO's effective date and continued past RICO's effective date. Accordingly, the Court dismissed the following Affirmative Defenses:

Philip Morris USA Inc.: Nos. 14 and 30;
Altria Group, Inc.: Nos. 15 and 31;
R.J. Reynolds Tobacco Co.: No. 7;
Brown & Williamson Tobacco Co.: No. 7;
BATCo: No. 18;
Lorillard Tobacco Co.: Nos. 32 and 33;
Liggett Group, Inc.: Nos. 19 and 60;
CTR: No. 22;
Tobacco Institute: No. 12

See United States v. Philip Morris, 310 F. Supp. 2d 58, 64-66 (D.D.C. 2004) (Order #509).

C. The Affirmative Defenses of Waiver, Equitable Estoppel, Laches, Unclean Hands and In Pari Delicto Are Unavailable As a Matter of Law and Fact

The Court held that the Affirmative Defenses of waiver, equitable estoppel, laches, unclean hands and in pari delicto are unavailable to Defendants as a matter of law and fact. Therefore, the Court dismissed the following Affirmative Defenses:

Philip Morris USA Inc.: Nos. 3 and 5;
Altria Group, Inc.: Nos. 4 and 6;
R.J. Reynolds Tobacco Co.: Nos. 2, 3 and 10;
Brown & Williamson Tobacco Co.: Nos. 3, 4, 5 and 15;
BATCo: Nos. 4, 5 and 6;
Lorillard Tobacco Co.: Nos. 10, 11, 41 and 43;
Liggett: Nos. 4 and 29;
CTR: Nos. 2, 3, 4 and 16;

TI: Nos. 3 and 5

The Court also dismissed "any other Affirmative Defense that depends, in part on in whole, on the equitable defenses of waiver, equitable estoppel, laches, unclean hands, or in pari delicto." See United States v. Philip Morris, 300 F. Supp. 2d 61 (D.D.C. 2004) (Order #476).

1. The Equitable Doctrines Underlying the Dismissed Equitable Defenses Cannot Be Applied to Frustrate RICO's Important Objectives by Limiting Remedies for Defendants' RICO Violations

In Order #476, the Court dismissed Defendants' equitable defenses of laches, unclean hands, waiver, equitable estoppel, and in pari delicto. See id. In its accompanying Memorandum Opinion, the Court found that laches and unclean hands were unavailable in this case as a matter of law, because the United States brought this action in its sovereign capacity in the public interest. Id. at 66, 72-74. The Court also held that Defendants had failed to present facts, even if presumed true, that would satisfy the traditional elements of an equitable estoppel claim, let alone the heightened standard that applies when equitable estoppel is asserted against the United States. Id. at 70-72. The Court rejected Defendants' claim of waiver, finding that Defendants offered no triable facts that would allow a reasonable factfinder to conclude that the United States had "unmistakably" waived its right to bring its RICO claims in this case. Id. at 68-70. Finally, the Court found the defense of in pari delicto wholly inapplicable, since Defendants failed even to allege "that the Government has committed any illegality during the period covered by the Complaint's allegations of conspiracy." Id. at 74-76.

At the end of its decision, the Court stated: "This decision does not address the applicability of the doctrines discussed to issue related to equitable relief, should liability be established." See id. at 76 n.21. Based on this sentence, Defendants have argued that the Court

should consider all of the evidence that failed to support these defenses, for purposes of deciding what remedies are appropriate. Defendants are wrong.

The Court should not consider evidence of lawful governmental activities to limit or restrict appropriate remedies for Defendants' RICO violations. As to the nature or scope of equitable and injunctive relief, the Supreme Court established long ago that equitable doctrines may not be used to "frustrate the purpose of its laws or to thwart public policy." Pan Am. Petrol. & Transp. Co. v. United States, 273 U.S. 456, 506 (1927); see also FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994) ("Courts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws."); Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) at 86 (2d ed. 1993) ("Although the rule is formulated in various ways, the essence is that estoppel is not applied against governmental entities when to do so would frustrate or impede public policy."). "Unless the Government did something which in good conscience it should not have done, or failed to do something fair dealing required it to do, it comes into court with clean hands and is entitled to the equitable relief it obtained.'" United States v. Second Nat'l Bank of N. Miami, 502 F.2d 535, 548 (5th Cir. 1974) (quoting Deseret Apartments, Inc. v. United States, 250 F.2d 457, 458 (10th Cir. 1957)).

RICO's legislative history and federal caselaw is replete with statements about the compelling public purposes served by RICO's civil provisions, and expressly indicates that equitable doctrines should not be applied to undermine the accomplishment of those paramount public interests. The Congressional Statement of Findings and Purpose underlying RICO explains that, among other things, RICO was designed to combat activities that

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

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

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

S. Rep. No. 617, 91st Cong., 1st Sess., at 160 (1969); see also Russello v. United States, 464 U.S. 16, 26-28 (1983) (discussing important purposes of RICO); United States v. Turkette, 452 U.S. 576, 585-90 (1981) (same); see also United States v. International Bhd. of Teamsters, 3 F.3d 634, 638 (2d Cir. 1993) (when it proceeds under § 1964, "the government sues in its sovereign capacity pursuant to a 'compelling governmental interest' and 'strong congressional policy'") (citations omitted)).

For example, the Senate Report states that "there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, **nor is the doctrine of laches applicable**." S. Rep. No. 91-617 at 160 (emphasis added). Congress' statement that the **doctrine** of laches does not apply to suits brought by the United States under RICO's civil provisions, not merely the **defense** of laches, indicates Congress' intent that equitable doctrines not interfere with the United States' ability to obtain any and all relief necessary to effectuate RICO's remedial purposes. Similarly, Congress explicitly stated its intent that the Government

not be denied remedies be designed to ensure the effective accomplishment of RICO's objectives, even if such remedies imposed economic hardship on wrongdoers:

> However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities . . . .
>
> **If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.**

Id. at 81 (emphasis added).

Consistent with RICO's text and legislative history, the United States' instant enforcement action to address Defendants' extensive fraudulent scheme is intended to vindicate the important public interests embodied in RICO. The Court's (re)consideration at trial of testimony and evidence that it has previously deemed inadequate even to create triable issues regarding Defendants' equitable defenses, as grounds to deny the United States relief in this case, threatens to frustrate the purposes, and thwart the public policies, underlying RICO.[1]

In granting the United States' Motion for Partial Summary Judgment, the Court assumed all of the facts cited by Defendants to be true for purposes of the motion, yet the Court found none of them to suggest that the United Stated did something that "in good conscience it should not have done, or failed to do something fair dealing required it to do." See Second Nat'l Bank of N. Miami, 502 F.2d at 548 (citation and internal quotation marks omitted). Defendants have failed to present any evidence of affirmative misconduct by the United States, let alone

[1] Further, Section 1964 allows the United States to effectuate the purposes of RICO only through equitable and injunctive relief, rather than legal remedies such as damages. See, e.g., United States v. Philip Morris Inc., 273 F. Supp. 2d 3, 9 (D.D.C. 2002) ("Section 1964(a) authorizes civil suits in which only equitable relief may be granted."). The Court rejects Defendants' attempt to resuscitate legally irrelevant evidence as grounds to deny the United States' meaningful, effective relief for Defendants' half-century of fraud.

misrepresentations on smoking and health matters or other actions necessary to invoke the equitable doctrines of laches, waiver, equitable estoppel, unclean hands, or in pari delicto. Accordingly, Defendants may not re-inject into the proceedings evidence intended to convince the Court that equitable and injunctive relief should be denied or limited because of lawful activities undertaken in good faith by employees or agencies of the United States. Permitting Defendants to introduce such evidence is legally inappropriate where, as here, the United States is acting in its sovereign capacity to vindicate important public interests.[2]

Further, evidence of lawful activities undertaken by federal agencies or employees is irrelevant to the relief actually sought by the United States, which is narrowly tailored to address Defendants' fraudulent conduct. For example, the United States seeks an injunction that would: (1) prohibit Defendants from engaging in future racketeering activity; (2) prohibit Defendants from making false or misleading statements about the health effects of smoking or exposure to secondhand smoke, or the addictiveness of smoking and nicotine; (3) order the disclosure to appropriate governmental bodies certain documents relating to Defendants' research and marketing activities; (4) ordering Defendants to issue corrective statements about smoking's effects and its nicotine-based addictiveness in future marketing activities; and (5) order Defendants to fund public health education campaigns and smoking cessation programs for addicted smokers. See Philip Morris, 273 F. Supp. 2 at 10-11. Should the United States prove the scheme to defraud it has alleged, none of the first three listed elements of sought injunctive

[2] See also Order #497 (entering without objection Report & Recommendation #145, which cited Order #476 to conclude, as to one challenged document, that "to the extent that Joint Defendants' claim this document is relevant to these [equitable] defenses, Joint Defendants cannot establish need as these defenses are no longer in this case." R&R #145 at 21 n.12); Report & Recommendation #154 at 10-11.

relief is at all related to (or mitigated by) governmental conduct, and thus should not be denied on that grounds. Similarly, the prayer for an injunction requiring corrective statements is a common form of relief granted to inform the public that previous public statements by the wrongdoer were false, misleading, and/or deceptive. See, e.g., Novartis Corp. v. FTC, 223 F.3d 783, 787-89 (D.C. Cir. 2000); Warner-Lambert Co. v. FTC, 562 F.2d 749, 759-61 (D.C. Cir. 1977).

Evidence of governmental activity is likewise irrelevant to the United States' request for equitable disgorgement. As the Court has recognized previously, any disgorgement award will reflect the amount that the United States' has adequately proven is a reasonable approximation of proceeds causally related to Defendants' fraudulent activity. See, e.g., United States v. Philip Morris USA Inc., 2004 WL 1161455 (D.D.C. May 21, 2004); United States v. Philip Morris USA, 310 F. Supp. 2d 58, 63-64 (D.D.C. 2004) (discussing SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-31 (D.C. Cir. 1989)). Thus, since any disgorgement award will reflect an amount that reasonably approximates Defendants' proceeds from unlawful conduct – conduct to which the United States' activities are neither relevant nor even alleged by Defendants to be "wrongful, inequitable, or a manifestation of bad faith" – evidence about actions taken by the United States simply do not bear on whether, or how much, Defendants should be required to disgorge.

As the evidence that Defendants would seek to introduce to deny the sought equitable and injunctive relief lacks even the allegation that "any of the Government conduct upon which they rely is wrongful, inequitable, or a manifestation of bad faith," see United States v. Philip Morris, 300 F. Supp. 2d at 76 (rejecting Defendants' claim of unclean hands), relief targeted to prevent

future RICO violations and to address the ongoing effects of fraudulent activity may not be denied or eviscerated on the basis of such evidence. To conclude otherwise would threaten to undermine the United States' ability to vindicate the important purposes of RICO through a meritorious Section 1964(a) enforcement action.

II

THE REQUESTED DISGORGEMENT DOES NOT VIOLATE THE EIGHTH AMENDMENT

A. The Requested Disgorgement Does Not Constitute Punishment and Hence Does Not Even Implicate the Eighth Amendment, Much Less Violate It

The Court has held that because the Excessive Fines Clause of the Eighth Amendment "applies only to penalties that are properly characterized as 'punishment,'" RICO disgorgement of "ill-gotten proceeds . . . does not implicate the Excessive Fines Clause" because such disgorgement is remedial and "is not punishment." See Philip Morris, 310 F. Supp. 2d at 63-64. Defendants have argued that the United States may not rely on the well-established principle that disgorgement of ill-gotten gains is not punishment because the United States' calculation of the disgorgement sought allegedly fails to distinguish between legally and illegally acquired proceeds. See id. at 64. The Court rejects Defendants' argument because the Court has found that the United States properly seeks disgorgement of $280 billion which is a reasonable approximation of profits causally connected to Defendants' RICO violations. See United States' Final Proposed Conclusions of Law (Vol. One) ("U.S. FPCL Vol. 1") at § IV.

Moreover, disgorgement of Defendants' gains from their unlawful proceeds for the "time value of money" does not constitute punishment, especially since such disgorgement is necessary to prevent Defendants' unjust enrichment and to deprive Defendants of all their ill-gotten gains,

primary non-punitive objectives of disgorgement.[3] Furthermore, disgorgement that accounts for the "time value of money" and "prejudgment interest" is routinely imposed under the securities laws to achieve these non-punitive objectives of disgorgement.[4] Significantly, in General Motors Corp. v. Devex Corp., 461 U.S. 648, 653-54, n.10 (1983), the Supreme Court rejected the view that awarding prejudgment interest is a penalty, stating that granting it is necessary to deprive the wrongdoers of a "windfall" and to "remove an incentive to prolong litigation." Accord Modern Electric, Inc. v. Ideal Electronic Security Co., Inc., 145 F.3d 395, 397 (D.C. Cir. 1998) (holding that awarding prejudgment interest does not constitute a penalty because it "merely compensated [plaintiff] for the continuing time-value of its money").[5] Therefore, disgorgement reflecting the "time value of money" which seeks to deprive the wrongdoer of an unjust windfall does not

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[3] See, e.g., SEC v. Sekhri, 2002 WL 31100823, at *18 (S.D.N.Y. 2002) (calculation "to approximate the time value of money" is necessary to deprive defendant of "his or her ill-gotten gain and will prevent his or her unjust enrichment."); Crude Co. v. F.E.R.C., 923 F. Supp. 222, 241 (D.D.C. 1996) (Defendant "has had the use of monies received under the [unlawful transactions] for nearly 20 years. Further, [defendant] has had the use of the more than $1.2 million it owes in restitution during the entire pendency of this action. Money has a 'time value', and unless [defendant] is required to include the time value of money in the amount of its liability, there will not have been full disgorgement of ill-gotten gains."). Cf. In Re Kidd, 315 F.3d 671, 677-78 (6th Cir. 2003) (holding that a monetary judgment should include an amount to account for the change in the "value of money over time"). Accord Forman v. Korean Airlines Co., 84 F.3d 446, 450-51 (D.C. Cir. 1996).

[4] See, e.g., SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996); Commercial Union Assur. Co., PLC v. Milken, 17 F.3d 608, 613-14 (2d Cir. 1994); SEC v. Antar, 97 F. Supp. 2d 576, 589 (D.N.J. 2000); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 16 (D.D.C. 1998); SEC v. Cross Fin. Servs., Inc., 908 F. Supp. 718, 734 (C.D. Cal. 1995); SEC v. Stephenson, 732 F. Supp. 438, 439 (S.D.N.Y. 1990). See also Motion Picture Ass'n of Amer. Inc. v. Oman, 969 F.2d 1154, 1157 (D.C. Cir. 1992) (prejudgment "interest compensates for the time value of money, and thus is often necessary for full compensation"); Hopi Tribe v. Navajo Tribe Cases, 46 F.3d 908, 922-23 (9th Cir. 1995); Matter of Oil Spill By The Amoco Cadiz, 954 F.2d 1275, 1331 (7th Cir. 1992) ("prejudgment interest . . . is an ordinary part of any award under federal law"); Gorenstein Enters. v. Quality Care - USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989) ("prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay.").

[5] See also Matter of Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 849 (7th Cir. 1997) ("an award [of prejudgment interest], no matter how large, cannot be called 'punitive'"); Oiness v. Walgreen Co., 88 F.3d 1025, 1033 (Fed. Cir. 1996) ("Prejudgment interest has no punitive, but only compensatory, purposes"); Drennan v. General Motors Corp., 977 F.2d 246, 253 (6th Cir. 1992) ("an award of prejudgment interest is compensatory rather than punitive").

constitute punishment, and hence does not implicate, much less violate, the Eighth Amendment.

It is also noteworthy that Defendants have not cited a single case holding that disgorgement's accounting for the "time value of money" constitutes punishment. Indeed, during the nearly five years that this case has been pending, Defendants have not cited a single decision holding that disgorgement of ill-gotten gains under any circumstances constitutes "punishment."

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

Moreover, even assuming arguendo that RICO disgorgement could constitute "punishment" under the Eighth Amendment, disgorgement of a defendant's ill-gotten proceeds can never be considered "excessive" or "grossly disproportionate" in violation of the Eighth Amendment. Recently, the Supreme Court stated that the Eighth Amendment "contains a narrow proportionality principle," and that accordingly "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." Ewing v. California, 538 U.S. 11, 21 (2003) (internal quotations and citations omitted). Therefore, the Supreme Court emphatically admonished "that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." Id. at 22. Accord Lockyer v. Andrade, 538 U.S. 63, 77 (2003) ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case"). Disgorgement of a wrongdoer's ill-gotten gains does not constitute such an "extraordinary case."

Indeed, federal courts of appeals have repeatedly held in the context of both criminal and civil forfeiture cases that forfeiture of crime proceeds (as distinguished from forfeiture of

lawfully obtained property used in, or to facilitate, a crime) merely deprives the wrongdoer of his unlawful gains to which he has no right, and therefore such forfeiture can never constitute punishment or an excessive fine within the meaning of the Eighth Amendment. See, e.g., United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860, 874-75 (9th Cir. 2001) ("'[f]orfeiture of proceeds . . . simply parts the owner from the fruits of the criminal activity' [and hence] . . . criminal proceeds represent the paradigmatic example of 'guilty property,' the forfeiture of which has been traditionally regarded as non-punitive, we follow the Seventh, Eighth, and Tenth Circuits and hold that the excessive fines clause of the Eighth Amendment does not apply to [such forfeiture of crime proceeds].") (first alteration in original; citations omitted). Accord United States v. Candelaria-Silva, 166 F.3d 19, 44 (1st Cir. 1999); United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1395 (10th Cir. 1997); United States v. Alexander, 108 F.3d 853, 855, 858 (8th Cir. 1997); Smith v. United States, 76 F.3d 879, 882 (7th Cir. 1996); United States v. $21,282.00 in U.S. Currency, 47 F.3d 972, 973 (8th Cir. 1995); United States v. Wild, 47 F.3d 669, 674 n.11 (4th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994); United States v. Horak, 833 F.2d 1235, 1246 n.4 (7th Cir. 1987) (dictum); United States v. $288,930.00 in U.S. Currency, 838 F. Supp. 367, 370 (N.D. Ill. 1993). Cf. United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001) ("The court ordered [the defendant] to forfeit only so much of the property as was purchased with illegally obtained funds – money that she had no right to in the first place"). See also Philip Morris, 310 F. Supp. 2d at 63-64.

a. Defendants' prior reliance (Joint Defendants' Preliminary Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses ("JD. PFF"), p. 875) upon United

States v. Halper, 490 U.S. 435 (1989), is unavailing, as the Court has ruled that Halper is distinguishable and does not govern this case. See Philip Morris, 310 F. Supp 2d at 63 n.7. Halper held that an in personam "civil penalty of . . . an amount equal to 2 times the amount of damages the Government sustain[ed] because of the [defendant's violation of law], and costs of the civil action" could constitute "punishment" that triggered application of the Double Jeopardy Clause. Id. at 438, 452. In United States v. Ursery, 518 U.S. 267, 278-88 (1996), the Supreme Court held that Halper was confined to its facts that involved "in personam civil penalties under the Double Jeopardy Clause," and did not apply to "in rem civil forfeitures." Id. at 288. Accordingly, the Supreme Court held that civil in rem forfeitures, pursuant to 21 U.S.C. § 881(a)(7), "are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." Id. at 292.[6]

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

> It is difficult to see how the rule of Halper could be applied to a civil forfeiture. Civil penalties are designed as a rough form of "liquidated damages" for the harms suffered by the Government as a result of a defendant's conduct. . . . **Forfeitures serve a variety of purposes**, but are designed primarily to confiscate property used in violation of the law, **and to require disgorgement of the fruits of illegal conduct**. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the non-punitive purposes

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

> served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the non-punitive purpose of that forfeiture. Quite simply, the case-by-case balancing test set forth in Halper, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.

Id. at 283-284 (emphasis added).

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

b. Defendants' prior reliance (JD. PFF, p. 875) upon United States v. Bajakajian, 524 U.S. 321 (1998), and Austin v. United States, 509 U.S. 602 (1993), is also misplaced. Bajakajian held that the forfeiture of $357,144 that the defendant was carrying when he attempted to leave the United States without reporting it, imposed as part of the defendant's criminal sentence for violating the reporting requirements of 31 U.S.C. § 5316,[7] violated the Excessive Fines Clause of the Eighth Amendment. The Court explained that such "in personam criminal forfeitures" constitute "punishment" since such forfeitures "serve[] no remedial purposes" and "clearly" are part of the defendant's criminal "punishment" imposed at sentencing. 524 U.S. at 343-44.

Austin held that the civil in rem forfeiture of a defendant's vehicles and real property used to facilitate the commission of drug-related crimes could constitute "punishment" within the

[7] 31 U.S.C. § 5316 provides, in relevant part, that it is a crime to wilfully transport or attempt to transport out of the United States more than $10,000 at one time without reporting it to the proper authorities.

scope of the Excessive Fines Clause because such forfeiture historically had been considered punishment (509 U.S. at 612-14) and currently "serves, at least in part, to punish the owner." 509 U.S. at 618.[8]

In striking contrast to the criminal and civil forfeitures involved in Bajakajian and Austin, it is well established that, as this Court has found (see supra p. 9), the civil disgorgement sought here is designed to serve entirely remedial, non-punitive purposes, i.e., to deter unlawful conduct and to prevent unjust enrichment. On this basis alone, Bajakajian and Austin are clearly inapposite. Moreover, this case does not involve forfeiture imposed as part of a defendant's sentence to punish him for his criminal conviction that plainly implicates the Eighth Amendment. Finally, neither Bajakajian nor Austin involved the disgorgement of a defendant's proceeds of unlawful activity, as involved here, a remedy which does not – and can never – constitute a violation of the Eighth Amendment because a wrongdoer does not have any cognizable right to the proceeds of his unlawful conduct. See supra pp. 12-13. In sum, Bajakajian and Austin offer no support to Defendants' argument that the sought civil disgorgement of their ill-gotten gains even implicates, much less violates, the Eighth Amendment.

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

Assuming arguendo that under Bajakajian's proportionality analysis disgorgement of proceeds of unlawful conduct could ever violate the Excessive Fines Clause of the Eighth Amendment, the sought disgorgement in this case is constitutional. In Bajakajian, the Court stated that "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the

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

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

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

Moreover, the maximum sentence that could have been imposed in a criminal prosecution includes restitution and a fine "of twice the gross gain or twice the gross loss." See 18 U.S.C. § 3571(c)(2) & (d). Since the United States has established that Defendants' gross gain is at least $742 billion (see U.S. FPCL Vol. 1, pp. 134 n.120), the total potential fine is at least $1.484 trillion, a sum that far exceeds the amount of sought disgorgement. Indeed, even if the $280 billion figure is used to calculate the maximum potential fine, the sought disgorgement is still

one half of the $560 billion maximum fine,[9] which "presumptively" establishes that the sought disgorgement is not excessive.[10]

Finally, the harm Defendants have caused is hardly minimal. In addition to unlawfully defrauding millions of victims of at least $280 billion, Defendants have caused substantial financial harm to the United States and to the public as well as incalculable harm to the health of the American people. It has been reasonably calculated by the United States' experts that society will suffer harm to the health care system in the amount of $938 billion (in 2001 dollars) **only** in connection with the Youth Addicted Population utilized to calculate the United States' disgorgement calculation of $280 billion. Put another way, with regard to the 49 million persons who were smoking more than five cigarettes per day before reaching age 21 during the period 1954-2000, $938 billion in costs is likely to be incurred by the health care system, including payments borne by individuals and their families, by 2050. These total health care costs will likely be incurred for the treatment of over 38 million person-years of lung cancer and chronic obstructive pulmonary disease, and 70 million person-years of coronary heart disease, stroke, and other major smoking-attributable diseases. In this population, these 49 million smokers will likely experience **13 million premature deaths** and **174 million years of life lost** as a result of

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

[10] See, e.g., United States v. Moyer, 313 F.3d 1082, 1086 (8th Cir. 2002) ("the court-ordered forfeiture was half the amount of the permissible fine. . . . Thus, the forfeiture is presumptively not excessive"); United States v. Hill, 167 F.3d 1055, 1072-73 (6th Cir. 1999) ("there is no [Eighth Amendment] violation when the forfeiture does not exceed the maximum fine allowed by statute"); United States v. Elder, 90 F.3d 1110, 1132-33 (6th Cir. 1996) (same); United States v. Libretti, 38 F.3d 523, 531 (10th Cir. 1994) (holding that where the value of the property forfeited was less than the permissible fine the forfeiture was not excessive), aff'd on other grounds, 516 U.S. 29 (1995); United States v. One Parcel Prop. Loc. at Lot 85, Ctry. Ridge, 894 F. Supp. 397, 406-07 (D. Kan. 1995) (same). See also United States v. One Parcel Property, 106 F.3d 336, 339 (10th Cir. 1997); United States v. Bieri, 68 F.3d 232, 236-67 (8th Cir. 1995).

these diseases. See U.S. FPFF § IX ¶¶ 39-67. Expert Report of Timothy Wyant and Scott L. Zeger, United States v. Philip Morris USA, July 19, 2002. As this Court has held, such health care costs attributable to smoking are relevant to Defendants' Eighth Amendment claim. See United States v. Philip Morris, Order No. 235 (Sept. 30, 2002).

In all these circumstances, even assuming arguendo that Bajakajian's proportionality analysis applies, the sought disgorgement of $280 billion is not grossly disproportionate to Defendants' massive unlawful conduct and does not violate the Eighth Amendment.[11]

D. Defendants May Not Claim Hardship

Moreover, Defendants have no cognizable claim that disgorgement of $280 billion in proceeds is impermissible because it is a large amount and would adversely affect their businesses. See JD. PFF, p. 887, ¶ 2146. It cannot be overemphasized that the amount of disgorgement is solely a result of Defendants' massive unlawful conduct, and they never had a right to the proceeds of their unlawful conduct in the first place. Furthermore, in enacting RICO Congress recognized that a wrongdoer may not be heard to complain that the United States is not entitled to deprive a wrongdoer of the fruits of his illegal conduct merely because it would impose an economic hardship. As noted supra, the Senate Report regarding RICO discussed the remedies available under RICO, stating: "If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, **the Government cannot be denied the later remedy because economic hardship, however severe, may result.**" S. Rep. No. 91-617, at 81 (emphasis added). For these same

[11] Accord, e.g., Bollin, 264 F.3d at 417-19; Loe, 248 F.3d at 464; Hill, 167 F.3d at 1072-73; United States v. Hurley, 63 F.3d 1, 21-23 (1st Cir. 1995); United States v. Saccoccia, 58 F.3d 754, 785, 787-89 (1st Cir. 1995).

reasons, Defendants' unsupported claim that they are unable to pay a disgorgement sum that reasonably reflects their gains obtained as a result of their fraudulent scheme is inadmissible and legally irrelevant to the scope of relief ordered by the Court. See, e.g., America's Community Bankers v. FDIC, 200 F.3d 822, 828 (D.C. Cir. 2000); Hobson v. Brennan, 646 F. Supp. 884, 888 n.8 (D.D.C. 1986); CFTC v. Avco Fin. Corp., 1998 WL 524901, *1 (S.D.N.Y. 1998) (refusing to consider defendant's "dire financial circumstances" in fashioning disgorgement award).

At bottom, a wrongdoer who steals or otherwise obtains through fraud billions of dollars from his victims has no cognizable right to either preclude disgorgement of the proceeds of his crimes or to keep those proceeds. To rule otherwise would eviscerate the remedial, deterrent purposes served by disgorgement.

III

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

Defendants CTR and the Tobacco Institute assert that pursuant to New York Not-For-Profit Corporation Law sections 1002 and 1003, they were dissolved in November 1998 and August 2000, respectively, and have ceased their operations. Defendants assert an affirmative defense that consequently the United States "cannot establish any possibility, let alone a 'reasonable likelihood' of future violations of RICO, and cannot obtain relief under 18 U.S.C. § 1964(a)." See JD. PFF, pp. 837-41; Memorandum of Law in Support of Joint Motion For

Summary Judgment by Defendants The Council For Tobacco Research – U.S.A., Inc. and The Tobacco Institute, Inc., at 1-2 ("CTR/TI MSA"). However, the New York State statutes that Defendants CTR and the Tobacco Institute rely upon explicitly provide that dissolution of not-for-profit corporations, such as CTR and the Tobacco Institute, do "not affect any remedy available . . . against such corporation . . . for any right or claim existing or any liability incurred before such dissolution." NY N-PCL § 1006(b). Moreover, a substantial body of caselaw firmly establishes that under New York law, dissolved corporations remain liable for injunctive and monetary relief even if they have ceased their activities and are unable to pay any monetary relief.

A. Factual Background

1. The Council for Tobacco Research – U.S.A., Inc.

The Council for Tobacco Research – U.S.A., Inc., was first organized as the Tobacco Industry Research Council in 1954. MD000289-0296 (U.S. Ex. 21,218). The name of the organization was changed to The Council for Tobacco Research – U.S.A. in 1964 and it was incorporated in the State of New York under the name The Council for Tobacco Research – U.S.A., Inc. (collectively "TIRC/CTR" or "CTR") under New York Not-For-Profit Corporation Law in 1971. 1003041486-1488 (U.S. Ex. 20,146); 10247626-7638 (U.S. Ex. 22,245).

The genesis of TIRC/CTR occurred when representatives of the major tobacco companies met in New York City at the Plaza Hotel on December 14 and 15, 1953, to develop an industry response to counter the negative publicity generated by the studies linking cigarette smoking and lung cancer. 508775416-5416 (U.S. Ex. 20,817). The companies initially forming TIRC/CTR included Defendants American, Brown & Williamson, Lorillard, Philip Morris and R.J.

Reynolds. TIMN0029907-9907 (U.S. Ex. 21,267).[12] The meetings were also attended by representatives from Hill & Knowlton, the public relations advisors retained by the industry to develop the public relations program on the health issue. 2022998227-8231 (U.S. Ex. 22,241).

On December 24, 1953, Hill & Knowlton submitted a proposal regarding the tobacco industry's public relations campaign, recommending that the companies form a joint industry research committee that would sponsor independent scientific research on the health effects of smoking and announce the formation of the research committee nationwide as news and in advertisements. 01138856-8864 (U.S. Ex. 20,036). The Tobacco Industry Research Committee was chosen as the official name of the committee. SHSW001300-1303 (U.S. Ex. 21,236).

Following Hill & Knowlton's advice, the formation and purpose of TIRC/CTR was announced on January 4, 1954, in a full-page advertisement called "A Frank Statement to Cigarette Smokers" published in 448 newspapers throughout the United States. TIMN0029907-9907 (U.S. Ex. 21,267). The Frank Statement set forth the industry's "open question" position that it would maintain over the next forty years: there was no proof that cigarette smoking was a cause of lung cancer; cigarettes were not injurious to health; and more research on smoking and health issues was needed. In the Frank Statement, the participating companies accepted "an interest in people's health as a basic responsibility, paramount to every other consideration in our business" and pledged "aid and assistance to the research effort into all phases of tobacco use and health." The companies promised that they would fulfill the obligations they had undertaken in the Frank Statement by funding independent research through TIRC/CTR, free from industry

[12] Defendant Liggett was not an initial member of TIRC/CTR, but participated in TIRC/CTR throughout the years. ARU5856934-6943 (U.S. Ex. 75,927).

influence. TIMN0029907-9907 (U.S. Ex. 21,267).

Defendants did not keep the promises made in the Frank Statement. In addition to helping to perpetuate the "open question" controversy and exploiting TIRC/CTR as a public relations tool, TIRC/CTR was also used by Defendants in a variety of ways. TIRC/CTR's employees oftentimes acted as consultants, advisors and strategists to various Defendants with respect to smoking and health issues. CTR also administered self-serving research for Defendants through CTR Special Projects, research projects recommended by industry lawyers and advisors, which allowed Defendants to pursue witness development needs and the cultivation of favorable research studies. LG2002635-2638 (U.S. Ex. 21,201); 321668053-8055 (U.S. Ex. 20,591); 2045752106-2110 (U.S. Ex. 20,467); LG2000741-0750 (U.S. Ex. 36,269).

CTR pursued voluntary dissolution in 1998 pursuant to New York Not-For-Profit Corporation Law as a result of a voluntary vote to dissolve by its member companies and board of directors following agreements made by such organizations in settlement of the Minnesota litigation and the MSA. CTR's voluntary dissolution followed an application by the New York State Attorney General in 1997 seeking judicial dissolution of the organization based upon its fraudulent conduct with respect to smoking and health issues. TI31113275-3279 (U.S. Ex. 21,256).

2. The Tobacco Institute, Inc.

The Tobacco Institute, Inc., was incorporated in the State of New York in 1958 also under the New York Not-For-Profit Corporation Law. TIMN0011255-1260 (U.S. Ex. 22,250). The Tobacco Institute was formed by tobacco companies, including Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, Liggett, Lorillard, and American, to assume many of the public

relations functions of TIRC/CTR. 93481139-1140 (U.S. Ex. 21,117); ATX110005290-5303 (U.S. Ex. 21,774); 501941580-1581 (U.S. Ex. 20,004); 201007690-7691 (U.S. Ex. 22,252); 502645038S-5038Z (U.S. Ex. 23,053). According to its 1958 Certificate of Incorporation, the purposes for which the Tobacco Institute was formed were

> to promote a better understanding by the public of the tobacco industry and its place in the national economy; to cooperate with governmental agencies and public officials with reference to the tobacco industry; to collect and disseminate information relating to the use of tobacco; to collect and disseminate scientific and medical material relating to tobacco; to collect and disseminate information relating to the tobacco industry published or released by an governmental agency, federal or state, or derived from other sources independent of the industry; to collect and disseminate information relating to legislative and administrative developments, federal or state, affecting the tobacco industry; to promote public good will.

TIMN0011255-1260 (U.S. Ex. 22,250).

Despite these publicly stated purposes, the privately articulated primary functions of the Tobacco Institute included advancing – through press releases, advertisements, publications, and other public statements – Defendants' primary position that there were legitimate scientific and medical doubts concerning the relationship between smoking and disease; disputing statements from health organizations about smoking and disease, and later about second-hand smoke and disease; making certain that Defendants' positions on issues related to the connection between smoking and disease and second hand smoke and disease were kept constantly before the public, the medical community, the press, and the government; selectively using the results of TIRC/CTR research projects and other industry-sponsored research projects to question the charges against smoking, to emphasize the complexities of those diseases with which smoking has been statistically associated, and to reassure the public that Defendants were actively

investigating the issues; denying that cigarette smoking was addictive; minimizing the difficulties of quitting smoking; and denying that Defendants marketed to children.

The New York State Attorney General sought judicial dissolution of the Tobacco Institute in 1997 based upon its fraudulent conduct with respect to smoking and health issues. TI31113275-3279 (U.S. Ex. 21,256). The Tobacco Institute then pursued voluntary dissolution pursuant to the New York Not-for-Profit Corporation Law in 2000.

3. The Dissolution of CTR and the Tobacco Institute

Although CTR and the Tobacco Institute pursued voluntary dissolution, neither Defendant has undertaken affirmative action to disavow or defeat the purpose of the RICO Enterprise or conspiracy and neither has made a full disclosure of its unlawful scheme to the authorities. The fraudulent conduct of the Enterprise has continued to this day by CTR's and the Tobacco Institute's co-conspirators and named Defendants in this action. See infra and U.S. FPCL Vol. 1 § III.B.

B. Dissolution Of CTR And The Tobacco Institute Does Not Vitiate Their Liability For Their Participation In A Scheme To Defraud And Their Participation In A RICO Enterprise And Conspiracy

1. The United States has submitted substantial evidence that establishes that Defendants, including CTR and the Tobacco Institute, participated in a multi-faceted scheme to defraud the public for over 45 years and have caused literally thousands of mailings and interstate wire transmissions in furtherance of their joint scheme to defraud.[13]

It is well-established that the existence of a RICO enterprise and conspiracy and a defendant's participation in both are not vitiated merely because a defendant's participation in

[13] See U.S. FPFF §§ I, IV and V; U.S. FPCL Vol. 1 § I.G.

them ceases. As the District of Columbia Circuit has stated, "[I]t is not essential that each and every person named in the indictment [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to have been members at any time." United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988).[14]

Likewise, it is well established that proof of a conspiracy is not defeated merely because membership in the conspiracy changes and some defendants cease to participate in it.[15] In addition, each co-conspirator is liable for the acts of all other co-conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the

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[14] Accord United States v. White, 116 F.3d 903, 925 n.7 (D.C. Cir. 1997) ("Such an association of individuals may retain its status as an enterprise even though the membership of the association changed by the addition or loss of individuals during the course of its existence"); United States v. Mauro, 80 F.3d 73, 77 (2d Cir. 1996) (existence of enterprise not defeated by "changes in membership"); United States v. Church, 955 F.2d 688, 698 (11th Cir. 1992) (enterprise established where the "personnel of the enterprise was not the same from beginning to end"); United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir. 1985) (liability for participation in a RICO enterprise does not require "participation of all members throughout the life of the enterprise"); United States v. Hewes, 729 F.2d 1302, 1317 (11th Cir. 1984) ("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life"); United States v. Elliot, 571 F.2d 880, 898 n.18 (5th Cir. 1978) (existence of enterprise not defeated by insufficient evidence as to one of its alleged members).

[15] See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986) ("An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time."); United States v. Warner, 690 F.2d 545, 549 n.7 (6th Cir. 1982); United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Boyd, 595 F.2d 120, 123 (3d Cir. 1978); United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) ("Nor does a single conspiracy become several merely because of personnel changes."); United States v. Michel, 588 F.2d 986 (5th Cir. 1979); United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982) (for RICO conspiracy, continuity may be met even with changes in personnel or even when different individuals manage the affairs of the enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985) (personnel change does not prevent RICO conspiracy); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992) ("What was essential is that the criminal 'goal or overall plan' have persisted without fundamental alteration, notwithstanding variations in personnel and their roles."); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir. 1988) (single conspiracy can be found even where "the cast of characters changed over the course of the enterprise"); United States v. Nasse, 432 F.2d 1293 (7th Cir. 1970); United States v. Sepulvedam, 15 F.3d 1161, 1191 (1st Cir. 1993) ("in a unitary conspiracy it is not necessary that the membership remain static") (citing Perholtz, 842 F.2d at 364); United States v. Bryant, 364 F.2d 598, 603 (4th Cir. 1966) ("The addition of new members to a conspiracy or the withdrawal of old ones from it does not change the status of the other conspirators.") (quoting Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956)); United States v. Shorter, 54 F.3d 1248 (7th Cir. 1995).

conspiracy even if the conspirator did not participate in, or was unaware of, such acts.[16] Moreover, such liability remains even if the defendant has ceased his participation in the conspiracy.[17]

Under the foregoing authority, it is clear that mere dissolution and cessation of business activities of Defendants CTR and the Tobacco Institute does not affect their liability for their participation in the RICO Enterprise and conspiracy and its extensive scheme to defraud.

2. Similarly, there is no merit to CTR's and the Tobacco Institute's argument that their dissolution and cessation of operations precludes injunctive relief because (as they contend) it is impossible to show a reasonable likelihood that they will engage in future illegal conduct. See CTR/TI MSA at 1-2, 12-16. To begin with, contrary to Defendants' argument (CTR/TI MSA at 13 n.12), to determine a reasonable likelihood of future unlawful activity, the Court is not limited to the evidence of CTR's and the Tobacco Institute's separate conduct in isolation from the conduct of their co-conspirators. Rather, as demonstrated above, Defendants CTR and the Tobacco Institute remain liable for the acts and statements of their co-conspirators undertaken in furtherance of the RICO Enterprise or conspiracy.[18]

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[16] See, e.g., Salinas v. United States, 522 U.S. 52, 63-64 (1997); Pinkerton v. United States, 328 U.S. 640, 646-47 (1996); United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995); Aetna Cas. Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. Pungitore, 910 F.2d 1084, 1145-48 (3d Cir. 1990); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

[17] See, e.g., United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997); In Re Corrugated Container Antitrust Litigation, 662 F.2d 875, 886 (D.C. Cir. 1981); United States v. Nava-Salazar, 30 F.3d 780, 799 (7th Cir. 1994); United States v. Loya, 807 F.2d 1483, 1493 (9th Cir. 1987); United States v. Read, 658 F.2d 1225, 1239-40 (7th Cir. 1981).

[18] Therefore, CTR and the Tobacco Institute are mistaken in contending that the United States' "sole claim" with respect to allegations of ongoing or future RICO by them is "the vague claim that these dissolved companies continue to assert, or are likely to assert in the future, improper claims of privilege in order to conceal information" (continued...)

Not only is CTR's and the Tobacco Institute's alleged mere cessation of unlawful activity insufficient to absolve them of RICO liability, (see United States v. Philip Morris, 2004 WL

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[18](...continued)
and that such claim cannot create "a fact issue as to a reasonable likelihood of future RICO violations by CTR and TI." See CTR/TI MSA at 16.

In any event, Defendants' argument is without merit. First, other courts have specifically found that abuse of privilege by Defendants, including CTR and the Tobacco Institute, was evidence of the "explicit and pervasive" nature of Defendants' fraud. See, e.g., Haines v. Liggett Group, Inc., 140 F.R.D. 681, 689, 694-95 (D.N.J. 1992), vacated on procedural grounds, 975 F.2d 81 (3rd Cir. 1992) (following an in camera review of 1,500 documents, confirmed "plaintiff's contentions of the explicit and pervasive nature of the alleged fraud by defendants [Liggett, Lorillard, R.J. Reynolds, Philip Morris, and the Tobacco Institute] and defendants' abuse of the attorney-client privilege as a means of effectuating that fraud" and found "that the attorney-client privilege was intentionally employed to guard against . . . unwanted disclosure," and defendants and their lawyers "abused the attorney-client privilege in their efforts to effectuate their allegedly fraudulent schemes."). See also State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., Feb. 21, 1995) (upholding special master's ruling that lawyers for Defendants American, R.J. Reynolds, Brown & Williamson, BATCo, Philip Morris, Liggett, Lorillard, CTR, and the Tobacco Institute "undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking"); State of Washington v. American Tobacco Co., No. 96-2-15056-8SEA (King Cty. Sup. Ct. 1998) (several rulings in which the court determined that numerous documents for which Defendants American, Brown & Williamson, Liggett, Lorillard, Philip Morris, R.J. Reynolds, CTR, and the Tobacco Institute had asserted privilege were subject to the crime/fraud exception and were therefore "de-privileged." The bases for the findings included "that defendants attempted to misuse legal privileges to hide research documents;" "that attorneys controlled corporate research and/or supported the results of research regarding smoking and health;" "that the industry, contrary to its public statements, was suppressing information about smoking and health;" "that CTR was neither created nor used to discover and disseminate the 'truth,' contrary to defendants' representations to the public;" "that Special Account #4 was used to conceal problematic research;" and "that CTR and the SAB [Scientific Advisory Board] were not independent and that the industry's use of CTR was misleading to the public.").

Second, the cases cited by Defendants CTR and the Tobacco Institute (CTR/TI MSJ at 16) do not support their argument that the misuse of the attorney-client privilege and other privileges to conceal evidence of a massive fifty-plus year scheme to defraud the American public cannot be used as evidence to support the United States' RICO claims.

In United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996), a criminal case involving convictions for tax evasion, tax perjury and bank fraud, the Court, in reviewing the sufficiency of the record on the bank fraud count, found that there was insufficient evidence for the bank fraud count where the defendant, during the pendency of a civil suit in state court, delayed an entry of judgment in the suit by filing a false and misleading answer and affidavit and slowed discovery. In United States v. Pendergraft, 297 F.3d 1198, 1208-09 (11th Cir. 2002), the court, in reviewing whether the mailing of litigation documents containing false statements had violated the mail fraud statute, held that there was "no intent to deceive" by the defendants' actions and that therefore the mail fraud statute had not been violated.

Therefore, neither case held that evidence that defendants have engaged in a long standing practice of abusing privileges in litigation to conceal evidence of their fraud could not be considered as evidence, among other matters, of mail fraud or of a reasonable likelihood of future unlawful activity, as involved here. Moreover, here, Defendants' misuse of privileges has been an integral part of their scheme to defraud, unlike in Mueller and Pendergraft. Where, as here, Defendants' improper conduct during the course of litigation was integral to their scheme to defraud, such misconduct may be considered as evidence underlying a scheme to defraud. See, e.g., United States v. Eisen, 974 F.2d 246, 253-54 (2d Cir. 1992); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1373-74 (10th Cir. 1991); Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1019-20 (3d Cir. 1987); Rowe v. Smith, 848 F. Supp. 1258, 1263-64 (W.D. La. 1994).

1045766 at * 3 (D.D.C. May 6, 2004)), but also "withdrawal" from the RICO enterprise and conspiracy does not preclude CTR's and the Tobacco Institute's liability for their fraudulent conduct. See infra Section X (explaining why Liggett remains liable even if, as it claims, it has withdrawn from the RICO conspiracy). Moreover, even if "withdrawal" were a defense here – and it is not – Defendants CTR and the Tobacco Institute have not established, as a matter of law, the factual prerequisites of a withdrawal defense – i.e., that they took "affirmative actions to disavow or defeat the purpose" of the RICO enterprise and conspiracy which was communicated in a manner reasonably calculated to reach their co-conspirators or that they made a full disclosure of their unlawful scheme to the authorities. See infra Section X.C. & D.

Moreover, New York law, which determines the capacity of CTR and the Tobacco Institute to be sued and the scope of their liability, conclusively establishes that such dissolution and cessation of operations does not preclude injunctive relief; rather New York law expressly permits injunctive relief. See infra Section III.C-E. See also United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 307-09 (1897) (holding that the dissolution of an illegal trade association did not preclude injunction restraining the trade association and its members). On this ground alone, Defendants' argument must be rejected.

Furthermore, the United States has established that there is a reasonable likelihood of the continuance of Defendants' future unlawful activity based upon their extensive pattern of past fraudulent conduct and racketeering activity, which is not defeated by mere cessation of activities, and their ongoing fraudulent and racketeering activity.[19]

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[19] See U.S. FPCL Vol. 1 § III. See, e.g., United States v. Local 30 United States Tile, 871 F.2d 401, 409 (3d Cir. 1989); United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377 (2d Cir. 1993); United States v. (continued...)

In addition, as this Court has held, even assuming arguendo that Defendants have complied with the MSA and further assuming that the MSA is being effectively enforced and affords relief similar to the relief the United States seeks here, the MSA may not defeat the United States' request for equitable relief as a matter of law on several independent grounds: (1) the MSA itself precludes Defendants from relying upon it here; (2) the MSA cannot preclude the United States from vindicating its paramount independent sovereign interests in enforcing its laws; (3) the MSA does not afford significant relief sought by the United States here; and (4) "mere cessation of the alleged violations 'is no bar to the issuance of an injunction.'" See Philip Morris, 2004 WL 1045766 at **2-3 (citations omitted). Moreover, the United States is entitled to disgorgement of Defendants' unlawful gains regardless of whether it is entitled to permanent injunction (see infra Section III.F).

It also bears repeating that under well-established principles, Defendants CTR and the Tobacco Institute remain liable for the acts of their co-conspirators in furtherance of their joint scheme to defraud and conspiracy even after CTR and the Tobacco Institute allegedly ceased their active participation in operations.

Therefore, it is clear that the dissolution of CTR and the Tobacco Institute does not preclude their RICO liability and equitable relief against them.

C. The Governing New York Statutes Explicitly Allow Suits Against Dissolved Corporations For Liabilities Incurred Prior to Dissolution

Pursuant to Fed. R. Civ. P. 17(b), "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Both CTR and the Tobacco Institute

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[19](...continued)
Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19-22 (E.D.N.Y. 1992).

were incorporated as not-for-profit corporations under New York law. It is clear from both New York statutory law regarding not-for-profit corporations (and for-profit corporations as well), and New York caselaw, that not only is it permissible for the United States to bring a RICO action against CTR and the Tobacco Institute, no matter their corporate status, but that it is also permissible – and proper – for this Court to issue appropriate remedies, including equitable and monetary relief, should Defendants CTR and the Tobacco Institute be found liable under RICO.

Defendants CTR and the Tobacco Institute claim, however, that relief sought by the United States in the instant action "would require CTR and TI to violate New York law that they 'carry on no activities except for the purpose of winding up [their] affairs.'" CTR/TI MSA at 18 (citing NY N-PCL § 1005(a)(1)). Defendants are clearly wrong.

Defendants CTR and the Tobacco Institute neglect to address the very next section of New York Not-For-Profit Corporation Law, which states that a dissolved not-for-profit corporation "**may sue or be sued in all courts** and participate in actions and proceedings whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served upon it." NY N-PCL § 1006(a)(4) (emphasis added).[20] Moreover, NY N-PCL § 1006 also states that:

> **The dissolution of a corporation shall not affect any remedy available to or against such corporation**, its directors, officers or members, **for any right or claim existing or any liability incurred before such dissolution**, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

NY N-PCL § 1006(b) (emphasis added). Similarly, NY N-PCL § 1005 states:

[20] NY Business Corporation Law § 1006 contains a similar provision addressing for-profit corporations incorporated under New York state law.

> The [dissolved] corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collects its assets, sell its assets for cash at public or private sale, **discharge or pay its liabilities**, and do all other acts appropriate to liquidate its business.

NY N-PCL § 1005(a)(2) (emphasis added).

Moreover, section 1007 **expressly** provides that suits brought by the United States against dissolved corporations are not precluded by New York state law and need not be filed pursuant to section 1008. NY N-PCL § 1007(c) ("Notwithstanding **this section and section 1008, tax claims and other claims of this state and of the United States shall not be required to be filed under those sections**, and such claims shall not be barred because not so filed, and distribution of the assets of the corporation, or any part thereof, may be deferred until determination of any such claims.") (emphasis added).[21]

Therefore, the governing New York statutes clearly provide that dissolution does not absolve a corporation of any liability incurred prior to their dissolution. Consequently, New York statutes NY N-PCL §§ 1005, 1006, 1007 and 1008 standing alone require rejection of CTR and the Tobacco Institute's contention that they are exempt from liability or relief in this case. Indeed, Defendants do not cite a single case under New York law holding that dissolution requires dismissal of a lawsuit for liability incurred before dissolution.

Moreover, although CTR and the Tobacco Institute have been named as Defendants in many lawsuits, Defendants do not point to a single case dismissing them based on their dissolution. See CTR/TI MSA Tab 16 and CTR/TI McAllister Aff. Exh. 2 (identifying litigation

[21] Thus, Section 1008, which enumerates permissible matters related to the dissolution of a not-for-profit corporation over which the New York Supreme Court can preside, is at best a discretionary statute, and does not apply to the United States' claims.

in which CTR and the Tobacco Institute have been named as defendants). Indeed, the very terms of the respective dissolution agreements filed by CTR and the Tobacco Institute with the New York State Attorney General **specifically anticipated** that these two entities would be subject to suit for their misconduct. Paragraph 10 of the Dissolution Order regarding CTR provides:

> This Order and the non-judicial dissolution of CTR shall not alter, interfere with or otherwise affect in any way CTR's right or ability to continue, after the winding up of its other activities, to conduct litigation-related activities in connection with the defense of lawsuits that are pending or threatened now or that are brought or pending in the future, and to act to protect any interests that CTR considers to be significant to the defense of such lawsuits, pursuant to the provisions of the N-PCL and as set forth in Section 6 of the Plan.

CTR/TI MSA Tab 6.[22]

Similarly, paragraph 7 of the Dissolution Order regarding the Tobacco Institute provides:

> This Order and the dissolution of TI pursuant to the MSA shall not alter, interfere with or otherwise effect in any way TI's right or ability to continue, after the winding up of its other activities, to conduct litigation-related activities as provided in the Plan in connection with the defense of lawsuits that are pending or threatened now or that are brought, pending or threatened in the future, and to act to protect any interests that TI considers to be significant to the defense of such lawsuits, pursuant to the provisions of the N-PCL and as set forth in Section 5 of the Plan.

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[22] See also CTR/TI McAllister Aff. Exh. 2, Plan of Corporate Dissolution and Distribution of Assets of The Council for Tobacco Research – U.S.A., Inc., ¶ 5 ("CTR shall continue to have the right and the ability to conduct litigation-related activities pursuant to Section 1006 of the N-PCL and Section 6 of this Plan."); ¶ 6.1 ("Pursuant to Section 1006 of the N-PCL, CTR has the right to continue to defend itself against claims threatened or asserted against it now or in the future. . . . CTR will retain its full authority with respect to, and will retain sole discretion over, the conduct of its defense and the protection of its interests in litigation, including . . . **settling claims asserted against it**") (emphasis added); ¶ 6.3 ("It is not possible to determine how long CTR's need to conduct litigation-related activities will continue. However, in light of the large number of lawsuits pending against CTR and the possibility that numerous additional lawsuits will be filed against CTR in the future, CTR believes it is very likely that this need will continue to exist for a number of years after the conclusion of the winding up of CTR's research-funding activities pursuant to Section 5 of this Plan.").

CTR/TI MSA Tab 14.[23]

Consequently, the pursuit of legal action – through resolution – against CTR and the Tobacco Institute for many years was contemplated and approved by the State of New York when the New York Supreme Court approved their respective Plans of Dissolution.

D. Civil Caselaw Upholds Suits Against Dissolved Corporations For Liabilities Incurred Prior to Dissolution Including Injunctive Relief

Caselaw also confirms that New York permits suits, including suits for equitable relief, against dissolved corporations (both not-for-profit corporations and for-profit corporations) for liabilities they incurred prior to their dissolution and the imposition of judgments against them.

In United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114 (E.D.N.Y. 1992), a civil RICO action brought by the United States for injunctive and other equitable relief under 18 U.S.C. § 1964, the district court rejected the arguments of defendant Long Island Rubbish that claims against it should be dismissed because it had dissolved prior to the filing of the complaint. The district court stated:

> The defendant Long Island Rubbish argues that it should be dismissed from this action because it "ceased operations and withdrew from the refuse removal business effective May 31, 1987." Memorandum of Long Island Rubbish at 5. However, New York Business Corporation Law Section 1006(b) provides that (subject to two exceptions inapplicable here) dissolution does not extinguish claims against a corporation. Thus, even if

[23] See also CTR/TI MSJ Tab 15, Plan of Corporate Dissolution and Distribution of Assets of The Tobacco Institute, Inc., ¶ 5 ("[T]his Plan is not intended to, and shall not be construed or interpreted to alter, interfere with or otherwise affect in any way TI's right or ability (I) to conduct litigation-related activities in connection with the defense of lawsuits that are pending or threatened now or that are brought or threatened in the future"); ¶ 5.1 ("TI has the right to continue to defend itself against any claims threatened or asserted against it now and in the future. . . . TI will retain sole discretion over all litigation decisions, including . . . **settling any claims asserted against it**.") (emphasis added); ¶ 5.3 ("It is not possible at this time to determine how long TI's litigation-related activities will continue. In light of the large number of lawsuits pending against TI, however, and the possibility that numerous additional lawsuits may be filed against TI in the future, TI believes it is likely that such litigation-related activities will continue to exist for several years after the conclusion of the winding-up of TI's non-litigation activities pursuant to this Plan.").

> Long Island Rubbish had been dissolved – which does not appear to be the case – it could still be a party to this action. See, e.g., Flute v. Rubel, 682 F. Supp. 184, 186-87 (S.D.N.Y.1988) (under New York Business Corporation Law Section 1006(b), action may be maintained against dissolved corporation).

793 F. Supp. at 1154 n.46. Thus, Private Sanitation Industry Ass'n confirms that CTR and the Tobacco Institute are not entitled to dismissal of this action because they were dissolved under New York state law.

Similarly, in Town of Oyster Bay v. Occidental Chemical Corp., 987 F. Supp 182 (E.D.N.Y. 1997), an action brought by the Town of Oyster Bay alleging claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and common law claims including nuisance, against corporations that had allegedly brought hazardous material to a site and successor corporations, the district court held that a dissolved New York corporation was subject to suit on CERCLA claim and the nuisance claim and that equitable relief was also an appropriate remedy against the dissolved corporation.

In discussing the viability of CERCLA claims against dissolved corporations, the district court concluded that "a corporation subject to CERCLA claims based upon hazardous waste disposal that occurred **before** the corporation was dissolved and became dead and buried is not absolved from suit under CERCLA." 987 F. Supp. at 201. The district court also noted that it could "incorporate principles of state law as the rule of the decision, provided that the state law is consistent with the policies underlying the particular federal interest." Id.

Accordingly, the district court cited New York Corporation Law § 1006, quoted supra, and noted:

> This statute is consistent with New York decisional law abrogating the

> English common law rule that the liabilities of a corporation are extinguished by its dissolution. See Shayne v. Evening Post Pub. Co., 168 N.Y. 70, 77, 61 N.E. 115, [115]-116 (1901). In rejecting the traditional English rule, the New York Court of Appeals observed that it would be 'unjust and arbitrary' to cut off all causes of action against a corporation upon its dissolution, and noted that such a rule would encourage corporate officers to extinguish meritorious causes of action by dissolving a corporation, only to reorganize the corporation later with impunity. Shayne, 168 N.Y. at 74, 61 N.E. at 115-116.

Id. The Court also noted:

> The New York Court of Appeals has indicated that the determinative factor is whether the claim against the corporation existed at the time that it was dissolved; "**[w]hether the distribution of its assets in advance of dissolution may make a judgment, if recovered, futile, we do not now consider . . . . The collection of the judgment must wait upon its entry**." City of New York v. New York & S. Brooklyn Ferry & Steam Transp. Co., 231 N.Y. 18, 131 N.E. 554 (1921) (Cardozo, J.); see also Hudson River Fishermen's Assoc. v. Arcuri, 862 F. Supp. 73, 77 (S.D.N.Y. 1994) ["injunctive relief as well as statutory damages and attorney's fees and costs found to be appropriate at inquest by the Magistrate Judge are available under New York law even where a corporation is dissolved, if the cause of action as here accrues before dissolution"]; Independent Investor Protective League v. Time, Inc., 50 N.Y.2d 259, 262-263, 406 N.E.2d 486, 488, 428 N.Y.S.2d 671, 673 (1980) ["determined here that a shareholder derivative action may be maintained even though commenced after the subject corporation has effected a dissolution and distributed its assets"]; Fernandez v. Kinsey, 205 A.D.2d 448, 613 N.Y.S.2d 894, 895 (1st Dep't 1994) ["defendant, even though dissolved and its assets distributed, can therefore be sued in connection with claims . . . that arose prior to its dissolution"]; Dominguez v. Fixrammer Corp., 172 Misc.2d 868, 656 N.Y.S.2d 111, 113 (Sup. Ct. Bronx Co. 1997) ["corporate manufacturer's sale of its assets and dissolution does not preclude it from liability in this lawsuit"].
>
> The Court agrees with then-Judge Cardozo's observation in New York & S. Brooklyn Ferry & Steam Transp. Co. that liability and collectibility are two separate and distinct concepts. A corporation should not be permitted to insulate itself from exposure to CERCLA liability by dissolving and distributing its assets after the disposal of hazardous substances. . . . The bringing of a suit against a corporation that became dead and buried after being exposed to potential CERCLA liability may or

> may not prove to be pointless in the collection process, which will be governed by state law.

Id. at 202 (emphasis added).

With respect to the nuisance claims against the dissolved corporate defendant the district court concluded:

> [A]s set forth at length above, the law in New York is that a claim that accrues prior to a corporation's dissolution may be interposed against the dissolved corporation, **even if it has distributed its corporate assets**. See Independent Investor Protective League, 50 N.Y.2d at 262-263, 406 N.E.2d at 487-488, 428 N.Y.S.2d at 672-673; Fernandez v. Kinsey, 205 A.D.2d 448, 613 N.Y.S.2d 894 (1994). In this case, the Town's nuisance claim arose out of the disposal of hazardous waste at the landfill that occurred until 1975, seven years before GACCC's corporate dissolution. **Therefore, as the Town's nuisance claim accrued before GACCC's dissolution, this claim, to the extent that it seeks equitable relief against GACCC, may proceed. . . . Although it may be an academic exercise to permit a claim for equitable relief to proceed against a dead and buried corporation, such a result appears to be conceptually correct under controlling New York precedent.**

Id. at 210 (emphasis added).

Accordingly, it is clear that it is permissible to bring – and sustain through judgment – actions against dissolved corporations under New York law, including those for equitable and monetary relief. To be sure, numerous decisions establish beyond serious dispute that Defendants CTR and the Tobacco Institute are not entitled to dismissal of this action merely because they have been dissolved. Further, it is irrelevant whether a dissolved corporation can pay a judgment; inability to pay does not require dismissal of an action. See also Hudson River Fishermen's Ass'n v. Acuri, 862 F. Supp. 73, 77 (S.D.N.Y. 1994) (**injunctive relief**, including enjoining parties from using site in violation of the Clean Water Act, and other fees **"are available under New York law even where a corporation is dissolved, if the cause of action**

as here accrues before dissolution").[24]

E. Criminal Caselaw Also Upholds Suits Against Dissolved Corporations For Liabilities Incurred Prior to Dissolution

The same is true for a dissolved corporation's criminal liability because "[u]nder New

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[24] See also Eng v. Battery City Car & Limousine Serv., Inc., 2001 WL 1622262, *7 (S.D.N.Y. Dec. 18, 2001) ("[A] time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing . . . . New York has such a statute."); The Open Housing Center, Inc. v. Kessler Realty, Inc., 2001 WL 1776163, *11 n.10 (E.D.N.Y. Dec. 21, 2001) (discrimination suit permissible against two dissolved corporations); New York v. Longboat, Inc., 140 F. Supp. 2d 174, 177 (N.D.N.Y. 2001) (concluding that dissolved corporation was proper party in CERCLA suit); Independent Investor Protective League v. Time, Inc., 406 N.E.2d 486 (N.Y. 1980) (corporation continues to exist as legal entity after dissolution, at least for purposes of actions and proceedings); Wells v. Ronning, 702 N.Y.S.2d 718, 721 (N.Y. App. Div. 3rd Dep't 2000) ("corporation continues to exist, while undergoing dissolution, for so long as is necessary to satisfy its debts and it may sue or be sued until its business affairs are fully adjusted"); Gutman v. Club Mediterranee Int'l, Inc., 630 N.Y.S.2d 343, 344-45 (N.Y. App. Div. 2d Dep't 1995) (personal injury action permitted to proceed against corporation dissolved two years after plaintiff's accident); Harris v. Stony Clove Lake Acres, Inc., 633 N.Y.S.2d 691, 692 (N.Y. App. Div. 3rd Dep't 1995) (corporation, dissolved by Secretary of State, may defend foreclosure action relating to its corporate assets because "corporation continues to exist as a legal entity after dissolution for purpose of appearing in legal actions and proceedings"); Simplicity Pattern Co., Inc. v. Miami Tru-Color Off-Set Service, Inc., 619 N.Y.S.2d 29, 29 (N.Y. App. Div. 1st Dep't 1994) (holding that trial court properly decided that adverse inference could be drawn against dissolved corporate defendant for its failure to produce its president at trial "since dissolution does not affect liability occurring prior to dissolution and such a corporation remains obligated to respond to subpoenas"); Fernandez v. Kinsey, 613 N.Y.S.2d 894, 895 (N.Y. App. Div. 1st Dep't 1994) (suit alleging exposure to lead based paint permitted to be continued against dissolved corporation); Briere v. Barbera, 558 N.Y.S.2d 278, 279 (N.Y. App. Div. 3rd Dep't 1990) ("cannot prevent suit against [dissolved corporation] because Business Corporation Law § 1006(a)(4) and (b) permit suit against a dissolved corporation as part of winding up its affairs"); Dominguez v. Fixrammer Corp., 656 N.Y.S.2d 111, 113 (N.Y. Sup. 1997) ("the corporate manufacturer's sale of its assets and dissolution during the course of the instant action does not preclude it from liability in this lawsuit"); Bouhayer v. Georgalis, 645 N.Y.S.2d 1008, 1009 n.1 (N.Y. Sup. 1996) ("fact that corporation was dissolved some two years prior to the commencement of the derivative action does not operate as a bar to this action"); Feneck v. Murdock, 181 N.Y.S.2d 441, 445 (N.Y. Sup. 1958) (mere filing of a certificate of dissolution does not fully dissolve an existent corporation; "[i]t must first lawfully dispose of its assets and do all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name"); 60 Columbia St. v. Leofreed Realty Corp., 110 N.Y.S.2d 417 (N.Y. Sup. 1952) (corporation, though dissolved, exists for purpose of paying, satisfying, and discharging existing liabilities or obligations, collecting and distributing its assets, and doing all acts required to adjust and wind up its business and affairs and it may sue and be sued in its corporate name); Douglas v. Perlstein, 10 N.Y.S.2d 479, 481 (N.Y. Sup. 1939) ("comprehensive [statutory] language embraces all dissolved corporations and permits the maintenance of any action to enforce liabilities or obligations of such corporation existing at the time of their dissolution[; statute] applies regardless of the manner in which the dissolution is achieved and regardless of the nature of the existing corporate liabilities or obligations"); Treemond Co. v. Schering Corp., 122 F.2d 702, 706 (3d Cir. 1941) (dissolved corporation's appeal of an order dismissing a patent suit proper even though appeal instituted subsequent to dissolution because pursuant to New York law, dissolved corporation could sue and be sued in its corporate name).

York law, a dissolution . . . of a corporation will not preclude the assessment of criminal liability against such malefactor corporation." United States v. Stone, 452 F.2d 42, 47 (8th Cir. 1971) (citation omitted); United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 214, 217 (S.D.N.Y. 1955) (noting under New York Stock Corporation Law dissolution provisions the "clear public policy of the state [of New York] with respect to a dissolved or consolidated corporation is that it shall, for a determined period beyond its dissolution, be entitled to pursue its rights and also to remain suable for its debts and obligations, that **the public purpose also contemplates the right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution**. And unless the legislative purpose to abate a criminal prosecution is clear and unequivocal, the public policy of the state to hold a corporation liable for acts committed during its existence should not be defeated by dialectical definitions which serve to discriminate against the community at large." (emphasis added)).[25]

Accordingly, for the reasons stated above, the dissolution of CTR and the Tobacco Institute cannot serve to "sweep[] away [their] liability," United States v. Brakes, Inc., 157 F. Supp. at 918, and entitle them to avoid suit. In the words of one court:

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

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[25] See also United States v. Brakes, Inc., 157 F. Supp. 916, 918 (S.D.N.Y. 1958) (rejecting defendant's contention that its dissolution "sweeps away its liability to criminal prosecution"); People v. Pymm Thermometer Corp., 591 N.Y.S.2d 459, 460 (N.Y. App. Div. 2d Dep't 1992) ("we reject Pymm's argument that any prosecution of it abated upon its dissolution, in view of New York's strong public policy in favor of maintaining corporate liability beyond dissolution"); Melrose Distillers, Inc. v. United States, 359 U.S. 271, 274 (1959) ("there is no more reason for allowing [dissolved corporations] to escape criminal penalties than damages in civil suits"); United States v. Mobile Materials, Inc., 776 F.2d 1476, 1480-81 (10th Cir. 1985) (noting public policy reasons for holding a dissolved corporation subject to criminal liability).

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

F. CTR And The Tobacco Institute Are Liable For Disgorgement Even If Their Dissolution Precludes Injunctive Relief

The United States has established supra that the dissolution of CTR and the Tobacco Institute does not preclude the United States' claims for equitable relief, including an injunction and disgorgement. Defendants CTR and the Tobacco Institute argue, however, that the United States is seeking mandatory injunctions against them, which (they erroneously contend) would violate New York law. CTR/TI MSA at 18.[26] Assuming arguendo that injunctive relief would be barred because of the dissolution of CTR and the Tobacco Institute, which New York law does not mandate, nevertheless, CTR and the Tobacco Institute remain liable for disgorgement of the Tobacco Company Defendants' ill-gotten gains because disgorgement vindicates significant public interests independent from those served by an injunction against Defendants at hand.[27] In that respect, this Court, the District of Columbia Circuit, and other courts have repeatedly held that the primary purposes of disgorgement are "to deprive a wrongdoer of his unjust enrichment and to deter **others** from violating the . . . laws." SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).[28]

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[26] Defendants CTR and the Tobacco Institute also mistakenly argue that the United States' "attempt to have this Court direct how CTR and TI will conduct future litigation would intrude on the jurisdiction of the New York Supreme Court to supervise the winding up of these dissolved corporations." CTR/TI MSA at 18. Defendants CTR and the Tobacco Institute do not, however, give any explanation or citation as to how the United States is purportedly seeking such relief, or how, if such relief were afforded, this would intrude on the New York Court's supervision of their "winding up."

[27] Defendants CTR and the Tobacco Institute are jointly and severally liable for the ill-gotten gains of their coconspirators, the Defendant Cigarette Companies. See United States v. Philip Morris, 2004 WL 1045768 at *3-4.

[28] Accord Philip Morris USA, 310 F. Supp. 2d at 62-65; Philip Morris USA, 2004 WL 1161455 at *6; SEC v. Bilzerian, 29 F.3d 689, 697 (D.C.Cir. 1994) ("The primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" (quoting SEC v. Blatt, 583 F.2d 1325, (continued...)

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

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

931 P.2d at 304 (quotation marks omitted). The court concluded, therefore, that disgorgement of ill-gotten gains was appropriate "whether or not the court also enjoins future violations." Id.

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

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[28](...continued)
1335 (5th Cir. 1978)); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000); SEC v. Savoy Industries, 587 F.2d 1149, 1168 (D.C. Cir. 1978); see also SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998); SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); SEC v. Blatt, 583 F.2d at 1335; SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104 (2d Cir. 1972); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971); SEC v. Kenton Capital, Ltd., 69 F. Supp.2d 1, 15 (D.D.C. 1998).

recur." See also Comfort Lake Ass'n, Inc. v. Dresel Contracting Inc., 138 F.3d 351, 355 (8th Cir. 1998) ("When a claim for injunctive relief becomes moot, a related claim for money relief is not mooted.").

The logic of Defendants' position dictates a rule of law that a wrongdoer may keep hundreds of billions of dollars that it unlawfully obtained through fraud merely by providing assurances that he would not defraud others in the future. That rule of law would not deprive a wrongdoer of unjust enrichment and would hardly constitute effective deterrence of the wrongdoer and "others"; rather, it would be an invitation to commit crime, because it would allow the wrongdoer to keep vast sums of ill-gotten gains. It cannot be overemphasized that a wrongdoer does not have, and never had, a cognizable legal interest in the proceeds of unlawful conduct.[29] Therefore, CTR and the Tobacco Institute remain joint and severally liable for disgorgement of the ill-gotten gains of their co-defendants. To rule otherwise would eviscerate the deterrent effect of disgorgement and would permit unjust enrichment, and hence would vitiate the primary purposes of disgorgement. Consequently, the United States' right to disgorgement of proceeds of unlawful conduct is not defeated even if the dissolution of CTR and the Tobacco Institute were to preclude injunctive relief.

G. The Burford Abstention Doctrine Does Not Preclude The RICO Claims

Defendants CTR and the Tobacco Institute argued that the RICO claims against them

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[29] The District of Columbia Circuit has analogized disgorgement of unlawful proceeds to the seizure of proceeds "'from a bank robber [, an act which] merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.'" Bilzerian, 29 F.3d at 696 (quoting United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994)). Accordingly, the District of Columbia Circuit and other courts have recognized that because disgorgement of unlawful proceeds merely requires the wrongdoer to "give up only his ill-gotten gains" to which he has no right, such disgorgement is entirely remedial and "is not punishment." Bilzerian, 29 F.3d at 696; accord First City Fin. Corp., 890 F. 2d at 1230-31; SEC v. Tome, 833 F.2d at 1096; Hunt, 591 F.2d at 1222.

must be dismissed under the doctrine of Burford v. Sun Oil, 319 U.S. 315 (1943), on the ground that adjudication of the RICO claims "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." See CTR/TI MSA at 17 (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989)). However, this Court has rejected Defendants' reliance upon Burford, concluding that "[n]one of the factors that made abstention appropriate in Burford are present in this case." United States v. Philip Morris USA Inc., 2004 WL 1161384 at *3 (D.D.C. May 21, 2004) (Order #549).

IV

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

Defendants assert affirmative defenses that their innumerable public statements cannot serve as a basis for liability or constitute violations of the mail and wire fraud statutes because they were "good-faith" expressions of opinion or belief and are protected by the First Amendment.[30] Defendants are incorrect as a matter of law and fact. In its Final Proposed Findings of Fact, the United States presents overwhelming evidence that Defendants' statements were knowingly false, misleading, and deceptive in furtherance of a scheme to defraud. See U.S. FPFF § IV. As a result, the labels that Defendants now attach to these statements – attempting to cast the public communications as political speech, commercial speech, or expressions of scientific opinion – are wholly irrelevant. False, misleading, or deceptive speech in furtherance

[30] See, e.g., Philip Morris USA Aff. Def. No. 4; Philip Morris Companies/Altria Aff. Def. No. 5; R.J. Reynolds Aff. Def. No. 8; B&W Aff. Def. Nos. 13 and 14; Lorillard Aff. Def. No. 28; Liggett Aff. Def. No. 61; TI Aff. Def. No. 4; BATCo Aff. Def. 14; CTR Aff. Def. No. 9. See also JD. PFF, pp. 848-863.

of a scheme to defraud receives **no** First Amendment protection.

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

Defendants have repeatedly endeavored to cast all of their public statements as protected speech, citing cases that concern either fully protected expression of opinion on issues of public concern or commercial speech that receives a lesser degree of First Amendment protection. See JD. PFF, pp. 850-53; Defendants' Motion for Partial Summary Judgment on Claims that Defendants Advertised, Marketed, and Promoted Cigarettes to Youth and Fraudulently Denied Such Conduct at 20-27 ("Youth Marketing Motion" or "DSJ Youth"). However, Defendants have not cited to a single civil or criminal case in which the First Amendment has been held to be a legitimate defense to a fraud-based claim where the speech at issue was integral to the fraudulent conduct, as is the case here. That is because the Supreme Court has made it clear that

> it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . **Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against . . . agreements and conspiracies deemed injurious to society.**

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (emphasis added); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that no First Amendment protection is afforded speech which amounts to incitement of imminent unlawful action).[31]

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[31] See also National Organization for Women v. Operation Rescue, 37 F.3d 646, 655-56 (D.C. Cir. 1994) (noting that provision of injunction prohibiting "directing, aiding or abetting illegal trespasses or blockades" is "unproblematic" from a First Amendment perspective and collecting cases) (internal citations omitted); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (upholding conviction for 26 U.S.C. § 7212, which prohibits attempts (continued...)

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).[32] As this Court noted, "The Supreme Court has recently reiterated, albeit in a different factual context, that 'the First Amendment does not shield fraud.'" United States v. Philip Morris USA Inc., 304 F. Supp. 2d 60, 71 (D.D.C. 2004) (quoting Illinois ex rel. Madigan v. Telemarketing Assoc., Inc., 538 U.S. 600, 612 (2003)). Indeed, the Supreme Court and lower courts have repeatedly recognized that the First Amendment is no bar to vigorous enforcement of antifraud laws. See, e.g., Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (noting that "[f]raudulent misrepresentations can be prohibited" and citing approvingly to village statute prohibiting fraudulent solicitations); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("The State may, and does, prohibit fraud directly."); Riley v. National Federation of the Blind of North

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[31](...continued)
to interfere with administration of internal revenue laws, against First Amendment attack, because "speech is not protected by the First Amendment when it is the very vehicle of the crime itself"); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1982), cert. denied, 476 U.S. 1120 (1986) (noting that "where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone"); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."); United States v. Lincoln, 589 F.2d 379, 382 (8th Cir. 1979) (upholding conviction for mailing threatening communications over First Amendment challenge); United States v. Riggs, 743 F. Supp. 556, 559-61 (N.D. Ill. 1990); United States v. Kufrovich, 997 F. Supp. 246, 254 (D. Conn. 1997) (collecting cases); New York v. Ferber, 458 U.S. 747 (1982) (finding a New York state statute restricting the promotion of child sexual acts constitutional over a First Amendment challenge).

[32] As noted below, and in the U.S. FPCL Vol. 1 § G.2, the mail and wire fraud statutes prohibit any scheme intended to defraud. Thus, deceptive or overreaching conduct within the scope of the mail and wire fraud statutes includes literally true statements, half-truths and material omissions as well as affirmative false statements. See, e.g., Brontston v. United States, 409 U.S. 352, 358 n.4 (1973); Donaldson v. Read Magazine, Inc., 333 U.S. 178, 188-89 (1948) (communications "as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because [they] are composed or purposefully printed in such way as to mislead."); Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., 312 U.S. 410, 426 (1941); see also U.S. FPCL Vol. 1 § G.2

Carolina, Inc., 487 U.S. 781, 800 (1988) ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."); Donaldson, 333 U.S. at 190 & n.2 (governmental power to enact laws protecting people against fraud "has always been recognized in this country and is firmly established," and rejecting notion that "freedom of speech . . . include[s] complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes"); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Schneider v. State, 308 U.S. 147, 164 (1939) (overturning an ordinance that gave police impermissible discretion to determine prospectively who could distribute information door-to-door, while making clear that "[f]rauds may be denounced as offenses and punished by law."); Lowe v. SEC, 472 U.S. 181, 225 (1985) (White, J., concurring) ("[T]here is no suggestion that the application of the antifraud provisions of the [SEC] Act to require investment advisory publishers to disclose material facts would present serious First Amendment difficulties.") (citations omitted); Commodity Trend Service, Inc. v. CFTC, 233 F.3d 981, 992 (7th Cir. 2000) (rejecting First Amendment challenge to antifraud provisions of Commodity Exchange Act, 7 U.S.C. § 6o(1)(A), and implementing regulation, 17 C.F.R. § 4.41); CFTC v. Vartuli, 228 F.3d 94, 110 (2d Cir. 2000); R&W Technical Servs. v. CFTC, 205 F.3d 165, 175 (5th Cir. 2000) ("[T]he CEA [Commodity Exchange Act] can impose liability . . . for violations of the CEA's antifraud provisions, since liability for fraud would not run afoul of the First Amendment."); Freeman, 761 F.2d 549 (rejecting need to give First Amendment defense instruction for certain violations of the antifraud provisions of the tax code, 26 U.S.C. § 7206).[33]

[33] While the United States "is not limited only to explicit antifraud measures to prevent its citizens from being defrauded; certain other narrowly tailored measures with a direct relationship to preventing fraud may be used (continued...)

This rule is unsurprising, since fraudulent schemes inevitably involve some form of speech or communication.[34]

Moreover, if part of a scheme to defraud, the type or category of speech at issue is simply irrelevant. "Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech." Commodity Trend Service, 233 F.3d at 992 (citations omitted).

Indeed, in cases involving the same mail and wire fraud statutes that underlie Defendants' racketeering activity in this case, the Supreme Court and lower courts have rejected the contention that the First Amendment is a bar to liability, finding that the First Amendment is not implicated simply because the fraudulent scheme involved speech. See Donaldson, 333 U.S. at 189-92; United States v. Ballard, 322 U.S. 78, 84 (1944) (approving district court's jury instruction to decide whether defendants convicted of mail fraud for soliciting funds for a claimed religious movement genuinely held their asserted religious beliefs); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."); United States v. Hildebrand, 152 F.3d 756, 765 (8th Cir. 1998) (finding no error in district court's refusal to give First Amendment instruction in mail fraud prosecution for defendants' activities in fraudulent claim-filing business); United States v. DeFusco, 930 F.2d 413, 415 (5th Cir. 1991) (rejecting First Amendment challenge to convictions for mail fraud and conspiracy to commit mail fraud because defendant's fraudulent

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[33](...continued)
as well," the mail and wire fraud statutes on which Defendants' RICO liability rests are "explicit antifraud" laws. See Commodity Trend Service, 233 F.3d at 992.

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

publishing activities were misleading commercial speech); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981); In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 988 (3d Cir. 1985); Riggs, 743 F. Supp. at 559-560.[35] Defendants have wholly ignored, let alone refuted, this entire body of caselaw.

Notwithstanding the Supreme Court's repeated declarations that speech used in furtherance of fraud receives **no** protection from the First Amendment, Defendants have requested that the Court depart from this well-established rule and impose a heightened evidentiary standard upon the United States. See, e.g., DSJ Youth at 24, n.19. Defendants' request must be rejected. In Madigan, the Court reaffirmed that "in a properly tailored fraud action the State bears the full burden of proof." 538 U.S. at 620. Consistent with its precedent, the Court indicated that the requirement that the government "shoulder that burden in a fraud

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[35] In scores of cases, courts have upheld convictions under the mail and wire fraud statutes where the scheme to defraud was predicated in whole or in part on false or misleading advertising statements and marketing practices analogous to Defendants' conduct here. See, e.g., Blanton v. United States, 213 F. 320, 325 (8th Cir. 1914) (fraudulent advertisements for the defendant's scheme to sell worthless instruments passed off as genuine soldier's script); United States v. Pike, 158 F.2d 46, 47 (7th Cir. 1946) (fraudulent advertisements regarding mail-order seed business); Crooks v. United States, 179 F.2d 304 (4th Cir. 1950) (per curiam) (fraudulent newspaper advertisements sent through the mails in furtherance of a fraudulent work-at-home scheme); United States v. Sylvanus, 192 F.2d 96, 103-106 (7th Cir. 1951) (mail fraud conviction based on misleading letters and advertisements); United States v. Owen, 231 F.2d 831, 832 (7th Cir. 1956) (fraudulent advertisements for the defendant's mail-order plant business); United States v. Pearlstein, 576 F.2d 531, 536 (3d Cir. 1978) ("The most crucial evidence of the fraudulent nature of the overall [mail fraud] scheme lies in the false and misleading statements included in the [defendant's company's] promotional material."). See also United States v. Kyle, 257 F.2d 559, 561 (2d Cir. 1958); Sonntag v. United States, 267 F.2d 820, 821 (9th Cir. 1959) (per curiam); United States v. Baren, 305 F.2d 527, 528-29 (2d Cir. 1962); Babson v. United States, 330 F.2d 662, 662-64 (9th Cir. 1964); United States v. Press, 336 F.2d 1003, 1006 (2d Cir. 1964); United States v. Rosenblum, 339 F.2d 473, 474 (2d Cir. 1964); Atkinson v. United States, 344 F.2d 97, 98-100 (8th Cir. 1965); United States v. Thaw, 353 F.2d 581, 582-84 (4th Cir. 1965); United States v. Hopkins, 357 F.2d 14, 16 (6th Cir. 1966); United States v. Andreadis, 366 F.2d 423, 428-33 (2d Cir. 1966); Lustiger v. United States, 386 F.2d 132, 135 (9th Cir. 1967); United States v. Grow, 394 F.2d 182, 202-203 (4th Cir. 1968); United States v. Sheiner, 410 F.2d 337, 341 (2d Cir. 1969); United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-80 (2d Cir. 1970); United States v. Caine, 441 F.2d 454, 455-56 (2d Cir. 1971); United States v. Uhrig, 443 F.2d 239, 241 (7th Cir. 1971); United States v. Netterville, 553 F.2d 903, 909-10 (5th Cir. 1977); United States v. Themy, 624 F.2d 963, 967-68 (10th Cir. 1980); United States v. Serian, 895 F.2d 432, 433-34 (8th Cir. 1990); United States v. Hawkins, 905 F.2d 1489, 1497 (11th Cir. 1990); United States v. Queen, 4 F.3d 925, 926 (10th Cir. 1993); United States v. Pirello, 255 F.3d 728, 730-31 (9th Cir. 2000).

action" ensures that the government "avoids chilling protected speech." See id. at 1841 n.9 (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965), and Speiser v. Randall, 357 U.S. 513, 525-26 (1958)); cf. Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("Assuming that Noerr-Pennington or the First Amendment reaches . . . torts in some sense, we see no constitutional problem where plaintiffs have shouldered the burden of showing that the defendants' petitions were deliberately false."). Here, it is undisputed that the United States must prove every element of the alleged RICO violations – predicated on violations of the mail and wire fraud statutes – including proving fraudulent intent. Thus, the Supreme Court's jurisprudence compels the conclusion that the elements of fraud and the burden of proving them provide sufficient safeguards against improper infringement of legitimate First Amendment expression.[36]

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

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

[36] Defendants do not explain how or why the right to petition deserves greater protection than the other expressive rights guaranteed protection by the First Amendment, such as the anonymous election pamphleteering that the Court in McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995), suggested could be punished if found to be fraudulent, or the First Amendment rights permissibly curtailed in numerous civil RICO actions, see, e.g., United States v. International Bhd. of Teamsters, 19 F.3d 816, 823-24 (2d Cir. 1994) (freedom of association), United States v. Carson, 52 F.3d 1173, 1185 (2d Cir. 1995) (same); United States v. Private Sanitation Industry Ass'n, 995 F.2d 375, 377 (2d Cir. 1993) (same). Indeed, the Supreme Court has rejected this very position. See McDonald v. Smith, 472 U.S. 479, 485 (1985) (statements made in petition to President receive no greater constitutional protection than other First Amendment rights).

Afforded Constitutional Protection

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

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

570 F.2d 157 (7th Cir. 1977)).[37]

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

[37] The cases Defendants have cited to support their argument that certain of their statements are not commercial speech merely because they do not explicitly "propose a commercial transaction" are inapposite. Unlike here, the speakers in those cases were third party compilers and disseminators of information, not the products' manufacturers or their agents as is the case here. For example, in Commodity Trend Service, Inc. v. CFTC, 149 F.3d 679 (7th Cir. 1998), on remand, 1999 WL 965962 (N.D. Ill. Sept. 29, 1999), aff'd, 233 F.3d 981 (7th Cir. 2000), the Court found that a financial publication providing "impersonal evaluations and recommendations regarding available trading options" was not commercial speech. See 149 F.3d at 686; Taucher v. Born, 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999) (finding that publications providing "impersonal" commodity trading information was not commercial speech, relying on Commodity Trend Service). The final case cited in support of Defendants' claim that their statements are not commercial speech, Johnson v. R.J. Reynolds Tobacco Co., No. H-86-1343, 1987 WL 860608 (S.D. Tex. Apr. 2, 1987), is a one-page order without explanation or citation to the grounds or reasoning for the court's conclusion, and says nothing about the content or nature of the speech at issue.

use." Id. In NCEN II, the Court noted that "[t]he nature of the communication is not changed when a group of sellers joins in advertising their common product." NCEN II, 570 F.2d at 163. Similarly here, the evidence in the United States' Final Proposed Findings of Fact demonstrates that Defendants' statements, such as those denying that smoking had been scientifically proven to cause disease, denying that smoking and nicotine delivered by cigarettes are addictive, and denying that the manufacturers intentionally market their products to attract underage consumers, were intended to encourage the consumption of cigarettes by allaying fears the public may have about their role in causing disease, or the cigarette manufacturers' efforts to market to young people for profit. See, e.g., U.S. FPFF § IV.A(2). And, just as noted in Bolger and the NCEN decisions, the commercial nature of Defendants' statements is not altered because certain of them were issued by TI, an entity jointly created and funded to promote the tobacco industry's interests.

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

First Amendment does not protect commercial speech that is "more likely to deceive the public than inform it." Central Hudson, 447 U.S. at 563.

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

Further, the United States has presented overwhelming evidence that even Defendants' advertisement of "light" and "low tar/low nicotine" cigarettes – communications that are indisputably commercial speech – has been deceptive and misleading, and thus is not entitled to constitutional protection. Defendants have employed language and imagery intended to communicate to smokers and potential smokers that cigarettes that yielded comparatively low tar and nicotine ratings by the standardized FTC machine smoking regime were "safer" than

cigarettes with higher FTC ratings, when Defendants had no evidence that such products were in fact "safer." In fact, Defendants' own research showed that such products – which they designed to exploit smokers' need to obtain sufficient nicotine to create or sustain addiction – were unlikely to be safer. See U.S. FPFF § IV.F. Thus, Defendants' advertisements on "light" cigarettes fail the first prong of the Central Hudson test.

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

In various filings, Defendants have cited to cases that reiterate the well-established principle that liability for fraud requires proof of the wrongdoer's intent. See JD. PFF, ¶¶ 2066, 2073-2074; DSJ Youth at 26. Intent is, of course, directly relevant to Defendants' liability under RICO. Indeed, it is the proof of fraudulent intent that distinguishes speech worthy of First Amendment protection from speech that, like Defendants' public statements at issue here, properly forms the basis of liability.

Here, Defendants insist that their public statements, advertisements, and other publications reflected their "good faith" beliefs about smoking and health issues in order to claim that they lacked the requisite unlawful intent to defraud. Whether such communications were made with intent to deceive or were made in good faith is an issue to be decided by the factfinder. See, e.g., United States v. Brown, 147 F.3d 477, 483 (6th Cir. 1998) ("the issue of fraudulent intent is an issue reserved for the trier of fact"). However, Defendants' mischaracterization of their statements as statements of "belief" in no way confers protection from liability for fraud. As the Supreme Court has noted, "expressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990)

(rejecting notion that allegedly defamatory statements couched as statements of opinion warrant particular First Amendment consideration); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516 (1991) (rejecting "any special test for falsity for quotations" in libel context). The Second Circuit's recognition that "[i]t would be destructive of the law of libel if a writer could escape liability . . . simply by using, explicitly or implicitly, the words 'I think'" is equally applicable to the law of mail and wire fraud. See Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.).[38] Moreover, a person's good faith belief in the truthfulness of a statement does not necessarily preclude liability for reckless disregard of its truth. See U.S. FPCL Vol. 1 § I.G.3(b), pp. 64-65.

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[38] On this point, Defendants cite to cases that are irrelevant, that affirm the well-established principle that intent to defraud is a requisite element of liability for fraud, or that are wholly distinguishable based on evidence presented by the United States. A few examples are illustrative. Defendants have cited United States v. Amlani, 111 F.3d 705 (9th Cir. 1997) and Midwest Printing, Inc. v. AM Int'l, Inc., 108 F.3d 168 (8th Cir. 1997), two cases in which the defendants claimed their allegedly fraudulent statements were non-actionable "puffing" techniques of salesmanship. See JD. PFF, p. 852. Defendants' reliance on cases regarding the law of puffery is inconsistent with their contention that their public statements were scientific statements on a "product controversy" which was a "matter of public importance." Nevertheless, in Amlani, the Court simply affirmed the district court's jury instruction that "'good faith of a defendant is a complete defense to the charge of wire fraud . . . because good faith . . . is, simply, inconsistent with the intent to defraud'" and that action based on an "'opinion honestly held is not punishable'" as wire fraud. Amlani, 111 F.3d at 717-718 (upholding district court's refusal to give "puffing" instruction as unnecessary). The evidence presented by the United States in this case overwhelmingly demonstrates that Defendants' public statements on smoking and health issues were made not because they were "honestly held" but in order to further their fraudulent scheme, and thus fail the standard articulated in Amlani; even if such statements were made in good faith, they were made with reckless disregard as to their truth or falsity, and therefore would still be prohibited under the mail and wire fraud statutes. See U.S. FPCL Vol. 1 § I.G.3(b). Singer v. American Psych. Ass'n, 1993 WL 307782 (S.D.N.Y 1993), is also distinguishable for several reasons. There, the district court held that plaintiff's complaint failed to state a civil RICO claim on multiple grounds, including the complaint's failure to allege the elements of a RICO violation based on mail or wire fraud or to establish an economic motive in the alleged racketeering acts. See Singer, 1993 WL 307782 at *6-8, *11-12. Here, unlike in Singer, the United States has adequately pleaded both a substantive RICO and a RICO conspiracy claim, see United States v. Philip Morris Inc., 116 F. Supp. 2d 131 (D.D.C. 2000), and has presented extensive evidence of Defendants' fraudulent intent and economic motive underlying Defendants' racketeering activity. See generally U.S. FPFF §§ I & IV. As a final example, Defendants misleadingly quote Bennett Enters., Inc. v. Domino's Pizza, Inc., 794 F. Supp. 434 (D.D.C. 1992), in which the court held that a complaint failed to state a fraud claim. There, the court granted a motion to dismiss a fraud claim because the alleged fraudulent statements were "**legal conclusions and opinions** not actionable in fraud." Bennett Enters., 794 F. Supp. at 437 (emphasis added). Here, the United States' allegations and evidence in its Final Proposed Findings of Fact concern a wide range of Defendants' fraudulent statements and conduct, not "legal conclusions and opinions" concerning legal instruments as in Bennett Enters.

Moreover, substantial evidence presented by the United States shows Defendants' characterization of their statements to be erroneous. To illustrate the lack of merit to Defendants' assertions, the Court briefly addresses each of the two issues on which Defendants focus to support their contentions – disease causation and addiction.

1. Causation

With respect to disease causation, Defendants – as in the public statements they cite as examples – mischaracterize both the nature of the dispute and the nature of the evidence that demonstrates that Defendants intended to mislead the public about the scientific evidence of smoking's harmful effects. The "dispute" is not, contrary to Defendants' claim, simply "about the meaning of the word 'cause.'" See JD. PFF, p. 854. The United States' claims concern Defendants' public statements – including statements that have used the word "cause" – that intentionally mischaracterized the type and volume of scientific evidence supporting the conclusions that smoking causes disease. Nevertheless, it is also true – as it must be, since every public statement, issue advertisement, and other publication necessarily utilizes words – that Defendants have exploited and manipulated language to accomplish their fraudulent objectives. For example, while Defendants claim that a 1979 Tobacco Institute press release, issued fifteen years after the 1964 Surgeon General's Report, demonstrates the truth of their public statements, the press release in fact is a prime example of the fraudulent nature of such public statements. The 1979 TI press release stated:

> Despite millions of dollars spent since that time [1964] both by the Government and the tobacco industry on smoking and health related research, many questions about the relationship between smoking and disease remain unanswered. Now, as in 1964, there are statistical relationships and several working hypotheses, but no definitive and final

answers.

> Conclusion: The claim that cigarette smoking causes lung cancer has not been scientifically proven. The charge ignores basic unresolved scientific questions concerning cell types, animal experimentation, smoking patterns and lung cancer rates, dietary influence and diagnostic variations. Lung cancer is a complex disease, and a one-sided attack on cigarette smoking as the causal agent does nothing to advance the search for its cause and cure.

JD. PFF, p. 856; Racketeering Act No. 43. Like myriad industry statements about the health effects of smoking, this rests on the industry's public position – uniformly expressed from the inception of the Enterprise, see U.S. FPFF § I.B; 11309817-9817 (U.S. Ex. 20,277) – that a scientific conclusion about whether smoking causes disease could not be made absent "definitive and final answers" about exactly how smoking causes disease. As demonstrated below, each sentence from the TI press release contains misleading statements intended to deceive.

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

First, per the Gentleman's Agreement, the defendant manufacturers, by agreement, performed limited if any actual in-house biological research designed to discover the health effects of their marketed cigarettes. See U.S. FPFF § IV.B. While it was literally true (and remains so) that "many questions about the relationship between smoking and disease remain unanswered," whether smoking was a cause of disease was not one of them – that question had been answered by 1964 at the latest and was repeatedly re-reaffirmed in the subsequent fifteen years. See U.S. FPFF §§ IV.A. The sentence is also misleading because whatever research the tobacco industry performed or funded that it defined as "smoking and health related," it was not designed to answer any of the unresolved questions about the relationship between smoking and

disease. The tobacco industry was well aware of this. As Lorillard's Research Director wrote in a 1974 memorandum to Curtis H. Judge, Lorillard's Chief Executive Officer:

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

01421596-1600 at 1598 (U.S. Ex. 20,049); U.S. FPFF § IV.D.; see also 105408490-8499 at 8495 (U.S. Ex. 21,135) (1958 report of British tobacco industry scientists stated that "the S.A.B. of T.I.R.C. is supporting almost without exception projects which are not related directly to smoking and lung cancer").

Further, Defendants' approach to its public statements on causation was intentional. Soon after the 1964 Surgeon General's Report, Philip Morris executive George Weissman wrote to Chairman Joseph Cullman that "we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." Among the "crutches" and "rationales" proposed to be offered to the smokers were questions of medical causation, "that more research is needed," and that there are "contradictions" and "discrepancies." See 1005038559-8561 at 8559-8560 (U.S. Ex. 20,189); U.S. FPFF § IV.A. Similarly, TI recognized internally that Defendants' approach to its public statements was a carefully chosen strategy. In 1972, an internal memorandum to TI executive Horace Kornegay stated:

> For nearly twenty years, this industry as employed a single strategy to defend itself on three major fronts – litigation, politics, and public opinion.

* * *

> [I]t has always been a holding strategy, consisting of
>
> > – creating doubt about the health charge without actually denying it . . .
> > – encouraging objective scientific research as the only way to resolve the question of health hazard . . . .
>
> * * *
>
> As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, "the case is not proved" . . . .
>
> In the cigarette controversy, the public – especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) – must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor.

87657703-7706 at 7705 (U.S. Ex. 21,098). This document recognized the value of countering publications documenting the health effects of smoking with the industry's own publication, proposing a publication that "would be a counter-Surgeon General's Report" and concluding that "best of all, [the proposed publication] would only have to been seen – not read – to be believed . . . just like the Surgeon General's report." Id. The 1979 TI statement demonstrates that the industry "holding strategy" articulated in the 1972 TI memorandum remained in full force seven years later.

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

This statement misleadingly (1) implies that the scope and nature of scientific evidence concerning smoking's health effects was not significantly greater from that in 1964, (2) omits information about the strength and consistency of the "statistical relationships" and falsely implies that "statistical relationships" comprise the entirety of the evidence of smoking's causal role, and (3) implies that a conclusive scientific judgment of causation could not occur absent

"definitive and final answers." First, the medical and scientific community continued to research the health effects of smoking after 1964, and the evidence strengthened and expanded the evidence of smoking's harms. See, e.g., Reports of the Surgeon General on Smoking and Health of 1967 (U.S. Ex. 46,514), 1968 (U.S. Ex. 65,351), 1969 (U.S. Ex. 35,922), 1971 (U.S. Ex. 64,082), 1972 (U.S. Ex. 60,597), 1973 (U.S. Ex. 34,342), 1975 (U.S. Ex. 34,340), 1979 (U.S. Ex. 64,071); see also U.S. FPFF § IV.A. Second, the statement deceptively omits any discussion of the strength, nature, and consistency of the evidence of a causal relationship that emerged from the many carefully performed extensive epidemiological studies, and falsely implies that epidemiological evidence alone supported the causal judgment. In fact, the scientific and medical communities considered all relevant evidence from many scientific disciplines – biology, chemistry, pathology, etc. – before reaching the conclusion that smoking caused disease. See U.S. FPFF § IV.A(2)(e).

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

This statement was knowingly misleading when made, and rests upon Defendants' misleading use of the phrase "scientifically proven" to exclude all forms of scientific evidence indicting smoking other than a definitive explanation of the precise mechanism by which cigarette smoke causes cancer. By 1976, BATCo senior scientist S.J. Green had acknowledged in an internal memorandum that "[t]he industry has retreated behind impossible demands for 'scientific proof'" and in 1980 BATCo internally conceded that "[i]t is simply incorrect to say, 'There is still no scientific proof that smoking causes ill-health.'" See 1099384433-8436 at 8433, 8436 (U.S. Ex. 20, 267); 680050983-1001 at 0998 (U.S. Ex. 20, 981).

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

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

504822847-2852 (U.S. Ex. 20,735). Similarly, British tobacco scientists who visited U.S. tobacco companies in 1958 found:

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

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

TINY0003106-3116 (U.S. Ex. 21, 369).

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

For many of the reasons articulated above, this sentence is similarly false, deceptive and misleading. As noted above, the Surgeon General's reports – reflecting the overwhelming consensus in the scientific and medical communities – considered all available evidence from a variety of scientific disciplines, not simply epidemiology. See U.S. FPFF § IV.A(2). The sentence further deceptively ignores the overwhelming evidence that, even accounting for many of the factors identified, the epidemiological data supporting a conclusion that smoking causes lung cancer remained robust. And, as RJR's Rodgman had noted by 1962, "Attempts to shift the blame to other factors . . . necessitates acceptance of data similar to those denied in the cigarette smoke case." 504822847-2852 (U.S. Ex. 20,735).

2. Addiction

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

Smokeless Tobacco Is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 44707 (1996) (U.S. Ex. 64,323) (noting that in support of its "traditional definition" of addiction, "The industry cites no medical dictionary, expert panel, or scientific organization for this specific definition; the 'criteria' are instead extracted from portions of a definition developed in the 1950's and used by the editors of the 1964 Surgeon General's Report on tobacco.").

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

- A September 9, 1980 Tobacco Institute internal memorandum recognized that public acknowledgment that smoking was addictive would undermine their litigation defense that a person's decision to smoke is a "free choice": "[T]he entire matter of addiction is the most potent weapon a prosecuting attorney could have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" TIMN0107822-7823 at 7823 (U.S. Ex. 77,053).
- In a November 29, 1977 memorandum, Philip Morris researcher Thomas Osdene stated his concerns with statements by a CTR staff member who had acknowledged that "'Opiates and nicotine may be similar in action,' 'We accept

the fact that nicotine is habituating,' [and] 'There is a relationship between nicotine and the opiates.'" Osdene expressed his "strong feeling" that with the direction CTR was taking with its research into nicotine, "we are in the process of digging our own grave," adding that he feared that "the direction of the work being taken is totally detrimental to our position and undermines the public posture we have taken to outsiders." 2022246952-6952 (U.S. Ex. 36,865).

- In a November 3, 1977 memorandum, Philip Morris's Principal Scientist William Dunn described its strategy of concealing unfavorable research results. Regarding a nicotine study to be undertaken by scientist Carolyn Levy, Dunn stated, "If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it." 1000128680-8680 (U.S. Ex. 22,285).
- In March 1980, Dunn produced an internal memorandum discussing Philip Morris research concerning the psychopharmacology of nicotine. The research was "aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body." The internal memorandum noted that such research was "a highly vexatious topic" that company lawyers did not want to become public because nicotine's drug properties, if known, would support regulation of tobacco by the federal Food and Drug Administration ("FDA"). Consequently, the memorandum observed that while Philip Morris would continue its research program "to study the drug nicotine, we must not be

visible about it. . . . Our attorneys . . . will likely continue to insist on a clandestine effort in order to keep nicotine the drug in low profile." 2046754714-4715 (U.S. Ex. 20,475); see also U.S. FPFF § IV.E(1)(e) (detailing suppression of animal research by Philip Morris scientists Victor DeNoble and Paul Mele that confirmed nicotine's ability to induce self-administration, one hallmark of a dependence-producing drug).

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

> 3. The effect of nicotine at the levels achieved through smoking. While animal experiments could probably be designed to study the efect [sic] of nicotine (either by itself or as 'spiked' additions) our response to the ISC should be that we have nothing to offer. The little information we have is already in the public domain, and **we have no idea as to a worthwhile research programme.**
>
> * * * *
>
> 5. The role of nicotine, at the relevant lower range of nicotine dosage, in perpetuating the smoking habit. While much

> information already exists in the literature (Russell, Ashton and Stepney etc) this is a particularly sensitive area for the industry. **If any future study showed that nicotine either was, or was not, associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!) We must not become involved in any collaborative study with the ISC.**

109840698-0702 (U.S. Ex. 21,733) (emphases added).

Thus, while it is indeed true that the scientific and medical communities' understanding of addiction evolved after 1964 as research yielded more information about all drugs of dependence, including nicotine – an evolution reflected in the 1988 Surgeon General's Report, which articulated a definition of addiction that represented the medical and scientific consensus – Defendants' decision was motivated by their commitment to their fraudulent scheme. Accordingly, they carefully selected a "genuinely held" scientific position that could serve their unlawful objectives. See, e.g., 490010042-0044 at 0043 (U.S. Ex. 79,285) (presenting "Addiction Statement," prepared by Shook, Hardy & Bacon, concluding that smoking is not addictive and that, as crafted, "Statements in company documents cannot refute this conclusion.").

In short, Defendants purposefully designed their fraudulent scheme with public communications – including issue ads, product advertisements, press releases, and pamphlets – as the primary mechanism of execution. As the United States' proposed factual findings convincingly demonstrate, Defendants made innumerable public statements with the knowledge that they were false, misleading, and/or contained material misrepresentations or omissions.

Accordingly, Defendants' public communications – however characterized – are not protected by the First Amendment.

V

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

Defendants also contend that even if they are found liable for the alleged RICO violations predicated on a scheme to defraud, certain relief sought by the United States would "severely restrain" their freedom of speech in violation of the First Amendment. See JD. PFF, pp. 894-900. They are wrong. As this Court held in denying Defendants' Youth Marketing Motion, "If the Government successfully establishes that the Defendants disseminated their advertising in furtherance of an overall scheme to defraud, the First Amendment will not present an obstacle to appropriate injunctive and equitable relief to remedy the fraud." United States v. Philip Morris USA, 304 F. Supp. 2d at 71 (citing Carson, 52 F.3d at 1185).

First, the United States does not seek much of the equitable relief Defendants have complained of; for example, the United States does not seek relief regarding any warnings on cigarette packages and advertisements that would be inconsistent with any requirement imposed by any Act of Congress or any regulation duly promulgated thereunder. Second, as explained at length above, Defendants' speech has been the primary means for executing the scheme to defraud underlying the mail and wire fraud activities that form the basis for the United States' request for equitable relief. See supra § IV. An injunction prohibiting such unprotected speech does not violate the First Amendment. In addition, none of the relief sought by the United States constitutes a "prior restraint." The Supreme Court has held repeatedly that an injunction against

speech will not be considered an unconstitutional prior restraint if it is issued after the finder of fact has evaluated the speech in question and determined that it is not constitutionally protected or that a substantial governmental interest exists for restraining it. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel., 413 U.S. 376, 390 (1973). Therefore the Court's imposition, following a trial, of an injunction prohibiting existing and continuing unlawful and/or fraudulent practices does not constitute an unconstitutional "prior restraint."

Similarly, injunctive relief requiring Defendants to make affirmative, accurate statements directly to consumers and the public concerning their past unlawful conduct and their products poses no First Amendment problems because such disclosures are necessary to correct the effects of Defendants' half-century of fraudulent conduct and false and misleading statements. Finally, even assuming arguendo that such relief implicates Defendants' First Amendment rights, the restrictions and corrective statements are nevertheless justified because the United States has a compelling interest in ensuring that Defendants do not fraudulently market cigarettes and that cigarette consumers and potential consumers are not misled as to the actual health risks of smoking and related matters in the future. See United States v. International Bhd. of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991) (in civil RICO suit for equitable relief brought by the United States, holding that First Amendment rights may be curtailed to further "significant public interest" in preventing future RICO violations).[39]

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[39] See also United States v. International Bhd. of Teamsters, 19 F.3d at 823-24 (in civil RICO suit for equitable relief brought by the United States, holding that infringement on First Amendment right of association permitted in furtherance of compelling government interest in preventing corruption); Carson, 52 F.3d at 1185 (same); Private Sanitation Industry Ass'n, 995 F.2d at 377 (same); United States v. Local 560 Int'l Bhd. of Teamsters, 974 F.2d 315, 333-346 (3d Cir. 1992) (upholding permanent injunction under RICO barring union member from holding office or position or trust within union was "narrowly tailored to further the compelling governmental interest in eradicating organized crime and corruption from labor unions"); United States v.

(continued...)

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

Defendants err, first, by contending that the Court may not enjoin Defendants' continued efforts to fraudulently market cigarettes, including to minors, or to mislead consumers as to the health risks of smoking because, in their view, the Court may only enjoin future RICO violations and "point-of-sale and color advertising, use of logos appealing to youth, or even youth marketing generally are not predicate acts under RICO." See JD. PFF, p. 897; DSJ Youth at 14-15. This Court has previously and properly rejected this argument: "**[I]t is irrelevant that marketing to children does not per se constitute a predicate racketeering act, so long as the conduct constitutes wire or mail fraud**." Philip Morris USA, 304 F. Supp. at 69 (emphasis added); see also 18 U.S.C. § 1961(1).

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[39](...continued)
International Bhd. of Teamsters, 708 F. Supp. 1388, 1393-94 (S.D.N.Y. 1989) (allegations in civil RICO complaint did not violate defendants' First Amendment rights to association, as allegations addressed "only to alleged violations of RICO, which are not protected by the first amendment"); United States v. International Bhd. of Teamsters, 742 F. Supp. 94, 99-100 (S.D.N.Y. 1990), aff'd and modified in part, 931 F.2d 177 (2d Cir. 1991) (rules by court-appointed officers providing that accredited candidates for union office could have their campaign literature published in union magazine did not violate First Amendment free speech rights); id. at 103-104 (administrator's finding that union had misused membership lists in attacking court-appointed officers, government, and court by objecting to implementation of consent decree, warranting override of conditional protection against access to membership lists, did not violate First Amendment; "This finding of misuse does not infringe on the free speech rights of the IBT. While the IBT was and is free to speak on any matter concerning the Consent Decree, under labor law official union commentary may influence other statutory rights, including the right to a free election."); United States v. International Bhd. of Teamsters, 764 F. Supp. 797, 800-801 (S.D.N.Y. 1991), aff'd, 956 F.2d 1161 (2d Cir. 1992) (IBT Independent Administrator's sanction of union official for knowing association with La Cosa Nostra figures did not violate First Amendment); see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) (upholding ban on political activity by union employees); Hotel & Restaurant Employees Local 54 v. Read, 597 F. Supp. 1431, 1446-51 (D. N.J.1984) (rejecting claim that New Jersey Casino Control Commission's order requiring removal of union officials based upon their organized crime associations violated First Amendment right to freedom of association), aff'd mem., 772 F.2d 893 (3d Cir.1985). See also Alexander v. United States, 509 U.S. 544 (1993) (in criminal RICO prosecution, court-ordered forfeiture of assets used in furtherance of racketeering involving predicate acts of distributing obscene material did not constitute prior restraint on individual's freedom of speech).

As the United States has demonstrated, marketing (including advertising and other practices) designed to attract underage smokers is integral to Defendants' shared goal of preserving the market for cigarettes through fraudulent means. Even as Defendants have falsely denied that they intentionally market to youth, Defendants are well aware that the vast majority of smokers begin smoking as minors and are lured into doing so, in part, by Defendants' marketing activities. Defendants also have spent decades falsely denying or obfuscating the health risks of smoking, and while they have recently grudgingly conceded – with attendant equivocations, half-truths, and other misleading statements – some of the health risks on their websites and in litigation, they have not taken adequate steps to inform cigarette consumers directly of the dangers of smoking and to correct for the decades of deceitful marketing practices, including advertising, that preceded these partial admissions. These actions have been taken for the purpose of misleading consumers as to the health risks of Defendants' products in order to preserve the market for cigarettes. Such fraudulent, nationwide marketing practices clearly involve the use of interstate wire transmissions and the United States mails and other carriers covered by 18 U.S.C. § 1341, and hence constitute mail and wire fraud predicate offenses in furtherance of Defendants' ongoing RICO offenses. See U.S. FPCL Vol. 1.G.5(e), 6 & 8. The United States' requested relief which would enjoin such practices would plainly serve the permissible purpose of preventing future or ongoing RICO violations.

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

Defendants have contended that the potential injunctive relief identified by the United States enjoining certain marketing practices runs afoul of the prior restraint doctrine, and that the

Court cannot determine whether speech "yet to be uttered" is deserving of First Amendment protection. See JD. PFF, pp. 894-95. This is clearly wrong. The United States' proposed restrictions cannot constitute a prior restraint because Defendants have already been engaged in the unlawful practices sought to be enjoined, and any potentially protected speech has in fact already been uttered. Nothing prevents the Court from concluding that Defendants' prior fraudulent speech enjoys no First Amendment protection and from putting an injunction in place to prohibit and prevent such deceptive, fraudulent speech and conduct in the future. To clarify a point that Defendants attempt to obscure, the relief that the United States seeks relates directly to Defendants' scheme to defraud. Defendants have engaged in, and continue to engage in, a scheme to defraud through the use of the mails and interstate wire transmissions, which includes their fraudulent denials that they do not market to young people and their deceptive marketing of "light" cigarettes. See U.S. FPFF § IV.F. & IV.G. These activities do violate the mail fraud and wire fraud statutes, which constitute predicate acts under RICO. See 18 U.S.C. § 1961(1). In short, any possible injunctive relief pertaining to marketing necessarily stems from the Court's finding that Defendants have indeed engaged in this aspect of the scheme to defraud.

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, **before an adequate determination** that it is unprotected by the First Amendment. . . . [Where] the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication." Pittsburgh Press Co., 413 U.S. at 390 (emphasis added); see also SEC v. Wall Street Publishing Institute, 851 F.2d 365, 370 (D.C. Cir. 1988) ("Orders that are carefully focused, address a continuing course of speech, and are imposed after an opportunity for full

merits consideration are not properly analyzed as prior restraints.").[40] Here, as the United States has demonstrated, the activities the United States seeks to enjoin are those designed and executed both to mislead consumers about the health risks of smoking, particularly with respect to so-called "light" cigarettes, and to promote smoking among minors contrary to Defendants' denials that they do not market to youth. See U.S. FPFF §§ IV.F. & IV.G. As the relief proposed by the United States is directed at preventing practices already found to be unlawful, it does not constitute a prior restraint. Rather, even if analyzed as a restriction on speech, the relief would address speech which is an integral part of Defendants' scheme to defraud, and therefore undeserving of First Amendment protection. See cases cited supra § IV. See also Central Hudson, 447 U.S. at 564; Carson, 52 F.3d at 1183-84 (noting that the RICO statute specifically authorizes reasonable restrictions on the future activities of violators, including activities that would otherwise enjoy First Amendment protection, and that "[i]n general 'a district court has broad discretion to enjoin possible future violations of law where past violations have been shown.'" (citation omitted)).

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

Defendants contend that the proposed relief enjoining certain marketing activities, including advertising, does not meet the standard for restriction of commercial speech set forth in Central Hudson. Even assuming arguendo that Defendants' conduct at issue were "commercial

[40] See also Hirsh v. Atlanta, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (distinguishing injunctive relief against "a class of persons who have persistently and repeatedly engaged in unlawful conduct" from "a naked prior restraint against . . . a group that did not have a similar history of illegal conduct"); United States v. Estate Preservation Services, 202 F.3d 1093, 1106 (9th Cir. 2000). Cf. Alexander v. United States, 509 U.S. 544, 550-53 (1993) (forfeiture of assets following RICO violations did not constitute a prior restraint of defendant's future speech activities, even though he could not use those assets to fund such activities).

speech" presumptively enjoying First Amendment protection, the United States' proposed restrictions of Defendants' marketing practices do not violate their First Amendment rights. As discussed in Section VII, supra, the Supreme Court and lower courts have repeatedly held that in order to qualify for protection under the First Amendment, commercial speech must be lawful and non-misleading. See, e.g., Central Hudson, 447 U.S. at 566; Vidal Sassoon, 661 F.2d at 276 n.8; Washington Legal Foundation v. Henney, 56 F. Supp. 2d 81 (D.D.C. 1999), vacated in part, 202 F.3d 331 (D.C. Cir. 2000). The Central Hudson decision itself held that the First Amendment does not protect commercial speech that is "more likely to deceive the public than inform it." Central Hudson, 447 U.S. at 563. The United States' Final Proposed Findings of Fact amply illustrate the degree to which Defendants' purported commercial speech has been designed to deceive rather than inform the public, and thus is not entitled to First Amendment protection. See U.S. FPFF § IV.

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

Defendants have contended that the first prong of the Central Hudson test, whether the speech in question is protected by the First Amendment, is "irrelevant" because the Court cannot

"evaluate the nature of speech that Defendants have yet to utter." See JD. PFF, p. 895. This statement misapprehends the nature of the conduct this lawsuit seeks to enjoin. The United States has shown that Defendants have engaged in particular marketing activities with the intent to defraud consumers and market to youth. See U.S. FPFF § IV. It is precisely such conduct – that undertaken to further the scheme to defraud – which the requested relief would prevent. See Pittsburgh Press, 413 U.S. at 390 (enjoining newspaper advertising practice which promoted illegal discrimination in hiring and finding that "[b]ecause the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate about the effect of publication"). In light of the expert testimony and other evidence submitted by the United States showing that Defendants' ongoing marketing activities further the objectives of the RICO Enterprise and conspiracy, the Court may enjoin such practices without running afoul of the first prong of Central Hudson. Defendants' position is tantamount to stating that a court can never enjoin fraudulent speech, a contention which flies in the face of numerous courts having done just that. See infra n.42.

Addressing the second prong of the Central Hudson test, Defendants have argued that "all of Defendants' speech concerning their products," including the marketing practices addressed by the United States' proposed injunctive relief, "concerns the lawful activity of selling cigarettes." See JD. PFF, p. 894.[41] Nevertheless, commercial speech concerning a lawful

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

activity can promote unlawful activity, and consequently lawfully may be restricted. See Pittsburgh Press, 413 U.S. at 388 (striking down newspaper's categorization system for otherwise lawful employment advertisements because the system promoted unlawful discrimination in hiring); see also U.S. FPCL Vol. 1, pp. 58-59, 70-71. As the United States has shown, see, e.g., U.S. FPFF § IV.G., certain of Defendants' promotional and marketing activities have been designed to fraudulently attract youth to smoking and to fraudulently mislead smokers as to the health risks of smoking, and thus promote unlawful activity even though selling cigarettes is itself legal.

In addressing the third Central Hudson prong, Defendants do not contest the substantial nature of the government's interest in preventing a RICO violation; rather, they have argued only that marketing to youth does not constitute a RICO violation and thus cannot be enjoined by the Court here. However, this Court has rejected that claim because Defendants' scheme to defraud necessarily involves use of the mails and interstate wire transmissions, and therefore such marketing practices may underlie predicate acts under RICO, even if the marketing practices do not per se constitute a RICO predicate act. See Philip Morris Inc., 304 F. Supp. 2d at 69-70.

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

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[41](...continued)
afforded noncommercial speech.") (citing Central Hudson, 447 U.S. at 563 n.5).

means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (citations and internal quotation marks omitted; ellipsis in original); Board of Trustees of SUNY v. Fox, 492 U.S. 469, 478-79 (1989).[42] The United States' Final Proposed Findings of Fact demonstrate that certain of Defendants' marketing efforts have been undertaken in furtherance of Defendants' ongoing scheme to defraud, and therefore lawfully may be enjoined. See, e.g., U.S. FPFF §§ IV.F. & IV.G. It is irrelevant, therefore, that smoking by adults is a lawful activity that can be promoted by lawful means; the means targeted by the United States promote unlawful activity in furtherance of a massive scheme to defraud. The United States need not show that restriction of these activities is the least restrictive means of achieving its ends. See Fox, 492 U.S. at 476-480 (upholding ban on commercial solicitations in university dormitory rooms); Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 344 (1986) (upholding blanket ban on promotional advertising of legal casino gambling activities to Puerto Rican residents without first analyzing whether governmental goal of deterring casino gambling could

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

adequately have been served by alternative means of countering such advertising with speech designed to discourage gambling).

Thus, even if an injunction limiting Defendants' ability to exercise their commercial speech rights in certain ways did raise First Amendment concerns, an injunction designed to prevent precisely the types of conduct that Defendants' utilized to execute their scheme to defraud survives scrutiny under Central Hudson because it constitutes a reasonably tailored way to advance the United States' compelling interest in preventing ongoing and future RICO violations. See cases cited supra n.39.

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

As discussed above, the United States does not seek injunctive relief which would require Defendants to place warnings on their cigarette packages beyond what is required by any Act of Congress or any implementing regulation.[43] Nevertheless, this Court can and should order injunctive relief which would require Defendants to issue corrective statements to remedy Defendants' fraudulent conduct and otherwise educate cigarette smokers about Defendants' decades-long campaign to mislead and deceive them.

Because the government may regulate – and prohibit entirely – false or deceptive commercial speech, the First Amendment does not preclude government-imposed affirmative disclosures where necessary to prevent consumers from being confused or misled. See generally Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Thus, Defendants' interests in avoiding compelled speech can be overcome by a sufficiently

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

important state interest in preventing or correcting consumer deception or confusion. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (upholding requirement that attorney who referred to contingent fees in advertising include disclosure that clients could be liable for expenses even under contingency agreement).

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

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

erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims." Id. The court found:

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

Id. at 769.

Similarly here, despite Defendants' recent modifications in certain public statements regarding the adverse health effects of smoking cigarettes and their addictiveness, additional affirmative disclosures to consumers and the public are warranted to address the effects of decades of Defendants' false and misleading statements to the contrary. See U.S. FPFF §§ IV.A. & IV.E.; Warner-Lambert, 562 F.2d at 756. Defendants continue to deny that their previous statements were false or misleading, further increasing the likelihood that the "reservoir of erroneous consumer belief" will persist absent the sought relief. The injunctive relief sought here is narrowly tailored to achieve the desired goal, namely, correcting the specific misconceptions promoted by Defendants' past and ongoing deceptive marketing, including advertising, and other public statements by issuing corrective public statements. See Zauderer, 471 U.S. at 651. The record shows that in the absence of the corrective action sought by the United States, the effect of

this decades-long attempt to mislead consumers into believing that cigarettes are safer and less addictive than they actually are is "likely to linger" and perpetuate the goals of the RICO Enterprise. See Novartis, 233 F.3d at 788; Warner-Lambert, 562 F.2d at 769.[44]

VI

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

Defendants contend that the First Amendment, and specifically the Noerr-Pennington doctrine, immunizes what they characterize as "politically-motivated" statements "concerning issues of smoking and health" that were made to the public or to government officials.[45] Defendants' false and fraudulent statements are protected by the Noerr-Pennington doctrine. Nothing in the First Amendment or the Noerr-Pennington doctrine confers such an expansive immunity bath on Defendants' false, misleading and fraudulent misrepresentations designed to defraud the public. See generally supra § IV. Indeed, to do so would eviscerate the protections of numerous anti-fraud statutes to the substantial detriment of the public.

It bears repeating that "it has never been deemed [a violation of the First Amendment] to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting Giboney, 336 U.S. at 502). It is also particularly

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

[45] See PM Aff. Def. No. 7; Philip Morris Companies/Altria Aff. Def. No. 8; R.J. Reynolds Aff. Def. No. 9; Lorillard Aff. Def. No. 29; Liggett Aff. Def. No. 6; BATCo Aff. Def. No. 16; CTR Aff. Def. No. 9; see also JD. PFF, pp. 841-43, 844-48.

significant that the Supreme Court made clear that the Noerr-Pennington doctrine does not constitute an exception to the well established doctrine that "false statements are not immunized by the First Amendment." See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983).

Furthermore, even assuming arguendo that the Noerr-Pennington doctrine were pertinent at all to any of Defendants' fraudulent or misleading statements, its application is limited in this case because the vast majority of Defendants' false or misleading statements underlying the RICO offenses were not made to government entities or for the primary purpose of securing government action. In denying Defendants' Youth Marketing Motion, the Court reserved for trial the final determination of whether Defendants' press releases and public statements constituted "petitioning" that warrants consideration under the Noerr-Pennington doctrine, but noted that "very few" of the predicate acts that Defendants claimed to be protected by Noerr-Pennington "appear on their face to be fairly characterized as acts of petitioning the Government." Philip Morris USA, 304 F. Supp. 2d at 72.

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

public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.[46]

In limited circumstances, the Supreme Court and other courts have extended the Noerr-Pennington doctrine to contexts outside the antitrust arena. See, e.g., Bill Johnson's Restaurants, 461 U.S. at 743-44 (Noerr-Pennington barred NLRB from enjoining unfair labor practice lawsuit unless the lawsuit was objectively baseless); Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 62 (1993) ("PREI") (Noerr-Pennington barred liability for wrongful copyright infringement litigation where the infringement suit was supported by probable cause, even if the defendant's intent in bringing it was anticompetitive).

Nevertheless, Noerr-Pennington does not confer a blanket grant of absolution for deliberately false statements made in the context of a petition to a government entity. See Whelan v. Abell, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) (stating that "[w]e see no reason to believe that the right to petition includes a right to file deliberately false complaints" and holding that Noerr-Pennington did not preclude liability for false representations made as part of an administrative claim because "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods"). The Supreme Court also has noted that "[a] misrepresentation to a court" or "misrepresentations made under oath" to Congress or other government officials are not afforded any protection under Noerr-Pennington.

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

See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).[47] Likewise, the Supreme Court has stated that "false statements are not immunized by" the Noerr-Pennington doctrine. See Bill Johnson's Restaurants, 461 U.S. at 743. Similarly, Noerr-Pennington does not immunize otherwise unlawful conduct, including mail and wire fraud. See, e.g., In re American Continental Corp./Lincoln Sav. & Loan Securities Litig., 794 F. Supp. 1424, 1448 (D. Ariz. 1992) ("A rule of law which excused misrepresentations when it is the truth of the information which is fundamentally at issue would undermine the fabric of both systems. Whatever the ultimate breadth of Noerr-Pennington, it is not a shield for fraud."); Service Engineering Co. v. Southwest Marine, Inc., 719 F. Supp. 1500, 1506 (N.D. Cal. 1989) (Defendants' filing false reports with the Small Business Administration and the Navy constituted mail fraud violations, which were not protected by the Noerr-Pennington doctrine, because "[t]his privilege does not apply to the furnishing of false information to an agency or adjudicatory body – the First Amendment has not been interpreted to preclude liability for false statements."), vacated, 825 F. Supp. 891 (N.D. Cal. 1989); see also Whelan, 48 F.3d at 1254-55 (holding that neither the Noerr-Pennington doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation); Hydranautics v. Filmtec Corp., 70 F.3d 533, 538-39 (9th Cir. 1995) (Noerr-Pennington does not immunize anticompetitive patent infringement litigation where underlying patent was obtained by fraud); United States v. Goldberg, 906 F.

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

Supp. 58, 63-64 (D. Mass. 1995) (denying motion to dismiss indictment including mail and wire fraud charges related to conduct directed at the legislature on Noerr-Pennington grounds because "[t]he doctrine does not . . . immunize activities said to violate the criminal laws of the United States."). See also supra § IV.

Courts' refusal to allow the Noerr-Pennington doctrine to be wielded as a shield (or sword) of absolute immunity is consistent with the two fundamental principles discussed supra: as the First Amendment does not shield fraud, see supra, § IV, and the right to petition receives no higher constitutional protection than other First Amendment rights, see supra n.36, then the First Amendment does not grant the right to petition any special dispensation from the fraud laws.

2. It is clear that the vast majority of Defendants' false, misleading and deceptive statements underlying the RICO offenses and scheme to defraud involved here, unlike in Noerr, Pennington, and their progeny, were not made to government bodies or public officials in order to influence the passage or enforcement of laws, but rather were made to defraud millions of consumers and potential consumers. Hence, under the foregoing authority these statements derive no protection whatsoever from the First Amendment or the Noerr-Pennington doctrine.[48] Indeed, Defendants do not cite a single decision holding that the Noerr-Pennington doctrine precludes causes of action based upon false, deceptive and fraudulent representations made to the public pursuant to a scheme to defraud the public as involved here. To the contrary, such

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

intentional fraudulent conduct does not serve any legitimate societal interest and does not enjoy any protection under the Noerr-Pennington doctrine. See Gertz, 418 U.S. at 340; accord cases cited supra pp. 81-82.

Moreover, although Defendants also made false, deceptive and misleading statements about smoking and health issues to Congress and other governmental bodies, those statements were inextricably intertwined with Defendants' deliberate scheme to defraud the public,[49] and any intent to influence the passage of legislation or the enforcement of laws was, at best, a secondary objective. Hence these statements are not immunized by the Noerr-Pennington doctrine.

For example, in Allied Tube, petitioner, an association of individuals and groups, conceded that it had conspired with others to exclude respondent's product from a code that petitioner published which established product and performance requirements. Petitioner argued that its anti-competitive activities were entitled to immunity under the Noerr-Pennington doctrine because its activities "were incidental to a valid effort to influence governmental action." 486 U.S. at 502. The Court rejected this argument. The Supreme Court explained that although a form of "indirect" petitioning of governmental bodies could conceivably be entitled to Noerr-Pennington immunity, the Court "cannot agree with petitioner's absolutist position that the Noerr

[49] Obviously, Defendants' scheme to defraud would have been exposed if they made truthful representations to governmental bodies that they reasonably expected would be disseminated to the public, but that were contrary to their fraudulent representations made directly to the public. Moreover, and more importantly, the gravamen of this case is the fraudulent representations disseminated to the **public** – including those disseminated to the public during televised broadcasts of testimony of Defendants' representatives. As this Court has repeatedly recognized, this is not a "fraud on the government" case. See, e.g., Philip Morris, 116 F. Supp. 2d at 136 ("The Government's Complaint describes in detail what it alleges to be a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead **the American public** . . . .") (emphasis added); Philip Morris USA, 300 F. Supp. 2d at 66.

doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Id. at 503. Rather, the Supreme Court stated that the scope of Noerr-Pennington immunity depends on the activity's "impact . . . [and] on the context and nature of the activity." Id. at 504. The Court added that:

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

Id. at 504; see also id. at 509 n.11 (explaining that, outside the political context, "the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone **sufficient** to render that activity immune from antitrust liability") (emphasis added)). Accord California Transport v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process").

Under the teachings of Allied Tube, examination of the "impact," "context," and "nature" of Defendants' false, deceptive and fraudulent statements to allegedly influence governmental bodies confirms that they do not enjoy any Noerr-Pennington protection. First, Defendants' alleged petitioning activities have been part of a massive scheme to defraud the public of hundreds of billions of dollars and have had massive economic effects as well as incalculable harm to the health of the American people. See supra pp. 17-18. Therefore, the adverse "impact" of Defendants' fraudulent activities is enormous.

Moreover, the "nature" of Defendants' fraudulent activities do not further legitimate societal interests. See generally Gertz, 418 U.S. at 340 ("[T]here is no constitutional value in

false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues") (citing New York Times v. Sullivan, 376 U.S. 255, 270 (1964)). In re American Continental Corp., 794 F. Supp. at 1448. To be sure, Defendants' intentional false, misleading and deceptive representations to the public and to governmental bodies enjoy no constitutional protection. Accord cases cited supra § IV.

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

As but one example, the context and nature of Defendants' conduct relating to their seminal public statement that is the bedrock support for decades of their public communications on this issue – the 1964 Cigarette Advertising Code – is strikingly similar to the actions held not covered by Noerr-Pennington immunity in Allied Tube. As with the National Electric Code at issue in Allied Tube, the Cigarette Advertising Code was set privately by Defendants acting "primarily on [their] own behalf" rather than in the public interest, and the nature of the conduct – "rounding up economically interested persons to set private standards" – differed substantially from "efforts to influence legislative action in the political arena," even if Defendants' purposes included influencing governmental action. Id. at 501, 504, 509-10 (Noerr-Pennington immunity does not attach when "an economically interested party exercises decision making authority" in formulating private standards).

In sum, conduct which is otherwise unlawful, such as the acts of mail and wire fraud established in this case, cannot be converted to protected activity under Noerr-Pennington merely because Defendants plead a subjective intent to seek favorable legislation or to influence governmental actions. Cf. National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984) ("good motives will not validate an otherwise anticompetitive practice"); PREI, 508 U.S. at 59. See also supra § VIII. Indeed, if Defendants' unduly expansive interpretation of the Noerr-Pennington doctrine were accepted, wrongdoers would be able to easily immunize their schemes to defraud the public simply by coupling such fraud schemes with efforts to influence governmental bodies regarding related legislation or enforcement activities.[50]

3. Moreover, Defendants mischaracterize the United States' allegations in this action, juxtaposing statements from different places in the First Amended Complaint to assert that "the Government contends that Defendants' national public relations campaign," along with their false and misleading statements to governmental agencies, officials, and courts, were intended to forestall regulation of their products. See JD. PFF, pp. 841-42. In fact, as the United States'

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

Final Proposed Findings of Fact show (U.S. FPFF § IV), the purpose of Defendants' statements was to preserve and expand the market for cigarettes by deceiving current and future consumers as to the health consequences of smoking, and other matters. Defendants' public statements, including those made to governmental entities, were made for the purpose of maintaining the fiction of the "open controversy" about smoking and health and that addicted smokers freely "choose" to smoke as adults. See, e.g., U.S. FPFF §§ IV.A. & IV.E(1).[51]

Likewise, Defendants have mistakenly claimed that "the Government's allegations that Defendants misrepresented their activities related to alleged youth marketing can make sense **only** as an effort to forestall greater Government regulation." See JD. PFF, p. 845 (emphasis added). On the contrary, Defendants' fraudulent representations in that regard have had a natural tendency to influence the likely actions of parents of youths whom Defendants intended to attract by their marketing practices. See U.S. FPCL Vol. 1, § I.G.3(c).[52]

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

[52] For that reason, it is irrelevant to Defendants' liability whether Congress would have acted differently in the absence of Defendants' fraudulent conduct. Consequently, Defendants' reliance on PREI, 508 U.S. at 58, Buckman v. Plaintiffs' Legal Comm., 531 U.S. 341, 354 (2001) (Stevens, J., concurring), Pittston Coal Group, Inc. v. United Mine Workers of America, 894 F. Supp. 275 (W.D.Va 1995), Klinger v. Yamaha Motor Corp., 738 F. Supp. 898 (E.D. Pa. 1990), and Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996), aff'd, 114 F.3d

(continued...)

Moreover, Defendants' claim that numerous racketeering acts are immunized by the Noerr-Pennington doctrine is baseless. See JD. PFF, p. 848. Only 16 of the racketeering acts referenced by Defendants relate to Defendants' communications to government entities. Of those, six racketeering acts – Nos. 105 and 109 through 113 – charge that Defendants' representatives made false statements under oath to Congress and these statements were publicly transmitted via the wires and broadcasts. These statements do not enjoy Noerr-Pennington protection at all. See Allied Tube, 486 U.S. at 504 (observing that "misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action" are not entitled to the same Noerr-Pennington immunity as deceptive practices in the political arena); see also North Shore Medical Center, Ltd. v. Evanston Hosp. Corp., 1995 WL 723761, *6 (N.D. Ill. Dec. 5, 1995) (denying motion to dismiss mail fraud complaint alleging that corporation made statements to government falsely claiming to be in compliance with zoning laws because there was "no authority for the proposition that the First Amendment immunizes businesses, or anyone else, from liability for fraudulent misrepresentations made to the government"). It bears repeating that there is no constitutional right to lie or commit perjury. See supra n.47. Indeed, 18 U.S.C. § 1621 makes it a crime to commit perjury before Congress and other tribunals. See, e.g., United States v. Debrow, 346 U.S. 374 (1953); United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975). Under Defendants' misguided argument, 18 U.S.C. § 1621 violates the First

[52](...continued)
1177 (4th Cir. 1997) is misplaced, because Defendants' liability does not rest on "speculation" as to what governmental entities might have done "in a counterfactual situation." See Buckman, 531 U.S. at 354 (Stevens, J., concurring).

Amendment as applied to perjury before Congress whenever the Noerr-Pennington doctrine arguably would apply. Not surprisingly, no court has reached this absurd result.

Therefore, only Racketeering Act Nos. 3, 132, and 133 (concerning press releases addressing statements or reports by the U.S. Surgeon General); 13 and 14 (concerning recruiting witnesses to testify before Congress); 28 (concerning Defendants' concerted efforts to prevent the National Cancer Institute from funding a study likely to produce results harmful to the tobacco industry's fraudulent "open controversy" position); and 86 and 125-127 (concerning letters to public officials) implicate activities arguably covered by Noerr-Pennington. Even here, however, as demonstrated above, statements made to governmental entities with the knowledge and intent that such statements likely would be disseminated to the public and in furtherance of Defendants' ongoing scheme to defraud the public are not immunized from liability for that fraud merely because the statements were made to governmental entities and/or influenced government actions. See, e.g., cases cited supra pp. 82-83.

The remaining racketeering acts do not implicate Noerr-Pennington. Racketeering Act Nos. 5-7, 10, 12, 23, 24, 27, 29, 34, 35, 42, 43, 46, 49, 56, 61, 64, 65, 79, 81, 87, 91, 93, 100, and 117 describe press releases intended to further a scheme to defraud consumers and potential consumers of cigarettes into believing that cigarettes had not been shown to be harmful or addictive and that Defendants were supporting independent research intended to determine the truth about smoking and health.[53] Racketeering Act Nos. 71, 72, 74, and 75 concern Defendants'

[53] Although the press release described in Racketeering Act No. 35 noted that then-Tobacco Institute Chairman Joseph Cullman III had testified before a Senate Commerce Subcommittee in 1969 concerning tobacco companies' marketing practices, the purpose of the press release was to deceive the public into believing that tobacco companies do not market their products to youth, thus perpetuating the myth that smoking is a free "adult choice" rather than an addiction largely induced in minors.

attempts to intimidate former Philip Morris scientists Victor DeNoble and Paul Mele to prevent their disclosure of research supporting the conclusion that nicotine is addictive.[54] Racketeering Act No. 130 concerns a statement made over the public airwaves by a Tobacco Institute representative which falsely asserted that the Defendant Cigarette Companies actively discouraged smoking by persons under age 21. There is no evidence that these statements were made with the primary purpose of influencing legislation rather than deceiving the public, or that even if securing favorable government action were a subsidiary purpose, such a subjective intent would negate the overall fraudulent purpose. See NCAA v. Board of Regents of Univ. of Okla., 468 U.S. at 101 n.23.

VII

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

Defendants contend that their settlement of state lawsuits in the Master Settlement Agreement ("MSA") and other suits and their alleged changes in policy render the RICO claims here moot. See JD. PFF, pp. 836-41. The Court has rejected Defendants' claim stating:

> [T]he Court concludes that the existence of the MSA cannot establish, as a matter of law, that there is no reasonable likelihood of Defendants committing future RICO violations. As the Court has previously noted, at a much earlier point in this litigation, "[i]n arguing that the MSA obviates the need for injunctive relief, Defendants implicitly ask the Court to make the following two assumptions: that Defendants have complied with and will continue to comply with the terms of the MSA and that the MSA has adequate enforcement mechanisms in the event of noncompliance."

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

United States v. Philip Morris, 116 F. Supp. 2d at 149. However, there are many reasons the Court is not prepared to accept those assumptions at the summary judgment stage just as it was not prepared to do so at the motion to dismiss stage.

First, in Section 1964 (b), Congress has given the obligation to enforce RICO to the federal government not to the States. As the Government argues, the MSA does not trump the "paramount sovereign interests" of the United States in enforcing its own laws, especially given that it is not even a party to the MSA and that this Court has no jurisdiction to enforce the MSA. Govt's Opp'n. at 9, 12. The enforcement responsibilities under RICO may parallel the efforts of the States under the MSA but certainly can not be preempted by them.

Second, as the Government points out, the MSA itself precludes Defendants from relying upon it in this lawsuit. See Govt's Opp'n. at 8. Specifically, the MSA provides that it shall not be "offered or received in evidence in any action. . . for any purpose other than in an action. . . arising under or relating to this Agreement." MSA § XVIII (f). While the Defendants argue to the contrary, it is clear that the Government's lawsuit is not "an action . . . relating to this Agreement."

Third, the Government seeks significant relief not covered by the MSA. For example, the United States seeks disgorgement of Defendants' past ill-gotten gains of $280 billion in contrast to the payments of future profits that signatory Defendants are obligated to pay the States under the MSA. Govt's Opp'n. at 12. Moreover, MSA payments from the signatory Defendants are determined by a formula based, in part, on market share and a Defendant's MSA payments may be reduced if its market share falls. Id. Unlike the relief sought here, the MSA does not (1) require each Defendant to "make corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine" in its future advertising and marketing of cigarettes; (2) require funding of medically approved nicotine replacement therapy for smokers, or court-appointed monitors to implement the relief granted; (3) enjoin the Defendants from committing any racketeering acts defined in 18 U.S.C. § 1961 (1) and the knowing association with any person engaged in such acts of racketeering; and (4) enjoin Defendants' alleged youth-marketing practices. Id. at 12-13.

Fourth, even assuming that the MSA provided all the relief which the Government seeks here, mere cessation of the alleged violations "is no bar to the issuance of an injunction." Hecht Co. v. Bowles, 321 U.S. 321, 327

> (1944). Such cessation of unlawful activity cannot foreclose relief particularly where, as here, it is the result of a settlement designed to minimize liability in the face of various State suits.
>
> Fifth, the MSA cannot preclude relief in this RICO action because two of the Defendants, BATCo and Altria, are not even signatories to the Agreement. Accordingly, the MSA simply cannot enjoin all the wrongful conduct which the Government alleges.
>
> For all these reasons, existence of and compliance with the MSA does not preclude the equitable relief sought by the Government in this lawsuit.

See Philip Morris, 2004 WL 1045766 at **2-3.

VIII

THE UNITED STATES' RICO CLAIMS ARE NOT PRECLUDED BY THE DOCTRINES OF MOOTNESS, RES JUDICATA, COLLATERAL ESTOPPEL, RELEASE, OR ACCORD AND SATISFACTION

Defendants assert that the United States' claims are barred by the affirmative defenses of mootness, res judicata, collateral estoppel, release, and accord and satisfaction.[55] The sole basis for these defenses is Defendants' entry into the MSA with the States in November 1998. See JD. PFF, p. 863-67. On October 8, 2003, the United States submitted its Motion for Partial Summary Judgment Dismissing Defendants' Affirmative Defenses Asserting Res Judicata, Collateral Estoppel, Release, Accord and Satisfaction, and Mootness (R.2579) ("U.S. Res Judicata Motion"). That motion is still pending before the Court. However, as quoted supra Section VII, the Court has already decided that "**the existence of the MSA cannot establish, as a matter of law, that there is no reasonable likelihood of Defendants committing future RICO**

[55] See Philip Morris USA Aff. Def. Nos. 8-10; Altria Aff. Def. Nos. 9-11; R.J. Reynolds Aff. Def. Nos. 39-41; B&W Aff. Def. Nos. 26-27; BATCo. Aff. Def. No. 19; Lorillard Aff. Def. Nos. 3 & 46; Liggett Aff. Def. Nos. 30-32; CTR Aff. Def. Nos. 6, 18, 26; TI Aff. Def. Nos. 7-9.

violations." Philip Morris USA, 2004 WL 1045766 at *2 (emphasis added). Moreover, Defendants have effectively abandoned the defenses of res judicata, collateral estoppel, release, and accord and satisfaction. Thus, none of these factually and legally meritless defenses remains viable and must be rejected.

On May 6, 2004, the Court denied Defendants' Motion for Summary Judgment on the Grounds That There Is No Reasonable Likelihood of Future RICO Violations ("DSJ Reasonable Likelihood"). Id. In reaching its decision that "the MSA cannot preclude relief in this RICO action," the Court correctly found that the United States' RICO claims are entirely distinct from the actions that gave rise to the MSA: "[I]n Section 1964(b), Congress has given the obligation to enforce RICO to the federal government not to the States. . . . The enforcement responsibilities under RICO may parallel the efforts of the States under the MSA but certainly can not be preempted by them." Id. at *2. The Court further agreed with the United States that "the MSA does not trump the 'paramount sovereign interests' of the United States in enforcing its own laws, **especially given that it is not even a party to the MSA** and that this Court has no jurisdiction to enforce the MSA." Id. at **2-3 (citing U.S. Opp. to DSJ Reasonable Likelihood at 9, 12) (emphasis added). The Court also correctly held that "the MSA itself precludes Defendants from relying upon it in this lawsuit." Id. at *2 (citing MSA § XVIII(f)). Finally, the Court noted the obvious fact that the MSA was a **"settlement** designed to minimize liability in the face of various State suits," and thus not a final resolution on the merits of any of the State's claims. See id. at *3 (emphasis added).

In short, the Court has ruled that the MSA cannot be a legal bar to the United States in this case, and has agreed with the arguments presented in the United States' Res Judicata Motion

that (1) the instant civil RICO enforcement action is distinct from the State cases settled through the MSA; (2) Defendants may not rely upon the MSA in this case; (3) the United States was not a party to the MSA; and (4) the MSA was a contractual settlement of litigation, not a final decision on the merits of any of the State's claims. Accordingly, there is nothing left of Defendants' mootness defense, and Defendants cannot establish necessary elements of its mootness, res judicata, collateral estoppel, release, and accord and satisfaction defenses.

Further, as the United States pointed out in its Reply in support of its Res Judicata Motion, Defendants effectively abandoned the defenses of res judicata, collateral estoppel, release, and accord and satisfaction. Their opposition to the United States' Res Judicata Motion did not mention the defense of release at all, and relegated all discussion of res judicata, collateral estoppel, and accord and satisfaction to a single footnote, which failed to address the United States' comprehensive showing that these defenses are legally and factually baseless. See U.S. Reply in Supp. of Res Judicata Motion at 1, n.3.

Accordingly, additional extensive legal and factual argument specifically refuting each of these five defenses – mootness, res judicata, collateral estoppel, release, and accord and satisfaction – is unnecessary. For the expanded discussion of why each of these defenses must be rejected, see U.S. Res Judicata Motion at 1-29, and U.S. Reply in Supp. of Res Judicata Motion at 1-15.

IX

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

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

Defendants' takings contention is of no consequence, because the United States does not seek to have this Court grant the relief about which Defendants complain – disclosure of cigarette ingredients and additives, and modifications to warning label content or size, beyond what is required by any Act of Congress or any regulation duly promulgated thereunder. See, e.g., United States' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment on the Grounds That the Government's RICO Claims Violate Separation of Powers at 17 n.18 (R. 2762; Dec. 8, 2003). However, even if the United States were to seek such relief, the particular types of ingredient disclosure and warnings that the United States previously identified as potentially available relief would not violate the Just Compensation Clause of the Fifth Amendment.

The Just Compensation Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Governmental action does not run afoul of this provision unless both requisite conditions are

met: (1) the action constitutes a "taking," and (2) "just compensation" is due and has not been tendered. See, e.g., Brown v. Legal Foundation of Washington, 538 U.S. 216, 235-36 (2003).

With respect to the first part of the analysis, evaluation of whether an unconstitutional regulatory taking of Defendants' "trade secrets or other proprietary information" has occurred properly proceeds under the three-part inquiry articulated by the Supreme Court in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). That fact-based test examines the economic impact of the governmental action, whether that action interferes with reasonable "distinct investment-backed expectations," and the character of the government action. Penn Central, 438 U.S. at 124.[56]

Defendants' contention that the ingredient disclosures requested by the United States constitute an unconstitutional taking is incorrect. Defendants gloss over the particular forms of ingredient disclosure that the United States previously indicated that it might seek: (1) the disclosure to consumers, on cigarette packaging and advertisements, a list of "all known or suspected **toxic** chemicals, ingredients or additives in tobacco smoke or products, including the levels of such chemicals and their known or suspected health effects"; and (2) disclosure of brand-by-brand formula information only "to an appropriate regulatory authority." See U.S. Resp. to JD. Fourth Set of Continuing Interrog. to Plaintiff at 24-25 (emphasis added).[57]

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

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

The first form of disclosure would further the United States' objective of correcting Defendants' past false and misleading public statements concerning the contents and health effects of their products, and to prevent and restrain Defendants' ability to make such misleading or deceptive statements in the future. As noted above, this form of disclosure would require that the manufacturing Defendants publicly reveal only the disclosure of **toxic** ingredients or additives in cigarettes, not the entire product formula.[58] In Philip Morris Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002), the First Circuit referred favorably to this limited disclosure, suggesting that partial disclosure of ingredients "which create health risks" would not unduly interfere with the cigarette companies' investment-backed expectations. See 312 F.3d at 39-40 (suggesting disclosure of particular ingredients would not run afoul of the Takings Clause under "fair information" standard of Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919)).[59]

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

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

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

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

Indeed in Reilly, the court assessed the Massachusetts Disclosure Act in part in comparison to the two forms of disclosure previously identified as potential relief by the United States, as reflected in the Minnesota and Texas disclosure laws. The court found that, compared to the Massachusetts law under challenge, both alternative approaches preserved defendants' reasonable investment-backed expectations and would at least as effectively serve the strong public health interests underlying the action. See 312 F.3d at 28, 40, 45 ("There is no evidence that suggests that regimes similar to those adopted by Texas and Minnesota, or some combination thereof, would not achieve" the public health goals that motivated the Massachusetts disclosure law) & n.17.[60]

Even assuming arguendo that the forms of ingredient disclosure identified by the United States were to constitute a regulatory taking, Defendants have failed to demonstrate how any

[60] And while the court acknowledged that under the Massachusetts Disclosure Act "public disclosure of the [companies'] ingredient lists, even in part, will make it much easier to reverse engineer" product formulae, thus presenting potential economic adverse impact, Defendants have complied with precisely such a partial disclosure scheme in Minnesota. See Reilly, 312 F.3d at 41, 45. The Reilly court stated that Defendants have also complied with the brand-by-brand disclosure mandated in Texas, and have not challenged the validity of either state's law. See id. at 28.

"just compensation" would be due them. The Supreme Court has recently confirmed that "'[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.'" Brown v. Legal Foundation of Washington, 538 U.S. at 235 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985)). The measure of "just compensation" is "the property owner's loss rather than the government's gain." Id. (finding no violation of the Just Compensation Clause where property owner suffered no pecuniary loss even if taking occurred). Defendants do not explain how the specific types of ingredient disclosure previously identified by the United States – public disclosure of toxic constituents and brand-by-brand disclosure to an appropriate federal agency with adequate protections against improper disclosure or use – would cause them compensable pecuniary loss. See Monsanto, 467 U.S. at 1011 n.15.

In short, Defendants fail to adequately explain or support, factually or legally, how the particular forms of disclosure identified by the United States would "eliminate the manufacturer's right to exclude others from making use of their property" and violate the Fifth Amendment.[61] Nevertheless, the United States does not intend to pursue through this action relief in the form of ingredient disclosure or warning labels beyond what is required by any Act of Congress or any regulation duly promulgated thereunder.

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

X

LIGGETT'S CIVIL LIABILITY IS NOT PRECLUDED BY ITS ALLEGED WITHDRAWAL FROM THE RICO CONSPIRACY AND IN ANY EVENT LIGGETT HAS NOT AND CAN NOT DEMONSTRATE ITS WITHDRAWAL

Defendant Liggett Group Inc. (hereinafter "Defendant" or "Liggett") asserts an affirmative defense that it withdrew "from any alleged RICO enterprise or conspiracy in the mid-1990's . . . and that Liggett is not committing racketeering violations today and does not pose a reasonable likelihood to do so in the future." See Memorandum of Points and Authorities in Support of the Motion for Summary Judgment by Defendant Liggett Group Inc. ("Lig. SJM.") at 3. See also Liggett's Preliminary Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses ("L. PPCL").

Above all else, Liggett's withdrawal defense does not preclude its liability in this litigation as a matter of law because it involves a government suit for equitable relief based upon a pattern of mail and wire fraud offenses to which a statute of limitations does not attach. Therefore, Liggett remains civilly liable for its participation in the RICO conspiracy and Enterprise even assuming arguendo that it withdrew in the mid 1990s. See infra Section X.C.

Moreover, assuming arguendo that the defense of withdrawal applied in this case, Liggett has not and cannot establish the requisite elements of a withdrawal defense – that Liggett took affirmative action to disavow or defeat the conspiracy, actions that it communicated in a manner reasonably calculated to reach co-conspirators, or that it disclosed the unlawful scheme to the authorities. Further, assuming arguendo that Liggett carried its burden in that regard, the United

States has adduced evidence that rebuts Liggett's asserted withdrawal defense. See infra Section X.D.

Likewise, there is no merit to Liggett's claim that there is no reasonable likelihood of Defendants' future unlawful activity. On the contrary, the United States has demonstrated such a reasonable likelihood based upon Defendants' extensive past pattern of fraudulent activity, including Liggett's, and upon evidence of Defendants' unlawful activity after the mid-1990s, including Liggett's. See infra Section X.E. and U.S. FPCL Vol. 1 § III.

A. Liggett's Participation in the Enterprise and Conspiracy Prior to the Mid-1990s

Liggett was an active member in the key organizations of the RICO Enterprise and conspiracy. For over three decades, Liggett participated in the RICO Enterprise through entities established by the members of the Enterprise to counter the emerging scientific consensus regarding the adverse health effects caused by smoking. These entities included Defendant Council for Tobacco Research ("CTR"), the CTR Literature Retrieval Division, Defendant Tobacco Institute ("TI"), the Centre for Cooperation for Scientific Research Relative to Tobacco, the Tobacco Institute Testing Laboratory and the Center for Indoor Air Research.[62] Liggett was

[62] See, e.g., LG2006318-6330 (U.S. Ex. 21,203); 2025856068-6073 (U.S. Ex. 86,509); 2023723951-3955 (U.S. Ex. 86,510); 8760222-2272 (U.S. Ex. 23,515); 89259162-9465 (U.S. Ex. 86,512); TITL0003363-3374 (U.S. Ex. 21,931); see 508775416-5416 (U.S. Ex. 20,817); CTRBYL000001-0014 (U.S. Ex. 21,138); 1003041486-1488 (U.S. Ex. 20,146 (press release announcing Liggett's membership in CTR); Response of Defendant CTR to United States' First Set of Interrogatories, Schedule C, served February 6, 2001 (U.S. Ex. 75,927); Individual Defendants' Answers to Interrogatory No. 25 of United States' First Set of Interrogatories, United States v. Philip Morris USA, et al. (U.S. Ex. 87,930); 517004087-4090 (U.S. Ex. 20,874); LG2006318-6330 (U.S. Ex. 21,203); LG2008241-8242 (U.S. Ex. 21,206). See also U.S. FPFF §§ I.C, I.F, I.G, I.H(7).

not merely a passive participant in these organizations. It paid substantial sums to these organizations throughout the years.[63]

Along with the other Cigarette Company Defendants, Liggett used these organizations to carry out the scheme to defraud alleged in the United States' Complaint. For instance, Liggett was one of the founding members of the Tobacco Institute, which disseminated thousands of false and misleading public pronouncements related to smoking and health, nicotine addiction, and the tobacco industry's denial that it marketed to youth.[64]

Liggett also participated in the Enterprise by supporting the coordinated effort to collect, organize, store and annotate scientific literature through entities created under the auspices of the Board of CTR, such as the Central Files, Information Interservices Incorporated ("3i"), the Information Retrieval Division, and later the Literature Retrieval Division ("LRD").[65]

Even when Liggett sought to reduce or cease payments to the Tobacco Institute in 1993, it sought to continue participating on the Committee of Counsel, pledging to TI that it would not conduct its business "in a manner adverse to the interest of the industry as a whole." See LWDOJ00023390-3392 (U.S. Ex. 25,910; U.S. Ex. 86,106).

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[63] See, e.g., Response of Defendant CTR to United States' First Set of Interrogatories, Schedule C, served February 6, 2001 (U.S. Ex. 75,927); Individual Defendants' Answers to Interrogatory No. 25 of United States' First Set of Interrogatories, United States v. Philip Morris USA, et al. (U.S. Ex. 87,930); 2015040937-0938 (U.S. Ex. 20,322); CTRMNO15328-5329 (U.S. Ex. 21,600, U.S. Ex. 79,855). See also U.S. FPFF § I, 57-59.

[64] See, e.g., TIMN0123790-3793 (U.S. Ex. 21,330); TIMN0120596-0597 (U.S. Ex. 21,321); TIMN0120638-0639 (U.S. Ex. 21,698); 670500617-0619 (U.S. Ex. 20,968). See also U.S. FPFF §§ I.C(1), I.C(4), IV.A(2).

[65] See, e.g., CTRMINMOM000001-0015 (U.S. Ex. 21,145); CTRMINMOM000016-0034 (U.S. Ex. 21,170); LG2023420-3421 (U.S. Ex. 23,014); Response of Defendant CTR to United States' First Set of Interrogatories, Schedule C, served February 6, 2001; LG 2000823-0832 (U.S. Ex. 21,544); LG2017032-7034 (U.S. Ex. 34,100); LG2023462-3462 (U.S. Ex. 34,103). See also U.S. FPFF § I.F. & ¶¶ 644, 661.

Liggett also participated in the orchestration of a variety of research projects and witness development projects, including industry "Special Projects." See, e.g., 2045752106-2110 (U.S. Ex. 20,467); 2015059690-9697 (U.S. Ex. 20,309). Special Projects were overseen by a Committee of Counsel, the general counsels of each of the six Cigarette Company Defendants, including Liggett. See LG2000149-0171 (U.S. Ex. 21,197). Special Projects occurred under the aegis of Defendant CTR, which Defendants fraudulently represented would oversee independent research to investigate the link between smoking and disease. Special Projects took many forms, such as CTR Special Projects or Lawyer Special Projects (paid through Special Accounts). Contrary to the Cigarette Company Defendants' public statements, the research activities were not independent and did not investigate the link between smoking and diseases.[66]

Liggett also participated materially in every aspect of the scheme to defraud alleged by the United States. Liggett maintained that any causal link between smoking and adverse health was an "open question" for over thirty years despite its knowledge of the falsity of that assertion. Liggett was aware as early as 1961 that "biologically active" constituents of cigarette smoke were "a) cancer-causing b) cancer promoting c) poisonous d) stimulating, pleasurable, and flavorful." 2021382496-2498 at 2496 (U.S. Ex. 20,345).[67] Bennett LeBow, Liggett's controlling shareholder, former-CEO, and current CEO of Vector Group, Liggett's corporate parent, also

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[66] See, e.g., 507878840-8840 (U.S. Ex. 20,802); 2015031514-1514 (U. S. Ex. 20,316); 2045752106-2110 (U.S. Ex. 20,467); 502645038S-5038Z (U.S. Ex. 23,053); LG2021550-1550 (U.S. Ex. 21,209); 503655086-5088 (U.S. Ex. 20,720); LG2002618-2626 (U. S. Ex. 21,200); 507875702-5702 (U.S. Ex. 21,648); LG2024193-4196 (U.S. Ex. 21,212); LG2002635-2638 (U.S. Ex. 21,201); LG2000741-0750 (U.S. Ex. 36,269); LG2000149-171 (U.S. Ex. 21,197); LG2002533-2533 (U.S. Ex. 21,198; U.S. Ex. 34077). See also U.S. FPFF §§ I.G(1), I.G(2)(d)(v), I.G(3)(b)(iv).

[67] See U.S. FPFF § IV.A(2). As late as April 1994, Liggett's Chairman and Chief Executive Officer, Edward Harridan, Jr., testified before the House of Representatives Subcommittee on Health and the Environment that smoking had not been conclusively proven to be hazardous. See 502576586-6571 (U.S. Ex. 20,701); Cions, Marlene, Cigarette Chiefs Steadfastly Deny Smoking Kills, *Los Angeles Times*, April 15, 1994, at A1.

testified that it was unknown whether smoking caused lung cancer and other health problems in 1993. Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 113:22-115:8. LeBow later admitted his earlier testimony was not guided by his own knowledge, but was the result of guidance from his lawyers in order to testify consistently with the industry's "party line." Testimony of Bennett S. LeBow, Dunn v. R.J.R. Nabisco Holdings Corp., (18D01-9305-CT-06), February 23, 1998, 3137:3-3140:11.

Liggett also supported the Enterprise's efforts to mislead the public regarding the adverse health effects of environmental tobacco smoke ("ETS") or secondhand smoke. Liggett funded the ETS Advisory Committee (the "Hoel Committee") and, although not formally a member, also participated in meetings with the Council for Indoor Air Research.[68]

Similarly, Liggett supported the goals of the Enterprise through its fraudulent statements concerning nicotine addiction and manipulation. Liggett engaged in extensive research to determine the optimum delivery of nicotine necessary to establish and sustain addiction, while denying any knowledge that nicotine was addictive.[69] Liggett also met with other Defendants to discuss smoking behavior, including smokers' compensation.[70]

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[68] See, e.g., 2021004058-4064 at 4058 (U.S. Ex. 20,339); 2025856068-6073 (U.S. Ex. 86,509); 2023723951-3955 (U.S. Ex. 86,510); 521030439-0441 (U.S. Ex. 23,019); TIFL0522279-2280 (U.S. Ex. 21,424); 501547434-7448 (U.S. Ex. 20,682); 501547434-7448 (U.S. Ex. 20,682); Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 93:13-94:15; Deposition of Robert Bereman, United States v. Philip Morris, April 23, 2002, 28:21-29:5. See also U.S. FPFF §§ I.G., IV.C(4) & (5).

[69] See, e.g., X003675-3677 (U.S. Ex. 87,941); 1003287730-7731 (U.S. Ex. 20,161); LG2013892-3893 (U.S. Ex. 21,189); LG0234157-4157 (U.S. Ex. 36,262); LG0262127-2129 (U.S. Ex. 21,185); LG0262130-2131 (U.S. Ex. 21,596); LG0262149-2151 (U.S. Ex. 21,186); LG0262152-2153 (U.S. Ex. 21,187); LWDOJ9165472-5472 (U.S. Ex. 22,169); LG0262125-2126 (U.S. Ex. 59,994); LG0262506-2508 (U.S. Ex. 36,263); LG2018563-8563 (U.S. Ex. 21,190). See also U.S. FPFF §§ IV.E(1)(c), IV.E(2), IV.E(2)(c)(i) & (ii).

[70] See, e.g., 1003287730-7731 (U.S. Ex. 20,161). See also U.S. FPFF § IV.F(3)(b).

Through the Tobacco Institute, Liggett also issued false and misleading public statements denying the addictiveness of nicotine and in 1994, Liggett's then-CEO testified in televised hearings before Congress that nicotine was not addictive, and denied that Liggett manipulated the amount of nicotine in its cigarettes.[71]

Liggett's conduct with respect to researching and marketing a potentially less hazardous cigarette also furthered the goals of the RICO conspiracy and Enterprise. By 1978, Liggett had developed a product that it believed was less hazardous for smokers – the "XA." However, the XA project was stymied by Liggett's fear that such a cigarette would threaten Liggett and the industry's litigation position by suggesting that conventional cigarettes were unsafe, in contravention of the industry's efforts to keep open the question of whether there was a causal link between smoking cigarettes and adverse health consequences. Indeed, pressure to discontinue the project was brought upon Liggett by other Defendants who sought to ensure that Liggett abide by the joint agreement not to compete on health-related issues in the marketing of cigarettes.[72]

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[71] See, e.g., X003675-3677 (U.S. Ex. 87,941); 1003287730-7731 (U.S. Ex. 20,161); LG2013892-3893 (U.S. Ex. 21,189); LG0234157-4157 (U.S. Ex. 36,262); LG0262127-2129 (U.S. Ex. 21,185); LG0262130-2131 (U.S. Ex. 21,596); LG0262149-2151 (U.S. Ex. 21,186); LG0262152-2153 (U.S. Ex. 21,187); LG2002520-2524 (U.S. Ex. 21,594); TIMN0019963-9963 (U.S. Ex. 22,727); TNWL0019638-9640 (U.S. Ex. 21,703). See also U.S. FPFF § I.C.

[72] See, e.g., LATH00312201-2202 (U.S. Ex. 87,942); Deposition of James Mold, Cipollone v. Liggett Group, Inc., Nov. 26, 1985, 93-98, 102-105, 108, 362-366; LIGB0018879-8883 (U.S. Ex. 22,145); LWDOJ9293210-3743 (U.S. Ex. 87,943); Trial Testimony of Lawrence Meyer, State of Washington v. American Tobacco Co., Nov. 25, 1985, 102-105; LG2013584-3587 (U.S. Ex. 21,208); LG0166090-6102 (U.S. 21,195, 34024 ,U.S. Ex. 34,025, U.S. Ex. 34,026); LG0203254-3269 at 3266-3269 (U.S. Ex. 59,270); LG2013588-3594 (U.S. Ex. 76,175); LG60203242-3244 U.S. Ex. 87,944); LG60203277-3279 (U.S. Ex. 21,535); Trial testimony of Lawrence Meyer, State of Washington v. American Tobacco Co., Nov. 10, 1998, 5471-5475, 5481-5483, 5505-5526, 5540-5541; Deposition of James Mold, Cipollone v. Liggett Group, Inc., Nov. 25, 1985, 21-24, 30-31, 89-190; LG0203002-3002 (U.S. Ex. 21,192); LG0230997-1005 (U.S. Ex. 21,555); LG0266007-6010 (U.S. Ex. 34,045, U.S. Ex. 34,047, U.S. Ex. 71,712); Deposition of K.V. Dey, Cipollone v. Liggett Group, Inc., April 19, 1984, 172-176, 192-195; 524007145-7151 (U.S. Ex. 20,917, U.S. Ex. 20,918); Deposition of Bennett LeBow, United States v.

(continued...)

Also consistent with the other Cigarette Company Defendants, Liggett has marketed (and continues to market) "low tar/low nicotine" or "light" cigarettes with misleading advertisements intended to exploit a smoker's desire for "health reassurance" products. Liggett has marketed "light" cigarettes armed with the knowledge those "light" cigarettes are unlikely to be any less hazardous than are regular cigarettes. Similarly, Liggett has long known that the FTC Method for measuring tar and nicotine yields produces results that bear little correlation to the likely actual exposure to the smoker.[73]

Also in concert with other Defendants, Liggett has engaged in youth marketing but utilized the Tobacco Institute to deny such marketing publicly. Liggett was well aware of the import of the youth market, and designed its marketing to appeal to youth. Throughout the 1950s and 1960s, Liggett designed and ran a series of advertisements that emphasized themes and characters that appealed to youth. Since at least the 1980s Liggett has continually utilized pricing and marketing programs that appeal to youth.[74]

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[72](...continued)
Philip Morris, June 21, 2002, 30; Deposition of Robert Bereman, United States v. Philip Morris, April 23, 2002, 17-19, 64-65, 73-77, 164-165; Deposition of John Bunch, United States v. Philip Morris, May 22, 2002, 82-83; LDOJ2620361-0363 (U.S. Ex. 22,213); Deposition of Ronald Fulford, United States v. Philip Morris, May 20, 2002, 118-122. See also U.S. FPFF § IV.B(4)(b)(ii).

[73] See, e.g., LWDOJ00022736-2739 (U.S. Ex. 25,981); LWDOJ6135692-5692 (U.S. Ex. 21,215); LWDOJ9165648-5650 (U.S. Ex. 21,216); Institute of Medicine, Clearing the Smoke: The Science Base for Tobacco Harm Reduction, National Academy of Sciences (K. Stratton, et al., eds., National Academy Press 2001) (U.S. Ex. 20,919) (citing Liggett advertisements for "light" cigarette brands); Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, NIH Pub. No. 02-5074, October 2001 (U.S. Ex. 76,112); 2041186475-6517 (U.S. Ex. 22,181). See also U.S. FPFF §§ IV.F(1)(a)(viii), IV.F(2)(a)(viii), IV.F(2)(b)(vii), IV.F(3)(a)(vii), IV.F(3)(b)(viii), IV.F(3)(c)(viii).

[74] See, e.g., 2065081133-1135 (U. S. Ex. 20,517); TI05031335-1336 (U.S. Ex. 21,244); LDOJ2233261-3261 (U.S. Ex. 21,184). See also U.S. FPFF §§ IV.G(2)(c), IV.G(4)(b), IV.G(6), IV.G(7).

Finally, despite promising the public that it would conduct disinterested research into smoking and health and publish the results publicly, it is clear that liability litigation concerns drove Liggett's research program well into the 1990s, and controlled whether or not research would be done and the type of any research that would be done. Dennis Dietz, Liggett's Manager of Scientific Issues from 1991 to 1999, testified on July 1, 2002, that "instead of doing independent research into the question of smoking and health, the Company focused on insuring its products were no less harmful than those of its competitors." When Dietz began working for Liggett, he had an "orientation" meeting with outside counsel wherein they "open[ed] his eyes up to the fact that we were involved with research that wasn't just pure, really, academic," but rather "health related issues . . . that potentially could – could impact on – on product litigation." See, e.g., 508775085-5088 (U.S. Ex. 20,815); TIMN0123790-3793 (U.S. Ex. 21,330); TIMN0120596-0597 (U.S. Ex. 21,321); TIMN0120638-0639 (U.S. Ex. 21,698); 670500617-0619 (U.S. Ex. 20,968).

B. Liggett's Participation in the Enterprise and Conspiracy After the Mid-1990s

While Liggett argues that it has withdrawn from the RICO conspiracy and Enterprise, its current conduct still supports the goals of the Enterprise. Indeed, contrary to its claim of withdrawal, to this day Liggett continues to assert that there never was a RICO conspiracy and Enterprise, and that it never participated in it. See U.S. Ex. 75,845. As detailed below, Liggett still supports the Enterprise through its conduct, and remains a threat to engage in future unlawful conduct.

With respect to the marketing of cigarettes to youth, it was not until March 1997 that Liggett's then-CEO, Bennett LeBow, confirmed that the Cigarette Company Defendants

marketed their cigarettes to youth. See Testimony of Bennett LeBow, Engle v. R.J. Reynolds Tobacco Co., (94-08273), June 22, 2000, 55,408:13-55,409:8. LeBow also confirmed that his attorneys, after reviewing Liggett documents, informed him that the Cigarette Company Defendants market to young people and testified that the purpose of this marketing approach was "to try to keep people smoking, keep their [cigarette] business going," because, if young people did not start smoking, the Cigarette Company Defendants would "have no business in this generation." Testimony of Bennett LeBow, State of Minnesota v. Philip Morris Inc., et al., (CI-94-8565), September 29, 1997, 68:2-69:17; 99:19-100:8.

Despite this admission, Liggett's marketing activities actually have accelerated in recent years. In 1998, Liggett spent $113 million on promotion programs for its discount brands, including point-of-sale materials, buy downs, marketing accruals and coupons. See Deposition of Harold Petch, United States v. Philip Morris USA, October 12, 2001, 65:12-66:16. Further, marketing data for the years 1993 to 2003 in magazines with substantial youth readership demonstrate that Liggett began advertising its cigarette brands in publications with a substantial youth readership in 2001, and that it has increased its expenditures on such advertisements in both 2002 and 2003. See Declaration of Margaret Ann Morrison, United States v. Philip Morris USA, October 30, 2003, Exhibit B5 (U.S. Ex. 75, 942). Indeed, since the year 2001, Liggett has spent over $6 million advertising its cigarette brands in magazines with a substantial youth readership. Id. The majority of Liggett's expenditures in its cigarette brand advertising in magazines with a substantial youth readership has been in People magazine, a magazine which had, on average, more than three million readers ages 12-17 per issue from 1992 through 2002. Id. Expert evidence proffered by the United States establishes that "marketing is a substantial

contributing factor in youth smoking initiation and continuation of youth smoking." See Declaration of Michael Eriksen, United States v. Philip Morris, September 24, 2003 (U.S. Ex. 74,015).

Moreover, while LeBow admitted that Liggett has a responsibility to run a youth smoking prevention program, he testified that Liggett does not have a youth smoking prevention program because it "would not be effective. LeBow's conclusions about youth smoking, as well of those of other Liggett executives, are not based on any evidence, but rather, on Liggett's refusal to examine whether its own marketing practices affect youth. See Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 121:21-122:21; Deposition of Harold Petch, United States v. Philip Morris, October 12, 2001, 82:25-85:25; 89:21-90:2. For example, John Long, Vice President and General Counsel of Liggett, is Liggett's current youth smoking designee for compliance under the Master Settlement Agreement ("MSA"). As such, his duties include, inter alia, identifying methods to reduce youth access to, and consumption of, cigarettes. However, Long is unaware of any actions that Liggett has undertaken to ensure it is complying with the MSA youth marketing mandates. See Deposition of John Long, United States v. Philip Morris, June 24, 2001, 10:7-17:10; 19:20-20:24. Similarly, Steve Shipe – Liggett's former youth smoking coordinator, who is now coordinator for Vector Tobacco (a recently created Liggett affiliate) – testified that he was not aware of any program that Liggett had directed at the public designed to prevent youth smoking, and was not aware of any such program to be implemented at Vector Tobacco. See Deposition of Steve Shipe, United States v. Philip Morris, May 21, 2002, 60:15-74:8. Liggett also has no program to ensure that the retailers of its products comply with the marketing restrictions of the MSA to prevent underage smoking. See Deposition of Steve

Shipe, United States v. Philip Morris, May 21, 2002, 73:17-74:8. Thus, despite Liggett's obligations under the MSA, it is apparent that nothing has changed with respect to its conduct to prevent marketing to youth. Like the other Cigarette Company Defendants, Liggett also continues to market "light" and "low tar" cigarettes despite knowing of smoker "compensation" and the fact that consumers incorrectly interpret cigarettes marketed as "light" or "low tar" to be less hazardous. See Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 55:21-61:21; Deposition of Harold Petch, United States v. Philip Morris, October 12, 2001, 128:1-129:12. Liggett and Vector executives are well aware of consumer misunderstanding regarding the hazards of "low tar" and "light" cigarettes, see VDOJ6743-6744 (U.S. Ex. 64,727), yet Liggett does not remove the misleading descriptors because of a fear it would put them at a competitive disadvantage. In the words of LeBow, "one company can't just step up and do something like that and stay in business." See VDOJ6743-6744 (U.S. Ex. 64,727); VDOJ25338-5338 (U.S. Ex. 65,756); VDOJ25339-5341 (U.S. Ex. 64,737).

Liggett also continues to manufacture and market its products in accordance with industry practices. For instance, in July 1997, Liggett Director of Research John Woods offered suggestions to then CEO Ronald Fulford on how to make a traditional Liggett cigarette brand safer. Liggett's then-CEO Ronald Fulford testified that the company did not pursue Woods' suggestions for, among others, financial reasons – Fulford did not want to invest in the company's premium product lines at the time. He "couldn't find any instance anywhere in the world of anybody taking any initiative on the premium product to improve the sales." Further, consistent with the rest of the industry, Liggett continues to deny that it manipulates the nicotine content in its cigarettes while still researching methods to alter the nicotine-to-tar ratio in certain

brands and adjusting blends to insure cigarettes deliver sufficient nicotine. See VDOJ25299-5299 (U.S. Ex. 65,752); VDOJ25348-5348 (U.S. Ex. 64,735) (discussing Liggett and Vector's work to modify nicotine content in two new Vector brands).

In 2002, LeBow admitted that Liggett and the other companies "are following a similar course." See Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 133:5-138:7. This similar course includes not only the areas discussed above, but other areas as well. Other aspects of Liggett's conduct exhibit support for, and involvement with, the current conduct of the Enterprise. In 1999, Liggett sold three of its premium brands to co-Defendant Philip Morris for $300 million dollars. Testimony of Michael E. Szymanczyk, United States v. Philip Morris USA, et al., June 14, 2002, 494:18-496:21; Testimony of Bennett LeBow, Engle v. R.J. Reynolds Tobacco Co., (94-08273), June 22, 2000, 55402:24-55403:17. Philip Morris then removed the "smoking is addictive" warning from the brands. Deposition of Geoffrey Bible, United States v. Philip Morris USA, et al., Aug. 22, 2002, 112:12-113:17. LeBow also owns approximately 50,000 shares of Philip Morris stock with an option for another 100,000 shares. Deposition of Bennett LeBow, United States v. Philip Morris, June 21, 2002, 103:8-104:18. Thus, while asserting that Liggett has withdrawn from the Enterprise, LeBow stands to gain financially from the continuing effects of the Enterprise's scheme to defraud.

Finally, Liggett's conduct in this litigation also demonstrates Liggett's continuation of conduct that furthers the goals of the Enterprise. Liggett's improper concealment and suppression of material information continued well into the 1990s, and there are still highly relevant documents, such as the Project XA files that belonged to Liggett in-house counsel Joseph Greer (who originally sequestered the XA documents in Liggett's Law Department), that

have never been fully accounted for. See LG2002520-2524 (U.S. Ex. 21,594). In this litigation, Liggett concealed documents from discovery on its privilege logs with materially misleading descriptions of the documents it was withholding. Indeed, included in the documents that were ordered produced because they were described misleadingly were several lists of relevant Liggett research and corporate documents Liggett has sent to its outside counsel over the past twenty-years, but has not produced or logged as privileged in this litigation. See LHQ2006149-6188 (U.S. Ex. 25,927).

C. The Defense of Withdrawal Does Not Preclude Liggett's Liability As A Matter of Law

Liggett mistakenly relies on the defense of withdrawal that typically, but not exclusively, applies in criminal conspiracy prosecutions where a defendant claims his prosecution is time-barred because he withdrew from the charged conspiracy before the commencement of the applicable statute of limitations period.[75] However, that rationale has no application here for two principal reasons. First, as this Court has held, this case involves a civil suit brought by the United States to obtain equitable relief to which a statute of limitations does not apply. See Philip Morris, 300 F. Supp. 2d at 72-74. Therefore, Liggett cannot escape liability for equitable relief, especially disgorgement of ill-gotten proceeds, even if it withdrew from the RICO conspiracy.

As the District of Columbia Circuit stated, "Before the statute [of limitations] runs out the individual remains liable for his own criminal acts, and also for the acts of his co-conspirators, including those acts occurring after the individual's own last overt act in furtherance of the

[75] See, e.g., United States v. Zizzo, 120 F.3d 1338, 1357-58 (7th Cir. 1997); United States v. Starrett, 55 F.3d 1525, 1550 (11th Cir. 1995); United States v. Antar, 53 F.3d 568, 579-80 (3d Cir. 1995).

conspiracy." In re Corrugated Container Antitrust Litig., 662 F.2d 875, 886 (D.C. Cir. 1981); see also United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994) ("A withdrawal defense to a conspiracy charge is relevant only when 'coupled with the defense of a statute of limitations'. . . . [W]ithdrawal does not absolve a defendant from his membership in a conspiracy.") (citation omitted); United States v. Loya, 807 F.2d 1483, 1493 (9th Cir. 1987) ("To avoid complicity in a conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement") (internal quotations and citations omitted); United States v. Read, 658 F.2d 1225, 1232 & 1233 n.4 (7th Cir. 1981) ("[A]fter a defendant withdraws, he is no longer a member of the conspiracy and the later acts of the conspirators do not bind him. The defendant is still liable, however, for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy . . . . Dropping out during the limitations period does not absolve a defendant."). Accordingly, even assuming arguendo that Liggett withdrew from the RICO conspiracy in about the mid-1990s as it alleges, Liggett remains civilly liable for its unlawful conduct and the conduct of its co-conspirators that was in furtherance of the RICO conspiracy or Enterprise while Liggett was a member of the RICO conspiracy during the period before the mid-1990s.

The second reason that Liggett's withdrawal defense is unavailing here is that withdrawal does not preclude liability even in criminal prosecutions involving substantive mail and wire fraud offenses. For example, in Read, the court held that withdrawal was not a defense to substantive mail and securities fraud offenses. Read, 658 F.2d at 1239-40. The court explained the differences between application of the withdrawal defense to conspiracy and substantive offenses:

> The predicate for liability for conspiracy is an agreement, and a defendant is punished for his membership in that agreement. Mail and securities fraud, on the other hand, punish the act of using the mails or the securities exchanges to further a scheme to defraud. No agreement is necessary. A party's "withdrawal" from a scheme is therefore no defense to the crime because membership in the scheme is not an element of the offense. Speigel is liable for mail fraud as a principal or as an aider and abettor, not a conspirator. As an aider and abettor, Spiegel need not agree to the scheme. He need only associate himself with the criminal venture and participate in it.

Id. at 1240. Accord United States v. Waldrop, 786 F. Supp. 1194, 1201 (E.D. Pa. 1991) ("withdrawal is no defense to mail fraud"), aff'd, 983 F.2d 1054 (3d Cir. 1992) (Table). Accordingly, Liggett's alleged withdrawal from the RICO conspiracy and Enterprise does not preclude its liability for substantive mail and wire fraud offenses that underlie the civil RICO lawsuit for equitable relief brought by the United States.

Paramount equity considerations further support the conclusion that Liggett's alleged withdrawal does not preclude Liggett's liability for the sought relief. The District of Columbia Circuit, other federal courts of appeals, and this Court have ruled that "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). Accord Philip Morris, 310 F. Supp. 2d at 63-64. Therefore, Liggett is not entitled to keep its unlawful proceeds obtained from its RICO violations, to which it had no cognizable right in the first place, even if it did cease its participation in the RICO conspiracy and Enterprise in about the mid-1990s. See supra pp. 12-13. To rule otherwise would eviscerate the deterrent

effect of disgorgement and would permit unjust enrichment, and hence would vitiate the primary purposes of disgorgement.[76]

It is also particularly significant that Liggett has not cited a single decision holding that a participant in a conspiracy, or scheme to defraud, may escape civil liability entirely for equitable relief in a suit brought by the United States simply because at some point after committing substantial unlawful conduct the wrongdoer abandoned or withdrew from the unlawful venture.

D. Liggett Has Not Carried Its Burden of Establishing Withdrawal

1. Liggett Has Not Established The Requirements of the Withdrawal Defense by Competent Evidence

Assuming arguendo that the defense of withdrawal applies in this case, Liggett has not and cannot establish sufficient admissible evidence to support its claim. To establish withdrawal, a co-conspirator has the burden of proving more than mere cessation of his unlawful activities. Rather, a co-conspirator must also prove either that: (1) he took "affirmative action . . . to disavow or defeat the purpose" of the conspiracy which is communicated in a manner reasonably calculated to reach co-conspirators, or (2) he disclosed the unlawful scheme to the authorities.[77]

Liggett claims that the following purported "facts" establish that in about "the mid-1990's," it abandoned or withdrew from the RICO conspiracy and Enterprise: (1) Liggett

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[76] See supra, pp. 12-13. See also United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001) (upholding joint and several restitution order for co-conspirator in church-burning case, despite claim that she withdrew from the conspiracy: "A restitution order may order payment of losses consistent with the common law of conspiracy. Namely, a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others committed in furtherance of the conspiracy.").

[77] Hyde v. United States, 225 U.S. 347, 369 (1912). Accord United States v. United States Gypsum Co., 438 U.S. 422, 463-64 (1978); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 616 (7th Cir. 1997); United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997) (collecting cases); In Re Corrugated Container Antitrust Litig., 662 F.2d at 886.

admitted that smoking cigarettes causes cancer and is addictive and included product warnings on its packages beyond those required by law (Lig. SJM. at 4-5, 9, 13); (2) Liggett agreed to unfettered FDA jurisdiction and has allegedly cooperated with the scientific community and state attorneys general concerning smoking related issues (id. at 4, 9-10, 13); (3) government officials and others have complimented Liggett for its contributions to the public health community (id. at 4-7, 9-10); (4) Liggett became the first domestic cigarette manufacturer to begin to disclose the ingredients of its brands (id. at 4, 13); (5) Liggett released "certain" internal documents relevant to smoking and health issues (id.); (6) Liggett is acting independently from the other tobacco company Defendants (id. at 7) and has been "ostracized" from them. (id. at 7, 12-13); (7) Liggett entered into the MSA with 46 states (see Rule 7.1/56.1 Statement of Material Undisputed Facts by Defendant Liggett Group Inc. In Support of Its Motion for Summary Judgment ("Lig. Rule 7.1/56.1 St.") at ¶¶ 3, 13); and (8) Liggett's CEO has testified at various proceedings inconsistent with the objectives of the conspiracy and RICO Enterprise (see id. at ¶¶ 10, 17).

As a threshold legal matter, most of the "evidence" Defendant Liggett relies upon to establish these "facts" is based on inadmissible hearsay. Similarly, Liggett cannot rely upon the MSA because, as this Court has ruled, by the MSA's own terms the MSA is inadmissible in this litigation. See Philip Morris, 2004 WL 1045766 at *2. Therefore, Liggett's withdrawal defense is not sufficiently supported by admissible evidence, and hence must be rejected on this ground alone.

Moreover, most of the asserted "facts" Liggett relies upon are immaterial to the defense of withdrawal. Although some of Liggett's purported actions are arguably inconsistent with the objectives of the RICO conspiracy and Enterprise, they fall far short of disclosing the

conspirators' unlawful scheme to the authorities or taking decisive action "to disavow or defeat" the conspiracy, as is required to establish withdrawal. See cases cited supra n.77 and infra nn. 78 & 79. For example, to this day, Liggett continues to assert to this Court and other authorities that there never was a RICO conspiracy and Enterprise as alleged and proven by the United States, and that it never participated in them. See Lig. SJM. at 3 n.3; (U.S. Ex. 75,845). Liggett's position in that regard hardly constitutes **a full disclosure of the unlawful scheme to the authorities** or action to defeat the conspiracy, as is required to establish withdrawal.[78] Instead, Liggett's actions indicate self-serving efforts to minimize its liability in the face of numerous lawsuits, rather than efforts to defeat the conspiracy.[79]

2. The United States Established Evidence That Disputes and Overrides Liggett's Proffered Evidence

Assuming arguendo that Liggett submits admissible evidence in support of its withdrawal defense, the United States has adduced evidence that disputes the evidence Liggett relies upon and warrants rejecting Liggett's proffered evidence. For example, Liggett touts its prior conduct during the state attorneys general litigation, in which it provided assistance and "**certain** of its

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[78] See, e.g., United States v. Chambers, 944 F.2d 1253, 1265 (6th Cir. 1991) (defendant's cessation of activities in furtherance of a drug trafficking conspiracy and her admission to the authorities that she sold $100 worth of cocaine, "but otherwise provided little information" did not establish withdrawal. The defendant's "statement is not **a full confession** and, in fact, evidence a lack of cooperation with authorities.") (emphasis added); United States v. Piper, 298 F.3d 47, 53 (1st Cir. 2002) ("Typically [withdrawal] requires 'either . . . **a full confession to authorities** or a communication by the accused to his co-conspirators that he has abandoned the Enterprise and its goals") (citation omitted; emphasis added); United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998) (defendant's limited confession to the authorities and subsequent denials of culpability did not establish "a **full** confession to the authorities" as required to establish withdrawal) (emphasis added).

[79] See, e.g., United States v. Maloney, 71 F.3d 645, 655 (7th Cir. 1995) (evidence that the defendant took actions that "did not comport with the conspiracy's objectives" after learning of the authorities' investigation of the defendant's conduct did not establish withdrawal); United States v. Pofahl, 990 F.2d 1456, 1484 (5th Cir. 1993) (defendant's canceling of a trip to arrange a drug shipment "in the face of possible arrest is hardly an affirmative action to defeat the conspiracy").

internally held documents relevant to smoking and health issues" to some of the state attorneys general which assisted in their prosecution of those litigations. See Lig. SJM. at 4 (emphasis added). However, Liggett fails to mention that many of these documents had been ordered released over Liggett's objections well **before** Liggett ever chose to settle. For example, in Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992), vacated on procedural grounds, 975 F.2d 81 (3d Cir. 1992), the district court ordered 1,500 Liggett documents disclosed to plaintiffs over Liggett's objections under the crime-fraud exception to the attorney-client privilege. In Haines, the court found that "[its] own in camera review of the documents supports plaintiff's contentions of the explicit and pervasive nature of the alleged fraud by defendants and defendants' abuse of the attorney-client privilege as a means of effectuating that fraud." Id. at 689. However, up until 1997 – more than five years later and purportedly **after** Liggett withdrew from the RICO conspiracy and Enterprise – Liggett continued to protect many the documents publicly disclosed in Haines from disclosure through the use of privilege claims. See American Tobacco Co. v. State of Florida, 697 So.2d 1249, 1252 n.2 (Fla. Dist. Ct. App. 1997) (noting that "[m]any of these documents have already been publicly disclosed as a result of litigation in the Haines case," and, as noted supra, a finding **over** Liggett's objection and **against Liggett**). Moreover, many of the documents Liggett initially sought to protect from disclosure were never privileged in the first instance.[80] Thus, turning over these documents is a far cry from Liggett's

[80] See Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 362-364 (E.D.N.Y. 1997) (attempts by defendants, including Liggett, to designate CTR Special Project documents as privileged was without merit). See also State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., filed Feb. 21, 1995) (upholding special master's ruling that lawyers for American, R.J. Reynolds, Brown & Williamson, BATCo, Philip Morris, Liggett, Lorillard, CTR, and the Tobacco Institute "undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking."); State of Washington v. American Tobacco Co., Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct. 1998) (several rulings in which the (continued...)

self-serving characterization that it rendered assistance to the state attorneys general by voluntarily waiving privileges.

Where a Defendant's misuse of privileges has been an integral part of its scheme to defraud, as here, such misconduct may be considered as evidence underlying a scheme to defraud.[81] At least seven courts have made findings of crime-fraud, abuse of privilege, and improper concealment and/or destruction of documents by Defendants in this case, and considered such conduct to be evidence of Defendants' fraud on the public.[82] Indeed, one court specifically found that Liggett's abuse of privilege to be evidence of the "explicit and pervasive" nature of Defendants' fraud. See Haines, supra. Moreover, in this litigation, Liggett continues to assert privilege, and has, in fact, been sanctioned for logging hundreds of documents over which it asserted various privileges in a materially misleading fashion. See Order No. 360, affirming Report & Recommendation No. 111 (adopting recommendations of waiver of privileges and sanctions against Liggett); Order No. 410, adopting in part and modifying in part Report &

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[80](...continued)
court determined that numerous documents for which Defendants American, Brown & Williamson, Liggett, Lorillard, Philip Morris, R.J. Reynolds, CTR, and the Tobacco Institute had asserted privilege were subject to the crime/fraud exception and were therefore "de-privileged." The bases for the findings included "that defendants attempted to misuse legal privileges to hide research documents"; "that attorneys controlled corporate research and/or supported the results of research regarding smoking and health"; "that the industry, contrary to its public statements, was suppressing information about smoking and health"; "that CTR was neither created nor used to discover and disseminate the 'truth,' contrary to defendants' representations to the public"; "that Special Account #4 was used to conceal problematic research"; and "that CTR and the SAB [Scientific Advisory Board] were not independent and that the industry's use of CTR was misleading to the public.").

[81] See, e.g., United States v. Eisen, 974 F.2d 246, 253-54 (2d Cir. 1992); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1373-74 (10th Cir. 1991); Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1019-20 (3d Cir. 1987); Rowe v. Smith, 848 F. Supp. 1258, 1263-64 (W.D. La. 1994).

[82] See supra p. 118 & n.80; U.S. FPCL Vol. 1, n.116.

Recommendation No. 127 (ordering that Liggett waived any claims of privilege over certain documents and ordering production of same).

Liggett also asserts that it "scrupulously avoids any and all marketing that could appeal to children or adolescents." Lig. Rule 7.1/56.1 St. at ¶ 6. However, Liggett does nothing to determine whether its current marketing practices attract youths. See, e.g., Deposition of James Taylor, United States v. Philip Morris, June 14, 2002, 99:22-102:3. Liggett's current designee on MSA youth smoking issues, John Long, could not say whether Liggett has done anything to change its marketing practices in light of the MSA restrictions. See, e.g., Deposition of John Long, United States v. Philip Morris, June 24, 2002, 11:18-17:18. Indeed, Liggett continues to engage in marketing tactics that appeal to youths, such as couponing, sampling, and "buy one get one free" offers for its cigarettes, and advertises in magazines with substantial youth readership. See, e.g., Deposition of Steven Shipe, United States v. Philip Morris, May 21, 2002, 86:22-87:13.

Liggett states that it "became the only company to disclose the ingredients of its cigarettes." Lig. SJM. at 4; Lig. Rule 7.1/56.1 St. at ¶ 6. Although Liggett has disclosed **certain** ingredients, according to Dennis Dietz, Liggett's Manager of Scientific Issues for nine years, Liggett does not now, nor has it ever, disclosed **all** of the ingredients in its cigarettes to the public or to public health authorities. Included in the list known to Liggett that are not disclosed are ingredients in the paper, filters, base ingredients of various additives, and indirect ingredients (also known as flavor packages and those ingredients that result as the cigarette is smoked), including perazines, heterocyclic compounds, and potential mutagens. Furthermore, certain of

the non-disclosed ingredients, especially those in the filter, paper, and additives, can affect nicotine delivery.[83]

Moreover, despite admitting in the mid-1990s that cigarettes cause lung cancer and that nicotine is addictive, as of 2002, Liggett had not made any product design changes on any of its traditional products that could potentially make them less hazardous or less addictive. Liggett also continues to deny that it manipulates the nicotine content in its cigarette while still researching methods to alter the nicotine-to-tar ratio in certain brands and adjusting blends to ensure that cigarettes deliver sufficient nicotine. See supra pp. 111-112; VDOJ25299-5299 (U.S. Ex. 65,752); VDOJ25348-5348 (U.S. Ex. 64,735).

Furthermore, several Liggett and Vector Tobacco (Liggett's corporate affiliate) scientists and executives admitted in sworn testimony in 2002 that they were aware of compensation and the flaws in the FTC method for measuring nicotine levels in cigarettes. Notwithstanding this knowledge, the company still uses product design methods which allow smokers to obtain nicotine and tar levels that far exceed those indicated in its FTC disclosures. This continued use of features that induce misleading FTC yields comes despite Vector's stated ability to produce cigarettes whose true yields are substantially closer to those measured by the FTC and other smoking machine tests.[84]

In sum, even though several of Liggett's self-aggrandizing statements contain some truth and may be commendable, Liggett is not entitled to escape liability for its extensive pattern of

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[83] See Deposition of Dr. Dennis Dietz, United States v. Philip Morris USA, July 1, 2002, pp. 96-117.

[84] See Deposition of Robert Bereman, United States v. Philip Morris USA, April 29, 2002, 52:24-54:12; Deposition of Ronald Bernstein, United States v. Philip Morris USA, June 25, 2002, 32:20-33:22; LWDOJ9165648-5650 (U.S. Ex. 21,216).

unlawful conduct. Liggett has not disclosed the unlawful conspiracy and scheme to defraud to the authorities. Quite the contrary, Liggett persists in its unfounded claim that the alleged RICO Enterprise and conspiracy never existed. Nor has Liggett taken sufficient steps to disavow or defeat the RICO conspiracy and scheme to defraud. In these circumstances, Liggett has not carried its burden of establishing withdrawal.[85]

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[85] See, e.g., United States v. Zimmer, 299 F.3d 710, 718 (8th Cir. 2002) ("'[I]t is not easy to withdraw from a criminal conspiracy.' . . . Zimmer must do more than demonstrate that he undertook no conspiratorial activity after the cut-off date; he must demonstrate that he took affirmative action to withdraw from the conspiracy either by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators. . . . To make a clean breast of a conspiracy, the conspirator must 'sever all ties to the conspiracy and its fruits, **and** act affirmatively to defeat the conspiracy by confessing to and cooperating with the authorities.'")(citations omitted); United States v. True, 250 F.3d 410, 425 (6th Cir. 2001) (in price-fixing conspiracy, "even if the conspirators at some point in 1992 agreed to no longer **discuss** pricing and bidding, there was no effective withdrawal by any co-conspirator because they continued to **act** based on their prior discussions . . . ." (emphasis in original)); United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001) ("Merely leaving the church grounds did not necessarily end the conspiracy, nor her participation in the conspiracy. Boone took no affirmative acts inconsistent with the conspiracy: she did not put the original fire out; she did not convince the others to leave; and she did not announce to the others that she had changed her mind about the original plan to 'burn the nigger church.' She is, therefore, appropriately liable for the acts of the other members of the conspiracy."); United States v. Alred, 144 F.3d 1405, 1415 (11th Cir. 1998) ("the government presented evidence that, while the divorce of Irma and Charlie Alred resulted in competition among some of the coconspirators during the later stages of the conspiracy, the goal of obtaining and distributing marijuana through known sources remained the same. **Disagreements among participants in a conspiracy does not mean that they have not been and continued to be involved in the overall conspiracy**.") (emphasis added); United States v. Walls, 70 F.3d 1323, 1327 (D.C. Cir. 1995) ("even if the other co-conspirators had considered expelling Blakney from the conspiracy, she remained a member because she remained loyal to the conspiracy and made no affirmative attempt to withdraw"); Antar, 53 F.3d at 583 ("resignation from the Enterprise does not, in and of itself, constitute withdrawal from a conspiracy"); Nava-Salazar, 30 F.3d at 799 ("Withdrawal requires that the conspirator make himself 'completely unavailable for the conspiracy's purposes.'") (citation and internal quotation marks omitted); United States v. DePriest, 6 F.3d 1201, 1206-07 (7th Cir. 1993) (despite fact that defendant and coconspirator had "falling out" over a debt from a previous drug transaction, after which the coconspirator determined not to have further drug dealings with the defendant, this did not establish withdrawal: "The burden to prove withdrawal remains firmly on the defendant even when it appears that he has been expelled from the conspiracy."); United States v. Schweihs, 971 F.2d 1302, 1323 (7th Cir. 1992) (that defendant was expelled from conspiracy by a co-conspirator and no longer allowed to play a part in the illegal activities did not establish withdrawal); United States v. Minicone, 960 F.2d 1099, 1108 (2d Cir. 1992) (defendant's "serious falling out" with co-conspirator to the point that the co-conspirator shot at the defendant did not establish withdrawal); United States v. Garrett, 720 F.2d 705, 714 (D.C. Cir. 1983) ("mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal. . . . Testimony that defendant had broken off relations completely with co-conspirators did not constitute withdrawal") (internal quotations deleted).

It is noteworthy that Liggett does not respond at all to the foregoing evidence and case law which was provided to Liggett in April 2003.

3. Substantial Evidence Rebuts Liggett's Withdrawal Claim

Assuming arguendo that Liggett established that it withdrew from the conspiracy in about the mid-1990s, substantial evidence rebuts its withdrawal. See Answer of Liggett Group Inc. To Plaintiff's Complaint for Damages and Injuctive and Declaratory Relief, United States v. Philip Morris, filed October 30, 2000 (U.S. Ex. 75,845); VDOJ25299-5299 (U.S. Ex. 65,752); VDOJ25348-5348 (U.S. Ex. 64,735); VDOJ6743-6744 (U.S. Ex. 64,727); VDOJ25338-5338 (U.S. Ex. 65,756); VDOJ25339-5341 (U.S. Ex. 64,737); LHQ2006149-6188 (U.S. Ex. 25,927); supra, Section X.B. First, Liggett continues to this day to obtain substantial proceeds from Liggett's joint conspiracy and scheme to defraud with Defendants since Liggett continues to profit from addicted smokers who are the victims of Defendants' and Liggett's conspiracy and scheme to defraud. Therefore, Liggett's financial stake in the continuing success of the conspiracy and the scheme to defraud and its continuing receipt of the fruits thereof rebut its withdrawal defense.[86]

Moreover, in contrast to Liggett's attempts to distort the tenor of the deposition testimony of Dr. David Burns to suggest Liggett is a "responsible" tobacco company, Liggett in fact continues to engage in significant activities in furtherance of the objectives of the conspiracy and its scheme to defraud, including: marketing cigarettes to youths; deceptively marketing cigarettes as "light," and continuing to manipulate nicotine and delivery of nicotine in its cigarettes. See supra Section X.B; VDOJ25299-5299 (U.S. Ex. 65,752); VDOJ25348-5348 (U.S. Ex. 64,735); VDOJ6743-6744 (U.S. Ex. 64,727); VDOJ25338-5338 (U.S. Ex. 65,756); VDOJ25339-5341

[86] Accord Zizzo, 120 F.3d at 1357-58; Antar, 53 F.3d at 583-84; United States v. Agueci, 310 F.2d 817, 839 (2d Cir. 1962); United States v. Tsai, 14 Fed. Appx. 834, 837 (9th Cir. 2001) ("One may still be considered part of the conspiracy when receiving profits from the conspiracy.").

(U.S. Ex. 64,737). Moreover, Liggett continues to attempt to conceal documents, research and other information relevant to issues of smoking and health that might be adverse to the interests of Liggett and the RICO Enterprise. See supra pp. 118-120; LHQ2006149-6188 (U.S. Ex. 25,927). Accord United States v. Perholtz, 842 F.2d 343, 357 (D.C. Cir. 1988) (defendant's "attempts to influence witnesses" and "acts of concealment . . . were parts of continuing activity . . . in furtherance of the survival of an ongoing operation" and conspiracy) (internal quotations and citations omitted).

The foregoing evidence conclusively rebuts Liggett's claim of withdrawal and demonstrates that Liggett has continued to engage in misconduct that furthers the objectives of the alleged conspiracy.[87]

E. The United States Has Established A Reasonable Likelihood of Future Violations By Defendants

Liggett argues that because "undisputed facts" establish that it withdrew from the RICO Enterprise and conspiracy in the mid-1990s, the United States cannot establish a reasonable likelihood of its committing RICO violations in the future. See Lig. SJM. at 10-14. Above all

[87] See, e.g., United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000) ("even if the defendant completely severs his or her ties with the Enterprise, the defendant still may remain a part of the conspiracy if he or she continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations," and finding that evidence that the defendant continued to engage in conduct that advanced the goals of the conspiracy refuted withdrawal (citing Antar)); United States v. Diaz, 176 F.3d 52, 98-99 (2d Cir. 1999) (evidence of the defendant's meetings and discussions with other co-conspirators about conspiratorial matters rebuts withdrawal); United States v. Lash, 937 F.2d 1077, 1083-1084 (6th Cir. 1991) (even if defendant had withdrawn, from the conspiracy, "his subsequent acts neutralized his withdrawal and indicated his acquiescence"); United States v. Phillips, 664 F.2d 971, 1017-18 (5th Cir. 1981) (same); United States v. Lowell, 649 F.2d 950, 954, 957-58 (3d Cir. 1981) (holding that a single telephone conversation in which the defendant cautioned a co-conspirator to be careful because of ongoing investigations was sufficient to rebut the defendant's withdrawal); United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964) (holding that "dissolution of the 1950 [drug distribution] partnership would not constitute an effective withdrawal so long as any of the contraband obtained during [the defendant's] partnership was being sold"). Again, Liggett ignores this authority contrary to its position.

else, this claim must be rejected because it rests on the false premise that Liggett withdrew from the RICO Enterprise and conspiracy. See supra Sections X.B & X.D.

Moreover, for the reasons stated in U.S. FPCL Vol. 1 § III, the United States has established a reasonable likelihood of Defendants' future unlawful activity, including Liggett's. The United States briefly summarizes its demonstration in that regard.

First, the United States demonstrated that Defendants' past intentional, unlawful conduct over a 45-year period, including Liggett's, is sufficient by itself to establish a reasonable likelihood of future violations. See U.S. FPCL Vol. I § III.A. Contrary to Liggett's claim (Lig. SJM. at 12 n.12), Liggett's alleged "changed circumstances," i.e., Liggett's purported cessation of unlawful activity, does not defeat the United States' demonstration. See supra Section X.A & X.B and U.S. FPCL Vol. 1 § III.A.

Second, even if the United States were required to prove Defendants' ongoing unlawful activity after the mid-1990s, the United States has adduced extensive evidence that Defendants have continued to engage in a pattern of unlawful fraudulent conduct in furtherance of the Enterprise's overarching scheme to defraud after the mid-1990s (see U.S. FPCL Vol. 1§ III. B(3)), and that Liggett remains liable for those acts of its co-conspirators and co-defendants undertaken in furtherance of their joint scheme to defraud. See supra pp. 24-26; U.S. FPCL Vol. 1, pp. 100-101.

It is particularly noteworthy that neither Liggett nor any other Defendant has cited a single decision holding that to establish a reasonable likelihood of future unlawful activity, the United States must establish that **all** Defendants are continuing to commit RICO violations or are reasonably likely to commit such violations in the future, as Liggett has improperly suggested.

See Lig. SJM. at 10-13. Quite the contrary, this Court and other numerous courts have held that evidence that defendants have intentionally engaged in a pattern of past unlawful conduct is sufficient by itself to establish a reasonable likelihood of future violations, without the need to show that **any** defendant, much less each and every one of them, is continuing to commit unlawful violations. See Philip Morris, 2004 WL 1045766 at *2 n.3; U.S. FPCL Vol. 1 § III. B(1) & (2).

Liggett's unprecedented proposed rule is not the law and would pose an undue burden and be unworkable in significant multi-defendant cases. For example, the United States has brought civil RICO lawsuits for equitable relief against corrupt union and business officials and organized crime figures involving scores of defendants, including one case with over 100 defendants.[88] Nothing in these cases suggest that to impose equitable relief against a particular defendant, the government is required to prove that the particular defendant continued to engage in unlawful activity beyond his past violations. Indeed, in such government civil RICO cases, courts granted injunctive relief even though many of the wrongdoers were not in a position to continue their unlawful conduct because they were imprisoned for lengthy terms or removed from their office in the corrupt enterprise.[89]

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[88] See, e.g., United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114, 1120 (E.D.N.Y. 1992) (112 defendants); United States v. International Broth. of Teamsters, 708 F. Supp. at 1392 (over 40 defendants); United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986) (over 30 defendants).

[89] See, e.g., Private Sanitation Industry Ass'n., 995 F.2d at 377-78; United States v. Local 30, United Slate Tile, 871 F.2d 401, 405-09 (3d Cir. 1989); United States v. Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate Tile, 686 F. Supp. 1139, 1162-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 319-326 (D.N.J. 1984), aff'd. 780 F.2d 269, 292-94 (3d Cir. 1986).

At bottom, the central rationale underlying co-conspirator liability (see supra pp. 24-26) dictates the conclusion that Liggett remains liable for the continuation of events it conspired with its co-defendants to set in motion, even if Liggett had ceased its unlawful activity.

Even assuming arguendo that the United States must establish that Liggett itself continued to engage in unlawful activity in furtherance of its scheme to defraud after the mid-1990s, as Liggett mistakenly claims (Lig. SJM. at 12), the United States has set forth evidence demonstrating Liggett's ongoing activity in furtherance of the alleged unlawful scheme to defraud after the mid-1990s. See supra Section X.B & D(2).[90] Moreover, assuming arguendo that the United States is not entitled to an injunction because it has not established a reasonable likelihood of continuing unlawful activity, Liggett remains liable for disgorgement of all ill-

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[90] Furthermore, Liggett has mistakenly argued (Lig. SJM. at 1-12) that the United States must prove that Defendants committed the elements of a RICO violation after the mid-1990s. See U.S. FPCL Vol. 1 § III.B(1).

Liggett also erroneously conflates (Lig. SJM. at 11-12) two distinct issues: the evidence necessary to prove the "continuity" prong of the pattern of racketeering activity to establish liability for a civil or criminal RICO violation with the requirement of "a reasonable likelihood of future unlawful activity" to entitle a plaintiff to equitable relief. Liggett argues that "unless the government can demonstrate a continuing RICO here – an open-ended pattern of racketeering activity into the future – it cannot meet its burden or prove its case." L. PPCL at p. 24. Liggett mistakenly conflates and misinterprets two distinct issues: (1) the requisite "continuity" to prove a pattern of racketeering activity to establish RICO liability; and (2) whether there is a reasonable likelihood of future wrongful conduct to obtain injunctive relief.

Contrary to Liggett's argument, the requisite "continuity" to establish a "pattern" may be established by several alternative methods of proof, including "closed-ended" continuity based upon past racketeering acts that spanned a substantial period regardless of any threat of future unlawful conduct, as well as by "open-ended" continuity. See U.S. FPCL Vol. 1 § I.H(2). "Open-ended" continuity may also be established without showing that the RICO violation is continuing into the future. For example, in Indelicato, 865 F.2d at 1383-84, the Second Circuit held that the requisite continuity was established by the defendant's simultaneous murder of three persons that took literally only a few moments because the murders were committed in furtherance of a Mafia organized crime group that posed a potential threat of future unlawful activity. Therefore, the nature of the RICO enterprise and its activities may demonstrate a threat of future unlawful activity without having to prove that the RICO offense is actually continuing into the future. See also cases cited U.S. FPCL Vol. 1 § III.B(1) & (2).

The "reasonable likelihood of future wrongful conduct" may be proven by inferences from past unlawful conduct, and/or other evidence showing a reasonable likelihood that a defendant might engage in unlawful conduct in the future, without having to prove that the RICO offense is in fact continuing into the future. See U.S. FPCL Vol. 1, pp. 111-117 & nn.102 & 104.

gotten gains the conspirators obtained from the RICO violations alleged by the United States. See supra Section III.F.

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