UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, and NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK Intervenors, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., *et al.*, Defendants.	Civil No. 99-CV-02496 (GK) Next court appearance: (none scheduled)

POST-TRIAL BRIEF OF THE UNITED STATES OF AMERICA[1]

[1] Pursuant to Order #992, this Post-Trial Brief also opposes Defendants' Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c).

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I

INTRODUCTION

After a trial of nearly nine months, the United States has proven RICO liability on the part of all Defendants. As more fully set out in the United States' Post-Trial Proposed Findings of Fact, filed August 15, 2005, the evidence adduced at trial establishes that Defendants devised an extensive scheme to defraud the public of money, that they have executed this scheme for more than 50 years, and that this scheme continues to this day, with devastating consequences for the health of the American public. The United States has further proven that the Court must impose comprehensive equitable remedies in order to restrain Defendants from engaging in future fraudulent, deceptive and unlawful conduct. The Court's imposition of the injunctive relief requested by the United States will significantly advance the salutary purposes of such relief – to prevent and restrain future unlawful conduct – and will protect the American public, particularly those youths who constitute the overwhelming majority of new smokers, from Defendants' predatory, fraudulent conduct.

That the equitable remedies permitted under the RICO statute will serve salutary purposes in this case is apparent from the massive toll that Defendants' conduct has taken, and continues to take, on the health of the American public. Approximately 440,000 Americans die from smoking related illnesses every year, and one-third to one-half of all smokers will die prematurely as a result of their cigarette smoking. Sadly, a majority of smokers want to quit but are addicted to nicotine and cannot stop smoking, and every year new smokers, most of whom are 18 years of age or younger, begin daily smoking and become addicted to the nicotine in cigarettes. The fraudulent conduct of Defendants is a major past and continuing contributor to this cycle of addiction and death.

The sheer pervasiveness of Defendants' fraudulent conduct and their continued efforts to

profit by misleading public relations and marketing efforts, even after the filing of the Complaint in this case by the United States, was conclusively demonstrated at trial. This Court possesses the statutory duty to impose equitable relief that insures that the American public will in the future no longer suffer the extraordinary harms that would – due to Defendants' fraud – otherwise continue to plague every part of our society.

II

THE UNITED STATES HAS PROVEN RICO AND RICO CONSPIRACY LIABILITY ON THE PART OF ALL DEFENDANTS

As this Court is aware, on July 18, 2005, the United States petitioned the United States Supreme Court for certiorari from the D.C. Circuit's February 2005 decision on disgorgement. Defendants' opposition is due September 16, 2005 (following their request for a 30-day extension of time to respond). A decision on certiorari is thus unlikely before the Supreme Court's conference of October 16, 2005, and, of course, could be well after that. No matter what the outcome of the petition for certiorari, no procedural impact upon this Court's functions and responsibilities will ensue from the issuance of liability findings. Regardless of the procedural detours occurring in the appellate arena, liability based upon the trial record must be determined by the trial Court; doing so without delay is beneficial.

Of primary importance is the need for the Court to issue findings of fact on liability while the issues, factual disputes, credibility determinations and presentation of the evidence are still fresh. In a matter of this complexity, as well as enormity, the potential for the passage of time to hinder the efficiency of the Court in determining liability is great. As was noted by the Second Circuit in discussing the importance of a district court's findings of fact, "[s]uch a result can usually be avoided by following what we believe is the better practice of filing findings with the opinion, when the evidence is still fresh in the mind of the trial judge." United States v. Forness,

125 F.2d 928, 942 (2d Cir. 1942). This Court prudently tried the case to its conclusion while the remedial appellate issue loomed over the proceedings. There is no reason now to disrupt the orderly flow of the process by postponing the issuance of a liability determination.[2]

It is well within this Court's discretion to issue a liability determination regardless of the procedural posture of the remedial aspect of the case. For the above stated reasons, and on the basis of the legal principles and evidence summarized below, the United States urges the Court to do so.

A. The United States Has Proven Each Element to Establish RICO Liability, Including Predicate Acts Involving Mail or Wire Fraud Offenses

The United States must establish its claims by a preponderance of the evidence, the required standard of proof under civil RICO. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985). The evidence introduced at trial establishes by much more than a mere preponderance that Defendants and others comprised an association-in-fact enterprise ("Enterprise") and each Defendant participated in the conduct, management, and operation of the Enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

[2] As the Court is well aware, an initial liability determination, in advance of a remedial decision, is not unprecedented. In fact, in Salazar v. District of Columbia, 954 F. Supp. 278 (D.D.C. 1996), this Court employed such a process. Just as in Salazar, where this Court issued detailed findings of fact (188 specific factual findings following a seven-day bench trial) and conclusions of law and held the defendants liable for violating the plaintiffs' federal and constitutional rights before addressing the appropriate relief for those violations, here too it is appropriate for the Court to make such findings. The Court has broad discretion to conduct its trial in any manner it deems appropriate. Likewise, it is well recognized that the District Court has inherent power to "control its own docket." Clinton v. Jones, 520 U.S. 681, 706-07 (1997) (citing Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936) (a district court can "control the disposition of cases on its docket with economy of time and effort for itself, for counsel and for litigants"); Dellinger v. Mitchell, 442 F.2d 782, 786 n.7 (D.C. Cir. 1971) (citing Landis).

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The United States has proven this violation by establishing each of the following elements:

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

See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985); United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997) (listing elements); United States v. Philip Morris USA, 316 F. Supp. 2d 13, 16 (D.D.C. 2004).

All the alleged predicate racketeering acts in this case involve mail or wire fraud offenses, in violation of 18 U.S.C. § 1341 or § 1343. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

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

To establish an offense under § 1341 (or § 1343), the plaintiff must prove by a preponderance of evidence the following elements:

- The defendant knowingly devised or intended to devise any scheme or artifice to

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

- The defendant mailed any matter, or caused the mailing of any matter (or sent or caused to be send by interstate wire transmission), for the purpose of furthering or executing such scheme or artifice, and
- The defendant acted with the specific intent to defraud or deceive.

See Neder v. United States, 527 U.S. 1, 24-25 (1999); United States v. Philip Morris USA, 304 F. Supp. 2d 60, 69 (D.D.C. 2004). The trial record leaves no question that Defendants devised a scheme to defraud and used mailing and wire transmissions for the purpose of furthering the fraudulent scheme.

1. Defendants Established an Association-In-Fact Enterprise

As established at trial and explained herein, the United States has presented overwhelming evidence that Defendants formed a RICO Enterprise, comprised of a group of business entities and individuals associated-in-fact consisting of the Defendants to this action and other entities and persons, including agents and employees of Defendants.

a. The legal principles regarding an association-in-fact Enterprise are well-settled

The RICO statute provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has held that an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). In accordance with Turkette, the Court of Appeals for the District of Columbia Circuit has consistently held that an association-in-fact "enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity," and that the

enterprise need only involve "some structure to distinguish an enterprise from a mere conspiracy." United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (citations omitted); accord United States v. White, 116 F.3d 903, 924 & 925 n.7 (D.C. Cir. 1997); United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir. 1988). As the District of Columbia Circuit further explained: "It is not necessary that the enterprise . . . have any particular or formal structure but it must have sufficient organization that its members function and operated together in a coordinated manner in order to carry out the common purpose alleged." Perholtz, 842 F.2d at 364.

Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members' commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping nature of the wrongful conduct.[3] Moreover, "it is not essential that each and every person named [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to have been members at any time." Perholtz, 842 F.2d at 364. Likewise, it is not

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[3] See, e.g., United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (members of drug trafficking enterprise provided other members with financial assistance and coordinated transportation of drugs); Richardson, 167 F.3d at 625 ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern"); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997); Perholtz, 842 F.2d at 355 ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise"); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985) (holding that the jury could have inferred the existence of the alleged association-in-fact enterprise from the "coordinated nature of the defendants' activity" and that the defendants' racketeering acts were facilitated by their nexus to the enterprise); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) (jury entitled to infer existence of Enterprise from circumstantial evidence).

necessary to prove "that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 697 F.2d 915, 922 (11th Cir. 1983); accord United States v. Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989).

The Court previously held, consistent with the law of this Circuit, that a RICO enterprise may consist of "a group of individual[s], partnerships, and corporations associated in fact," United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152 (D.D.C. 2000) (quoting Perholtz, 842 F.2d at 351, n.12). Similarly, in Perholtz, the D.C. Circuit squarely held that RICO's definition of "enterprise" includes an association-in-fact of corporations, legal entities and individuals, as alleged here. 842 F.2d at 352-53. Perholtz is binding precedent. Even if the enterprise alleged here were limited to a group of corporations – and it is not – every federal court of appeals that has considered the issue has held that a RICO enterprise may consist of a group of corporations or other legal entities associated-in-fact. See, e.g., United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993).

b. Defendants formed an Enterprise

1) Members of the Enterprise had a common purpose

The central shared objectives of Defendants have been to maximize their profits by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud. Indeed, documents recounting the December 1953 meeting at the Plaza Hotel attended by the presidents for Defendants Philip Morris, RJR, B&W, Lorillard, and American – a meeting called by American's president to discuss an "industry response" to research identifying cigarette smoking as a cause of lung cancer – report that the executives agreed to jointly

> sponsor a public relations campaign which is positive in nature and is entirely "pro-cigarettes" . . . . [The executives] are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel

> that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future. Each of the company presidents attending emphasized the fact that they consider the program to be a long-term one.

US 21411 at 3549 (A). See also US FF § I.B(2). These and the other pertinent facts surrounding the events that mark the formation of the Enterprise are not the subject of conflicting evidence.

As the Court is well aware, Defendants publicly announced their cooperative and long-term program on January 4, 1954 in a newspaper advertisement called "A Frank Statement to Cigarette Smokers," which was published in 448 newspapers throughout the United States. In the "Frank Statement," Defendants challenged the scientific evidence establishing a link between cigarette smoking and disease, 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." US 20277 (A). See generally US FF § I.B. Over the next several decades, the common goal of developing a "pro-cigarettes" campaign remained central to the actions of Defendants, which both individually and collectively uniformly denied: that smoking had been proven as a cause of cancer and other serious diseases (while falsely promising that the industry was funding independent research to determine the health effects of smoking), that smoking was addictive, that the industry manipulated the levels of nicotine in its products, and that the industry marketed its products to young people.

The United States has shown that the Defendant members of the Enterprise who were not physically present at the Plaza Hotel meeting – including Liggett, Altria (which was formed as Philip Morris Companies in 1985), BATCo, CTR (which was created as the Tobacco Industry Research Committee in the wake of that December 1953 meeting), and the Tobacco Institute (which was formed in 1958) – shared the common goals of the Enterprise and acted in

furtherance of those goals.[4] See US FF §§ I.B, I.C. Moreover, in furtherance of the central objectives of the Enterprise, all Defendants endeavored to conceal or suppress information and documents or to destroy documents to avoid adverse liability in litigation involving smoking and health issues and to prevent discovery of evidence showing or recognizing the causal link between cigarettes and disease and addiction. See US FF §§ I.K, III.F.

2) The Enterprise has utilized both formal and informal organization

The United States has also presented ample evidence that the Enterprise possessed organization. Each Defendant is a legally distinct corporation. Two Defendant members of the Enterprise – TIRC/CTR and TI – were jointly formed and funded by other Defendants of the Enterprise to help the industry execute the strategy devised to achieve their shared goal. TIRC/CTR served as the research sponsorship arm for the Enterprise. It sponsored and funded research that attacked scientific studies demonstrating the harmful effects of smoking cigarettes and did not address the fundamental questions regarding the adverse health effects of smoking thereby serving as an effective and elaborate public relations vehicle. Moreover, attorneys for Defendants also created a mechanism to fund "Special Projects" through CTR – research projects conceived and directed by industry representatives, including industry lawyers, to support scientists who had shown a willingness and ability to generate information and provide testimony that could bolster the industry's litigation defenses before courts and governmental bodies. See

[4] The result of that meeting and others shortly thereafter at the Plaza Hotel resulted in the creation of a new entity – the Tobacco Industry Research Committee ("TIRC") – by Defendants Philip Morris, R.J. Reynolds, B&W, Lorillard and American. TIRC was founded in January 1954 and changed its name to CTR in 1964. See US FF § I.B. Defendant Liggett was a member of CTR from 1964 to 1969 and then continued to participate in CTR activities for decades; Liggett also continued to attend many scientific meetings at CTR over the years. Even when it was not a member of CTR, Liggett made contributions to CTR's Special Projects fund from 1966 through 1975 and to CTR's Literature Retrieval Division from approximately 1971 through 1983. See US FF § I.B(2).

US FF §§ I.D(2) and III.B. Altria[5] executives served on the Board of Directors of CTR, and Altria had, and exercised, approval authority for CTR special projects. See, e.g., Parrish TT, 1/27/05, 11349:8-11352:23, 11355:1-11357:8; US 87508 (A); US 20384 (A).

Similarly, from 1958 to 1998, the Tobacco Institute actively designed, wrote, and caused to be published press releases, advertisements, pamphlets, and prepared testimony that advanced Defendants' jointly formulated positions on smoking and health issues, including denying that smoking cigarettes caused diseases and was addictive, and supporting the false claim that the link between smoking cigarettes and exposure to secondhand smoke and adverse health effects was an "open question." See US FF §§ I.C, III.A(1), III.A(2). The Tobacco Institute served as an effective conduit of information between members of the Enterprise through its various committees. See US FF §§ I.C(4), I.C(5). Altria executives attended meetings of the TI Committee of Counsel and sat on the TI Executive Committee. Parrish TT, 1/27/05, 11352:24-11353:24; US 62461 (A); US 88252 (A); US 88308 (A).

Defendants also used numerous other means – including structures of varying degrees of

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[5] Defendant Altria, which was incorporated in 1985 (as Philip Morris Companies Inc.), effectively and actively controls the activities of all of its subsidiaries, including Defendant Philip Morris USA Inc. and Philip Morris International, Inc. Overall policies on all major aspects of the companies' operations are set by Altria management, and senior Altria executives, employees, and agents participate in and/or control decisions about how the operating companies implement those policies, through both formal and informal reporting relationships. Berlind PD, U.S. v. Philip Morris, 5/23/02, 8:4-10:13; US 23061* (A). It is disingenuous to argue, as Altria does, that its control, through the reporting relationship, of decisions taken by Altria Corporate Services ("ACS") employees on behalf of its subsidiaries does not constitute "control" of those decisions. Altria's relationship with its subsidiaries was structured to maintain consistency among its companies on sensitive issues such as smoking and health, addiction, and passive smoking. The CEO and Chairman of Philip Morris Companies, Geoffrey Bible, was the ultimate authority on content of public statements on smoking and health made by Philip Morris Companies subsidiaries, including Philip Morris USA. Bible PD, U.S. v. Philip Morris, 8/22/02, 83:9-84:9, 85:22-86:25. Moreover, the Court has already found that the document retention procedures and policies that led to the destruction of email from senior executives at Philip Morris while this lawsuit was pending were created with and approved by Altria. United States v. Philip Morris USA, 327 F. Supp. 2d 21, 24 (D.D.C. 2004).

formality such as CIAR, the Committee of Counsel, the ETS Advisory Committee, the Ad Hoc Committee, the Research Liaison Committee, the Industry Technical Committee, law firms, and direct communications between and among members of the Enterprise – to coordinate their activities, to ensure continued adherence to the joint strategy, and to enable the Enterprise to respond as new threats to the industry arose. See US FF § I.

Finally, Defendants employed less formal mechanisms to organize the affairs of the Enterprise. For example, evidence shows that Defendants had an unwritten agreement not to compete by making explicit health-related statements in the marketing of cigarettes. Similarly, documents prepared by high-level scientists at Defendants Philip Morris and RJR describe "Gentlemen's Agreements" among high level executives to share any innovation that could lead to the development of "an essentially 'safe' cigarette" and not to use intact animals in-house in biomedical research. See US FF § III.A(3).

3) The Enterprise has functioned as a continuous unit

The evidence also convincingly demonstrates that the Enterprise has functioned as a continuous unit from December 1953, when the executives of five Defendants (Philip Morris, RJR, B&W, Lorillard and American) agreed to launch their long-term public relations campaign as announced in the Frank Statement to Smokers. See US FF §§ I.B, III.A(1), III.B. A wealth of evidence shows that for five decades, Defendants not only communicated directly with one another on matters relevant to the aims of the Enterprise, but also created, supported, and controlled a web of organizations, committees, and other bodies that facilitated coordinated behavior. For example, TIRC/CTR, which was created in 1954, existed through 1998, and the Tobacco Institute, which was created in 1958, existed through 2000. Likewise, jointly created and funded CIAR, which was created in 1988, existed through 1999. In addition, Defendants' participation in various other organization, including several international organizations,

continued for years. For example, the United States has presented evidence that Defendants, including Defendant BATCo, participate in the TAC (formerly the TSMC and then the TRC) up until the present day. Similarly, Defendants, including Defendant BATCo, continued to participate in CORESTA, and the TDC (formerly ICOSI and then INFOTAB). See US FF § I.H. Defendants, oftentimes via the Tobacco Institute, furnished advice, assistance, and even financial support over many years to such international industry-related groups and organizations as those groups worked on projects, publications, videos, conferences, briefing papers, and lobbying materials. See US FF § I.H(8). And as the Court is well aware, Defendants utilized their outside lawyers to further the goals of the Enterprise, including attorneys such as Janet Brown at Chadbourne & Parke, John Rupp at Covington & Burling, Andrew Foyle at Lovells, and others at Shook, Hardy & Bacon, Jones Day, and other firms.

Finally, Defendants' continued adherence to positions determined at the genesis of the Enterprise – positions such as denying the health effects of smoking and exposure to secondhand smoke, denying the addictive properties of nicotine, denying that Defendants market to youth – demonstrates the collusive behavior conceived by and adhered to by members of the Enterprise. See US FF § III; Harris WD, 22:12-28:17; 71:19-83:6; 102:1-106:5.

In sum, the evidence establishes that all Defendants were entities having separate structures that worked together to coordinate significant activities for over 50 years through TIRC/CTR, the Tobacco Institute, and other entities, to achieve shared objectives, including their primary goal of maximizing their profits by preserving and expanding the market for cigarettes. Pursuant to their joint strategy, Defendants caused CTR and the Tobacco Institute to carry out numerous racketeering acts at the same time as the remaining Defendants also committed numerous parallel racketeering acts, all in furtherance of the Enterprise's primary objectives. Thus, the evidence shows the interlocking nature of the scheme to defraud, the overlapping

nature of Defendants' wrongful conduct, and that this Enterprise functioned as a continuous unit from its inception. In far less compelling factual circumstances than those present here, courts have found the existence of an association-in-fact enterprise.[6]

2. The Enterprise Engaged in and Its Activities Affected Interstate and Foreign Commerce

Sections 1962(c) and (d) require the United States to prove that the alleged "enterprise engaged in, or the activities of which affect[ed], interstate or foreign commerce." The courts of appeals uniformly have held that to satisfy this element, a plaintiff is not required to prove that each defendant or each member of the enterprise was engaged in, or affected, interstate or foreign commerce; rather, it is sufficient that the enterprise engaged in, or its activities considered in their entirety affected, interstate or foreign commerce, and that this requirement may be satisfied by evidence of the enterprise's members' individual nexus to interstate or foreign commerce.[7]

Moreover, when the enterprise "engaged in" interstate or foreign commerce, it is not necessary to prove that the enterprise's activities "affected" interstate or foreign commerce. See United States v. Robertson, 514 U.S. 669 (1995). Here, each of the Cigarette Company Defendants stipulated that from 1953 to the present it has been engaged in, and its activities affect, interstate and foreign commerce within the meaning of 18 U.S.C. § 1962(c) and (d), so the issue is not in dispute. Similarly Altria stipulated that it has engaged in interstate and foreign

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[6] See, e.g., United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996); Securitron Magnalock Corp., 65 F.3d at 263-64; Perholtz, 842 F.2d at 355; Local 1804-1, 812 F. Supp. at 1310-15; Mitland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 1055 (S.D.N.Y. 1992).

[7] See, e.g., United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (collecting cases); United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Bagnariol, 665 F.2d 877, 892-93 (9th Cir. 1981); United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981).

commerce since it was formed as Philip Morris Companies in 1985. See Order #280. Similarly, during the period 1954 to 1998, Defendants CTR and TI (beginning in 1958) each received over $500 million in funding in interstate commerce via the interstate banking system from various Cigarette Company Defendants located in different states from CTR and TI. See US FF § IV, ¶¶ 12, 19. Moreover, during that time period CTR funded millions of dollars of research projects in interstate commerce, which were conducted by researchers and institutions in various states and countries, and the results were published in periodicals and other venues throughout the United States and in foreign countries. See id. ¶ 20. Similarly, TI issued numerous press releases and funded numerous public relations advertisements which were disseminated in interstate commerce throughout the United States in various newspapers, magazines, periodicals and other venues. See id. ¶¶ 13-15.

Under Robertson, the foregoing undisputed evidence overwhelmingly establishes that the alleged RICO Enterprise was "engaged in" interstate or foreign commerce, and hence it is not necessary to establish that the Enterprise's activities "affected" interstate or foreign commerce. Nevertheless, the above-referenced evidence also establishes that the alleged Enterprise "affected" interstate or foreign commerce. Indeed, this Court has observed:

> Although Defendants initially asserted the Tenth Amendment as an affirmative defense contending that the RICO claims and relief sought by the Government address "purely intrastate matters that are beyond the scope of federal authority," they now concede that the manufacturing, sale, advertising, and marketing of cigarettes in all 50 States constitutes the type of commercial, interstate activity within the purview of both the Commerce Clause and RICO.

United States v. Philip Morris USA, Inc., 316 F. Supp. 2d 19, 26 (D.D.C. 2004) (footnotes omitted). In fact, the evidence that Defendants have bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce since 1954 far exceeds the evidence of an effect on interstate commerce found sufficient in any reported RICO decision, and

conclusively establishes the requisite effect on interstate commerce.

3. Each Defendant Was Distinct From and Associated With the Enterprise

a. Each Defendant is distinct from the Enterprise

The Court has already granted partial summary judgment in favor of the United States on the issue of distinctness, deciding that each Defendant is distinct from the RICO Enterprise. Specifically, the Court held:

> Regardless of how the enterprise is defined (if at all), the Government has proven the distinctness element in this case. This Court has already held that an "association-in-fact" enterprise can be a group of corporations. See Philip Morris, 116 F. Supp. 2d at 152-53. Moreover, there is no dispute that each individual Defendant is a separate legal entity. Thus, if this Court should find an enterprise comprised of at least two of the Defendants, the individual Defendants will be distinct from the enterprise itself.

United States v. Philip Morris USA, 327 F. Supp. 2d 13, 18 (D.D.C. 2004).

b. Each Defendant is associated with the RICO Enterprise

Section 1962(c) of RICO requires proof that each defendant was "employed by or associated with" the alleged enterprise. It is well settled that to prove a defendant's association with an association-in-fact enterprise, it is not necessary to prove that the defendant had a formal position in the enterprise, participated in all the activities of the enterprise, "or had full knowledge of all the details of" its activities, or knew about the participation of all the other members in the enterprise; rather, it is sufficient that the defendant "know the general nature of the enterprise and that the enterprise extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989) (collecting cases).[8]

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[8] Accord United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002); United States v. Zichetello, 208 F.3d 72, 99 (2d Cir. 2000); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); United States v. Console, 13 F.3d 641, 653 (3d Cir. 1993); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981).

Furthermore, courts have taken a flexible approach regarding the evidence sufficient to prove that the defendant was "associated with" the enterprise. For example, in Perholtz, 842 F.2d at 351 n.12, the RICO enterprise consisted of ten corporations and partnerships and seven individuals associated-in-fact to obtain government contracts through bribery and fraud. The D.C. Circuit found that the defendants were "associated with" the enterprise, stating: "The individual defendants joined with each other and formed the corporations to further their common objectives. This relationship of individuals and corporations is precisely what Section 1962(c) was designed to attack." Perholtz, 842 F.2d at 354.[9]

Moreover, "[a] defendant is considered to have 'associated with' a RICO enterprise if he either engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise," Blue Cross & Blue Shield of N.J., Inc. v, Philip Morris, Inc.,113 F. Supp. 2d 345, 366 (E.D.N.Y. 2000), or otherwise commits racketeering acts in the conduct of the enterprise's affairs.[10] Beyond this, a defendant "associates with" an enterprise when he conducts business with or through the enterprise, or otherwise has an effect on its activities, including its unlawful activities. United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992).

Under the foregoing authority, the evidence establishes that not only did each Defendant know the general nature of the Enterprise and that it extended beyond its individual role, but each

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

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

Defendant also knew that all the other Defendants were participating in the Enterprise to achieve their shared objectives. Defendants formed numerous entities – both formal and informal – to achieve their shared objectives, as summarized above and detailed in the United States' Post-Trial Proposed Findings of Fact. See US FF §§ I.B, I.I.

As also explained above, Liggett clearly shared and supported the common objectives of TIRC/CTR with the other Defendants. See generally US FF §§ I.B, I.C. Defendant Altria also shared and supported the common objectives of CTR. Altria employees not only knew about the activities of CTR, but were involved in them as well, attending CTR Board of Director meetings and CTR Annual Member meetings and participating in the approval and funding decisions related to CTR Special Projects. Pollice WD, 6:1-12:12; Pollice TT, 10/04/04, 1526:22-1527:14, 1528:19-1529:1. See US FF §§ I.B(2), I.C, IV. Similarly, Defendant BATCo shared and supported the common objectives of TIRC/CTR. Communication and contact between high level smoking and health research scientists at BATCo and scientists affiliated with TIRC/CTR was frequent and direct. See generally US FF §§ I.B, I.C. TIRC/CTR employees also traveled to England to attend meetings with BATCo employees and other members of international tobacco organizations. See US FF § I.H. BATCo was a critical participant in worldwide efforts to deny or distort the health risks of ETS exposure, though organizations such as IEMC, Infotab, CORESTA, the VdC, and others, and its participation included coordination with CIAR.

As set out at greater length above, the primary functions of the Tobacco Institute included: advancing – through press releases, advertisements, publications, and other public statements – the Enterprise's primary position that there were 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; 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 the industry was actively investigating the issues; denying that cigarette smoking was addictive; minimizing the difficulties of quitting smoking; and denying that the industry marketed to youth. All Defendants except BATCo and CTR agreed to fund and did in fact jointly fund the Tobacco Institute through 1999. See generally US FF §§ I.C, I.I. Notably, the evidence of the foregoing activities leaves no room for dispute by Defendants.

The Tobacco Institute also supplied the Enterprise with a host of committees to further the Enterprise's common objective of maintaining a unified front in accomplishing the goals explained above. Specifically, the Committee of Counsel[11] provided a forum for the General Counsels of the members of the Tobacco Institute to coordinate, discuss, and make decisions related to various smoking and health related issues including addiction, industry witness development (especially in the area of ETS), CTR Special Projects, Lawyers Special Accounts, jointly funded institutional research, CTR's Literature Retrieval Division, review of the Tobacco Institute's ads, and smoking and health litigation generally. Stevens WD, 6:10-12, 6:13-21; Northrip WD, 8:11-13. Representatives from Altria were members of the Committee of Counsel, and some Committee of Counsel meetings were held at Altria headquarters in New York. Northrip WD, 8:14-8:5; US 87590 (A); US 87591 (A).

The Tobacco Institute Executive Committee, also made up of representatives of TI's member companies, ensured that all members of the Tobacco Institute knew about, and were able to weigh in on, the multi-faceted activities of the Tobacco Institute. It had the "final voice on TI

[11] The Committee of Counsel was comprised of the general counsels of the sponsoring companies of the Tobacco Institute – Philip Morris, Reynolds, Lorillard, Liggett, B&W, and American. Stevens WD, 2:18-22, 5:1-11, 5:12-23; Juchatz TT, 11/18/04, 06545:11-06546:2; Kornegay PD, Small v. Lorillard, 11/18/97, 34:11-18.

matters," established Tobacco Institute policy and determined resource allocation within the organization. Dawson WD, 10:13-11:2; Chilcote PD, Richardson v. Philip Morris, 9/21/98, 92:21-97:2; Kornegay PD, Small, 11/18/97, 25:13-29:1. The Executive Committee often discussed issues of joint industry research on smoking and health, research funded through CTR, and funding of Tobacco Institute advertising. Dawson WD, 11:3-6; Northrip WD, 8:11-13; Chilcote PD, Broin, 11/19/93, 34:5-35:5.

The Tobacco Institute also orchestrated, staffed and hosted the College of Tobacco Knowledge – a seminar series open to members of the Enterprise to educate employees on the Enterprise's party line on numerous issues. Topics addressed by the College of Tobacco Knowledge included smoking and health generally, international issues, ETS, and public relations. The Enterprise's goal was for the College to achieve a consistent public message. For example, at both 1983 sessions of the College, William Kloepfer of the Tobacco Institute spoke to the students on public relations issues. In addressing the issue of the "effectiveness and unity" of the tobacco industry, Kloepfer contended that because "**what affects one affects all**," the Tobacco Institute used many strategies "**to keep us together, to keep us all aware**" (emphasis added). See US FF § I.C(5).

Throughout the life of the Enterprise, Defendants have coordinated their deceptive activities through other entities as well. For example, the Center for Indoor Air Research ("CIAR") provided Defendants with an organization to maintain the "open question" position with respect to exposure to secondhand smoke and disease. CIAR funded research projects designed to challenge the scientific findings linking exposure to secondhand smoke and disease and to provide Defendants cover for their position in the legislative and legal arenas. CIAR appeared to be an independent research funding organization when it really was a "front" organization used by the Enterprise to conceal industry participation in certain scientific studies.

See supra and US FF §§ I.G, III.A(2)(g).

Defendants' use of informal organizations such as the Ad Hoc Committee (which was comprised of tobacco industry lawyers and advised Defendants on matters affecting the tobacco industry), the Research Liaison Committee (which was also comprised of lawyers reviewed, directed and coordinated joint research activity by Defendants), the ETS Advisory Committee (which dealt with issues related to environmental tobacco smoke and led to the formation of CIAR), and the Industry Technical Committee (which was comprised of the scientific directors of the Cigarette Company Defendants and assisted TIRC/CTR on technical issues related to cigarette design and other matters), allowed the Enterprise to direct the conduct of its members and provided mechanisms to respond to areas of common concern. See US FF § I.E.

Defendants' participation in various international organizations such as the International Committee on Smoking Issues ("ICOSI") also allowed them to develop common international positions on smoking and health issues. It was recognized that there was a need "**to develop a defensive smoking and health strategy, to avoid our countries and/or companies being picked off one by one, with a resultant domino effect.**" US 75149 (O) (emphasis added); US FF § I.H. Thus, joint participation on the international front was vital to the continued existence of the Enterprise.

The documentary and testimonial evidence of direct communications among Defendants – phone calls, meetings, and correspondence at the highest levels of their respective corporate, scientific, and legal hierarchies – is overwhelming. This evidence proves that each Defendant knew that (and in innumerable instances, knew how) other Defendants were knowingly acting to further the common purposes of the Enterprise. See generally US FF § I. Moreover, all Defendants associated with the Enterprise through these various formal and informal entities through periodic meetings, correspondence and decisions regarding, inter alia,

research projects, public statements and advertising designed to advance the primary objectives of the Enterprise – to maximize profits by acting in concert to preserve and enhance the market for cigarettes and to avoid legal liability that could result in large damage awards and increase public recognition of the harmful effects of smoking and its addictiveness. See supra and US FF § I. In addition, as discussed in Section II.A.6, infra, all of the Defendants committed racketeering acts in furtherance of the shared objectives of the Enterprise. See US FF § IV.

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

4. Each Defendant Participated in the Affairs of the Enterprise

Section 1962(c) requires proof that each defendant did "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." In Reves v. Ernst & Young, 507 U.S. 170 (1993), the Supreme Court addressed this element, holding that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation or management of the enterprise itself." Id. at 185. The Supreme Court elaborated:

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

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

The Court further stated:

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

Id. at 184. Following Reves, the federal courts of appeals have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, a defendant need only intentionally perform acts that are related to, and foster, its operation or management. As one court explained: "The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performances of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993). Likewise, numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise implemented decisions directed by higher-ups in the enterprise or committed racketeering acts, which furthered the integral goals of the enterprise, at the direction of other members of the enterprise. See, e.g., United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997); United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995).

Here, each Defendant not only participated in the operation and management of the Enterprise, but each Defendant was also a significant participant in the making and implementation of decisions in furtherance of the Enterprise's affairs, including, as discussed above, TIRC/CTR, the Tobacco Institute and numerous other joint committees and organizations. See generally US FF § I.

The member companies of the Tobacco Institute and Defendant Altria also participated in the Committee of Counsel to further the Enterprise's objectives. The Committee of Counsel

made decisions regarding the Enterprise's conduct in many areas including, but not limited to, joint research, litigation defense and public relations. See US FF § I.C(3)(a). For instance, in a presentation to the Committee of Counsel in the early 1980s, Ernest Pepples, B&W General Counsel, reported that "[t]he products liability environment is growing more hostile with dramatic speed. . . . A mistake – any concession – by a defendant will be costly." Complaining of certain health claims in a Philip Morris advertisement that suggested that certain cigarettes were unsafe, Pepples noted that:

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

See US 20874 (A) (emphasis added); US FF § I.C(4). This internal document corroborates the findings of the 1964 trip report, entitled "Report on Policy Aspects of the Smoking and Health Situation in U.S.A." from certain British scientists, including G.F. Todd, Director of the Tobacco Research Council. That report described the import of the lawyers' Policy Committee: "This Committee is extremely powerful; it determines the high policy of the industry on **all** smoking and health matters – research and public relations matters, for example, as well as legal matters – and it reports directly to the Presidents [of the cigarette companies]." See US FF §§ I.B and I.H.

Each Defendant had some part in directing the affairs of the Enterprise by coordinating and causing the public dissemination of false, misleading or deceptive statements – through the Tobacco Institute and on their own accord – regarding the links between smoking cigarettes and adverse health effects and addictiveness and by the commission of related racketeering acts, all in furtherance of the primary, shared objective of the Enterprise. See US FF §§ I.C and III. The actions of Defendant Altria have been no different. In addition to its own activities in

furtherance of Defendants' scheme to defraud, Altria participated in the Enterprise by directing and controlling the actions of Philip Morris. Altria's relationship with its subsidiaries was structured to maintain control and consistency among its companies on sensitive issues such as smoking and health, addiction, and passive smoking.[12] For example, through to the late 1990s, the General Counsel of Philip Morris, along with all Philip Morris in-house counsel, were actually employees of Altria Corporate Services (ACS) and reported directly to the General Counsel of Altria. The General Counsel had only a "dotted line" reporting relationship to Philip Morris CEO Michael Szymanczyk. Keane TT, 1/19/05, 10488:25-10491:8; Szymanczyk TT, 4/7/05, 18252:9-22.

Worldwide Scientific Affairs ("WSA") is a group established by Altria to coordinate science and science policy, including policy about smoking and health issues, across all of the Altria companies. WSA was organized in regions covering various operating company subsidiaries, including Philip Morris, Philip Morris International, and their subsidiaries, in various parts of the world; scientific policy was coordinated across these regions and Altria subsidiaries. Reif PD, U.S.. v. Philip Morris, 3/30/04, 316:17-318:7; US 89153 (O); US 89155 (O).

Altria has a Scientific Research Review Committee ("SRRC") with responsibility for overseeing "all scientific studies, related to tobacco, smoke and/or smoking, conducted or funded by Philip Morris Companies or any of its subsidiaries around the world" with authority to review

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[12] And although Philip Morris has its own communications department, Altria controls Philip Morris's communications on sensitive issues such as litigation against Philip Morris, Philip Morris's opposition to federal excise taxes on cigarettes, and Philip Morris's support for FDA regulation of tobacco products, even when those issues affect Philip Morris alone among Altria's subsidiary companies. John Hoel PD, U.S. v. Philip Morris, 5/30/03, 60:12-63:7, 67:3-22, 166:17-167:14; see also US 44422 (O); US 45675 (O). As another example, Altria, through its subsidiaries, controls the use of the Marlboro trademark both in the United States and abroad. Myers TT, 5/19/05, 21719:8-21720:13.

and approve all funding of scientific studies related to those topics. SRRC was represented on the following entities which conducted jointly-funded research with other tobacco companies: CIAR; VDC; Association Suisse des fabricants de cigarettes; Centre de cooperation pour les rechereches scientifiques relatives au tabac – CORESTA (France); Tobacco Manufacturing Association (TMA), formerly Tobacco Advisory Council (TAC) and Tobacco Research Council (TRC) (UK); Australian Cigarette Association. Reif PD, U.S. v. Philip Morris, 7/30/03, 49:1-49:12. After the dissolution of CTR and CIAR pursuant to the terms of the MSA, the SRRC continued to approve research projects funded by Philip Morris through its "External Research Program" which was created in 2000 to take over the function of funding third-party research and eventually took the place of the SRRC. Id. at 194:15-195:13.

Worldwide Regulatory Affairs was a department established by Altria to coordinate and ensure consistency in regulatory policy statements and responses across all of the Altria companies. See, e.g., Keane TT, 1/19/05, 10484:19-10489:3; US 41574 (A); Reif PD, U.S. v. Philip Morris, 3/30/04, 344:14-345:11. WRA was originally a subdivision of the legal department of ACS, headed by an attorney, Marc Firestone, whose title at the time was Associate General Counsel for Philip Morris Companies. Berlind PD, U.S. v. Philip Morris, 5/23/02, 8:4-10:13. The Corporate Scientific Affairs group, a predecessor entity, included numerous Philip Morris scientific personnel but addressed worldwide scientific and regulatory issues, including the "Asia ETS Consultant Program" run by Covington & Burling on behalf of several tobacco companies. US 23061 (A). WRA was established in 1994 at the direction of the Chairman of Altria, Geoffrey Bible, and its areas of responsibility included worldwide coordination on ETS positions as a "core issue." In 2000, WRA chaired a "cross-functional Strategic Issues Task Force" comprised of representatives from Altria, Philip Morris, Philip Morris International, Philip Morris Europe, WSA, and ACS legal representatives to develop a set of recommendations

to optimize coordination of strategies across both Philip Morris International and Philip Morris regarding youth smoking prevention, marketing and advertising practices, product regulation, harm reduction and the Altria, Philip Morris, and Philip Morris International Web sites. Berlind PD, U.S. v. Philip Morris, 195:25-198:6, 200:5-202:8.

In addition to Altria's role in coordinating worldwide public relations positions in order to maintain adherence to the goals of the Enterprise, overwhelming evidence of correspondence between and among Defendants and their representatives' participation in frequent meetings establishes that all Defendants directed and coordinated activities in furtherance of the affairs of the Enterprise and their joint scheme to defraud. See supra. The Cigarette Company Defendants also agreed not to compete through use of explicit health-related claims in the marketing of cigarettes at those Plaza Hotel meetings in 1953. See US FF § I.B. And in the few instances after 1953 when one member of the Enterprise did make comparative health-related statements that disparaged the products of another Enterprise member (as Philip Morris did in 1983 in a Holland advertisement), other members of the Enterprise (and specifically Defendant BATCo) self-policed that agreement and received a commitment for continued adherence to the agreement worldwide. See US FF § III.D.

Defendants also entered a "Gentlemen's Agreement" whereby they agreed that any tobacco company to discover an innovation that could lead to the manufacture of a less hazardous or "safer" cigarette would share it with the others and that no domestic tobacco company would use intact animals for in-house biomedical research to test their commercial products. And when it was revealed that Defendant RJR had been performing biological research in its "Mouse House," other members of the Enterprise demanded that RJR cease such research activity. The "Mouse House" was immediately disbanded and the research stopped. See US FF §§ I.J, III.A(3). Thus, pursuant to these agreements, the Cigarette Company

Defendants sought to avoid any actions that would contradict their fraudulent public relations position.[13]

In all of these circumstances, each Defendant participated in the operation or management of the Enterprise in full satisfaction of Reves, 507 U.S. at 185. Indeed, because each Defendant is an "insider" – i.e., a member of the Enterprise that had some part in directing significant aspects of the Enterprise's affairs, including the public dissemination of false, misleading or deceptive statements regarding addiction and the links between smoking cigarettes and adverse health consequences, this case does not even implicate the concerns of Reves. See, e.g., United States v. Owens, 167 F.3d 739, 754 (1th Cir. 1999) (holding that because Reves involved the liability of an "outsider" to an enterprise, the "Reves's analysis does not apply where a party is determined to be **inside** a RICO enterprise"); accord United States v. Houlihan, 92 F.3d 1271, 1298-99 (1st Cir. 1996); United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995); cf. Parise, 159 F.3d at 797.

5. Defendants Knowingly Devised a Scheme to Defraud by Means of Material False or Fraudulent Representations, Pretenses and Promises

When reviewing the evidence of the establishment and conduct of the affairs of the Enterprise, as well as the massive scheme to defraud that the Enterprise carried out, this Court will make factual findings based upon the record as a whole. The Court, having received almost nine months of live testimony, had many opportunities to observe the demeanor of witnesses, and as Defendants recognize, may make credibility findings based upon those observations. Indeed,

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[13] In addition, each Defendant endeavored to conceal or suppress information and documents and/or to destroy records which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in tobacco and health related liability cases against Defendants or in congressional and other governmental proceedings, and evidence of the link between smoking cigarettes and adverse health consequences and addictiveness. See US FF §§ I.K, III.F.

under Federal Rule of Civil Procedure 52(a), following a bench trial, the district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In a very recent decision, the D.C. Circuit re-affirmed this Rule 52(a) principle. Government of Rwanda v. Johnson, 409 F.3d 368 (D.C. Cir. 2005).

That credibility determinations are within the unique province of the fact-finder is well settled law. In a 1985 Supreme Court decision, Anderson v. Bessemer City, N.C., 470 U.S. 564, 575 (1985), the Supreme Court ruled that:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

(Citation omitted).

Anderson did caution that a district court may not "insulate [its] findings from review by denominating them credibility determinations," but the Court went on to state:

> But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, **that finding, if not internally inconsistent, can virtually never be clear error."**

Id. (emphasis added; citation omitted).[14]

Credibility is a significant issue, and the Court, having personally observed the live witnesses, needs little assistance from the parties to make those important assessments; joint defendants, however, seek to re-write the trial record through their arguments in their proposed

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[14] Anderson was issued in 1985, and is still good law. Indeed, in a decision issued earlier this year, the D.C. Circuit cited Anderson when it stated, "We give substantial deference to the district court's evaluation of witness credibility." Koszola v. F.D.I.C, 393 F.3d 1294, 1300-1301 (D.C. Cir. 2005) (citing Anderson, 470 U.S. at 575).

findings. Apparently disturbed by the display of the United States at closing arguments emphasizing various defense witnesses' biases and inconsistent testimony given at trial, joint defendants include almost 100 pages in their proposed findings of fact purporting to address witness bias and credibility. Rearguing the rulings addressing admissibility of evidence received at trial, defendants launch an unwarranted attack on various United States' witnesses, suggesting for certain witnesses that, by virtue if their involvement in the "tobacco control movement," these witnesses must not be believed. Defendants' argument runs into rough sledding from the outset. To suggest that mere affiliation with a particular party or point of view automatically leads to a finding of bias would completely obliterate the testimony given by most witnesses in the control of defendants, and is any event, is not a proper approach.

The testimony of defendants' well-paid experts and fact witnesses, however, subjects them to a higher degree of scrutiny as to both weight and credibility. Indeed, a major issue bearing upon witnesses' credibility is money -- the substantial payments made by defendants to its fact **and** expert witnesses. These facts are certainly relevant to the witnesses' interest in testifying and may well be viewed by the Court, on this record, as an incentive to testify favorably for defendants. This is particularly true given the abnormal degree of inconsistency in trial testimony and documents authored by some of those same witnesses.[15] Equally relevant to an assessment of credibility, almost all of the fact witnesses called by the United States were adverse witnesses, that is, witnesses employed by or formerly employed by the defendants, witnesses under the defendants' control. All but two adverse witnesses were examined by

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[15]The United States' Proposed Findings of Fact set forth the payments made by defendants to various witnesses as well as misrepresentations made by certain witnesses both in testimony and in documents. As the Court observed, there was an abnormal degree of inconsistency in testimony and documents authored by a number of witnesses paid by defendants.

written direct. Despite the huge advantage enjoyed by Defendants in the opportunity to review the witnesses' proposed written direct testimony with counsel[16] and make changes, many of these witnesses nonetheless gave inconsistent and highly incredible testimony.

The Court's discretion may be suitably directed to issues of credibility. On this record as a whole, witnesses associated with defendants fared poorly, for a number of different reasons. The Court observed the trial testimony and appropriately may make its own assessments and express credibility findings. As noted above, such findings may be reversed by the Court of Appeals only if clearly erroneous. Fed. R. Civ. P. 52(a). Accordingly, the United States respectfully requests that the Court make express credibility determinations in its findings of fact and conclusions of law. See, e.g., United States v. Local 560, Int'l Brotherhood of Teamsters, 581 F. Supp. 2d 279, 292-303 (D.N.J. 1984) (following 51-day bench trial in labor union RICO case, district judge included 12 pages of express credibility determinations in findings of fact and conclusions of law pursuant to Rule 52), aff'd, 780 F.2d 267 (3d Cir. 1985).

a. Defendants executed a scheme to defraud with devastating impact on the health of the American people

The totality of the evidence proving Defendants' scheme to defraud demonstrates its sheer pervasiveness and the compelling need for a comprehensive remedial order to prevent and restrain future wrongful conduct. As established at trial and explained below, the pursuit of primary and other shared objectives permeated Defendants' public relations, research, cigarette design and marketing related to seven primary areas that constitute the pillars of Defendants' overarching scheme to defraud: (1) adverse health effects; (2) the myth of independent research; (3) addiction; (4) manipulation of the nicotine content of cigarettes; (5) light and low tar

[16]Attempts to explore the content of discussions witnesses had with counsel while revising the United States' prepared written directs were met with objections asserting claims of privilege, which were sustained by the Court.

cigarettes; (6) youth marketing; and (7) suppression of information. The evidence demonstrating Defendants' fraudulent activity in these seven areas is set out in detail in the United States' Post-Trial Proposed Findings of Fact, and the United States respectfully refers the Court to its Findings for a comprehensive account of the full record of Defendants' multifaceted, 50-year scheme to defraud. The United States' Findings present the evidentiary foundation for the Court's ultimate findings of liability and the imposition of remedies, and are therefore the indispensable complement to this Post-Trial Brief. Below, the general parameters of each of the seven pillars, or sub-schemes, is described, along with the reasons that certain of the principal lines of defense raised at trial fail to withstand evidentiary scrutiny.

1) The adverse health effects of cigarette smoking

Defendants' joint efforts to deny and distort the health effects of cigarette smoking emerged from the series of Plaza Hotel meetings that took place in December 1953, as discussed above. Following the meetings, Defendants embarked on a decades-long, multifaceted public relations campaign, seeking to protect their profits by peddling doubt and providing what they described as a "psychological crutch" to smokers and potential smokers, including teenagers. Defendants do not deny making the extraordinary number of public statements – statements that denied or questioned smoking's harms; attacked legitimate scientific investigation; continually called for more research; and repeatedly promised to find answers through disinterested research, claiming years after questions of causation were resolved that the tobacco industry was committed to determining **whether** smoking was a cause of disease. The evidence of Defendants' five decades of public statements concerning disease issues is undisputed.

Similarly, at trial Defendants did not dispute that smoking is a cause of significant disease and death, and evidence demonstrates the extent of suffering by smokers and former smokers. Cigarette smoking and exposure to secondhand smoke kills 440,000 Americans every year, or

more than 1,200 every single day. The annual number of deaths due to cigarette smoking is substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS. Approximately one out of every five deaths that occur in the United States is caused by cigarette smoking. US FF § III.A(1)(a).

Instead of questioning whether smoking is established as a cause of disease, Defendants suggested through cross-examination that a genuine scientific controversy existed concerning whether smoking was a cause of lung cancer through at least the 1950s and early 1960s. The cross-examination failed for at least four primary reasons:

- First, Defendants offered no affirmative expert testimony on this issue to counter the convincing testimony of Dr. Allan Brandt and Dr. David Burns, who identified the mid-1950s as the time when the scientific community arrived at a consensus that smoking was a cause of lung cancer. See Brandt WD; Burns WD; US FF § III.A(1)(b), (d). Accordingly, there is no expert testimony in the record before the Court that disputes the explanation of the consensus formation process (particularly as it relates to the identification of smoking as a cause of lung cancer) offered by Drs. Brandt and Burns.

- Second, Defendants' insistence that **some** reputable scientists questioned whether **certain** lines of evidence were unimpeachable during the 1950s does not disprove the existence of scientific consensus. To the contrary, the skepticism expressed about certain studies or aspects of the evidence demonstrating conclusively that smoking was a cause of lung cancer was just that: questions about certain studies or certain aspects of the evidence. Every comprehensive review of the totality of the evidence has reached the same conclusion, beginning in the 1950s: smoking is a cause of lung cancer. And the totality of the evidence was comprehensive. The history of science and medicine demonstrates that scientists have utilized clinical observation, population studies, and laboratory investigation, alone or in combination, to reach correct causal conclusions for centuries. All three lines of investigation showed smoking to be a cause of lung cancer. US FF § III.A(1)(d).

- Third, during the 1950s, Defendants' own scientists recognized the legitimacy and reliability of the scientific evidence establishing smoking as a cause of disease and identified carcinogens in cigarette smoke. US FF § III.A(1)(e) (identifying documents and investigation by scientists such as Drs. Claude Teague and Alan Rodgman at RJR and Dr. Helmut Wakeham at Philip Morris).

- Fourth, even if Defendants could convince the Court that the existence of a few isolated skeptics eviscerates a sound scientific consensus – and Defendants cannot do so – they at

best establish that, in the period before 1964, some of the many public statements they made in furtherance of the goals of the Enterprise may not have been literally false.[17]

That Defendants recognized that smoking was a cause of disease cannot seriously be disputed, as established by trial testimony from witnesses such as former Philip Morris scientists Dr. William Farone and Dr. Jerry Whidby, former Brown & Williamson scientist Dr. Jeffrey Wigand, and RJR's Wayne Juchatz, who testified about the knowledge of scientist Robert DiMarco. See US FF §§ III.A(1)(*l*) and III.A(3). Dr. Whidby remains a Philip Morris consultant and expert witness and was paid $2,800 per day for time spent preparing to testify and taking the witness stand as a fact witness in this case. He admitted that he "never doubted" that smoking was a cause of cancer, emphysema, and other diseases, and testified that the same was accepted by his colleagues at the company. Whidby TT, 2/22/05, 14112:6-14113:11. At the same time, Dr. Whidby was aware that during the entire time he worked at Philip Morris, the company took a contrary public position. Id.

That public position and Defendants' efforts to deny and distort the scientific evidence of smoking's harms are evidenced not only in decades of press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but in evidence of concerted, multifaceted public relations strategies designed to counter mainstream scientific publications such as Surgeon General's Reports. The intense public relations activity – consisting of numerous false statements – both before and after the publication of the 1964 Report is one example. See US FF § III.A(1)(h) (citing evidence of public statements). Following the 1964 Report, a February 26, 1972 Tobacco Institute press release asserted that the

[17] As discussed later in this subsection, however, reckless indifference to the truth or falsity of a statement satisfies the specific intent requirement in a mail fraud case, and all of Defendants' statements were made with reckless indifference to the statements' truth or falsity; Defendants only sought to adhere to their public relations position.

1972 Surgeon General's Report "insults the scientific community" and that the report was "another example of 'press conference science' -- an absolute masterpiece of bureaucratic obfuscation." The press release also asserted that "the number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public." US 21322 at 0602 (O).

Another example is the attention paid by Defendants to countering the release of the 1979 Surgeon General's Report. As set out in greater detail in the United States' Findings, Defendants began planning their public relations strategy a year before the Report was to be released. Then, on January 10, 1979, one day prior to the release of the 1979 Report, the Tobacco Institute published Defendants' own document, "Smoking and Health 1964-1979: The Continuing Controversy" to the news media (in conjunction with a press conference) and tailored it to respond to the content of the 1979 Report (the Tobacco Institute had managed to obtain three draft chapters of the Surgeon General's Report which assisted it in the development of the publication). The document was drafted by a public relations staff member, was 166 pages long and represented a major effort on the part of the tobacco industry to pre-empt the impact of the 1979 Surgeon General's Report. See US FF § III.A(1)(*l*).

Three years later, the Tobacco Institute issued another lengthy publication in anticipation of the release of the 1982 Surgeon General's Report, citing its "axiom that it is more effective to take the initiative in situations involving a prospective negative news event." US 20063 at 2472 (O). And in anticipation of 1983 Surgeon General's Report, "The Health Consequences of Smoking – Cardiovascular Disease," the Tobacco Institute published a document titled "Cigarette Smoking and Heart Disease." It falsely stated that smoking was not an important risk factor for heart disease, and that "[w]hether cigarette smoking is causally related to heart disease is not scientifically established." US 20561 at 2090-91 (O). As set out in detail below,

Defendants similarly attacked the conclusions of the 1988 Report on nicotine and addiction, and issued press releases disputing the 1989 Report. US FF § III.A(1)(*l*).

Of paramount significance to the Court's assessment of Defendants' activities is the fact that Defendants' internal documents **admit** the purpose of their public relations strategy. For example, William Kloepfer, Vice President of Public Relations for the Tobacco Institute wrote to Earle Clements, President of the Tobacco Institute expressing concern about the purpose: "Our basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." US 63576 at 2354 (A). The Tobacco Institute's 1968 internal "Tobacco and Health Research Procedural Memo" advised: "The most important type of story is that which casts doubt on the cause and effect theory of disease and smoking. . . . [T]he headline should strongly call out the point – Controversy! Contradiction! Other factors! Unknowns!" US 21302 at 1489 (A). Similarly, an internal B&W document entitled "Smoking and Health Proposal" explained: "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public. It is also the means of establishing a controversy." US 21040 at 0954 (A).

Despite these admissions of their intent, at trial Defendants sought to defend against the evidence of their concerted campaign to convince Americans that there was an open question about whether smoking caused disease through three primary arguments: first, that their public statements had no material impact on the American public; second, that after a certain date, they only made public statements about smoking and health issues when specific questions were posed to them; finally, that they have undergone profound and fundamental corporate change in recent years. The Court should reject all three arguments.

The first argument is, at the outset, legally insufficient. As explained in detail below,

Defendants' public statements concerning the health effects of cigarette smoking are material as a matter of law, and Defendants may not escape liability for their scheme to defraud by claiming that the public was not deceived or otherwise injured by their misconduct and could not have reasonably relied upon their fraudulent representations. As a factual matter, Defendants' admitted in internal documents that their public relations strategy was working. As but one example, in 1967, through a focus group with smokers conducted by the public relations firm Ted Bates and Company for Lorillard, Defendants learned that

> because they are still smoking, smokers are **compelled** to feel the government has not proved its case. If they want to hear anything, it is reassurance that smoking does **not cause** lung cancer – not that there is a difference of opinion. Smokers agree that smoking is "unhealthy" but don't translate this as meaning it causes lung cancer or any specific, potentially fatal, disease. Smoking may cause shortness of breath, a cough or even a shorter life – but they don't expect it to give them lung cancer.

US 21554 at 2010 (A) (emphasis in original). As another example, in a 1975 marketing document, B&W acknowledged the necessity of continuing the "open controversy" strategy:

> Smokers perceive cigarette smoking as dangerous for one's health. However, they continue to smoke. Thus, they are faced with the fact that they are behaving illogically. They respond by providing either a rationalization for smoking or by repressing their perceptions of the dangers involved. . . . The advertising must also cope with consumer attitudes about smoking, providing either a rationale or a means of repressing the health concern.

US 20987 at 3761-3762 (A).

Evidence concerning risk perception by smokers – both youth and adults – refutes Defendants' attempt to rely on surveys limited to questions such as whether respondents were aware of the reported health hazards of smoking. Defendants argued throughout the trial that people appreciate the risks associated with smoking, and, in fact, over perceive those risks. According to the trial evidence, however, this assertion is flawed on several levels. Most individuals, at the point of initiation, do not adequately appreciate the risk associated with

smoking in order to make an informed decision about whether or not to engage in smoking behavior, and the analysis of this issue is far more complex than simply looking at the number of smokers at any given point in history.

A critical flaw in the approach Defendants brought to the issue of risk perception at trial through their highly paid law professor, W. Kip Viscusi, is that basic survey questions resting, in essence, on mere awareness utterly fail to probe the respondent's level or depth of awareness of any given risk. For example, both Drs. Paul Slovic and Neil Weinstein presented compelling evidence that although people may say that smoking is dangerous or even deadly, relatively few individuals display an in depth understanding of the plethora of diseases caused by smoking or the true nature of those diseases. See US FF § III.A(4)(b)(i). Dr. Viscusi's analysis simply does not address whether smokers appreciate the debilitating consequences of smoking-induced morbidity and mortality. Dr. Viscusi admitted as much on cross examination. Viscusi TT, 4/6/05, 17957:11-14 and 17958:4-17.[18]

In fact, the evidence shows that most people's knowledge of the nature and consequences of diseases caused by smoking tends to be superficial. See US FF § III.A(4)(b)(i); Slovic WD, 18:14-20:5; Weinstein WD, 24:7-29:22. Utilizing such a narrow view of what constitutes "understanding" ignores important issues essential to understanding risks and decisions about risks.

In that same vein, Dr. Viscusi's data likewise fails to demonstrate that smokers appreciate

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[18] Likewise, Dr. Viscusi's data fails to account for whether or not individuals, prior to or during smoking initiation, adequately understand the nature of nicotine addiction. Dr. Viscusi admitted during cross-examination that an analysis of the nature of addiction is not part of the data collected from the results of his three core questions. See Viscusi TT, 4/6/05, 17957:15-20. Trial evidence established, however, most individuals do not have such an understanding about the nature of nicotine addiction, but rather suffer from under-appreciation. See US FF § III.A(4)(b)(iv).

the cumulative or future nature of smoking risks. A cumulative risk, such as smoking, is one in which the likelihood of harm increases as the activity is repeatedly engaged in, i.e., the risk accumulates over time. Slovic WD, 16:4-14. As Dr. Slovic explained at trial, "Because the risk accumulates slowly and invisibly, there appear to be no adverse consequences and, therefore, the risk does not seem as imminent as it might seem when the same overall probability of harm threatens you at a single moment in time." Slovic WD, 16:15-17:12. Young people tend to discount the potential impact smoking may have upon them because of the cumulative nature of the risk, and because smoking risks are not realized until long after an individual commences smoking behavior, tend to discount such far off effects. See US FF § III.A(4)(c).

The second argument – that after a certain date, Defendants only made public statements about smoking and health issues when specifically asked – can be summarily dismissed by the Court. First, it is preposterous to suggest that Defendants should be absolved of their liability because they only lied when asked a question about issues like the health effects of cigarettes smoking or the addictiveness of smoking or nicotine. Second, there is no factual support for Defendants' assertion. As but one example that the Court is very familiar with, Tobacco Institute spokesperson Brennan Dawson, a regular face on ABC's Good Morning America and CNN's Crossfire at times of public relations importance for Defendants during the 1980s and 1990s, admitted on the witness stand, after attempting to evade questions posed by the Court, that she intended viewers to believe her representations about health issues. Dawson TT, 1/12/05, 9929:11-9930:18. In addition, Defendants' representatives continue to this day to speak on Defendants' behalf on smoking and health issues on television programs seen by millions of viewers and in press releases sent to newspapers nationwide, and their positions on smoking and health issues are affirmatively conveyed by additional media such as websites that are accessible to anyone with Internet access.

The final argument – that Defendants have changed – fails both legally and factually. Legally, as more fully discussed in Section III of this Post-Trial Brief, the Court can and should find a continuing likelihood of future RICO violations based on past acts alone. Factually, evidence demonstrates that Defendants have not changed. As set out throughout the United States' Findings and further discussed in Section III, infra, Defendants continue to undertake the same types of actions related to the health effects and marketing of cigarettes that they have pursued for decades, and do so in pursuit of the same goal: maximizing their profits from the sale of cigarettes. Defendants continue to deny or obfuscate the health effects of smoking, continue to promote flawed research findings that support their public relations positions, such as the 2003 study prepared by Dr. James Enstrom that was paid for by Defendants (see US FF § III.A(2)(k)(iv) (recounting history of Enstrom study)), and refuse to acknowledge the health consequences of cigarette smoking that are accepted throughout the scientific community.

In fact, to this day, R.J. Reynolds and BATCo deny the health consequences of exposure to secondhand smoke, while other Defendants such as Philip Morris refuse to admit any health consequences of ETS. As the Court is aware, Defendants' efforts to deny and distort the disease risks of exposure to secondhand smoke, or ETS, spread to virtually every corner of the world. More specifically, beginning in the 1970s, Defendants crafted and carried out an "open question" strategy, extended from active smoking, to meet the issue of passive smoking. The evidence of a comprehensive plan involving the expenditure of an extraordinary amount of money to develop a worldwide network of consultants to support a public relations offensive with a singular goal shows that defendants did not act in good faith, as they have argued. Instead, the plan was to deny and distort, no matter what the science was or what they knew internally. They did so by attacking legitimate scientific investigation through:

- The identification and pre-selection of what were held out as "independent" ETS

consultants by Covington & Burling and Shook, Hardy & Bacon.

- The creation of supposedly "independent" scientific groups, such as Indoor Air International ("IAI") and the Associates for Research on Indoor Air ("ARIA"), and even a scientific journal, written by lawyers and industry consultants that exists to this day.

- The review, editing, and rewriting of consultants' papers and editorials by industry lawyers and scientists before publication.

- The planning and execution of industry controlled symposia to generate favorable publications.

- Bypassing Scientific Advisory Boards at CTR and CIAR for favorable "Special Projects" (CTR) and "Applied Studies" (CIAR).

- Ghostwriting papers under names of so-called "independent" scientists.

- Falsification of ETS "science" by law firms and employees of Defendants.

These categories of activity are addressed in detail in the United States' Post-Trial Proposed Findings of Fact, as are the public statements that were made by Defendants in tandem with the foregoing efforts. See US FF § III.A(2).

Defendants attempted to explain away the extraordinary public relations machinery they employed to attack the scientific evidence establishing ETS as a cause of disease by asserting that the evidence did not establish a link between exposure to secondhand smoke as diseases such as lung cancer and cardiovascular disease. The effort to defend against the evidence introduced by the United States at trial fails first and foremost, however, because the weight of scientific evidence established secondhand smoke as a cause of lung cancer by 1986. As explained by Dr. Jonathan Samet and Dr. David Burns, two of the world's foremost experts and most accomplished researchers on smoking and health matters,[19] the scientific consensus was based on the totality of scientific evidence. See US FF § III.A(2)(b)(i). Defendants' resort to a full-time

[19] Defendants have recognized Dr. Samet's expertise and conservatism regarding opinions on the causal relation between adverse health effects and passive smoking in an internal litigation document that was written in or about August 1994. US 76214 at 7891 (A).

litigation consultant, Dr. Edwin Bradley, did nothing to rebut the scientific record relied on by Drs. Samet and Burns. See id., § III.A(2)(b)(ii).

Additionally, assuming arguendo that Defendants could establish that there was a legitimate scientific question about whether exposure to secondhand smoke caused disease, it is clear that Defendants made their public statements on the issue with a singular focus on denying the causal relationship to improve their profits, without regard for the truth of their assertions. Legally, statements made with reckless disregard for their truth satisfy the scienter and intent requirement of mail fraud.[20] The same is true of the wire fraud statute.[21] Accordingly, "[o]ne who acts with reckless indifference as to whether a representation is true or false is chargeable as if he had knowledge of its falsity." Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964). Moreover, one may be held criminally liable where he or she is wilfully blind to the truth. See United States v. Cassiere, 4 F.3d 1006, 1023-24 (1st Cir. 1993). Wilful blindness or a failure to investigate the basis for claims can constitute recklessness. Eisenberg v. Gagnon, 766 F.2d 770, 777 (3d Cir. 1985); SEC v. Infinity Group, 212 F.3d 180, 193 (3d Cir. 2000).

What emerged at trial made it clear that Defendants are still, to this day, fraudulently denying the health effects of ETS exposure and seeking to hide their involvement in research funding and scientific witness publication and testimony. As to the latter, the Court need only look to the evasive answers and false denials provided by witnesses like Covington & Burling lawyer John Rupp and former CIAR Executive Director Max Eisenberg to see that Defendants

[20] See, e.g., United States v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000); United States v. Love, 535 F.2d 1152, 1157-58 (9th Cir. 1976).

[21] See, e.g., United States v. Armstrong, 654 F.2d 1328, 1336 (9th Cir. 1981); United States v. Boyer, 694 F.2d 58, 59-60 (3d Cir. 1982); In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 269 (2d Cir. 1993); Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990); United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986); United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984).

continue seeking to cover the tracks of their involvement in developing a worldwide network of paid scientific consultants and clandestinely sponsored papers and symposia.

As to the former, in this litigation, Philip Morris, BATCo, Brown &Williamson, Lorillard, and R.J. Reynolds have denied that ETS causes disease in nonsmokers:

- RJR continues to publicly dispute that secondhand smoke causes diseases and other adverse health effects in nonsmokers. The company's position on its website indicates: "Considering all of the evidence, in our opinion, it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults." US 9201) (A). Mary Ward, an in-house attorney for RJR until 2004, testified that the RJR position on passive smoking has not changed since she joined the company in 1985, with the exception of admitting that ETS "may trigger attacks in asthmatics." Ward TT, 11/4/04, 5076:9-5077:22.

- Lorillard continues to dispute publicly the scientific consensus as well. Lorillard general counsel Ron Milstein testified that his company has never admitted in any forum that ETS exposure causes disease, and that an October 2003 press release containing one of his statements was in line with the company's position that ETS is not a proven health hazard. Milstein TT, 1/7/05, 9263:8-9264:24.

- B&W's most recent website tells the public that ETS is not harmful. The company's 2003 website stated: "It is, therefore, our view that the scientific evidence is not sufficient to establish that environmental tobacco smoke is a cause of lung cancer, heart disease or other chronic diseases." US 76761 (A). B&W CEO Susan Ivey testified that her company places its positions on its website for consumers to rely on. Ivey TT, 11/16/04, 6098:7-19.

- BATCo also denies that passive smoke is a health hazard to adults or children. US 86747 (O).

- From 1999-2001, the Philip Morris website publicly stated its disagreement with the scientific consensus as well: "Many scientists and regulators have concluded that ETS poses a health risk to nonsmokers. **Even though we do not agree with many of their conclusions**, below we have provided some links so you can access some of their views." US 92056 at 2 (A) (emphasis added); Parrish TT, 1/25/05, 11080:23-11082:14. Presently, in contrast to its corporate position on active smoking, Philip Morris is careful not to state its agreement with, or even acknowledge the existence of, the scientific consensus that passive smoking causes disease. US 92055 (A).

2) The myth of independent research

There is no dispute that, beginning with the Frank Statement in 1954, Defendants told the public that they would fund independent research to provide "aid and assistance to the research

effort into all phases of tobacco use and health." US 20277 (A). This promise was repeated again and again, see US FF §§ III.A and III.B, but contrary to their public representations, Defendants failed to fund independent research dedicated to the central question of the connection between cigarette smoking and disease. Instead, Defendants used scientific research as a tool to advance their public relations and litigation objectives. At the same time, when any Defendant-funded research came close to making actual discoveries about important smoking and health issues, Defendants terminated funding or, in some instances, even altered results to avoid any appearance of being tied to an indictment of their product.

Defendants' use of biased research for public relations and litigation purposes is well documented in the form of funding for CTR Special Projects, CIAR Applied Studies, and other Defendant-financed research initiatives such as ETS consultants recruited and managed by Covington & Burling and Shook, Hardy & Bacon. See US FF §§ I, III.A(1), III.A(2) and III.B. Evidence also unequivocally demonstrates Defendants' successful efforts to terminate funding that they found threatening to the Enterprise. For example:

- When researchers at Microbiological Associates made progress with inhalation research funded by CTR, Defendants expressed dire concern. Philip Morris scientist Thomas Osdene wrote: "I am forced of the opinion that the program seems to be misdirected since its main mission seems to be to prove that smoking causes cancer." US 24708 at 3038 (O). Defendants discontinued their funding and, before publication of results from the work, manipulated the report from the scientists involved and added an introduction that omitted the scientists' conclusion that there was carcinogenic response in animals after exposure to cigarette smoke. See US FF § III.B(2)(ii)(bb).

- Dr. Gary Huber performed research at Harvard University pursuant to a contractual agreement with B&W, Liggett, Lorillard, RJR, and Philip Morris, and produced human-type diseases in the lungs of animals that inhaled cigarette smoke. After Huber reported to his tobacco company sponsors that his research demonstrated a response to inhaled cigarette smoke, including disease mechanisms similar to those associated with diseases in humans, Defendants cut off funding to Huber. In a 1980 meeting at a Boston hotel, Defendants' attorneys told Huber that the reason funding for his research had been discontinued was because he was "getting too close to some things." See generally Huber PD, Texas v. American Tobacco, 9/20/97; US FF § III.A. As the Court is well aware, Defendants subsequently fought to keep the Huber story from the public by first, urging

to "keep the faith, to hold the line," when he was subpoenaed for deposition in 1997, and then employing every strategy at their lawyers' disposal to keep the deposition under seal. Seven years after Huber's deposition, the United States was finally able to obtain the transcript, over vigorous opposition by Defendants, by initiating a court action in the Eastern District of Texas. In re United States' Motion to Modify Sealing Orders, 5:03-MC-2 (E.D. Tex. June 8, 2004).[22]

Despite their false public representations and use of research to advance their unlawful objectives, Defendants seek to escape liability for their deception by pointing to things like the reputations of certain members of CTR's SAB and the publication record of certain CTR grantees, while attempting to minimize Defendants' role, usually carried out through their attorneys, in terminating and suppressing adverse findings. The last of these claimed defense to liability fails based on the evidentiary record contained in documents and corroborating testimony of witnesses like Dr. Huber and Dr. Carol Henry, as set out in the United States' Findings. See US FF §§ III.A and III.B. Indeed, the reputations of SAB members or the

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[22] In their proposed findings, Joint Defendants elect to attack Dr. Huber personally, asking the Court to affirmatively find that there are "questions about Dr. Huber's integrity" and completely discredit his testimony. JD FF, ch. 3, ¶¶ 550, 553. There is no basis for doing so; in fact, the record supports the reliability of Dr. Huber's testimony. Defendants offer no explanation for why they fought to keep Dr. Huber from testifying in 1997 or why they sought for so long to keep his entire deposition under seal. Moreover, Defendants' assertion that their conduct was justified by a purported consultancy agreement should be assessed against the privilege objections raised by counsel for Defendants during Dr. Huber's deposition, which included **privilege** objections to questions about such matters as the number of persons in the United States who suffer from emphysema every year and the content of newspaper articles. Finally, Defendants' effort to question Dr. Huber's credibility based on the fact that he was called by prior testimony designations in this case must also be rejected – the designation process was proper and it would be improper for the Court to question Dr. Huber's credibility on the ground that his sworn testimony was provided by prior designation.

Defendants also seek to have the Court make an affirmative finding that Robert McDermott of Jones Day and Lee Stanford of Shook, Hardy and Bacon acted appropriately in their conversations with Dr. Huber before his 1997 deposition. JD FF, ch. 3, ¶ 547. The Court should reject Defendants' request. Dr. Huber specifically testified that McDermott and Stanford implied to Huber that he did not "fully appreciate the full weight of Shook, Hardy & Bacon and Jones Day" representatives of the tobacco industry; the calls caused Huber to fear for the safety and financial security of his family. Huber PD, Texas v. American Tobacco, 9/20/97, , 101:4-8, 10-21.

publication record of CTR grantees is largely irrelevant to whether and how Defendants deceptively utilized TIRC/CTR, and later CIAR, as vehicles to advance a fraudulent public relations agenda.

And as but one example of their distortions of the trial record on this point, Defendants trumpeted Dr. Brandt's testimony that Defendants wanted "good science" from CTR's program as if the testimony were a grand admission obtained through blistering cross-examination, and Defendants cite to the same testimony in their proposed findings. TT, 11/18/04, 6463:18-23; TT, 4/21/05, 19597:19-22; JD FF, CH. 3, ¶ 131. But Dr. Brandt's Written Direct Examination, adopted before cross-examination began, specifically explained that Defendants' desire for "good science" was itself a necessary component of their public relations effort:

> In order to fulfill its larger public relations goals, it was critical that the TIRC/CTR sponsor credible scientific investigations, conducted by scientists with appropriate credentials and positions. Some TIRC/CTR sponsored research was published in reputable peer-reviewed journals. This process was essential to the goal of legitimating the TIRC/CTR as a scientific agency, and providing Little and other members of the Scientific Advisory Board with a forum for their statements. But, as industry officials frequently observed in internal documents, the research conducted under TIRC/CTR auspices did not focus on the central questions relating to the health impact of cigarette smoking. The TIRC/CTR through its Special Projects also allocated funding on a non-peer reviewed basis for research projects associated with litigation and witness preparation.

Brandt WD, 127:11-22. Dr. Brandt's testimony captures the fundamental flaw in the defense strategy utilized by Defendants at trial. Defendants did not proffer persuasive evidence of the qualitative focus of research funded through the TIRC/CTR grant program, could not offer evidence explaining how Special Projects did anything but directly conflict with their public promises, and offered wholly incredible parsing and qualifications for their own candid internal assessments of the research program they sponsored through CTR.

3) Addiction

On the subject of addiction, since 1982 Defendants have intentionally made and continue to make material false and otherwise fraudulent statements about the addictiveness of smoking. Overwhelming evidence compels this conclusion; evidence rebutting it is scant to non-existent. At trial, Defendants paid little attention to their actual public statements, and offered little if any evidence to counter the mountain of internal documents and testimony proving Defendants' knowledge of and focus on nicotine and its role in smoking. To the extent that Defendants proffered a defense on this issue, it rested mainly on semantic and historical arguments about the use of the word "addiction" and on their insistence that their current public positions are fully aligned with the consensus view of the medical and scientific communities. As shown below, neither of these defenses has merit, let alone sufficient weight to overcome the United States' proof of fraud in this area. Fact and expert testimony, as well as Defendants' internal documents spanning five decades, firmly establish that Defendants have intended their statements about addiction to further the scheme to defraud by concealing what Defendants openly recognized internally – that smoking is an addiction driven primarily by the drug effects of nicotine.

A substantial portion of Defendants' internal research was animated by the understanding that nicotine was the most important chemical delivered by cigarettes, and their product research and development efforts had the overriding objective of harnessing and manipulating the power of nicotine and ensuring that their marketed products delivered enough nicotine to create and sustain addiction. Yet Defendants' scheme centered on not admitting that cigarettes – let alone a substance under their full control, such as nicotine – were responsible for causing disease in smokers. So they have chosen not to inform smokers directly that cigarettes deliver nicotine, an addictive drug that causes dependence in 85% of smokers, and thereby keeps them inhaling toxic and carcinogenic chemicals delivered along with the nicotine in cigarette smoke cigarette after

cigarette, day after day, year after year.[23]

The testimony of Dr. Henningfield provides the proper historical context for an inquiry into Defendants' public statements denying addiction. Dr. Henningfield offered the clear conclusion that by the early 1980s, the medical and scientific communities recognized that the results of clinical observations, laboratory research, and population studies together justified the conclusion that tobacco-delivered nicotine was addictive. Henningfield TT, 11/22/04, 6811:11-6812:2. In March 1982, the head of the National Institute on Drug Abuse ("NIDA") announced that "five major national and international reviews of this question, which have involved the most knowledgeable and experienced authorities in the area, have all reached the same conclusion: cigarette smoking is an addiction." JD-004305 (A); see also Henningfield WD, 132:10-134:13 (describing scientific basis for NIDA conclusion). Defendants' nicotine expert, Peter Rowell, readily conceded that NIDA did not change or invent any definition of addiction or dependence in reaching its scientific conclusion that smoking is a prototypic drug dependence. Rowell TT, 3/23/05, 16668:5-15.

In 1988, the Surgeon General issued a report titled "The Health Consequences of

[23] Indeed, **to this day** none of Defendant cigarette manufacturers publicly admit that nicotine is an addictive drug delivered in cigarettes. Defendants' current public statements on addiction avoid any mention of nicotine, let alone its role in addiction. See US FF § III.C(1)(d). Dr. Jack Henningfield and Dr. Michael Eriksen, both testified that Defendants' current statements about addiction omit material information and do not fully align with the conclusions of the medical and scientific communities. Henningfield WD, 104:23-109:22; Eriksen TT, 5/16/05, 21248:20-21249:15. Philip Morris and B&W have even taken affirmative steps to **withhold** information about addiction from smokers in recent years. In 1999, when Philip Morris purchased three brands (L&M, Lark and Chesterfield) from Liggett, it removed from the packages the statement "Smoking is Addictive," information Philip Morris Senior Vice President and General Counsel Denise Keane admitted is both correct and material. Keane WD, 39:13-40:1; Keane TT, 1/18/05, 10457:5-10460:16. And when B&W assumed responsibility from Star Scientific, a smaller tobacco company, for marketing the Advance cigarette in 2001, it eliminated the Star package "onsert" that contained references to addiction and the fact that people smoke for nicotine. Blackie TT, 10/26/04, 3899:15-3900:10; US 52963 (A); US 87216 (A).

Smoking: Nicotine Addiction" ("the 1988 Report"). US 64591 (A). The United States' addiction experts, Dr. Henningfield and Dr. Neal Benowitz, each among the world's leading experts in his particular field, were two of the four Senior Scientific Editors for the 1988 Report. The 1988 Report compiled and evaluated the body of existing evidence that had led all other expert bodies that had considered the question to conclude that smoking was a drug addiction. Henningfield WD, 139:21-141:5. The 1988 Report affirmed NIDA's 1982 conclusion that cigarette smoking is an addictive behavior, a drug dependency characterized by compulsive use, psychoactive effects, and drug-reinforced behavior.

In response to the emergence of a scientific consensus on this issue in the early 1980s, Defendants began making numerous public statements of four types:[24] (1) Smoking cigarettes is not addictive because some smokers can, and have, quit smoking on their own (e.g., "smoking is a truly personal choice which can be stopped if and when a person decides to do so" (US 22727 (A)); (2) Smoking cigarettes is not addictive because it does not lead to physical "dependence" (e.g., "the claim that there is a physical dependence to smoking is simply a desperate attempt to find some way to differentiate smoking from other habits" (US 85366 (A)); (3) Smoking cigarettes is not addictive because it does not induce "intoxication" (e.g., "Tobacco is not intoxicating, in direct contrast to any other substance that has been claimed to be addictive, from heroin and cocaine through to alcohol" (US 23036 (A)); (4) Smoking cigarettes is not addictive because cigarettes are not like other addictive drugs; rather, smoking is merely a pleasurable behavior (e.g., the "attachment" to smoking is in the same category as "tennis, jogging, candy, rock music, Coca-Cola, members of the opposite sex and hamburgers" (US 65625) (O)).

As to the first category of statements, there is simply no evidence in the record to support

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[24] Defendants' numerous addiction statements are presented in § III.C(1) of the United States' Findings.

the assertion that smoking is not addictive because a smokers can quit. Not a single defense witness could provide any support, scientific or otherwise, for this proposition. See Dawson WD, 49:5-20; Rowell TT, 16678:21-16679:4; Keane WD, 22:9-14.[25] It is essentially undisputed that this first type of statement was knowingly false when made.

The second and third categories of public statements may be addressed together. In each, Defendants purposefully cited to characteristics of addictive drugs – physical dependence[26] and intoxication – as **essential** when they knew they were not and had not been considered so for decades. It is true that in 1964, the Surgeon General's Report applied the definitions of "drug habituation" and "drug addiction" that had been published by the WHO's Expert Committee on Addiction-Producing Drugs in 1957, and that under those definitions, a drug was "addictive" if it induced "periodic or chronic intoxication" and generally caused users to experience physical dependence. Dr. Henningfield explained why, based on the limited evidence available at that time, the 1964 Report reasonably concluded that tobacco use should be classified as a drug "habituation." Henningfield WD, 115:7-119:4; JE 059895 at 350-52 (A).

But, as Drs. Benowitz and Henningfield testified, the scientific community abandoned the distinction between "addictive" and "habituating" drugs soon after release of the 1964 Report. Benowitz WD, 26:15-27:2-29; Henningfield WD, 122:20-123:22. Later in 1964, the same WHO Expert Committee that had created the classification system in 1957 eliminated it because it was

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[25] Moreover, Dr. Rowell confirmed that Defendants never expressed the view internally that the addictiveness of smoking or any drug was determined by whether people could quit or not. Rowell TT, 16677:11-16678:20. Dr. Rowell further confirmed that Defendants kept abreast of the medical and scientific literature on smoking, nicotine, and addiction. Id., 16634:1-5, 16637:25-16638:3.

[26] "Physical dependence" and "withdrawal" are generally considered equivalent concepts. The occurrence of withdrawal symptoms upon removal of the dependence-producing agent is the marker for physical dependence. Rowell TT, 3/23/05, 16701:10-13.

inadequate to account for the wide variety of substances that induced dependence. US 90105 (A). For example, cocaine was not "addictive" under that 1957 classification, because cocaine and amphetamine are two drugs that do not produce strong physical dependence. Henningfield WD, 119:5-23; Benowitz WD, 26:16-27:2; Rowell TT, 3/23/05, 16700:5-16701:9 (agreeing that cocaine and amphetamine are drugs of addiction, and have withdrawal characteristics and severity similar to nicotine).[27]

In place of the old classification system, the WHO substituted the single term "dependence," and defined it as "a state arising from repeated administration of a drug on a periodic or continuous basis." Under this definition, intoxication and physical dependence were **not** required criteria, because the WHO recognized that the characteristics associated with a particular drug dependence would "vary with the agent involved." US 90105 (A). Defendants introduced no evidence that since 1964, any organization or public health body with expertise in drug addiction has concluded that a drug must induce physical dependence or intoxication to be dependence-producing or addictive. Indeed, Dr. Rowell readily agreed that it has been his view since his scientific training in the early 1970s that a drug does not have to cause intoxication to be addictive. Rowell TT, 3/23/05, 16632:4-7, 16632:23-16633:2.[28]

Additionally, Defendants' public statements directly contradicted their own internal

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[27] Defendants' uniform choice to ignore the tremendous advancement in addiction science and to rely, in their public statements, upon criteria for addiction promulgated in 1957 and abandoned by 1964 is further evidence of their coordination on smoking and health issues in furtherance of the aims of the Enterprise. See, e.g., Harris WD, 211:21-214:3, 215:18-216:2 (explaining why the uniform testimony of Defendants' CEOs at 1994 Waxman hearings on addiction was evidence of continuing collusion).

[28] Dr. Rowell also rejected Defendants' claim that a drug is not addictive if it does not cause physical dependence. Id., 16633:3-10. Moreover, Rowell testified that by 1980 – before Defendants began their campaign of public denials of addiction – there was evidence that smoking **does** cause physical dependence. Rowell TT, 3/22/05, 16549:23-16650:15; Rowell TT, 3/23/05, 16736:12-23.

recognition that smoking could cause intoxication. See, e.g., Farone WD, 72:19-74:3, 78:17-80:14 (discussing basis for conclusion that Defendants understood smoking to be addictive and Philip Morris's knowledge of nicotine's role in smoking addiction). And Defendants similarly understood that smokers experience withdrawal symptoms upon cessation. US 20097 at 8676, 8708 (O) (1971 Philip Morris document stating that a realistic view of cessation would show "a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline"); see also US FF § III.C(1)(b).

Finally, as to the fourth category of statements – smoking cigarettes is a pleasurable behavior comparable to other non-drug related activities – Defendants denied to the public what they recognized repeatedly internally beginning in the 1950s: people smoke primarily because of the pharmacological effects of the drug nicotine. Defendants' own nicotine expert, Dr. Rowell, readily agreed that smoking cigarettes involves a drug and is not comparable to non-drug "habits" cited by Defendants in their public statements, such as jogging, playing tennis, or nail-biting. Rowell TT, 3/24/05, 16685:5-16687:19, 16633:24-1634:10.

The United States' Post-Trial Proposed Findings of Fact recount the incontrovertible proof that Defendants knew smoking was addictive because of nicotine. See generally US FF § III.C(1)(b). Indeed, documents consistently communicate that Defendants consider themselves to be in the "nicotine business" because nicotine is the "sine qua non" of cigarettes. See, e.g., US 22848 at 7837-7839 (A) (Philip Morris in 1969: "We have then as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine. . . . [N]one [of the psychological motives for smoking] are adequate to sustain the habit in the absence of nicotine."); US 20659 at 5684-5685 (A) (R.J. Reynolds' researcher in 1972: "Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects. . . . [T]he confirmed user of tobacco products is primarily seeking the physiological 'satisfaction'

derived from nicotine.").[29]

Moreover, testimony from former company employees affirmed that within their walls, Defendants openly recognized the addictiveness of cigarettes. Dr. Jeffrey Wigand, who worked for B&W from 1989 to 1993 as Vice President for Research and Development, testified that he had numerous discussions with high level executives of B&W and BATCo that clearly indicated that "throughout the entire BAT organization it was understood" "that nicotine was addictive." Wigand WD, 84:10-86:2. Dr. Wigand specifically testified that those executives and others at B&W often stated that "we are in the nicotine delivery business and tar is the negative baggage." Id.[30] Similarly, Dr. Farone testified that during his time at Philip Morris there was "widespread acceptance internally throughout the company – among executives, scientists, and marketing people" that nicotine was primarily responsible for addiction to smoking. Farone WD, 72:21-73:1, 74:10-23. Dr. Farone also participated in discussions with Philip Morris executives where they "candidly acknowledged smoking's addictiveness." Id. at 80:15-81:14.

Additionally, several witnesses who worked for Philip Morris – Dr. Farone, Dr. Mele, and Dr. DeNoble – gave uncontroverted testimony that Dr. DeNoble and Dr. Mele's research in the early 1980s showed that rats self-administer nicotine intravenously, a hallmark of drugs of

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[29] These and similar documents drafted by employees of other Defendants make clear that it is nicotine's pharmacological effects that Defendants consider so critical, not its "taste." Indeed, evidence in the record show that nicotine has a bitter taste, and one of Defendants' goals was to mask the taste of nicotine with tar, additives, and flavorants. See, e.g., Farone WD, 85:7-23; US 85271 at 8814-15 (A) (1976 RJR memo noting, "Nicotine is definitely an irritant in smoke and its taste must be blended out or modified by other constituents in the TPM to make smoke acceptable.").

[30] Dr. Wigand also testified that B&W CEO Tommy Sandefur's 1994 testimony before Congress that he did not believe that nicotine is addictive was flatly contrary to numerous statements Sandefur had made to Wigand and others at B&W, including Sandefur's frequent statement that "we need to hook 'em young and hook 'em for life." Id. at 88:23-90:9, 98:22-99:5.

addiction. DeNoble WD, 16:7-20:2; Mele WD 6:21-7:10. After a peer-reviewed journal approved the research for publication, Philip Morris ordered DeNoble and Mele to withdraw the article, and prohibited public disclosure of other nicotine research worthy of publication. After hearing about DeNoble's research, Philip Morris CEO Ross Millhiser asked Dr. DeNoble, "Why should I risk a billion dollar industry on rats pressing a lever to get nicotine?" To avoid that risk, in April 1984 Philip Morris suddenly shut down the lab and killed the rats. See US FF § III.C.(b)(i). The research directors were told that DeNoble's work "showed proof of addictive effects which was negative to the company position and that any research that was contrary to the company position in the areas of smoking and health and addiction would be shut down." Farone WD, 156: 6-15.

Defendants' efforts to conceal their knowledge of nicotine's powerful drug effects underscores that the information Defendants kept from the American public is material. Materiality is presumed for matters that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000); accord Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992). Representations relating to the addictiveness of smoking and nicotine delivered in cigarettes plainly merit that presumption. Further, Philip Morris Senior Vice President and General Counsel Denise Keane admitted on the stand that the fact that nicotine is a drug and primarily responsible for addiction is important, material information for a smoker. Keane TT, 1/18/05, 10533:5-10534:4.

Lacking evidence to challenge the United States' proof that their actual knowledge and state of mind directly contradicted their public statements, Defendants raised semantic and historical arguments about the definitions of "addiction" versus "dependence." They suggested that the primary difference between the 1964 and 1988 Surgeon General's Reports was that the definition of addiction was simply "broadened" in 1988 to encompass tobacco-delivered

nicotine. And they suggested that the conclusions in the 1988 Report – and the use of the word "addiction" instead of "dependence" – were motivated not by science, but by the desire of public health officials to demonize smoking in the public's eye by lumping it in with illegal drugs like cocaine and heroin.

Defendants' attack fails on several grounds:

- First, Defendants themselves – both before and after the 1964 Surgeon General's Report – internally referred to cigarette smoking and nicotine as "addictive." See, e.g., US 22034 at 3415 (A). Defendants also used the terms "dependence-producing" and "habituating" internally.

- Second, the consensus criteria for whether a drug was addictive evolved as scientific and clinical understanding of addiction evolved. Henningfield WD, 123:1-22, 146:6-12; Benowitz WD, 31:1-25. The criteria outlined in the 1988 Report reflected the progress in the understanding of addictive drugs in the 31 years after the 1957 WHO classifications. Defendants' own witness, Dr. Rowell, agreed that the definition of drug dependence in the 1988 Report was correct. Rowell TT, 3/23/05, 16625:12-15.

- Third, Dr. Henningfield, Dr. Rowell, and documentary evidence established that the scientific community used the terms "addiction" and "dependence" interchangeably well before the 1988 Report. Henningfield WD, 110:9-22; Rowell TT, 3/23/05,16659:20-16660:12.[31] The introduction to the 1988 Report expressly stated that the terms were "scientifically equivalent." US 64591 (A); see also Rowell TT, 3/23/05, 16716:8-16717:1 (Rowell confirming that people use "dependence" and "addiction" interchangeably). Moreover, Defendants never told the public that the basis for their denial that smoking and nicotine are "addictive" was that the scientifically correct term to describe smoking or nicotine is "dependence-producing." Keane TT, 1/18/05, 10447:23-10449:8; Dawson WD, 37:4-9.

Defendants have intentionally maintained and coordinated their fraudulent position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous. In this way, Defendants have kept more

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[31] While Defendants suggested that the decision to use the term "addiction" in the 1988 Report was made before it was ever written, the evidence shows that the terms were used interchangeably during the Report's development; indeed, comments by peer reviewers late in the process recommended that the title of the Report be changed to use the term "addiction" instead of "dependence." Henningfield TT, 12/1/04, 7510:15-7514:16 (discussing JD-054316 (A) and JD-012117(A)).

smokers smoking, recruited more new smokers, and maintained or increased profits. Additionally, Defendants have sought to discredit proof of addiction in order to preserve the argument that "smoking is a free choice" in litigation.

4) Nicotine manipulation

As part of Defendants' focused study of nicotine and its effects on the smoker, Defendants dedicated substantial resources to devising techniques to modify and manipulate the amount of nicotine that their products deliver. Dr. Farone, testifying from his personal experience at Philip Morris and as an undisputed expert in cigarette design, and Dr. Henningfield, based on extensive review of Defendants' documents, testified that Defendants have studied extensively how every characteristic of every component of cigarettes – including the tobacco blend, the paper, the filter, and the manufacturing process – affects nicotine delivery, and have utilized that understanding in designing their cigarettes. In light of Defendants' recognition that "no one has ever become a cigarette smoker by smoking cigarettes without nicotine," they have designed their cigarettes with a central overriding objective – to ensure that smokers can obtain enough nicotine to create and sustain addiction.

As a necessary corollary to Defendants' fraudulent denial that smoking and nicotine are addictive, Defendants have publicly and fraudulently denied that they manipulate nicotine delivery. Evidence establishes that Defendants' particular statements denying manipulation of nicotine have been intentionally deceptive, misleading, or otherwise fraudulent when made. Through these and other false statements, Defendants have furthered their common efforts to deceive the public and carry out their fraudulent scheme.

Considerable evidence introduced at trial establishes that Defendants spent significant time and money over decades to understand and manipulate the delivery of nicotine in their cigarettes, and that they intended and believed they had succeeded in ensuring that smokers of all

brands of their cigarettes consumed sufficient nicotine to establish and maintain addiction. Defendants cannot refute this evidence; instead, they have developed elaborate arguments suggesting that their statements that they do not manipulate nicotine are not fraudulent or misleading because their nicotine manipulation techniques do not actually work, or do not work in the way explained by the United States' experts. See, e.g., JD FF ch. 7 §§ III.B, IV. This line of argument is ignores the central point: Defendants' own internal evidence shows that (a) they intended to manipulate the nicotine delivery of their cigarettes; (b) they employed numerous design techniques because they intended and believed those techniques allowed them to successfully manipulate nicotine delivery; and (c) these efforts were driven by Defendants' widespread understanding that nicotine is an addictive drug and that cigarette smoking is a drug-driven addiction. Nevertheless, at the same time they were pursuing these techniques, Defendants fraudulently denied both their efforts to manipulate nicotine and their knowledge of nicotine's addictiveness.[32]

The United States' Findings summarize the largely undisputed proof that Defendants actively tried to manipulate the nicotine delivery of their cigarettes, and particularly their attempts to ensure that smokers will continue to receive sufficient nicotine from cigarettes that would deliver reduced tar and nicotine measurements under the FTC Method. See generally US FF § III.C(2)(c); see also Farone WD, 2:20-3:7, 3:12-22, 59:2-14, 84:16-85:16; Henningfield WD, 49:8-68:4. The evidence also establishes that Defendants undertook these efforts because they recognized the relationship between nicotine delivery and continued cigarette sales. See generally US FF § III.C(2)(b).

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[32] Defendants' arguments that their denials of manipulation did not start until the 1990s and about their purported lack of fraudulent intent in making these denials overlook the obvious. Defendants manipulate nicotine to maintain addiction; their denials of manipulation are part of their more general denial of the addictiveness of nicotine.

At trial, Defendants attempted to focus the Court's attention on the fact that some of the techniques attempted by Defendants did not work as well as they once thought, or work by poorly understood mechanisms. Defendants also attempted a blunt defense against the charge of nicotine manipulation by defining "manipulation" to require the addition of nicotine above the levels naturally found in the tobacco used in a cigarette and then denying that they "spike" or enhance the amount of nicotine in their cigarettes. They argue that their denials were targeted at the "negative connotation" of the word "manipulate" and that their manipulation of nicotine delivery in their cigarettes was not fraudulent because they "openly" tried to reduce the FTC-method nicotine measurements of their products. See, e.g., JD FF ch. 7 § II.B. This is both misleading and beside the point.

Despite their denials, the evidence shows that Defendants have attempted to alter the "natural" tar to nicotine ratio by increasing the amount of nicotine present in the tobacco blends used in low-delivery cigarettes. See, e.g., Whidby TT, 2/22/05, 14056:19-25; 14110:24-14111:14 (admitting that Philip Morris's Merit Ultima uses a higher nicotine blend of tobacco); Wigand WD, 101:10-102:14 (discussing Brown & Williamson's development of and attempts to use Y-1 high-nicotine tobacco). Defendants do not manipulate nicotine delivery solely by manipulating the amount found in the unsmoked cigarette; they also manipulate the delivery to the smoker, in the smoke, of a percentage of the nicotine present in the unsmoked cigarette, resulting in nicotine deliveries well above the FTC method measurement.[33] Farone WD, 86:10-12, 16-19; Farone TT, 10/7/04, 2021:6-13; Henningfield WD, 35:16-36:16.

As described in US FF § III.C(2)(b), Defendants have long recognized that the key

[33] It is irrelevant, therefore, whether public health authorities encouraged the development of higher nicotine-to-tar ratios, as alleged by Defendants. See JD FF ch. 7 § III.A. Defendants used the fruits of these efforts to mislead consumers by suggesting that the resulting products delivered less nicotine to smokers than they actually do deliver.

element in attracting and keeping smokers is creating a cigarette that allows smokers to obtain their optimum dose of nicotine. Consequently, while creating a market for so-called “low delivery” products that could be marketed to smokers as implicitly less risky than full-delivery cigarettes, Defendants were challenged to modify cigarettes’ nicotine delivery to ensure that smokers could continue to receive the optimum level of nicotine while smoking cigarettes that measure below the optimum level on the FTC machine. Defendants engaged in extensive research over decades to achieve that result. Their intent was clear, regardless of the efficacy of the design techniques they researched, developed, and implemented.

Defendants have developed and continue to use highly sophisticated technologies designed to deliver nicotine in ways that create and sustain addiction in the vast majority of individuals who smoke. Every aspect of a cigarette involves extensive engineering that relates to nicotine dosage and dosage control, ensuring that a cigarette smoker can pick up virtually any cigarette on the market and get an addictive dose of nicotine. Although cigarettes may appear to simply be tobacco rolled in fine papers, most cigarettes are manufactured using reconstituted tobacco material, additives, burn accelerants, ash conditioners, and buffering substances. Other cigarette design features used by Defendants to manipulate nicotine delivery include filter design, paper selection and perforation, ventilation holes, leaf blending, and use of additives (such as ammonia) to control the acidity or alkalinity of cigarette smoke.

Notwithstanding the substantial evidence that Defendants designed their products to deliver doses of nicotine sufficient to create and sustain addiction, Defendants have publicly and fraudulently denied that they manipulate nicotine and falsely asserted that the level of nicotine in a cigarette is inextricably linked to the cigarette’s tar level, that nicotine delivery levels follow tar delivery levels in cigarette smoke, that nicotine is an essential flavorant, and that because they do not add “extra” nicotine to cigarettes they are not engaged in manipulating the delivery of

nicotine through the smoke. Through these and other false statements, Defendants have furthered their common efforts to deceive the public regarding their manipulation of nicotine. These false statements are set out in detail in US FF § III.C(2)(a) and illustrated by the following examples.

In written statements and oral testimony before Congress in April 1994, the Cigarette Company Defendants, except BATCo, each fraudulently denied that they manipulated nicotine delivery or attempted to control nicotine delivery for any purpose other than consistency of "flavor." US 77011 (O). As illustrated by the internal documents summarized above, these statements were clearly false and/or misleading and were delivered as part of Defendants' overall scheme to defraud by denying the addictive properties of nicotine and misleading consumers into believing that they were ingesting lower levels of nicotine from "low delivery" cigarettes, when in fact all of Defendants' cigarettes were designed to deliver an addiction-sustaining level of nicotine. Defendants clearly intended their design features and additives such as ammonia to have the effect of delivering more nicotine than the levels measured by the FTC method, without disclosing this salient fact to their consumers, and pursued this goal because they recognized that an addiction-sustaining level of nicotine is necessary for a cigarette's commercial success. The evidence clearly shows that Defendants recognized the importance of nicotine in creating and sustaining addiction in smokers, and did everything in their power to ensure that all of their cigarettes could deliver doses of nicotine needed to addict and maintain addiction for the largest number of smokers possible.

5) Light and low tar cigarettes

The evidence shows that as part of a scheme to intercept potential quitters and dissuade them from giving up smoking, Defendants developed and introduced filtered and purportedly "low tar and nicotine" cigarettes, referred to internally as "health reassurance" brands. As their

internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their health reassurance brands as less harmful than regular cigarettes, and thus an acceptable alternative to quitting, while at the same time carefully avoiding any admission that any cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them smoking and buying cigarettes.

Defendants were aware, however, that because most smokers are addicted to nicotine, they would not smoke health reassurance cigarettes if those cigarettes did not supply enough nicotine to allow addicted smokers to sustain their addiction. Defendants therefore secretly, and deceptively, designed their low tar and nicotine cigarettes with what they referred to as "elasticity" of delivery to create the illusion of low tar and nicotine delivery and at the same time facilitate a smoker's ability to compensate for the reduced nicotine yield. By designing low tar cigarettes with elasticity of delivery, Defendants ensured that those cigarettes generated low tar and nicotine yields in machine testing that Defendants could use to create health reassurance marketing materials, but at the same time those cigarettes allowed addicted human smokers to obtain the much higher levels of nicotine that they needed to feel satisfied. As a result of smoker compensation, smokers inhale essentially the same amount of nicotine (and with it, tar) from low tar cigarettes as from regular cigarettes.

The evidence in the trial record establishes that Defendants have known for decades that filtered and low tar cigarettes offer nothing more than the illusion of reduced risk, and that their marketing communications that touted reductions in tar and nicotine were false and misleading. As demonstrated at trial, the scientific consensus outside of the industry confirms what Defendants have known internally for decades: low tar cigarettes offer no meaningful reduction in health risk to smokers.

Evidence shows that the vast majority of people who smoke today want to quit due to health concerns. Defendants perceive smokers' desire to quit as a significant threat, because they know that if anywhere near the number of smokers who want to quit actually do so, it will greatly diminish their profits. In 1978, a Tobacco Institute document offered the following assessment of the threat to Defendants' businesses: "low tar cigarette smokers . . . are potential cigarette quitters . . . . And more of them than the average have tried to quit smoking. Since low tar smokers are an expanding share of the market, **their greater desire to quit smoking poses a special problem for the cigarette industry**." US 21866 at 6008 (A) (emphasis added). Defendants knew that the main reason smokers wanted to quit was due to health concerns, and that many smokers felt guilty about the fact that they continued to smoke. They also knew and intended that smoking purportedly "low tar and nicotine" cigarettes would reduce smokers' guilt about smoking and thus make them less likely to quit. Dolan WD, 106:14-107:2; 118:4-8; 118:23-123:8; 126:8-16; accord Burns WD, 69:3-14.

Therefore, to deter smokers from quitting, Defendants fostered a "continuing controversy" denying that any negative health impacts had been proven, and at the same time introduced low tar and nicotine cigarettes to reassure smokers that they could eliminate or significantly reduce any potential risks by switching to these products. This strategy is revealed in an August 26, 1958 letter written by Clarence Cook Little, Scientific Director of the Tobacco Industry Research Committee (TIRC/CTR). In it, Little acknowledged that the public perceived Defendants' statements of reduced tar and nicotine as indications that these cigarettes were less harmful, and cautioned that, insofar as industry advertisements promised a reduction in harm, they implicitly admitted that cigarettes are harmful. Little wrote:

> Although this serious danger exists, I believe that it can and should be eliminated by prompt and unanimous action by the industry. This, I believe, should take the form of a simple statement or

> statements to the public by press, radio and television to the effect that: The increase in manufacture of filtered cigarettes is a response to public demand and to <u>nothing</u> <u>else</u>. . . . The industry does not admit adverse health effects of smoke constituents or nicotine as contained in its products previously or now sold, with or without filters.

US 20138 at 7480 (O) (emphasis in original). Defendants' marketing of low tar cigarettes and their public statements characterizing this marketing have been remarkably consistent with the approach recommended by Little in 1958.

Defendants' intent to deter quitting through health reassurance is abundantly clear from their own internal documents. As an example, a 1978 B&W memorandum stated:

> We search for answers to the questions 'Why do people smoke?' and 'Why do people stop smoking?' to provide us with direction in developing new products. Perhaps answers to another question 'How do people stop smoking?' could lend insight into the creation of new products. Having answers to this latter question **we might then design products to 'intercept' people who are trying to give up smoking**.

US 87138 (A) (emphasis added). Philip Morris researcher Myron Johnston revealed the essence of Defendants' fraud with respect to health reassurance cigarettes, and demonstrated that Defendants chose increased profits over truth and accuracy in their marketing materials and public statements, and the health of their consumers, writing: "The **illusion** of filtration is as important as the **fact** of filtration. Therefore any entry should be by a radically different method of filtration but **need not be any more effective**." US 20123 at 3857 (A) (emphasis added). Many additional such internal admissions were highlighted for the Court in the United States' third interim summation, TT, 4/21/05, 19724:20-24, 19728:3-19731:6, and closing argument, TT, 6/7/05, 23064:20-23080:13. Still others are identified in the United States' Findings. <u>See</u> US FF §§ IV.D(2)-(3) (documenting the extraordinary attention paid by Defendants to the need to deter smokers from quitting).

The evidence shows that even though low tar smokers have a greater desire to quit, their misperception of reduced harmfulness of low tar cigarettes dissuades them from doing so. The evidence shows that approximately 61% of current low tar smokers offer reducing their health risk as a reason they smoke light cigarettes. Likewise, research shows that approximately 44% of low tar smokers smoke light cigarettes to reduce their health risks without having to quit smoking. Still other studies show that approximately 42% of individuals who switch from full flavor cigarettes to light cigarettes do so as a step toward quitting. Together, this research makes clear that approximately 50% of all low tar smokers smoke lower tar cigarettes because they perceive them to be a "healthier" cigarette and a potential step toward quitting. Weinstein WD, 53:3-54:20; Benowitz WD, 60:8-22.

However, there is no evidence that switching to low tar cigarettes actually increases the likelihood of successfully quitting. Weinstein WD, 57:9-17 (citing Giovino, <u>et al.</u>, 1996)); Burns WD, 47:10-14. Evidence establishes that this is precisely what Defendants intend. <u>See</u> US FF § III.D.(2). Evidence further demonstrates that Defendants' conduct has had a dramatic affect on the cigarette market in the United States and has increased cigarette consumption. <u>See</u> US FF § III.D(2)-(3) (discussing in detail how Defendants have profited from consumers' mistaken perception that filtered and low tar cigarettes are less hazardous).

Despite overwhelming evidence such as that detailed above demonstrating that Defendants intended to market low tar cigarettes with health reassurance in order to deter potential quitters, Defendants have consistently maintained publicly that "all of their marketing activities had one and only one purpose: to impact the **brand choice** of adults who had already chosen to smoke." In addition, "[t]he tobacco companies expressly stated they had no interest in either (1 increasing the likelihood of anyone's beginning to smoke or (2) decreasing the likelihood that a current smoker would quit." Dolan WD, 56:3-14 (emphasis added). Evidence

demonstrates that Defendants' public statements are false. For instance, former Philip Morris Director of Consumer Research and Senior Vice President for Marketing and Sales Information Carolyn Levy testified that at the same time Philip Morris was making public statements that it had no interest in intercepting quitters, she was conducting research on ways to deter smokers from quitting. Levy WD, 33:12-34:9, 34:23-35:2. Levy testified that Philip Morris was "studying the factors that influence quitting," including whether "people quit because of health concerns," so that Philip Morris could "design products or line extensions of existing brands that addressed those factors." Asked if the purpose was "[s]o that people would keep smoking Philip Morris cigarettes rather than quitting," Levy testified: "Yes, if Philip Morris could design new products to address those concerns." Levy WD, 31:9-22.

Low tar marketing has the same purpose. Defendants acknowledge that, today, every major manufacturer continues to manufacture and sell low tar brands and brand extensions in both the "light" and "ultra light" categories. Ivey WD, 54:6-17; Bonhomme WD, 8:13-9:18. Defendants use these so-called brand descriptors such as "light," "medium," "mild," and "ultrahigh" to market their brand extensions as low in tar with full knowledge that a substantial number of smokers interpret these descriptors as indicating a less harmful cigarette. See US FF § III.D(3)(a) (discussing in detail Defendants' use of marketing to convey health reassurance). In fact, evidence shows that Defendants carefully targeted smokers concerned with the ill health effects of smoking with their health reassurance brand marketing. Dolan WD, 123:21-124:7. As just one example, in discussing RJR's Limit, a low tar cigarette, a 1976 memorandum made clear that the marketing and promotion of the product was intended to convey a healthy image based on its claim of being the lowest tar product on the market. The memorandum noted that "LIMIT will satisfy the needs of smokers who wish for the ultimate in low 'tar' assurance – providing the strongest health reassurances available in cigarettes today." US 22153 at 4094 (A).

Evidence also establishes that Defendants have known for decades that there was no basis to conclude that low tar cigarettes offered any reduction in disease risk over regular cigarettes. Defendants' knowledge is demonstrated in three primary areas: (1) Defendants' knowledge of the central role of nicotine addiction in smoker compensation; (2) Defendants' internal studies on mutagenicity and toxicity; and (3) Defendants' deceptive design of their cigarettes with elasticity of delivery.

- Smoker Compensation. Defendants have known for decades that each smoker has a particular nicotine requirement that he/she must satisfy in order to sustain his/her addiction and, as a result, smokers will inhale the same amount of nicotine, and with it tar, from low tar cigarettes and regular cigarettes. Benowitz WD, 55:11-22; 56:22-23; 57:5-9; 57:23-1; Benowitz TT, 11/2/04, 4762:23-24; 4763:14-16; Farone WD, 103:18-104:1; accord Farone TT, 10/12/04, 2169:18-19; see also US FF § III.D(4)(b) (detailing Defendants' internal understanding of smoker compensation).[34]

- Mutagenicity and Toxicity. Defendants' internal documents show they have known since at least the 1960s that not only did low tar cigarettes not reduce a smoker's risk of smoking-related cancer, but in fact may even **increase** that risk. By 1978, Philip Morris had substantial evidence that filter dilution, the main design technique used to reduce FTC tar and nicotine yields, was increasing the biological "activity" of the whole smoke condensate ("WSC") collected from its cigarettes. Farone WD, 119:7-120:15; 121:20-23; US 20298 at 3610-11 (O); US 21479 (O); Farone TT, 10/7/04, 1888:2-1889:5; 1891:17-19. Likewise, R.J. Reynolds reported in a 1992 internal presentation that lower tar cigarettes were more likely to cause mutations such as tumors and cancer than higher tar cigarettes: "Higher tar cigarettes tend to have lower Ames activity . . . than lower tar cigarettes." US 20830 at 3825 (O).

- Deceptive Design. Evidence also establishes that Defendants used their knowledge of compensation to secretly design their low tar cigarettes to achieve "elasticity" of delivery, so that they would register deceptively low tar and nicotine yields on the standardized testing machine operated by the FTC, but enable smokers to compensate and obtain much higher deliveries of nicotine and tar, deliveries high enough to create and sustain

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[34] Defendants' knowledge of the extent and effects of compensation and cigarette design is particularly evident in a 1975 Philip Morris report from Barbro Goodman, who concluded from smoker profile data that Marlboro Light cigarettes were not smoked like regular Marlboros. The report found that "[t]here were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers and Marlboro Lights smokers. . . . In effect, the Marlboro 85 smokers in this study **did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery**." US 20348 at 4486-4488 (A) (emphasis added).

addiction. As Dr. Wigand testified, compensation "was a design consideration that played a central role in all of the cigarettes manufactured at B&W as well as the other BAT Cigarette Affiliated Companies." Wigand WD, 8:11-17; 120:5-17. He explained that "Brown & Williamson consciously designed its cigarettes with elasticity of nicotine delivery in mind." Id. at 8:11-17; 121:21-122:14; 123:21-124:1. Defendants knew that it was necessary to facilitate compensation, because if they did not allow consumers to obtain a sufficient amount of nicotine to sustain their addiction, they would be more likely to quit. Farone WD, 3:12-15. See, e.g., US 85075 (O); US 26072 at 4915 (A); US 85094 at 4881 (A); US 21412 (A); US 85449 at 0305-0307 (A).

As part of their scheme to defraud smokers, Defendants withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation. Farone WD, 112:23-113:10 (Defendants' superior knowledge of compensation was closely held within Philip Morris and the tobacco industry and there was an "effort on the part of [his] co-workers at Philip Morris, including [his] supervisors, to restrict any public acknowledgment on the part of Philip Morris of the phenomena of compensation"). When RJR was presented with a report in or around 1971 concluding that FTC yields for low tar cigarettes were substantially and inaccurately low due to smoker compensation, RJR deferred publication of the paper solely because its "contents can be interpreted to be contrary to Corporation interests" and "might raise further controversy on the issue of 'tar' delivery to smokers." RJR found "nothing wrong with this paper as concerns work quality, scientific merit, or written preparation," but deferred publication because "the results of this study may be interpreted by adversary forces to mean that smokers receive much more 'tar' than FTC numbers indicate. Such interpretation would be damaging to our already besieged industry." US 85074 at 6315-6316 (O).

Notwithstanding Defendants' sophisticated, decades-old understanding of smoker compensation, in 1998, Defendants Philip Morris, RJR, B&W, and Lorillard jointly stated to the FTC that compensation was a "hypothesized" and "weakly documented phenomenon" and that: "**The manufacturers are not convinced that compensatory smoking behavior is a sufficiently common or documented phenomenon that consumers should be alerted to its**

existence" in the form of a disclosure warning. US 88618 at 89 (A) (emphasis added). This recent statement **opposing** public disclosure about compensation squarely contradicts defense counsel's assertion during closing arguments in this case that "[b]asically, this industry is the one responsible for bringing compensation to the floor." TT, 6/8/05, 23111:23-24.

Throughout this litigation, Defendants have repeatedly, and incorrectly, claimed that they could not have engaged in fraud with respect to low tar cigarettes, as it was known from the time the FTC Test was implemented in 1967 that, because different people smoke cigarettes differently from one another and the FTC Test could not account for these individual variations in smoking behavior, the FTC Test could not indicate with precision the amount of tar and/or nicotine that any individual smoker would receive. FTC News Release at 2 (JD-040254) (A); see also US FF § III.D(4)(b) (discussing in detail the difference between smoker compensation and individual smoker variation). In a failed attempt to excuse their wrongful conduct, Defendants have misleadingly attempted to equate individual smoker variation with smoker compensation. Individual smoker variation refers to the fact that one smoker may smoke his or her cigarettes – either regular or low tar – differently than another individual smoker, and that the same person may smoke his or her same cigarette differently at different times. No standardized testing procedure could ever account for individual variation, and there was never any dispute that the FTC method would be unable to perfectly predict the precise amount of tar and nicotine that any individual smoker would inhale. This type of variability among smokers is separate and distinct from compensation, which is **driven by nicotine addiction** and involves smokers smoking "low-delivery" cigarettes more intensely in order to achieve their particular desired level of **nicotine** intake. Therefore, a statement "that no two people smoke in the same way" is not a

statement about smoker compensation. Benowitz WD, 56:6-23.[35]

Defendants now concede that compensation exists (see, e.g., Opening Statement, TT, 9/22/04, 292:8-10). However, Defendants contend that smokers of low tar cigarettes receive somewhat less than precisely 100% of the nicotine and tar that they would receive from a regular, full flavor cigarette, and as a result, lower tar cigarettes are less harmful than regular cigarettes. The issue of whether compensation is exactly 100% is a red herring. As the Court learned from Drs. Burns, Benowitz, and Samet, compensation is "essentially complete," and – as every major scientific body that has examined this issue has concluded – low tar cigarettes have not reduced the risks of smoking relative to full-flavor cigarettes. Therefore, whether compensation is precisely 100% is immaterial. The bottom line is that, contrary to Defendants' claim that low tar cigarettes offer a health benefit, **the scientific consensus is that low tar cigarettes are not better for smokers' health**. Defendants failed to introduce any credible evidence to the contrary. See, e.g., US FF § III.D(4)(a)-(b) (discussing the bias, lack of qualifications, and lack of credibility of Defendants' expert witnesses).

In the face of overwhelming evidence showing that Defendants marketed health reassurance brands to intercept and deter potential quitters, Defendants have claimed that they were only following requests from the Government and public health authorities and responding

[35] While early FTC documents, such as the FTC's August 1, 1967 press release, indicate an awareness of individual smoker variation, they do not mention **nicotine** or **addiction** or evidence an understanding that nicotine addiction would lead smokers to obtain essentially the same amount of nicotine (and with it, tar) from so-called low tar cigarettes as they would from regular cigarettes. As such, the early documents upon which Defendants rely do not discuss smoker compensation, but rather individual smoker variation. JD-040254; Farone TT, 10/12/04, 2170:5-23. In fact, Defendants could not possibly have "come clean" on smoker compensation because, to the present day, no Defendant other than Liggett has publicly admitted the basic premise upon which smoker compensation is based – that **nicotine** is addictive. US FF § III.C(1). Thus, Defendants' claim that they told the FTC about smoker compensation is, at best, misleading. To tell smokers about individual smoker variation, as Philip Morris currently does on its website, does not inform consumers about smoker compensation.

to consumer demand that, according to Defendants, resulted from Government recommendations. Schindler WD, 65:11-18; see also TT, 9/22/04, 288:16-22 (Defendants' opening statement contention that "[t]he evidence will establish that the government and the public health community helped to create demand for lower tar and nicotine cigarettes"); TT, 6/8/05, 23225:14-17 (closing argument claim that "these defendants did what the government and public health community wanted them to do").

Defendants' claims are squarely refuted by the evidence. First, Defendants have a consistent record of disputing virtually every statement of the United States Surgeon General, attacking every single Surgeon General's Report on the health consequences of smoking, and publicly disparaging virtually every report and statement of the public health community identifying the harmfulness of cigarette smoking. Thus, it is preposterous for Defendants to claim that they were following the requests of the Government and the public health community. To the contrary, Defendants intentionally marketed and promoted low tar cigarettes as a healthier alternative to regular cigarettes to **prevent** smokers from quitting (see US FF §§ III.D(1)-(2), in direct contravention of the Surgeon General's primary advice to smokers, which has always been, first and foremost, to quit smoking entirely. Dolan TT, 12/8/04, 8071:8-8074:12; US 74603 at 4902 (A); US 64591 at 0211-0212 (A).

Furthermore, Defendants' claim that they "did what the government and public health community wanted them to do" is belied by the fact that there is **no evidence** in the record of internal industry documents where Defendants stated that they were designing and marketing filtered and low tar cigarettes because the mainstream scientific community or the FTC had asked them to. See, e.g., Dolan TT, 12/8/04, 8077:1-6 (testifying that review of internal industry documents revealed no such claim by Defendants).

Defendants' claim that they marketed filtered and low tar cigarettes only in response to

consumer demand is refuted by the fact that Defendants' spending on the marketing and promotion of filtered and low tar cigarettes over multiple decades was disproportionately higher than the market share of those cigarettes. The FTC's report for 1997 reveals that for nearly three decades (1967 to 1992), Defendants' marketing expenditures for low tar cigarettes greatly exceeded their domestic market share. US 76080 at 1799 (A). As the FTC noted in a 1976 report, "[t]he lower and lowered 'tar' and nicotine cigarettes have in the last year been the subject of an intensive promotional effort by cigarette manufacturers." JD-003563 at 4 (A). In 1979, cigarette manufacturers devoted about 67% of their marketing dollars to these products when the percent of sales represented by low tar was only 41%. US 76080 at 1794 (A). This evidence directly refutes Defendants' claim that they introduced low tar cigarettes only **in response** to consumer demand, and did not intend to increase demand. Defendants' false claim is merely a failed attempt to explain the inconsistency between their public position denying that any cigarettes caused disease and their marketing of filtered and low tar cigarettes as impliedly less harmful. Brandt WD, 137:22-138:18.

The evidence also proves Defendants did the exact opposite of what the Government and public health community called for. While members of the public health community were calling for the development of a truly low-delivery, truly less hazardous cigarette, Defendants – as Myron Johnston's 1966 report reveals – merely set out to introduce cigarette products that gave the illusion of reduced harm, so that Defendants could use their sophisticated marketing techniques to reassure worried smokers and keep them from quitting, to the great detriment of smokers' health. See generally US FF §§ III.D(3)(a)-(c) (discussing in detail the health effects of low tar cigarettes, Defendants' knowledge of smoker compensation, and Defendants' deceptive design of low tar cigarettes, respectively).

Defendants have fraudulently exploited the FTC test method to target and benefit

financially by deceiving smokers. Defendants have offered no evidence that any of their recent actions have significantly altered or remedied the misleading nature of their continuing deceptive design and marketing of filtered and low tar cigarettes, and the evidence adduced by the United States – including the testimony of Drs. Burns, Farone, and Henningfield – demonstrates that it has not. See generally Burns WD, 30:9-12; 62:5-7; Farone WD, 3:12-22; 4:20-22; 72:13-18; 115:19-116:2; Henningfield WD, 55:13-56:7; 66:14-67:12; 82:16-19. The consequence of this deception is found in disease and death from smoking-related illnesses that could have been prevented absent Defendants' fraud.

6) Youth marketing

The Court has previously observed that:

> Claims relating to Defendants' alleged targeting of children as replacement smokers are just one component of the overarching scheme to defraud which the Government has alleged. The Government's theory is that the component sub-schemes . . . collectively served the goal of sustaining and expanding the market for Defendants' cigarettes and maximizing their profits by defrauding consumers of the purchase price of cigarettes. The youth marketing sub-scheme can only be meaningfully assessed in the context of the entirety of the Defendants' alleged conduct.

United States v. Philip Morris USA, 304 F. Supp. 2d 60, 66 (D.D.C. 2004). The trial record establishes the appropriateness of assessing the youth marketing sub-scheme in the context of the entirety of Defendants' overarching scheme to defraud.

Evidence adduced at trial demonstrates that while Defendants undertook coordinated, fraudulent activity to deny and distort the health consequences of smoking in order to maximize their profits, they simultaneously engaged in coordinated, fraudulent activity in order to protect their ability to recruit new, youth smokers through cigarette marketing, often utilizing the same joint organizations that were initially created to carry out deceptive public relations campaigns related to disease risks. In order to protect each company's ability to continue to market to the

teenagers who are of such vital importance to their continued survival, Defendants have continually promised the public, both through the Tobacco Institute and individually, that they do not market to youth, that their marketing is only aimed at adult smokers, and that their marketing has no impact on youth smoking. These public statements are false and misleading and have been made to further the Enterprise's overall objective of maximizing Defendants' profits from the sale of cigarettes. They are part and parcel of Defendants' overarching scheme to defraud.

Defendants' fraudulent statements stem from their recognition, contained in internal documents written regularly for decades, that new teenage smokers were essential to their continued profitability. See US FF § III.E(4) (citing numerous internal memoranda and reports recognizing the importance of teenagers to cigarette sales).[36] At trial, Defendants did not challenge the fact that they recognized and accepted that the overwhelming majority of new smokers are teenagers, and that if a person does not start smoking as a teenager, he or she is unlikely to do so. As a result, Defendants have long had a shared interest in protecting their ability to market to youth in order to maximize profits. And the trial record shows that Defendants not only recognized the importance of protecting their ability marketing to youth, but

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[36] Typical of what Defendants observed, a 1981 report conducted by the Philip Morris Research Center entitled "Young Smokers Prevalence, Trends, Implications, and Related Demographic Trends" stated that "Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens. . . . The smoking patterns of teenagers are particularly important to Philip Morris." US 22334 at 0808-0809 (A). See also US 20688 at 9351 (A) (1974 internal R.J. Reynolds memorandum concluding that "most smokers begin smoking regularly and select a usual brand at or before the age of 18"); US 21493 at 1791, 1795 (A) (1973 internal Philip Morris Memorandum entitled "Incidence of Smoking Cigarettes" discussing a survey measuring smoking incidence among 12-17 year olds); US 20031 at 1030 (A) (1981 internal Lorillard document commenting that the company "must continually keep in mind that Newport is being heavily supported by blacks and the under 18 smokers. We are on somewhat thin ice should either of these two groups decide to shift their smoking habits"); US 21607 at 0930 (A) (1974 B&W Five Year Plan for all of B&W brands stating "the younger smokers' importance cannot be denied. They have distinct brand choices and association appears to exist between growth brands and segments, and the younger smoker").

acted in concert based on their shared interest.

Specifically, in light of their recognition of the importance of recruiting youths**,** Defendants were alarmed when, on January 22, 1964, the FTC published a proposed Trade Regulation Rule for the prevention of unfair or deceptive advertising and labeling of cigarettes in relation to the health hazards of smoking and gave notice of a proceeding for the promulgation of the Rule. US 75032 (A). The threat of oversight by the FTC was accompanied by the threat of public scrutiny of Defendants' marketing practices, and the two combined to form a serious threat to Defendants' profits. Defendants responded to the threat in the same way they had responded to the emerging scientific evidence concerning the connection between smoking and lung cancer a decade before – by acting jointly to protect their ability to market cigarettes, particularly to youth, without interference. Initially, the joint response took the form of the adoption of the Cigarette Advertising and Promotion Code, with simultaneous joint public relations strategies undertaken through the Tobacco Institute, and numerous public statements offered by Defendants individually denying that Defendants market to youth or to smokers under the age of 21.

Defendants adopted the Cigarette Advertising and Promotion Code ("Advertising Code" or "Code") in April 1964. At the time, they made public their adoption of the Code in an attempt to gain positive publicity and to persuade the public that they did not market to youth. For example, on April 27, 1964, Philip Morris, B&W, Lorillard, Liggett, RJR, and American Tobacco, through the Tobacco Institute, issued a press release entitled "Cigarette Manufacturers Announce Advertising Code" to promote their supposed establishment of "uniform standards for cigarette advertising." US 20517 at 1133 (O). In fact, there is no dispute that Defendants Philip Morris, RJR, Lorillard, Liggett, and B&W have all publicly stated that they adhere to the provisions of the Code, either individually or jointly through the Tobacco Institute. See, e.g.,

Orlowsky WD, 10:6-13. Defendants' election to publicly announce the decision to adhere to the Code was strikingly similar to their decision to publish the Frank Statement in January, 1954. In the Frank Statement, Defendants pledged to provide aid and assistance into the research effort into the disease risks of smoking, while denying the scientific evidence showing smoking to be a cause of lung cancer. Adopting the Code, Defendants promised the public that the Code would prevent them from marketing to youth. US FF § III.F, § 4011, 4067, 4073.[37]

From 1964 to the present, Defendants have used the existence of the Code as a crutch to support their outright denials that they market to youth. As set out below, contrary to their representations, Defendants aggressively pursued the youth market – both youth under 18 and youth under 21 – while publicly denying their activities. But the inadequacy of Defendants' purported adherence to the Code has not prevented them from continuing to utilize the Code for public relations in order to advance the goals of the Enterprise. Twenty years after all Defendants officially withdrew from the supervision of the Code Administrator, Defendants again mobilized, relying on the Code for their concerted promotion of a renewed commitment to adhere to marketing prohibitions. The initiative was referred to internally as the Youth Action Plan, and was put into effect "with much fanfare and PR" on December 11, 1990. US 57030 (A). As part of the effort to publicize a purported commitment not to market to youth, Defendants sent Tobacco Institute spokesperson Brennan Dawson to appear on television and provide

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[37] The Code provided that an independent Administrator was to evaluate Defendants' marketing efforts to ensure that they did not target young people. But Defendants' expert Dr. James Langenfeld admitted at trial, by 1970, all Defendants had abandoned the office of the Code Administrator, and the Advertising Code has had no enforcement mechanism since 1970. Langenfeld TT, 3/10/05, 15192:12-15193:17. Dr. Langenfeld acknowledged that, despite the indication in the Advertising Code that Code Administrator would pre-clear advertisements, "as a practical matter, that wasn't what happened," and that the FTC didn't undertake any effort to pre-clear advertisements after the Code Administrator's office was shut down in 1970. Langenfeld TT, 3/10/05, 15191:21-15192:3, 15193:18-1594:22.

statements to newspapers, making such assertions as, "If a child never picks up another cigarette, it would be fine with the tobacco industry." See, e.g., US 85153 (A), 85154 (A). The next year, the Tobacco Institute published a booklet titled "Smoking and Young People – Where the Tobacco Industry Stands" that cited the Youth Action Plan, asserting, "in 1990, the tobacco industry launched a set of bold, new initiatives designed to ensure that smoking remains an adult custom." US 22206 (A).

The reliance on the provisions of the Advertising Code as a basis for denying any youth marketing did not stop after the 1990 offensive. Public statements of purported adherence to the Code and its principles continued unabated. See US FF §§ III.E(2)-(3) (summarizing public statements in numerous fora). And at the end of the 1990s, when Defendants agreed to adopt corporate principles as part of the MSA, many Defendants took provisions of the Advertising Code verbatim and simply pledged their continued adherence to the Code. See, e.g., Orlowsky WD, 17:8-18:8; US 65080 at 0351 (O) (1999 current marketing statement from Philip Morris website referencing the company's purported continued adherence to Advertising Code); US 72407 at 0028 (A) (most recent website statement from B&W on corporate responsibility asserting that since the mid-1960's the company had adhered to voluntary industry marketing codes). In fact, when Lorillard announced the adoption of corporate principles in 1999, its CEO Martin Orlowsky even invoked the Code, stating, "For years, Lorillard, as a matter of corporate policy, has voluntarily and scrupulously followed the tobacco industry Cigarette Advertising and Promotion Code." Orlowsky WD, 10:14-11:5; US 54555 (A). And to this day, R.J. Reynolds cites the Code on its website, asserting, "Voluntary Cigarette Advertising and Promotion Code rules still in use by RJRT." US 65063 at 7553 (O).

The public relations activity centered around jointly developed strategies was undertaken in tandem with Defendants' parallel public assertions that they did not market to youth, that they

viewed cigarette smoking as "an adult custom," that they were committed to reducing youth smoking, and similar pronouncements. See US FF § III.E(2) (citing extensive public statements by Defendants). These statements continue to the present day, appearing on Defendants' websites, in promotional materials, in corporate principles and in various other fora, and there is no dispute before the Court as to whether the statements were made. Similarly, Defendants continue to assert that their marketing has no effect on smoking prevalence – that they market only to current smokers in order to influence brand switching – and Defendants do not deny stating the same. See id. (containing examples of Defendants' statements on the purposes of their marketing activity).

But throughout the long period, beginning in 1964 and continuing to the present day, when Defendants have publicly promised their allegiance to the letter of the Cigarette Advertising Code, denied youth marketing, and asserted that they only market to current smokers, they have steadfastly marketed cigarettes to youth and sought to recruit new smokers from the ranks of nonsmokers and former smokers. And the evidence adduced at trial conclusively establishes that Defendants' marketing continues to act as a substantial contributing factor to – or one of the causes of – youth smoking today, just as Defendants intend it.

Defendants chose this point – the purpose and effect of their marketing activity – on which to contest the United States' allegations relating to the youth marketing pillar of their overarching scheme to defraud. The defense was twofold: first, Defendants contended that they do not market to youth or even to nonsmokers; second, they contended that cigarette marketing does not cause youth smoking initiation. But the evidence of Defendants' marketing activity, contained in the form of internal memoranda, tracking reports, marketing plans and the executed marketing strategies for Defendants' cigarette brands, along with scientific study and testimony from expert witnesses proffered by the United States, establishes the United States' claims.

Indeed, the United States' marketing experts conducted **extensive** review of thousands of internal marketing documents and actual promotions from Defendants (compared the virtual absence of **any** such review by Defendants' experts, who studiously avoided looking to Defendants' actions).

Defendants cannot dispute the extensive documentary evidence indicating that they conducted research into young people's vulnerabilities to cigarette marketing and knew that youth were highly susceptible to marketing and price sensitive.[38] Defendants similarly cannot dispute the fact that for more than fifty years, they have used the full range of marketing tools available to them, including: advertising on television, radio, and billboards, and in magazines and newspapers; sponsoring events, such as sporting events, bar promotions, festivals, concerts, and contests; coupons, price reductions, and free packs with purchase; gifts with purchase (known as "continuity items") such as t-shirts, mugs, and sporting goods; direct-mail marketing through which Defendants send magazines, birthday cards, and other materials directly to individuals' homes; distribution of free cigarette samples at retail stores, promotion public events and other locations; and retail store ("point of sale") advertising and promotions, which often engulf a visitor to a convenience store or gas station.[39] Moreover, Defendants' expenditures on cigarette advertising and promotion have increased dramatically over the past decades, and remain high both on an absolute basis and relative to other industries. In the nine-year period

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[38] See US FF § III.E(4) & V.K(1) (referencing internal company documents discussing reasons for youth smoking initiation); US FF § III.E(6) (discussing Defendants' knowledge and exploitation of youth price sensitivity).

[39] See US FF § III.E(4)(a)(ii) (discussing in general Defendants' mass marketing expenditures over the years); § III.E(6) (discussing Defendants' price related marketing); § III.E(7)(b) (discussing Defendants' marketing at retail); § III.E(7)(c) (describing Defendants use of promotional items, sponsorship of events such as "bar nights," and sponsorship of sporting events); § III.E(7)(d)(discussing Defendants' magazine advertising and direct mail marketing).

from 1991-1999, for example, domestic cigarette advertising and promotional expenditures totaled $51.4 billion dollars (unadjusted for inflation). US 60663 (A).

Unable to deny the foregoing facts, Defendants were left to quibble with the terms used by the United States' marketing experts, contending that the conclusion that their marketing is a "substantial contributing factor" to youth smoking does not translate into a "cause," which somehow absolves them of liability for their marketing activities, irrespective of their public statements on the subject. The proffered defense fails on several levels. First, from a legal standpoint, it is immaterial to Defendants' liability whether they actually succeeded in their efforts to market to youth. As this Court has previously stated on numerous occasions, to establish RICO liability on the part of Defendants, the United States is not required to prove that they succeeded in their scheme to defraud. United States v. Philip Morris, Inc., 273 F. Supp. 2d 3, 6 (D.D.C. 2002) (completion of scheme to defraud not required under federal fraud statutes); Philip Morris, 116 F. Supp. 2d at 153 ("A defendant who uses the mail with the **intent** of defrauding someone of property is guilty (or in this case, liable), whether the attempt succeeds or not") (emphasis in original); see also Philip Morris, 304 F. Supp. 2d at 69-70 (rejecting Defendants' argument that marketing to youth is not part of a scheme to defraud).

Second, the trial record shows that the United States' experts, relying on appropriately focused, peer-reviewed scientific investigation, came to the reliable conclusion that Defendants' cigarette marketing is a substantial contributing factor to – or one of the causes of – youth smoking. See US FF § III.E (4)(a)(i & iii) (summarizing conclusions of Surgeon General's Reports, NCI Monographs, and Institute of Medicine reports). The scientific research that formed the basis for the conclusions of Dr. Michael Eriksen, for instance, included not only consensus reports, but also studies in a full panoply of disciplines which demonstrate that : (1) youth are aware of Defendants' marketing; (2) exposure to cigarette marketing results in more

favorable attitudes among youth toward smoking and smokers; (3) exposure to marketing effects youth intentions to smoke; and (4) exposure to cigarette marketing effects youth smoking behavior. Eriksen TT, 1/27/05, 11446:22-11449:5. As another example, Dr. Anthony Biglan offered extensive testimony concerning, *inter alia*, brand imagery in cigarette advertising and its appeal to adolescents. See US FF § V.K(1) (discussing Defendants' use of youth appealing brand imagery in its marketing). The foregoing testimony was complemented by the approaches brought to marketing by Dr. Robert Dolan and Dr. Dean Krugman.

The essence of Defendants' failed effort to dispute the conclusions of the expert testimony and lines of evidence establishing the causal relationship between cigarette marketing and youth smoking initiation was the continued insistence that a definitive trial, such as a controlled randomized study, had not been completed to state whether cigarette marketing causes of youth smoking.[40] See, e.g., Defs' Second Interim Summation, 2/24/05, 14381:9-14382:11. Controlled trials, however, are not the only scientifically valid way to demonstrate the effects of Defendants' marketing. Causal relationships can and have long been established by the weight of other scientific evidence, as Drs. Eriksen and Brandt explained at trial. Accordingly, there is no support for Defendants' urging the Court to reject the overwhelming weight of scientific study on the issue of the causal effects of cigarette marketing.

At trial, Defendants also sought to defend against the evidence supporting the youth marketing pillar by claiming that they never marketed cigarettes to youth and that, regardless of their past conduct, their marketing today has changed. Both lines of defense are unavailing.

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[40] Numerous witnesses have testified that ethical guidelines for scientific research prohibit controlled trials exposing teenagers to cigarette marketing to cause them to smoke cigarettes, an addictive and deadly product. See, e.g., Biglan TT, 1/11/05, 9788:24-9790:23; Eriksen TT, 1/27/05, 11439:8-11444:1. Indeed, Defendants' own expert, Dr. Janet Wittes, testified that she would not be involved in a randomized study exposing teenagers to cigarette marketing. Wittes TT, 6/1/05, 22536:24-22538:10.

Defendants used the courtroom in this case as a stage to repeat the mantra that they did not market to youth because their recent, official marketing plans do not explicitly state that target audiences were comprised of individuals under 18. Defendants' attempt to reduce the issue of youth marketing to this narrow issue is, at bottom, a misguided attempt to divert attention from the overwhelming evidence demonstrating that they did, and continue to, market to youth under the age of 18, as borne out my numerous plans, research reports, memoranda and other internal documents; it also ignores the sum and substance of their decades long false public statements, which include denials that Defendants market to anyone under 21.

Defendants have tracked the incidence and brand preference of youth. See, e.g., US FF § III.E ¶4565 (discussing Reynolds' development in 1981 of "AGEMIX" system to track smoking rates and incidence of individuals as young as 12); ¶¶ 4303-4304 (discussing 1969 Eastman study which included information on the cigarette behavior and attitudes of children as young as 11, provided to Lorillard at the time that it developed the Newport Pleasure campaign that it still uses today). At the same time Defendants were studying why youth start smoking, they were designing their marketing campaigns to appeal to the psychological needs of adolescents. See US FF § V.K ¶¶ 412-448 (discussing internal research examining what causes adolescents to smoke and whether their marketing effectively associates cigarette brands with youth appealing themes and imagery). Defendants have also positioned their marketing to reach the maximum number of youth viewers. See US FF § III.E(4)(a)(ii).

Defendants nevertheless turn to the MSA, a document that they have sought unsuccessfully to use as a barrier to keep at bay the consequences of their past and ongoing fraudulent conduct. Defendants claim that the MSA fundamentally changed their marketing practices and effectively prevents and restrains them from marketing to youth. But the evidentiary record before the Court establishes that Defendants have not changed their marketing

practices since the effective date of the MSA in a way that reduces the youth appeal of their marketing. Instead of committing to change, Defendants have redoubled their efforts to reach teenagers (and nonsmokers). Defendants' marketing expenditures have increased substantially since signing the MSA. US FF §III.E(7)(a). The latest Cigarette Report from the FTC, published just weeks before the filing of this Post-Trial Brief, shows that advertising and promotional spending increased by over 21% from 2002 to 2003, rising to a staggering $15.15 billion. FTC Cigarette Report for 2003 (2005) (available at http://www.ftc.gov/opa/2005/08/cigreport.htm).[41] Spending on magazine advertising increased by more than twice the increase in total expenditures, by 46.4% from 2002 to 2003. Id. at 3.

Defendants have not altered the youth appealing themes and images they use in their marketing campaigns. Among other continuing activities:

- Philip Morris continues to utilize the same Marlboro brand imagery in its direct mail marketing, at point of sale, and on Marlboro cigarette packs. LeVan PD, U.S. v. Philip Morris, 6/25/02, 124:14-17, 221:10-221:14; Biglan TT, 1/10/05, 9530:6-9533:3.

- Lorillard has not changed the themes of its principle advertising campaign for its Newport Brand – the "Pleasure" campaign which has remained constant for the past 30 years. The MSA had no impact on the Pleasure campaign, and Lorillard has not attempted to reduce the visibility of Newport advertising at retail. Instead, it has increased. Milstein TT, 1/10/05, 9312:1-9314:9; 9417:18-9421:25; Orlowsky WD, 30:14-31:5.

- B&W continues to use youth appealing imagery in the marketing campaigns for its Kool brand of cigarettes. B&W received numerous complaints that its B Kool campaign, which ran from 1997 to 2000, appealed to adolescents. In 2004, just before the start of trial, after B&W launched its Kool Mixx marketing campaign utilizing hip hop imagery, three states filed lawsuits alleging that the company violated the MSA's provision against youth targeting. See US 92037 (A).

- R.J. Reynolds continues to target adolescents through its magazine advertising, which was appearing in *Rolling Stone* magazine at the same time its President, Lynn Beasley,

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[41] The Court can take judicial notice of the FTC Cigarette Report for 2003. B.T. Produce Co. v. Robert A. Johnson Sales, Inc., 354 F. Supp 2d 284, 285 n.2 (S.D.N.Y. 2004) ("Courts have frequently taken judicial notice of official government reports" pursuant to Fed. R. Evid. 201).

> adopted written direct examination in the courtroom, under oath, asserting that the company had ceased advertising in those publications. RJR has also recently launched flavored cigarette brands such as Kauai Kolada and Twista Lime, with extraordinary youth appeal. See US 90119 (A); see generally US FF V.K (4) (describing R.J. Reynolds ongoing marketing of flavored Camel cigarettes).

Finally, the Court should summarily reject Defendants' contention that they spent more than $12 billion per year in 2002 and $15.15 billion in 2003 simply to speak to the 4-9% of smokers who may switch brands annually. The absurdity of this contention was brought out during the cross-examination of David Beran, the Executive Vice President of Strategy, Communications and Consumer Contact at Philip Morris, who indicated that 6.3% of smokers switched brands in 2002, while an additional 9.9% made alternate brand purchases. Each market share point, Mr. Beran explained, was valued at $155 million. Beran TT, 4/18/05, 19322:16-19323:24. Thus, the potential profit to be made in 2002 from switchers and alternate purchasers was $2.5 billion, id., and Defendants ask the Court to believe that they devoted $12 billion in marketing expenditures for a potential profit of only $2.5 billion. The Court should reject this contention. See US FF § III.E(4)(a), ¶ 4105 (quoting former advertising executive who handled tobacco accounts: "I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products").

The evidence, more fully set out in the United States' Post-Trial Findings of Fact, is clear: Defendants have fraudulently denied the true intent of their marketing activities for decades, in concerted fashion and individually.

7) Suppression of information

Throughout the past fifty years, Defendants have engaged in parallel efforts to destroy and conceal documents and information in furtherance of the Enterprise's goals of (1) preventing the public from learning the truth about smoking's adverse impact on health; (2) preventing the

public from learning the truth about the addictiveness of nicotine; (3) avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation; and (4) avoiding statutory and regulatory limitations on the cigarette industry, including limitations on advertising. These activities occurred despite promises by Defendants that (a) they did not conceal, suppress or destroy evidence, and that (b) they shared with the American people all pertinent information regarding the true health effects of smoking, including research findings related to smoking and health. See, e.g., Farone TT, 10/12/04, 2091:23-2092:14; Farone WD, 156:3-15 (Philip Morris wanted to bury "any research that showed smoke caused disease or nicotine was addictive.").

Defendants' efforts to suppress information were in direct furtherance of their scheme to defraud because disclosure of the information would have assisted the American public understand the truth about the negative health consequences of smoking, the truth regarding the addictiveness of nicotine, the truth regarding Defendants' manipulation of nicotine, and the truth regarding the lack of health benefits from smoking light and low tar cigarettes.[42] Moreover, the suppression of information is in direct conflict with Defendants' repeated promises to pursue scientific information regarding the health consequences of smoking and the addictiveness of cigarettes, and to make that information available to the American public. See, e.g., US 88680 (O), US 88331* (O), JD-012603 (O), US 88332 at 7124 (O), US 88681 (O), US 85343 (O) and

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[42] See, e.g., Wigand WD, 78:12-79:9; see also id., 26:3-17; US 89371 (A); US 78246 (A). Documents were sanitized by B&W lawyers to remove "contentious" or "sensitive" issues including:

> anything related to smoking and health, addiction, fire safe cigarettes, ETS, biological activity, additives (particularly those that dealt with liberating free nicotine from tobacco), compensation, free nicotine, elasticity, smoker behavior, and certainly safer cigarettes. In short, anything that could arguably suggest that nicotine or cigarettes were addictive, and anything related to the negative health consequences of smoking.

see generally US FF § I, ¶¶ 41-43, § III.A, ¶¶ 67-68, 74, 78, 81 (discussing promised to pursue and communicate the truth about the health consequences of smoking to the American public).

The suppression of information also protected Defendants from exposure in smoking and health litigation. Indeed, much of the documentary and testimonial evidence – which clearly and explicitly proves that Defendants suppressed information – contains references to the fear of litigation exposure from scientific information. The concern over litigation exposure as a basis for suppression is legion in the documents presented by the United States at trial.[43]

The testimony of leading scientists from both Brown & Williamson and Philip Morris confirmed Defendants' concerns over scientific information becoming available to plaintiffs in smoking and health litigation. And, at trial, Kendrick Wells, B&W Assistant General Counsel for Product Litigation, confirmed that throughout his 30-year tenure at B&W, the company was concerned that documents created by other BAT Group companies and statements made by employees of other BAT Group companies could adversely affect B&W's position in litigation in the United States. Wells WD, 5:15-6:18. The concern over the use of information against the Defendants in litigation was also expressed in documents that chronicle the Defendants' cooperative efforts to suppress and conceal information. US 21203 (O) (memorandum in which outside counsel warned the Committee of Counsel that "should the results of the survey prove unfavorable, they may be subpoenaed or otherwise fall into the hands of the FTC, a Congressional Committee, or a plaintiff in pending cancer litigation").

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[43] For example, in the late 1980s, David Schechter, in-house counsel for B&W's parent company, had two outside legal firms prepare memoranda analyzing the exposure to Defendants from production of scientific documents in litigation. Schechter WD, 20:12-22:5; US 28152 (A); Schechter WD, 28:15-29:17; US 52686 at 5579 (A); see also US 30935 at 5314-5315, 5319 (O). Similarly, in the early 1990s, Fred Gulson, in-house counsel for W.D. & H.O. Wills (B&W's and BATCo's sister company in Australia) obtained legal advice from no less than three law firms (Lovells, Clayton Utz, and Allen, Allen & Hemsley) regarding the ability to dispose of scientific documents to avoid exposure in litigation. See US FF § III.F(2)(d)(vii), ¶¶ 5066-5084.

As indicated previously, however, litigation exposure was not the only reason for the suppression of scientific information. See Wigand WD, 80:24-81:5. The suppression also acted to directly support Defendants' enterprise by utilizing numerous means of concealing information that would have allowed the American public to learn the truth about smoking, both its addictiveness as well as its negative health consequences.

- First, Defendants destroyed documents to prevent them from being released outside of the companies. See, e.g., US 21677 (O) (RJR scientists confirm they will remove documents from the research and development files if it becomes clear the documents will expose RJR in litigation); US 34839 (A) at 3682 (in notes of a BATCo meeting in 1986 it was reported that research documents would be destroyed under the guise of "spring cleaning").

- Second, Defendants encouraged their employees, particularly scientists, not to create documents that contained sensitive information, particularly information related to smoking and health and addiction. BATCO and B&W implemented the "mental copy rule" to prevent the creation of sensitive documents. The "mental copy" rule asked employees to "imagine that the memo, note or letter you are about to write will be seen by the person that you would least like to read it." The employee is then to "send a 'mental copy' of your document to a newspaper, one of your competitors, a government agency, or potential plaintiff. Now: would you still write the memo? If so - would you still write it in the same way?" US 87012 at 4434 (A). See also, US 87003 at 1805-1806 (O) (setting forth Philip Morris's company policy encouraging employees not to create sensitive documents because they may one day have to answer for the contents of the document "while sitting in a witness chair in a court room in a lawsuit").

- Third, Defendants employed lawyers to review and edit scientific documents to ensure that no contentious information was included in company files. See, e.g., US FF § III.E, ¶¶ 5116-5127, 5184-5221.

- Fourth, Defendants established company policies to ship or secret scientific information outside of the United States. For example, Philip Morris established a foreign research facility known as INBIFO and established company policies to prevent research documents from the foreign research facility from entering or being kept in the United States. Farone WD, 21:16-22:9, 147:11-152:15; Farone TT, 10/07/04, 1938:2-1939:16. Similarly in 1994, Tommie Sandefur, the CEO and Chairman of B&W ordered that its sister companies around the world stop sending research materials to the United States. Read PD, U.S. v. Philip Morris, 05/01/02, 178:5-16, 179:2-181:4; (US 47616) (A); Read TT, 3/22/05, 16437:22-16441:12.

- Fifth, Defendants employed company lawyers as repositories or conduits for scientific documents in an attempt to shield documents from production, even though they were not truly protected by the attorney-client privilege. One of the most notorious of these

arrangements involved the shipment of BATCo documents to B&W through outside counsel by the name of Robert Maddox. See US FF § III.E(3), ¶¶ 5136-5179.

Joint Defendants' Proposed Findings suggest that the United States' claims of suppression of information fail because the evidence adduced at trial represented only disparate actions taken by individual Defendants, not concerted actions by the Defendants taken together. See, e.g., JD FF, ch. 8, ¶¶ 811, 934. First, this assertion is simply wrong. The evidence at trial confirms that many of the actions to suppress information were joint efforts by all of the Defendants through the Committee of Counsel, through other joint organizations, or through Defendants' law firms, including Covington & Burling and Shook, Hardy & Bacon. Second, Defendants apply a legal standard that does not exist. There is no requirement that each and every action taken in furtherance of the enterprise involve more than one Defendant. It is sufficient that the acts of suppression and destruction were undertaken in furtherance of the goals of the Enterprise (chiefly, denying causation and addiction and seeking protection against legal judgments). Contrary to Defendants' contention, no Court has held that a racketeering act must be "engaged in jointly by Defendants" to constitute a racketeering act that is actionable under RICO. Instead, it has long been the law under RICO that "it is irrelevant that each Defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as [the fact finder] may reasonably infer that each crime was intended to further or [was related to] the enterprise's affairs." United States v. Elliot, 571 F.2d 880, 902-03 (5th Cir. 1978). Moreover, acts taken in furtherance of the Enterprise, even before an individual Defendant joined the conspiracy are actionable under Section 1962(d) if they further the objectives of the Enterprise. Salinas v. United States, 522 U.S. 52, 63-64 (1997).

At trial, Defendants attempted unsuccessfully to counter the evidence of their document destruction by focusing on whether they had created and retained formal "research reports."

Indeed, in several instances, Defendants emphasized that in audits of their science libraries purportedly enabled them to account for "most" of their formal research reports. This exclusive emphasis on formal written research reports, however, misses the point of the United States' suppression claims:

- First, the suppression claim is not just about destruction of documents, but about any form of suppression of information. For example, Defendants fail to account for the fact that the evidence demonstrates that they discouraged their scientists from creating documents. Throughout the BAT Group of companies – including Defendants Brown & Williamson and BATCo – this discouragement became a formal company policy known as the "mental copy rule." Scientists were encouraged to mentally copy documents to a newspaper or a plaintiff in litigation. If they would be concerned that the information in the contemplated document would be detrimental to the company they were told not to create the document. US 87012 at 4434 (A).

- Second, Defendants' focus on the existence of some or even "most" final written reports overlooks the fact that information was suppressed when Defendants' lawyers reviewed and edited drafts of those reports before they were finalized. For example, Graham Read, head of research and development at BATCo, testified that, at least twice during his tenure with the company, scientists were required to clear their documents through the legal function before the documents could be circulated or distributed. According to Read, the reason for the clearance process was the "clearly very substantial legal environment, legal issues occurring in the US." Read PD, U.S. v. Philip Morris, 07/25/03, 82:19-88:2, 93:21-95:1, 103:9-106:4, 107:20-108:10; (US 34874) (A); (US 20872) (A); (US 21,732) (O); (US 22076) (A).

- Third, Defendants' focus on "formal" research reports overlooks the suppression of important scientific documents that did not rise to the level of a formal research report. For example, chief B&W scientist Jeffrey Wigand explained that substantial information related to the position of company scientists on smoking and health, biological activity, and addiction was lost when company lawyer Kendrick Wells edited the minutes before they could be issued even within the company. See US FF § III.F.(2)(d), ¶¶ 5013-5021.

The issue before the Court regarding suppression of information is not merely whether formal written research reports were kept in company files, but whether important information regarding the health consequences of smoking and the addictiveness of nicotine was shared, as promised, with the American public. The answer to that question is no. First, information that exists even today in company files was prevented from being shared with the public for decades through improper attempts to route scientific documents through lawyers in an attempt to create

an attorney-client privilege where none properly existed. See US FF § III, ¶¶ 5136-5179. Second, for far too long, Defendants secreted information away from the American public and litigants by shipping or keeping documents out of the United States. Third, Defendants' lawyers controlled company scientists so that important avenues related to smoking and health, and addiction were not even pursued.

In arguments that make the absence of a legitimate defense to the evidence of suppression transparent, Defendants repeatedly suggest that the Court should ignore documentary evidence of suppression because the ideas contained in formal company documents were just "thought pieces" that were "never implemented."[44] Like the proverbial "dog ate my homework" excuse, Defendants' claims might work if made once, or perhaps twice. But, the repeated reliance on the fall back argument that they just never implemented yet another detailed plan cannot survive scrutiny. Moreover, this attempt to cavalierly dismiss clear documentary evidence of suppression was most often employed by Kendrick Wells, with respect to whom the Court noted, "it seems difficult to get a clear and straight and fairly timely answer from this witness." TT, 02/02/05, 11966:22-25.

Defendants also attempt to counter the mountain of suppression evidence by, in effect, questioning the truthfulness of every single witnesses who testified to the suppression of information. Defendants fail to articulate why respected scientists like Drs. Farone, DeNoble and Wigand would lie. They cannot identify a legitimate motive to question the truthfulness of Fred Gulson, a successful businessman who had absolutely no reason to testify beyond a desire to tell

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[44] See, e.g., JD FF, ch. 8, ¶ 846 (ideas for lawyer management of company scientists never implemented); ¶ 847 ("nothing came of this letter" between lawyers regarding how to manage company scientist); ¶865 (just because it was written in a formal company memorandum "does not mean that Reynolds acted on the document"); ¶ 965 ("these ideas were never effectuated"); ¶ 982 ("these procedures were never implemented); ¶ 984 ("this idea was never implemented").

the true story of the BAT Group's worldwide document destruction scheme, undertaken largely to protect American affiliate B&W. Mr. Gulson stepped forward, traveled all the way from Australia twice (for deposition and trial testimony), and subjected himself to not only cross-examination by defense counsel, but the invasion of his family's affairs by private detectives hired by Defendants to conduct an intimidating examination of his private life. US 89421 (A); Gulson WD, 57:17-60:14. Defendants can offer no legitimate basis for an assertion that the trial's other Australian witness, Mr. Welch, had any motive beyond a desire to tell the truth about document suppression by the member companies of the Tobacco Institute of Australia.

Moreover, Defendants fail to explain how it is that all of the witnesses who testified about suppression provided consistent testimony, supported by documentary evidence, despite the fact that (1) they worked for different companies, (2) they worked for Defendants at different times; (3) some of the witnesses were half way around the world; and (4) most of the witnesses had never met each other. Given these facts, the similarity and consistency of the testimony from these witnesses is truthful testimony of disparate people describing a concerted effort to suppress information from the American people.

In judging credibility, one of the trial witnesses that the Court should observe through the videotaped evidence presented is Nicholas B. Cannar.[45] The Court can and should draw a negative inference against BATCo because, during his trial testimony in this case, BATCO's long-time legal head, Cannar, refused to answer numerous questions on grounds that the answers might incriminate him. During his trial testimony in Australia, Mr. Cannar invoked the

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[45] The testimony of Nicholas Cannar contained in the record is trial testimony in this case. The United States obtained Mr. Cannar's trial testimony in June 2004 via the Letter of Request process and the Hague Convention. This Court granted Mr. Cannar immunity from prosecution under United States law for his testimony in response to this Court's Letter of Request. In re Cannar, No. 03-Misc-196 (GK) (D.D.C. May 30, 2003).

Australian self-incrimination statute (referred to in the Cannar transcript as "Section 128") to avoid answering over one hundred questions relevant to his role in the document "management" policies of BAT Group companies, especially defendant BATCo, as well as defendant Brown & Williamson.

The Supreme Court held in Baxter v. Palmigiano, 425 U.S. 308, 316-319 (1976), that in a non-criminal case, it is proper to draw a negative inference from a witnesses's invocation of self-incrimination privilege:

> [A]side from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Indeed, as Mr. Justice Brandeis declared, speaking for a unanimous court in the Tod case, supra, which involved a deportation: "Silence is often evidence of the most persuasive character." And just last Term in Hale, supra, the Court recognized that **"(f)ailure to contest an assertion . . . is considered evidence of acquiescence** . . . if it would have been natural under the circumstances to object to the assertion in question."

Id. at 319 (emphasis added; citations omitted; quoting United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923), and United States v. Hale, 422 U.S. 171, 176 (1975)).

Nicholas Cannar was BATCo's legal head during the crucial years that the BAT Group engaged in much of the document suppression and destruction that the United States' evidence has shown. It is therefore especially appropriate to draw a negative inference against BATCo based upon Cannar's failure to contest the numerous conclusions in the McCabe trial court decision, based upon his belief that answers could tend to expose him to criminal prosecution.[46]

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[46] In re High Fructose Corn Syrup Antitrust Litig. 295 F.3d 651, 664 (7th Cir. 2002) (Posner, J.) (proper to draw negative inference against corporate defendant under Baxter and its progeny where convicted former corporate officers refused to testify based upon self-incrimination privilege). See also RAD Services, Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 275 (3d. Cir. 1986) ("the mere fact that the witness no longer works for the corporate party

(continued...)

The BAT Group paid Cannar's legal bills, further supporting a negative inference against BATCo and B&W as the corporate defendants who are members of the BAT Group. US FF § III.F.(2)(d)(vii), ¶ 5062; Cannar Exs. 6 & 7, New South Wales Sup. Ct. (R. 4435; filed 11/24/2004, pursuant to Order #828); RAD Services, 808 F.2d at 276.

In addition, this Court may also consider Justice Brownie's assessments[47] of Cannar's credibility and demeanor over the multiple days of testimony and privilege assertions: "I think it is abundantly clear that Mr. Cannar may reasonably be supposed to have knowledge about a wide range of matters . . . and that, generally speaking, he has not been making a genuine attempt to give evidence about them." Cannar TT, 06/21/04 order (US 16236), 3:16-21.

b. The false, deceptive and misleading statements were material

The false, misleading, and deceptive statements and omissions that have been made by Defendants as part of their scheme to defraud, summarized above and described in detail in the United States' Findings are "material." A matter is material if:

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

Neder v. United States, 527 U.S. 1, 22, n.5 (1999) (quoting Restatement (Second) of Torts § 538 (1977)). As a general rule, deceptive advertising or claims permit an inference "that the

[46](...continued)
should not preclude as evidence his invocation of the Fifth Amendment"); Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1481 (8th Cir. 1987); Brink's Inc. v. City of New York, 717 F.2d 700, 710 (2nd Cir. 1983).

[47] Justice Brownie was the Australian judge who presided over the proceedings during Nicholas Cannar's nine days of testimony in this case.

deception will constitute a material factor in a purchaser's decision to buy." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965).[48] Moreover, materiality is presumed for matters that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000); accord Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992).

Defendants' false statements, misrepresentations and concealments about the principal aspects of the scheme to defraud – particularly about the adverse health effects of smoking cigarettes and exposure to secondhand smoke, including the link to premature death and disease, about the addictive properties of cigarettes and nicotine, and denials of youth marketing – are material because such false statements, misrepresentations, and concealment significantly involve heath and safety matters of concern to consumers and had a natural tendency to influence a person's decision to initiate, continue, or quit smoking, and also had a natural tendency to influence the decisions of others to initiate, forgo or otherwise affect efforts to address smoking and health issues. See Philip Morris, 304 F. Supp. 2d at 69 n.4. Defendants had reason to know – and Defendants' internal documents demonstrate that they in fact expressly recognized – that members of the public were likely to regard such matters as important in deciding whether to initiate, continue, or quit smoking. Id. at 67-69 & n.4; cf. Order #235, Mem. -Op. at 2; see also US FF §§ III.A, C & D.

Just as significantly, Defendants may not escape liability for their scheme to defraud by claiming that the public was not deceived or otherwise injured by their misconduct and could not

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[48] Accord FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40-43 (D.C. Cir. 1985) (holding that deceptive advertising touting Defendants' low tar cigarettes created an "inherent tendency to deceive" consumers and was material); FTC v. Wilcox, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) ("Express claims or deliberately-made implied claims used to induce the purchase of a particular product or service are presumed to be material").

have reasonably relied upon their fraudulent representations. As this Court ruled previously, it is well established that to establish a mail or wire fraud violation a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct.[49]

In accordance with these principles, the D.C. Circuit has repeatedly rejected the claims that "no fraudulent scheme existed because no reasonable [prudent] person would have believed [the defendant's] misrepresentations . . . [or] where the persons defrauded unreasonably believed the misrepresentations made to them." United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). Rather, the D.C. Circuit has explained that "it makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright. . . . The only issue is whether there is a plan, scheme or artifice intended to defraud." Id. at 1036 (quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980); accord United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), aff'd 526 U.S. 398 (1999); United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976); Deaver v. United States, 155 F.2d 740, 744-45 (D.C. Cir. 1946).

Likewise, it is not a valid defense that no reasonably prudent consumer would have relied upon or believed Defendants' fraudulent misrepresentations because of contrary evidence in the public domain regarding the nexus between smoking cigarettes and adverse health effects and addictiveness. The gullibility, negligence, or lack of intelligence of the intended victim is no defense, particularly here where victims of Defendants' scheme to defraud are non-smokers who

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[49] See Philip Morris, 304 F. Supp. 2d at 69-70; Philip Morris, 116 F. Supp. 2d at 153; Philip Morris, 273 F. Supp. 2d at 6; accord Neder, 527 U.S. at 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in the federal fraud statutes.").

began smoking cigarettes and became addicted in their youth. In a variety of contexts, the law recognizes that such minors are a "protected class" in need of special protection, because they lack "that full capacity for individual choice," Ginsberg v. New York, 390 U.S. 629, 649-50 (1968), and "are not assumed to have the capacity to take care of themselves," Schall v. Martin, 467 U.S. 253, 265 (1984). Indeed, the evidence establishes that Defendants designed their marketing to appeal to teenagers because of their vulnerability and because they believed that most of the non-smoking young people who become daily smokers in their youth will become addicted lifetime smokers. In the end, as discussed here and detailed in the United States' Post-Trial Proposed Findings of Fact, Defendants' fraudulent scheme had an enormous, deleterious impact on the American public.

c. The fraudulent scheme was carried out intentionally

The evidence introduced at trial by the United States proves that each Defendant acted with the requisite specific intent to defraud. Defendants claim that such proof is lacking because the United States has not shown that each and every racketeering act contains a misrepresentation made by an individual with specific intent to defraud. See, e.g., TT, 6/8/05, 23353:8-23356:9 (closing argument). On this point, Defendants misstate RICO and mail fraud law. First, the federal courts of appeals have repeatedly ruled that a mail or wire fraud offense does not necessarily require proof of any misrepresentation of fact or affirmative false statement, although such would be highly probative of a scheme to defraud.[50] Accordingly, the mail fraud statute

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[50] See Philip Morris, 304 F. Supp. 2d at 70; see also United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000); United States v. Richman, 944 F.2d 323, 331-32 (7th Cir. 1991); United States v. Falcone, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991), modified in part on other grounds, 960 F.2d 988 (11th Cir. 1992) (en banc); McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 (1st Cir. 1990); United States v. Cronic, 900 F. 2d 1511, 1513-14 (10th Cir. 1990); Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989); United States v. Rafsky, 803 F.2d 105, 108 (3d Cir. 1986); United States v. Clausen, 792 F.2d

(continued...)

covers all fraudulent and deceptive statements, including literally true statements that are deceptive in context – not just affirmative misrepresentations.[51] Liability for mail fraud attaches if under the totality of the circumstances, the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property.[52] Second, each racketeering act does **not** have to independently satisfy all of the "essential elements" of the mail and wire fraud statutes, because the content of the thing need not itself be fraudulent or substantive evidence of the scheme to defraud; the thing mailed need only be intended to further the scheme in some way. Schmuck v. United States, 489 U.S. 705, 715 (1989) (citing Parr v. United States, 363 U.S. 370, 390 (1960)); accord Philip Morris, 304 F. Supp. 2d at 70.

As pertains to the issues of corporate knowledge and intent in this case, Defendants are wrong as a matter of law and fact. First, the law of this Circuit does not explicitly premise corporate liability for fraud on proof that the particular individual who makes a fraudulent

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[50](...continued)
102, 105 (8th Cir. 1986); Blachly v. United States, 380 F.2d 665, 673-74 (5th Cir. 1967); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954).

[51] See, e.g., Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) ("A half truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled"); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) (holding that misleading newspaper ads and letters which were mailed "need not be false or fraudulent on their face, and the accused need not misrepresent any fact" since "it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading"); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) (collecting cases); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977).

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

statement or causes the use of the mails or wires on behalf of a corporation **personally** possessed the requisite fraudulent intent. Second, as a matter of fact, the United States has proven that persons at each company acted willfully and intentionally to further the scheme to defraud, including people who made public statements on behalf of Defendants.

1) Corporate acts, knowledge, and scienter

a) Defendants are liable for the acts of their officers, employees, and agents

Here, each Defendant is liable for the acts of its officers, employees, and agents. It is well established that since a corporation may act only through its agents, it may be held liable for the acts of its officers, employees, and other agents. This is true in both criminal prosecutions, as well as civil cases.[53] Therefore, a corporation may be held liable for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Restatement (Second) of Agency § 219 et seq. (1958), so long as the action is motivated, at least in part, to benefit the principal. Sun-Diamond Growers, 138 F.3d at 970; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir. 1984); Restatement (Second) of Agency § 236. However, the United States here need not show that the agent was acting **exclusively** for the Defendant corporation; it is enough that the employee was acting in part for the benefit of the corporation. Likewise, it is not necessary for an agent's actions to have actually benefitted the corporate entity. United States v. Sun-Diamond Growers, 964 F. Supp. 486, 490

[53] For criminal cases, see United States v. Wise, 370 U.S. 405, 407-09 (1962); United States v. Najjar, 300 F.3d 466, 483 (4th Cir. 2002); Sun-Diamond Growers, 138 F.3d at 970. For civil cases, see United States v. Brothers Constr. Co., 219 F.3d 300, 310-311 (4th Cir. 2000); Davis v. Mutual Life Ins. Co. of N.Y., 6 F.3d 367, 379 (6th Cir. 1993) (respondeat superior liability in RICO cases permissible, since "corporate principals may act only through their agents.").

(D.D.C. 1997) (citing cases).

If the act is done within the course of employment and with intent to benefit the corporation, the corporation is liable even if the act was unlawful,[54] or was done contrary to instructions or policies.[55] At trial, Defendants never suggested, and introduced no evidence to establish, that any acts alleged to be unlawful or in furtherance of the fraudulent scheme were not done either in the course of employment or with intent to benefit Defendants, or that any such acts were outside the express, implied, or apparent authority given to the employee or agent by one or more Defendants.

b) Defendants possess the collective knowledge of their employees and agents

Furthermore, it is similarly established that "the knowledge of the employee is the knowledge of the corporation." Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976).[56] Moreover, a principal is attributed with the knowledge acquired by its agent even if the information is never communicated to it, see, e.g., N.Y. Univ. v. First Fin. Ins. Co., 322 F.3d 750, 753-54 & n.2 (2d Cir. 2003), or even after termination of the services of that officer,

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[54] Egan v. United States, 137 F.2d 369, 379 (8th Cir. 1943); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d at 204-05; Automated Med. Labs., 770 F.2d 399, 407 (4th Cir. 1985).

[55] Egan, 137 F.2d at 379; Automated Medical Labs., 770 F.2d at 407; United States v. Hilton Hotels Corp., 467 F.2d at 1000, 1004 (9th Cir. 1972); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295, 1296-97 (10th Cir. 1972).

[56] See also United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000); United States v. Inv. Enters., 10 F.3d 263, 266 (5th Cir. 1993); Eitel v. Schmidlapp, 459 F.2d 609, 615 (4th Cir. 1972) (where defendant's agent fraudulently conveyed property to defendant, agent's knowledge of fraud would be imputed to principal even where no evidence of actual knowledge on part of principal: "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew."); Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179, 182 (4th Cir. 1935).

employee, or agent, see Acme Precision Prods., Inc. v. Am. Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970).

c) Unlawful intent may be established by the collective knowledge and intent of their employees and agents

It follows from the foregoing that a corporation "cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." United States v. T.I.M.E.-D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974).[57] Defendants' insistence that the Court focus exclusively upon the knowledge and intent of the particular employee or agent making the fraudulent statement or acting in furtherance of the scheme to defraud, without regard to the collective knowledge of the Defendants and their agents, ignores the well-established principle that corporations are liable for the aggregate knowledge of all employees and agents within (and acting on behalf of) the corporation.

A seminal case on the "collective knowledge" and intent doctrines is United States v. Bank of New England, N.A., 821 F.2d 844 (1th Cir. 1987). In that case, the bank was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court instructed the jury to consider the bank "as an institution" whose "knowledge is the sum of the knowledge of all the employees. That is, the **bank's knowledge is the totality of what all of the employees know within the scope of their employment**." Id. at 855 (emphasis added). As to intent, the Court instructed: "If you find that the Government has proven with respect to any transaction either that an employee within the

[57] See also William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 790, at n.16 (Perm. Ed.); accord William E. Knepper & Dan A. Bailey, Liability of Corporate Directors and Officers, § 1.02, at 4 (Supp. 1992).

scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, than you may find that the bank has willfully failed to file the required reports." Id.

On appeal, the bank challenged the trial court's instructions regarding the bank's knowledge and also intent. The bank contended that "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." Id. at 856 (citations omitted). The First Circuit rejected the bank's argument. "A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." Id. at 856.[58] In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead ignorance." Id. at 856.[59]

Earlier cases reached similar conclusions. Likewise, in cases after Bank of New England, courts have continued to allow agents' knowledge to be aggregated and imputed to the

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[58] The court also upheld the determination of intent. The direct and circumstantial evidence of specific intent in this case – evidence summarized briefly below and comprehensively presented in the United States' Findings – is exponentially greater in quantity and quality than the evidence deemed sufficient to uphold the finding of intent in Bank of New England.

[59] As the Eleventh Circuit emphasized in First Alabama Bank, N.A. v. First State Insurance Co., 899 F.2d 1045, 1060 n.8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person."

corporation.[60] In re Worldcom, Inc. Securities Litigation, 352 F. Supp. 2d 472 (S.D.N.Y. 2005) considered a challenge to accounting certifications by accounting firm Arthur Andersen under the fraud section of the Securities Exchange Act of 1934, which requires proof of "an intent to deceive, manipulate, or defraud." 352 F. Supp. 2d at 495 (internal quotation and citation omitted). The court relied on Bank of New England to hold that "plaintiffs in securities fraud cases need not prove that any one individual employee of a corporate defendant also acted with scienter. Proof of a corporation's collective knowledge and intent is sufficient." Id. at 497.[61]

In this case, many of the fraudulent, deceptive, and misleading statements were issued as press releases, paid newspaper statements, pamphlets, and similar documents in the name of the corporate Defendants themselves. For example, the Tobacco Institute's 1974 version of its pamphlet titled "The Cigarette Controversy" (US 23020 (O)) does not identify any individual speaker other than The Tobacco Institute. Likewise, Philip Morris's 1994 issue advertisement in the New York Times containing misleading and deceptive statements on nicotine and addiction titled "Facts You Should Know" (US 65446 (A)) was issued by Philip Morris. For such fraudulent statements, it is unnecessary to identify all particular individual persons who "uttered," contributed to, or approved the statements in those documents, and to prove the state of mind of each. Were such proof required, it would be unduly burdensome to enforce laws enjoining corporate fraud, and by elevating form over substance, would allow corporate

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[60] See, e.g., Sun-Diamond Growers, 964 F. Supp. at 491 n.10 (D.D.C. 1997) (noting that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation").

[61] See also Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 Colum. L. Rev. 1252, 1256 n.26 (1996) ("Under the 'collective knowledge' doctrine courts have found the required intent by imputing to the corporation the aggregate knowledge of more than one employee.").

wrongdoers to raise hurdles that insulate their liability.

Defendants do not seriously contest that, as a matter of law, they are liable for the acts of their employees and agents, or that they are charged with the collective knowledge of their employees and agents.[62] They argue, however, that "collective knowledge" is entirely distinct from "collective intent," and that the law in this Circuit requires that the United States must show that their fraudulent conduct was undertaken by people who themselves possessed the requisite intent to defraud. Defendants are wrong.

Two courts in this Circuit have relied upon the Bank of New England intent standard in assessing corporate liability. First, in 1996, the D.C. Circuit cited Bank of New England to support its proposition that acts of negligence by employees cannot be combined to create a wrongful corporate intent. Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). The Court of Appeals stated that in Bank of New England, "corporate knowledge of certain facts was accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depended on the wrongful intent of specific employees." Id. The Saba court did not interpret Bank of New England to require proof that the employees who ultimately performed the acts that triggered corporate liability had to themselves possess the requisite unlawful state of mind; if anything, the Saba court endorsed the "collective intent" standard by quoting the approved jury instructions from Bank of New England that "[t]he bank is deemed to

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[62] The evidence that Defendants' collectively had the knowledge demonstrating the fraudulent nature of their public statements, inter alia, on the health effects of smoking and exposure to secondhand smoke, on the addictiveness of smoking and nicotine, on their marketing to youth is overwhelming and set forth in the United States' Findings. One representative example is the testimony of Jerry Whidby, a scientist at Philip Morris for three decades, that even well before he started at Philip Morris in 1972, he "never doubted" that smoking was dangerous and caused cancer, emphysema, and other diseases, and that this fact was "common knowledge" among his scientific colleagues at Philip Morris. Whidby WD, 5:13-6:5, 6:12-19; Whidby TT, 2/22/05, 11412:1-11413:10.

have acted willfully if one of its employees in the scope of his employment acted willfully." Id.

Second, in Sun-Diamond Growers in 1997, the district court denied a motion for judgment of acquittal of a wire fraud conviction by a corporate defendant. Sun-Diamond claimed there was insufficient proof that it possessed the specific intent to defraud. 964 F. Supp. at 488. The court found that the jury's finding of intent to defraud was permissible, and that the person committing the unlawful acts was acting within the scope of his employment with intent to benefit the corporation. While in Sun-Diamond, the same individual who possessed the specific intent also engaged in and furthered the illegal scheme, nothing in that decision supports Defendants' view that corporate liability **requires** that the person committing unlawful acts be the same employee or agent who has the unlawful intent.

Indeed, imposing the collective scienter upon the corporation follows equity as well as the extensive legal authority cited above. Just as corporations cannot "ostrich" themselves away from liability by exploiting the corporate form to compartmentalize knowledge, they cannot evade liability by compartmentalizing intent. For example, in United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1986), an accounting firm was convicted for making and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1). The firm's chief operating officer, Ashida, advised the customer about the investment, and provided information to another employee, Whatley, for the actual preparation of the customer's return. Id. at 1450-51. At trial, the firm contended that a corporation cannot be guilty of a § 7206 offense "when the person who actually subscribes the false return believes it to be true and correct." Id. The district court denied the motion, and the jury ultimately convicted the firm.

On appeal, the defendant claimed that six of the convictions should be overturned because there was no evidence that Whatley, the preparer and subscriber of these six tax returns, possessed the requite intent to wilfully make and subscribe a false tax return. Id. at 1454. The

firm conceded that "Ashida, who supplied Whatley with all of his information regarding the straddle losses, did have the requisite intent," but pointed out that Ashida did not physically subscribe to the return. Id. After considering the argument, the court of appeals concluded that it was "completely meritless":

> If it were accepted by the courts, any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return. This interpretation of section 7206(1) defies logic and has no support in the case law. A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false income tax return.

Id. at 1454. In so concluding, the court precluded the organization from shielding itself from liability by artificially dividing its responsibilities and its knowledge and claiming the intent of its employees was not attributable to the corporation. See also United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 919 (4th Cir. 2003) (declining to adopt defendant's proposed "single actor" requirement that the same employee know both the certifying requirement and the wrongful conduct, because "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against [False Claims Act] liability.").

For the foregoing reasons, Defendants's insistence in this case that a "single actor" must personally engage in conduct that satisfies every element of a mail or wire fraud violation is incorrect. Defendants' argument is particularly meritless, given that Defendants are large corporations that purposefully delegate responsibilities and knowledge among hundreds or thousands of employees and agents, and rely upon the collective efforts and knowledge of these various persons, departments, and agents to function. Such a result would not only be contrary to extensive legal precedent, but inequitable, since "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew." Eitel v. Schmidlapp, 459 F.2d 609, 615

(4th Cir. 1972) (citing, inter alia, Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 222-24 (1923)). Therefore, Defendants are accountable for the collective knowledge and intent of their employees and agents.[63]

2) Employees and agents of every defendant possessed specific intent to defraud

To establish specific intent under the mail and wire fraud statutes, the United States must prove only that the fraudulent scheme was reasonably calculated to deceive. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791-93 (1st Cir. 1990). "Fraudulent intent may be inferred from the modus operandi of the scheme." United States v. Reid, 533 F.2d 1255, 1264 (D.C. Cir. 1976). And as detailed elsewhere herein, intent under the mail and wire fraud statutes may be proven not just by direct evidence of intent, but also by inference from the totality of the circumstances, including by indirect or circumstantial evidence. See, e.g., United States v. Alston, 609 F.2d 531, 538 (D.C. Cir. 1979) (totality of the circumstances); United States v. Sawyer, 85 F.3d 713, 733 (1st Cir. 1996) (indirect and circumstantial evidence). In addition, evidence establishing reckless disregard for the truth or falsity of a statement, as well as willful blindness, may also satisfy the intent standard.

In this case, there is extraordinary evidence that Defendants took conscious, purposeful steps to protect, execute, and further the fraudulent scheme by making statements that were in direct conflict with their collective knowledge. As but one illustration, the members of the Tobacco Institute Executive Committee, comprised of Defendants' executives, were kept abreast

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[63] As but one example, one of the United States' racketeering acts is a January 1990 letter sent via the mails from R.J. Reynolds Public Relations Manager Jo Spach to Willow Ridge School, in which Ms. Spach told the school and its students that scientists did not know the causes of chronic diseases "reported to be associated with smoking." US 20813 (A). Under the foregoing authority, it is immaterial whether Spach personally possessed the information that made the statement false and fraudulent, as long as persons at Reynolds, such as scientists in the research and development department, had that knowledge (which they assuredly did).

of and approved TI communications directed at the public that promoted the "open question" position on disease causation and that denied that smoking or nicotine is addictive. At the same time, each of those executives' companies had knowledge showing the public statements to be false, deceptive, misleading, or otherwise fraudulent. Evidence of the existence and methods of Defendants' fraudulent scheme – including the Defendants' purposeful and conscious actions taken in light of their collective knowledge – reveals a "cumulative pattern" of decisions, actions, and inaction, see In re WorldCom, Inc. Sec. Litig., 352 F. Supp. 2d 472, 499 (S.D.N.Y. 2005), that is powerful circumstantial evidence mandating the conclusion that the executives on the Tobacco Institute Executive Committee, and thus TI itself, had the requisite fraudulent intent. Such intent is similarly established by Defendants' reckless disregard for the truth of their public statements about the health effects of smoking, smoking and nicotine addiction, and other smoking and health issues.

Under the legal principles set forth above, the Court should find that every Defendant possessed the requisite fraudulent intent. Most basically, the far-ranging scheme to defraud perpetuated by Defendants could have occurred only because of the awareness, knowledge, and purposeful conduct of many of Defendants' employees and agents. Numerous documents admitted to the Court record from the 1950s forward show that the routine recognition that Defendants' internal understanding of smoking's adverse health effects or addictiveness of nicotine contradicted the position they took toward the outside world. See, e.g., US 21794 (A) (internal memo of Philip Morris nicotine researcher acknowledging that nicotine is a drug while noting Philip Morris policy that "we must be **officially** heedless of the drug properties of nicotine") (emphasis added). And that same evidence often demonstrates that time after time, Defendants' employees accepted the discrepancy and chose courses of action intended to preserve the gap between internally expressed understanding and externally professed ignorance

and denial. Further, there is substantial undisputed evidence in the record that over the years, numerous executives and scientists of Defendants participated actively in the oversight and control of industry activities that were undertaken in execution of and in furtherance of the fraudulent scheme. These include, for example, the Chief Executive Officers of Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett who served on the Board of Directors and/or the Executive Committee of the Tobacco Institute; the General Counsels of the Cigarette Company Defendants who were members of the Committee of Counsel; the Boards of Directors of CTR and CIAR, both of which were comprised of employees of Defendants; and the numerous other bodies whose structures, functions, and activities are described throughout the United States' Findings of Fact. See, e.g., US FF §§ I.B (CTR) & I.C (Tobacco Institute).

Similarly, the evidence shows that members of the Enterprise who are not Defendants in this case – including law firms such as Shook, Hardy & Bacon and Covington & Burling, and other agents of Defendants – also possessed the requisite fraudulent intent. Individuals at these law firms and other entities undertook actions that were intended to protect against disclosure of Defendants' fraudulent scheme and actions to promote its unlawful objectives. The evidence of this is identified throughout the United States' Findings.

The following are examples of particular executives, employees, and agents of Defendants who possessed the specific intent required under the mail and wire fraud laws, with select – but in no way all – evidence supporting that conclusion. Many more are identified in the United States' Findings, where the evidence concerning the conduct of the individuals is detailed.

a) Philip Morris

Joseph Cullman III – Cullman's tenure as a top executive at Philip Morris entities spanned over three decades. He became President of Philip Morris's domestic unit in 1955, and retired as the Chairman Emeritus of Altria's Board of Directors in 1986. Along the way, he also

served as Philip Morris's representative on the Executive Committee and Board of Directors for both TI and CTR for many years.

Cullman was among the most ardent enforcers of Defendants' fraudulent agreement not to compete on smoking and health grounds. In 1957, he wrote to another tobacco company executive to complain that a letter to doctors that competed on smoking and health grounds was "not consistent with what we have been trying to accomplish in the industry in the past few years." US 36818 (A). In a 1971 "Face the Nation" TV interview, Cullman denied that cigarettes are hazardous: "We do not believe that cigarettes are hazardous; we don't accept that." US 35622 at 5560 (A). Evidencing his awareness that serious biological research would confirm the smoking-cancer link, Cullman a year earlier had rejected the request for a biological research program at Philip Morris in Richmond, instead approving the purchase of the INBIFO lab in Germany to avoid the "unattractive repercussions" if such research by Philip Morris were conducted and disclosed. US 20081 (A). Also in 1970, Cullman had called the head of Reynolds to demand – successfully – that Reynolds comply with the Gentleman's Agreement not to conduct live animal biological research in domestic facilities. US 26379 (O). According to the uncontradicted testimony of Dr. William Farone, Philip Morris's Director of Applied Research from 1977-1984, Cullman personally participated in discussions in Richmond with Farone and other high-ranking company scientists and executives that focused not on whether smoking causes disease – that was well accepted inside Philip Morris – but rather how the company should respond to that fact. Farone WD, 68:11-69:10.

Thomas Osdene[64] – Osdene was a Director and subsequently Vice President of Research

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[64] In three depositions – the State of Minnesota and State of Texas actions in 1997 and the Falise case in 2000 – Osdene repeatedly invoked his Fifth Amendment privilege against self-incrimination in response to questions about activities that occurred and documents that were (continued...)

at Philip Morris over 28 years. He was personally involved in many activities associated with Defendants' execution of their fraudulent scheme, controlled access to the most sensitive documents and information relating to smoking and health, including Philip Morris's overseas research, and was Philip Morris's liaison to INBIFO, the German laboratory Philip Morris purchased in the early 1970s to perform certain work it wanted to keep out of its U.S. laboratories. Farone WD, 20:18-21, 22:2-9, 146:12-148:23; US 50835 (A).

Osdene participated in Philip Morris's effort to keep Dr. DeNoble and Dr. Mele's work showing rat intravenous self-administration of nicotine from publication. DeNoble WD, 22:3-23:14, 39:12-40:17. He maintained a security safe at his home, and directed that important INBIFO documents be sent not to Philip Morris, but to his house, where he would "act on them & destroy." He also said that it was "OK to phone & telex (these will be destroyed)." US 34424 (A). According to Dr. Farone's testimony and other documents in evidence, Osdene's activities to restrict communications and control document distribution was supported policy at Philip Morris, not simply the paranoia of a single eccentric employee. Farone WD, 149:1-151:9.

Osdene also monitored the work that was sponsored by CTR to be sure it did not jeopardize the industry's public stance on disease causation and addiction. In uncontradicted testimony, Dr. Farone stated that Dr. Osdene participated in meetings of scientists and executives in Richmond, at which it was generally accepted that smoking causes disease. When CTR-sponsored research did threaten to undermine the public relations scheme in 1977, Osdene wrote to Philip Morris's head of Research & Development: "It is my strong feeling that with the

[64](...continued)
created while he was at Philip Morris. For several reasons, including Osdene's poor health and his stated intention to continue to invoke his Fifth Amendment privilege, the United States in its discretion opted not to depose or call Osdene in this case. In Order #605, the Court granted Defendants' motion in limine to exclude Osdene's prior Fifth Amendment deposition testimony from the trial record.

progress that has been claimed, we are in the process of digging our own grave. . . . I am very much afraid that the direction of the work being taken by CTR is totally detrimental to our position and undermines the public posture we have taken to outsiders. US 85951 (A). Osdene plainly knew that Defendants' "public posture" directly contradicted Philip Morris's internal understanding of smoking's health effects and nicotine's importance as the main pharmacological agent in smoking.[65] As to nicotine, in 1978, Osdene opposed funding research that could result in development of a chemical to block nicotine's effects, writing that such research "would have the potential of putting the tobacco manufacturers out of business." US 35204 (O).

Additionally, for many years Osdene worked regularly with Ragnar Rylander, the German professor who, under the veneer of academic independence, consulted with Philip Morris to help generate scientific information and published literature to bolster Philip Morris's activities in the area of ETS. See, e.g., Farone WD, 149:13-150:16 (discussing US 34424 and Rylander's relationship with Philip Morris and Osdene). Osdene's extensive role in Defendants' joint efforts to maintain "controversy" on the health effects of secondhand smoke exposure included representing Philip Morris at CIAR. According to Osdene, "It has been the purpose of CIAR as well as its precursor, the ETS Advisory Committee, to provide ammunition" in the tobacco industry's public relations and legal fights on ETS. US 20340 at 2384 (A). See generally US FF

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[65] As to adverse health effects, Dr. Farone testified in uncontradicted testimony that he and Osdene conversed about the health effects of smoking, and that there was "widespread acceptance" internally at Philip Morris – and within Dr. Osdene's R&D directorate – that smoking caused disease. Farone WD, 66:3-68:10. Yet in sworn deposition testimony in 1984 as a corporate designee, Osdene testified that Philip Morris did not agree that smoking was a proven cause of disease. Osdene PD, Cipollone v. Liggett, 10/3/84, 51:11-16.

§ III.A(2) (describing evidence of Osdene's role in Defendants' ETS activities).[66]

In short, the testimonial and documentary evidence compellingly proves that Dr. Osdene, with the full support of Philip Morris, knowingly and intentionally acted to ensure that Philip Morris's scientific conduct would not jeopardize the company's fraudulent public relations and litigation positions on smoking and health issues, and to further the fraudulent scheme.

Ross Millhiser – Mr. Millhiser was president of Philip Morris during the early 1980s, when Dr. DeNoble and Dr. Mele were conducting nicotine research in rats in the Behavioral Pharmacology lab at Philip Morris. When Dr. DeNoble traveled to New York in 1982 to present the results of his work, showing that rats would self-administer nicotine intravenously, Millhiser demanded of DeNoble, "Why should I risk a billion dollar industry on rats pressing a lever to get nicotine?" DeNoble WD, 24:8-25:1. By April 1984, Philip Morris had ordered Drs. DeNoble and Mele to withdraw from publication an article on their self-administration work that had already been peer-reviewed and accepted for publication in a scientific journal, and had dismantled in one day the Behavioral Pharmacology Lab, including killing rats involved in ongoing experiments. Id. at 38:4-16, 39:3-9; Mele WD, 25:19-26:21.[67]

Millhiser was also cognizant of Defendants' cooperation to maintain uniformity in their public denials that smoking and exposure to secondhand smoke caused disease. He received a

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[66] Yet Osdene also learned from INBIFO toxicity test results that secondhand smoke was "three times as active as mainstream smoke" at some concentrations. US 22921* at 2502 (O). Nevertheless, as Osdene admitted to Sam Chilcote of the Tobacco Institute in 1988, Defendants intentionally stayed away from sponsoring research that could confirm ETS's health effects: "In terms of the second issue, sponsorship of research into alleged health effects of ETS, with the exception of some [allergy] work by Dr. Salvaggio, we have avoided this issue." US 20340 (A).

[67] Dr. Farone was present when he and the other research Directors were told by Philip Morris lawyer Fred Newman that lab was closed because the research showed proof of addictive effects, and that any such work that contradicted Philip Morris's public position on smoking and health issues would be shut down. Farone WD, 156:3-15.

copy of a 1977 confidential memo from Philip Morris executive Hugh Cullman recounting the proposal from the head of Imperial Tobacco to Philip Morris, BATCo, Reynolds, Reemtsma, and Rothmans "to meet discreetly to develop a defensive smoking and health strategy for major markets such as the U.K., Germany, Canada, U.S. and possibly others." US 20407 (A). The strategy "would include a voluntary agreement, that no concessions beyond a certain point would be voluntarily made by the members [of the group] and if further concessions were required by respective governments, that these not be agreed to and that governments be forced to legislate." Id. Philip Morris did indeed send representatives from Richmond to the meeting at Shockerwick House, which resulted in Defendants' "Operation Berkshire" project. US 20409 (A); see also US FF § III.A(2)(g) (Operation Berkshire).

b) R.J. Reynolds

Samuel Witt, Ed Horrigan, and Wayne Juchatz – The evidence presented at trial showed that RJR attorney Wayne Juchatz, at the direction of General Counsel Witt and CEO Horrigan, undertook a "re-education" campaign after RJR's new head of R&D, Robert diMarco, had internally communicated his acceptance of the scientific evidence that smoking causes disease. DiMarco indicated that the "state of the art [knowledge] on cancer causation . . . over the past 20 years" had rendered RJR's legal defense theory obsolete, and suggested that the expert scientists the company presented in litigation lacked credibility and integrity. US 23009 (A).

Led by these three individuals, RJR conditioned management approval of diMarco's scientific program on his agreement not to take scientific positions that would "creat[e] any serious legal problems for RJR," such as communicating the suggestion that the company's existing products were unsafe. They also drafted a "position paper and R&D mission statement" pledging his fealty to RJR's position on smoking and disease that they required diMarco to sign and adopt. US 23009 (A); US 20746 (A); US 20747 (A); and US 20748 (A); see also US FF §

III.A(3). As was the case at Philip Morris, this incident indicates clear evidence that high-ranking employees of RJR took purposeful steps to perpetuate and preserve Defendants' fraudulent public relations position that smoking was not a proven cause of disease.

William D. Hobbs – Hobbs was Reynolds' Chairman and CEO in the mid-1970s, and served on the Tobacco Institute Executive Committee. See, e.g., US 88297 (O). He was personally and intentionally involved in furthering Defendants' fraudulent scheme. For example, in the early 1970s, at a time when Reynolds was publicly denying that they marketed cigarettes to youth, Hobbs personally approved the expansion of the marketing campaign for Camel cigarettes, titled "Meet the Turk," which was expressly designed to "increase [Camel's] share penetration among the 14-24 age group which . . . represent tomorrow's cigarette business." See US 78787 at 5556, 5557 (O) (recommendation with Hobbs' handwritten approval on cover memo); see also US 21609 at 6951 (A) (September 30, 1974 RJR presentation on marketing plans to the RJR Board of Directors emphasizing the importance of the "young adult market, the 14-24 age group").

Hobbs, with RJR counsel Sam Witt, also attended the 1977 Shockerwick House meeting along with high-ranking executives from Philip Morris, BATCo, Imperial Tobacco, Reemtsma, and Rothmans at which the tobacco industry formed its "defensive smoking and health strategy, to avoid our countries and/or companies being picked off one by one, with a resultant domino effect." US 22980* (O). Out of the meeting came the International Committee on Smoking Issues ("ICOSI") and the "Operation Berkshire" strategy. US 21908 (O).

c) Brown & Williamson

Thomas Sandefur – Sandefur, like the executives for the other Defendants who testified before the Waxman Subcommittee in April 1994, knowingly and intentionally made statements denying nicotine and addiction that flatly contradicted an extraordinary body of information at

B&W acknowledging both expressly and implicitly that smoking was addictive and that nicotine was the primary reason for that addiction. Dr. Wigand testified that Sandefur took particular interest in B&W's Project Rainbow to develop a highly flavored moist snuff product for young users that would acclimate and addict them to nicotine and thereby serve as a "gateway" to cigarette use. As Sandefur told Wigand several times, "We need to hook 'em young and hook 'em for life," referring to the need to addict people at an early age. At product development and review meetings, Sandefur stated his view that B&W was "in the nicotine business." Wigand WD, 84:10-86:2.[68] The direct and circumstantial evidence that Mr. Sandefur possessed specific fraudulent intent is compelling.

J. Kendrick Wells – Mr. Wells, a longtime counsel at B&W, on numerous occasions demonstrated his intent to protect the fraudulent nature of B&W's public statements from being revealed by taking steps to remove certain information from internal files and documents. For example, Dr. Wigand testified that Wells sanitized minutes from a meeting of BAT company scientists to remove references to potentially less hazardous cigarettes. Wigand WD, 35:12-53:22.[69] Wells also was an architect and advocate of a strategy to minimize disclosure of potentially damaging information by ensuring attorney oversight of scientific activity and

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[68] Brown & Williamson suggested that Wigand's testimony should be discounted because Mr. Sandefur is deceased, and therefore could not respond to Dr. Wigand. But Brown & Williamson did not offer testimony by any witness, or any other evidence, that contradicted or undermined Dr. Wigand's sworn fact testimony about the contradictions between Mr. Sandefur's internal and public statements.

[69] After numerous evasive answers by Wells during his examination, he finally admitted that he had, in fact, "produced an entirely different document" to take the place of the minutes drafted by the British scientist Ray Thornton. Wells TT, 02/02/05, 11963:20-11964:18. A highly paid, longtime corporate counsel, Wells insisted that in re-writing the minutes, he was acting as nothing more than a secretary to Wigand, a statement that lacks credibility on its face and was belied by the fact that Wells reviewed and edited the minutes from the same scientific meeting again the next year. Id. at 11969:13-11971:12; US 90132 (A).

documents. For example, he undertook efforts to remove categories of smoking and health documents – which he characterized as "deadwood" – from B&W's files.[70] As evidenced by US 79219, Wells noted that the hiring of a toxicologist, Scott Appleton, posed a threat to B&W's denials of causation and addiction: "Because of his credentials, any unfortunate statements he makes on key issues have the potential to be particularly troublesome in the hands of an adversary." US 79219 (A). As a result, Wells advised that "Scott should work especially closely with me for some time and Jeff [Wigand] should be wary in how he manages Scott in terms of areas and types of assignments and authority given to Scott." Id.

Ernest Pepples – Mr. Pepples, another longtime general counsel at B&W, was a core member of the Committee of Counsel from 1976-1987, and participated actively in shaping the activities of the Tobacco Institute and CTR, as well as keeping B&W's conduct consistent with the objectives of Defendants' fraudulent scheme. See, e.g., Wigand WD, 33:7-34:10 (explaining basis for B&W's denials that smoking is addictive). It was Pepples who wrote that "the primary function of this Committee of Counsel has been to circle the wagons, to coordinate not only the defense of active cases, but also to coordinate the advice which the General Counsels give to ongoing operations of their companies pertaining to products liability risks." US 20874 at 4089 (A).

And in 1982, for example, Pepples acknowledged frankly that Defendants' use of the FTC tar and nicotine yield numbers in advertising was deceptive and misleading. See US 21042 (A). Pepples also urged continued coordination and cooperation among Defendants on smoking

[70] For purposes of determining intent, it is immaterial whether Wells' document destruction and information suppression plans succeeded in the end. The fact that certain of the documents labeled as "deadwood" and marked for destruction may not have ultimately been destroyed does not change the fact that Wells intended that his course of suppressive action be undertaken on B&W's behalf.

and health issues. A 1983 letter to Jim Bowling of Philip Morris and Alexander Spears of Lorillard attached "a paper proposing recommendations which we might make to the Executive Committee." US 21061 (O). The attached paper entitled "Industry Research Support – Recommendations" listed Pepples' recommendations for consideration, including, "Maintain company cooperation – philosophies about research may differ at times, but goals should be the same." US 21062 (O).

d) Lorillard

Alexander Spears – For four decades, Spears was a leading protector of Defendants' fraudulent public relations positions. Spears joined Lorillard in 1959 as a Research Chemist, rose to head its Research and Development department, and then served as CEO from 1995 until retiring in 2000. He dominated Lorillard's conduct on key smoking and health issues for 40 years and represented Lorillard on many of the joint industry bodies and at myriad meetings of Defendants' representatives through which Defendants' plotted, coordinated, and executed the fraudulent scheme of the Enterprise. See generally US FF §§ I, III.A. In 1974, Spears recognized that CTR's research program was designed to serve Defendants' public relations needs, not to examine smoking effects on health. US 20049 at 1598 (A).

The evidence shows that Spears was part of the core group of people who sought to keep CTR away from research that might confirm smoking to be a cause of disease. In 1978, when Philip Morris Research Director Thomas Osdene developed a set of proposals for joint industry-funded research – including a list of "Subjects To Be Avoided," namely "1. Developing new tests for carcinogenicity. 2. Attempt to relate human disease to smoking. 3. Conduct experiments which require large doses of carcinogen to show additive effect of smoking" – Philip Morris's Vice President for R&D, Robert Seligman, forwarded that list on to Spears at Lorillard. US 85952 (A); US 35899 (A). Defendants introduced no evidence at trial that Spears disavowed or

disagreed with Philip Morris's suggestion to avoid the core topic on which Defendants had told the public CTR would focus.[71]

Spears also made misleading if not outright false statements about nicotine manipulation in 1994, when he told Congress that Lorillard does not set nicotine levels for particular brands of cigarettes, and that because the correlation between nicotine and tar is "essentially perfect," the nicotine level in cigarettes is therefore determined solely by the amount of tar, thereby disproving allegations of nicotine manipulation.[72] In 1981, however, Spears had stated explicitly that "low-tar" cigarettes used special blends of tobacco to keep the level of nicotine up while tar is reduced: "[T]he lowest tar segment [of product categories] is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine." US 77011 at 0148-0149, 0382-0383 (O); US 86932 (O). Ten years earlier, in 1971, Spears had received a memo stating that nicotine-to-tar ratios varied considerably among marketed cigarettes, and that "[t]he ratio of nicotine to tar can be controlled by blending high nicotine and tar grades with low ones resulting in a net gain of nicotine delivery over tar level." US 34293 at 6196 (A). See also Kessler WD, 18:9-24:14; US 34208 at 5001-5002 (O).

In short, the evidence presented by the United States proves that Spears intentionally and actively participated in the affairs of the Enterprise in furtherance of its unlawful objectives for

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[71] Spears himself acted affirmatively to prevent disclosure of truthful scientific information that could undermine Defendants' public relations positions. In July 1977, Spears directed a scientist who was to deliver a research paper to delete data in a study related to human smoking habits. US 20287 (O) ("I do not want Lorillard to report identifiable data on human smoking behavior").

[72] Finally, in October 1997, Spears restated Lorillard's fraudulent public denial that cigarettes are pharmacologically addictive because "the use of cigarettes does not result in euphoric intoxicating effects." US 85348 (O). As explained in US FF § III.C(1), the statement was misleading and fraudulent when made. As Defendants' own nicotine expert admitted, "intoxication" had not been a criterion of pharmacological addiction since 1964 and Defendants knew it.

40 years.

e) Liggett

Joseph Greer – Greer was a longtime in-house attorney at Liggett beginning in the early 1970s who rose to be Liggett's Vice President and General Counsel from 1977-1984. He was also a longtime member of the Committee of Counsel, and in that role oversaw and participated in Liggett's efforts, as a member of the Enterprise, to further its goals. In particular, Greer was intimately involved in reviewing and approving Liggett's funding of CTR Special Projects, ensuring that Liggett did not run afoul of Defendants' agreement not to compete on health-related issues in cigarette marketing, and executing Defendants' joint strategy toward the National Cancer Institute's Tobacco Working Group, in service of its fraudulent scheme.

As described in the United States' Findings, CTR Special Projects, Lawyers Special Projects funded through Special Account #4, and other research programs closely controlled by Defendants were intentionally established and designed by Defendants to generate scientific information to buttress their public and litigation positions. As set out above, Liggett participated in the review and funding of CTR Special Projects – even well after it was no longer a formal member of CTR, and Greer – along with Frederick Haas and Josiah Murray, other Liggett lawyers – responded to the regular requests that Liggett fund Special Projects research. See, e.g., US FF § I.D. Greer was personally aware that the ends-driven research supported by these programs was intended "to attempt to posture ourselves to defend product liability litigation and related attacks on our products," and was directly contrary to affirmative representations made by the Tobacco Institute and other Defendants about their commitment to independent research. See US 36218 (A).

When it came time for Liggett, in the late 1970s, to decide whether to market a cigarette that it had concluded was potentially less hazardous, Greer had to decide whether Liggett should

break from Defendants' longstanding agreement not to compete on health grounds in the cigarette marketplace. See US FF § III.A(3). As explained in the United States' Findings, Greer voiced concerns that development of the XA would cast doubt on the "party line," which maintained that smoking was not harmful to health. Ross PD, State of Washington, 10/22/98, 37:6-38:18. Other Defendants shared this belief, which is why they threatened Liggett's "very existence" if it proceeded to market with XA as a less hazardous cigarette. Meyer PD, State of Washington, 9/8/98, 107:5-111:1; Meyer PT, State of Washington, 11/10/98, 5511:4-5518:13.[73]

In short, the evidence in the record compels a finding that Greer was fully aware of Defendants' strategy of avoiding any activity that could raise the implication that Defendants knew their public denials of smoking's harms were fraudulent. And the evidence shows that Greer participated in Defendants' collective efforts to implement and further that strategy.

f) Council for Tobacco Research

Sheldon (Charles) Sommers – Sommers was employed by CTR for 22 years, during which he held a range of important positions, including member of the Scientific Advisory Board from 1967 to 1989 and SAB Chairman from 1970 to 1980. He was also a member of the CTR staff, first as Research Director from 1969 to 1972, and then as CTR Scientific Director from 1981 to 1987. See US FF § I.B(4). In his various positions at CTR, Sommers was integrally and knowingly involved in carrying out Defendants' scheme to use CTR in a manner contrary to Defendants' public representations.

[73] Greer was also involved in Defendants' purposeful efforts to stymie real progress by the NCI's Tobacco Working Group, a limited project that ran from 1967-1978. Greer, along with Fred Haas, agreed with other Defendants' lawyers in 1973 that Defendants should not submit a suggested list of studies to the TWG, to avoid any suggestion that Defendants agreed with the premise that cigarettes are harmful and might be made less so. US 34115 at 5542 (A) ("we had better keep our flanks protected so as to be able to the extent possible, to criticize research which will take place in the forthcoming years under Dr. Gori's direction"); see also US 22279 (A).

First, notwithstanding Defendants' claims that the members of the CTR SAB were disinterested scientists with no links to the tobacco companies that jointly established and controlled CTR, while serving simultaneously on the SAB and as CTR's Research Director, Sommers actively participated in Defendants' public relations efforts to discredit Oscar Auerbach's "smoking beagles" experiments. In April 1970, Sommers was enlisted by the Tobacco Institute to criticize the Auerbach studies and the American Cancer Society, which had supported the Auerbach research, at a press conference. US 86084 (O); US 47760 (O) (remarks of Joseph Cullman 3rd, as Chairman of the Tobacco Institute's Executive Committee, at the April 30, 1970 news conference, introducing Sommers).

Sommers also participated in other efforts to "spin" research results potentially adverse to Defendants' public relations positions. For example, when Defendants became concerned that mouse research by Microbiological Associates could be interpreted as supportive evidence that smoking causes cancer, they took steps to manipulate the research manuscript. Sommers wrote an Introduction for the manuscript that one of the researchers, in a sworn affidavit in 1997, called "seriously misleading because of the conclusions that are drawn and the failure to include the context in which the research was carried out." See US 31076 at 0257 (O); US FF § III.D(2).

More importantly, Sommers served as CTR's Scientific Director at the same time as he was serving on the SAB. In his capacity as Scientific Director, he was charged with reviewing and approving requests for Special Projects. See, e.g., US 75420 (A). He reviewed dozens of Special Project proposals during his tenure as CTR Scientific Director. See, e.g., US 26488 (A); US 85746 (A); US 86273 (A). Thus, at the same time he was participating in the SAB's supposedly "independent" program, Sommers was instrumental in executing the administration and support of research specifically conceived and intended by Defendants to bolster their public relations and litigation positions. Furthermore, Sommers himself received monies through the

lawyer-controlled Special Account #4 program. See, e.g., US 20798 (O).

And Sommers straddled both of his functions knowingly and consciously. He explicitly recognized that the SAB program was **not** focused on investigating whether smoking causes disease, as Defendants repeatedly told the public. Rather, Sommers stated that a CTR grant application's relevance to cigarette smoking and health was not the primary factor the SAB used in rating grant applications, but that "[s]cientific merit [was of] equal or of greater importance than relevance." Sommers PD, Cipollone v. Liggett, 10/2/86, 134:10-22, 135:4-6. Additionally, Sommers expressly recognized that "CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short." US 20281 (A).

This evidence, along with other evidence in the record, clearly warrants the conclusion that Sommers consciously and intentionally participated personally and actively in the execution of the component of Defendants' fraudulent scheme concerning their public commitment to sponsor, through CTR, "independent" research on smoking's health effects.

g) Tobacco Institute

William Kloepfer – Kloepfer was the longtime Vice President for Public Affairs at the Tobacco Institute and, inter alia, regularly led TI's College of Tobacco Knowledge. As early as January 1968, Kloepfer outlined a detailed review of Defendants' public relations situation and strategy, with the overall objective being "to attempt to increase substantially public awareness of the cigarette controversy; putting it another way, to make a greater portion of the public aware that widespread indictment of cigarettes as a cause of poor health does not amount to conviction." US 79902 at 5575 (O). By April 1968, in a memo to TI's President that was copied to Defendants' executives and lawyers, Kloepfer wrote that "Our basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." US 20213 (O).

Yet fifteen years later, Kloepfer was still actively promoting that same "open question" position. One particularly telling document evidencing Kloepfer's intent is his 1983 presentation to the "students" at the College of Tobacco Knowledge, Kloepfer stressed the conscious and purposeful role of his public relations operations in furthering the aims of the enterprise, in part by challenging and countering the messages of public health groups like the American Cancer Society. US 86172 (O). He spoke of industry public relations personnel as providing "bullets" for the "guns" of industry representatives in their efforts, noting that "[l]ast year 50 million Americans were exposed to our spokesmen" and "we work closely with our lawyers to ensure that what we say won't boomerang." Id. On the issue of whether smoking causes disease, "We think of it as a controversy. . . A subject far from decided . . . And through our spokesmen and literature, we make that point." Id. And concerning a study that Kloepfer claimed did not show that reducing smoking will reduce heart disease death rates, he stated: "Primarily through advertising, we intend to make the anti-smokers eat that study." Id. He also mentioned that "we [TI] and other national manufacturers associations" were working "quietly" with delegates to WHO's 5th World Conference on Smoking and Health to downplay smoking as a world health priority. Id. In closing, Kloepfer reiterated that "a united industry is our most potent public relations and legislative tool." Id.

Brennan Dawson – Brennan Dawson worked as Vice President of Public Relations for the Tobacco Institute during the 1980s and 1990s. In her public relations capacity for the Tobacco Institute, Dawson and other spokespersons appeared on various television shows broadcasted on all major networks in all fifty U.S. states and wrote and issued public statements. Merryman PT, Minnesota v. Philip Morris, 2/6/98, 2717:22-2718:21; US 89555 (O) (TI Response to Request for Admission No. 162). At trial, Dawson admitted that she and the Tobacco Institute intended the public to rely on the public statements the organization made on behalf of its tobacco

manufacturer members. Dawson TT, 1/12/05, 9930:2-18, 10110:1-6.

Intending the public to rely on her statements, Dawson made repeated false and fraudulent statements during television appearances on behalf of the Tobacco Institute. Frequently, Dawson publicly conveyed Defendants' fraudulent position on addiction and causation. See, e.g., US 89296 (A) ("what we think . . . is that the facts are not clear. The causal relationship has not been established"); US 21286 at 9476 (A) ("I can't allow the claim that smoking is addictive to go unchallenged"); US 87155* at 0455 (A) ("Is nicotine addictive? Absolutely not").

When asked about scientific support for the statements she was making on behalf of the Tobacco Institute, however, Ms. Dawson could not name a single public health organization that asserted, as did the Tobacco Institute, that it had not been proven that smoking caused disease during the time she was a spokesperson on behalf of the Tobacco Institute. Dawson WD, 76:8-11. Nor could Ms. Dawson name a single medical doctor, not associated with the tobacco industry, who took the position that it was not proven that smoking caused disease. Dawson WD, 76:12-15. Ms. Dawson also conceded that she could not cite a single reliable scientific source supporting the proposition that smoking – or any drug – is not addictive if the user can quit, and could not name any peer-reviewed scientific report or study published after 1983 that said that smoking and nicotine were not addictive because they may not produce intoxication or withdrawal. These concessions were made despite Ms. Dawson's admission that she had read the 1988 Surgeon General's Report. Id. at 38:1-2; 49:5-50:18.

The only inference to draw from Ms. Dawson's conduct is that she intentionally disregarded the scientific evidence and undertook no responsibility to determine the accuracy of her statements, instead communicating the industry's fraudulent positions.

h) BATCo

Sharon Boyse Blackie – In the 1980s and 1990s, Dr. Blackie was a central figure in BATCo's efforts, in conjunction with other Defendants, to counter the growing body of scientific evidence of the harms of exposure to secondhand smoke. For example, Blackie was a regular participant in the joint industry ETS consultancy programs, which aimed to recruit "independent" scientists to promote the industry's positions while hiding the tobacco industry's influence. See, e.g., US 22223 (A) (July 24, 1991 Blackie memo summarizing the ETS consultancy programs, and stressing the important role of U.S. lawyers because "for this type of programme it is absolutely essential to ensure that administration of the programme and contact with the consultants is made quite independently of the tobacco industry, and that no tobacco industry executives have direct contact with them.").

Consistent with Blackie's intent to conceal tobacco industry backing of "independent" scientists challenging the evidence of ETS's harms, in June 1992 Blackie also urged that documents be destroyed to guard against disclosure of links between Healthy Buildings International (HBI) and the tobacco companies supporting it. US 85632 (A) (Blackie cover note transmitting fax about a contract proposal between BATCo and HBI: "Please also note, more importantly, that this is an extremely sensitive document. HBI are currently under a considerable amount of investigation in the US about their connections with the industry. All references to companies in the quote has therefore been removed. Please do not copy or circulate this in any way and please destroy this fax cover sheet after reading.")

Dr. Blackie also helped BATCo further the Enterprise's fraudulent denials that smoking was addictive. In 1992, Dr. Blackie – then Dr. Boyse – circulated to B&W's J. Kendrick Wells BATCo's updated talking points on smoking and health issues. US 79172 (A). The cover letter stated: "Our rules on this one are that it is for internal industry use only, and should not, in its

entirety, be given to external parties." Id. The reference to the "industry" generally – not just BAT companies – and the document itself, which utilized precisely the same arguments and bases for those arguments as the other Defendants – make plain that Boyse was urging and facilitating uniformity in smoking and health public statements among all Defendants.

In 1994, Blackie herself wrote a letter to the editor of The Daily Telegraph in London that precisely tracked the bogus arguments of the other Defendants. US 23036 (A). Following the same substantive script as in the 1992 smoking and health talking points, Dr. Blackie wrote that smoking is not addictive because smokers can and do quit, often without medical assistance; that smoking is not a drug-based addiction; that smoking is not addictive because it does not cause intoxication, physical dependence, or tolerance; and that the nicotine in cigarettes does not make smoking addictive because aubergines and tomatoes also contain nicotine. See id.[74]

i) Altria

Charles Wall – After working for the tobacco industry at Shook, Hardy & Bacon for 20 years, Wall began working as in-house counsel at Altria (then Philip Morris Companies) in 1990, where he continued to direct and participate in activities and projects designed to protect and further Defendants' fraudulent scheme. Today, he serves as Altria's General Counsel.

During his time at Shook, Hardy & Bacon, Wall was involved in charting Defendants' public relations course on key smoking and health issues. He helped orient new industry executives to Defendants' positions on smoking and health issues. See, e.g., US 30917 at 0865 (A) (1990 letter from B&W lawyer J. Kendrick Wells to BATCo's Nick Cannar mentioning Wall's "briefing on smoking and health questions" for Alan Heard, BATCo's Head of Research

[74] Dr. Rowell, Defendants' own nicotine witness, testified that many of the central propositions in the letter were false or misleading at the time they were made. Rowell TT, 3/23/05, 16681:11-16683:24.

and Development). He participated in the Committee of Counsel meetings and was involved in the coordination of CTR Special Projects. See, e.g., US 86090 (A) (minutes of 1983 Committee of Counsel meeting at which the work of covert industry consultant Ragnar Rylander was discussed); US 30493 (A) (1990 letter recounting Wall presentation at Committee of Counsel meeting concerning Special Project funding for Carl Seltzer, longtime industry-supported scientist). In the late 1980s, Wall wrote a series of papers proposing that Defendants consider issuing a new "Frank Statement" that might redefine the industry's fraudulent public stance of denying that smoking was a proven cause of disease. See US 66598* at 7159 (A).

Once transferring over to Altria, Wall's service of the Enterprise and its objectives continued unabated. For example, Wall represented Altria in key meetings with other Defendants in the early 1990s at which Defendants plotted their campaign to promote scientific "controversy" on health effects of secondhand smoke. In 1991, Wall was involved in the formation of Defendants' jointly created International ETS Management Committee, and urged that it be organized to address the various "battlefields" upon which Defendants sought to fight on ETS. Wall identified the "battlefield areas would include science, litigation, media, government, employers/insurers, customers, transportation/public places, and employees." US 16174 at 2425 (O); see also US 86583 (O) (1991 invitation to Wall from BATCo's Nick Cannar to "ETS Strategy Meeting" along with representatives from Reynolds, B&W, and American Tobacco).

Wall also continued to attend Committee of Counsel meetings, continued to participate in CTR Special Project review, and represented Altria on the International Committee of Counsel in the 1990s – all critical programs and entities by which Defendants coordinated and executed the fraudulent scheme. US 21015 (A) (1992 meeting at which Wall presented Defendants' public relations plans in connection with Cipollone trial); US 86308 (A) (request to Committee of

Counsel to continue funding Rodger Bick's decade-long CTR Special Project); US 75121 (A) (1992 request to fund Ted Sterling's CTR Special Project to "challenge[] the scientific bases of many of the results on smoking and health published in the epidemiological literature"); US 20384 (A); US 86573 (A).

Wall was personally involved in maintaining international industry uniformity in its public statements on smoking and health. In 1991 he sent a letter to several other tobacco companies, including BATCo, explaining what Philip Morris meant in its statements that smoking was just a "risk factor" for disease: "This language means that there is a possibility that one day cigarette smoking may be scientifically established to cause lung cancer, but not yet." US 22725 (A). Similarly, in 1991 Wall reviewed and approved a "defensive" statement from CTR to respond to inquiries about CTR's ties to the tobacco industry, a statement which echoed CTR's public position – held since its founding in 1954 – that "scientific questions remain" about smoking's impact on health and that more research is necessary to investigate the diseases "with which cigarette smoking is statistically associated." US 56080 (A).

In 1992, Wall participated in considering proposals to fund research designed to provide Defendants ammunition in the "battlefields" he had previously identified. US 22850 (A). He also provided recommendations on allocation of Philip Morris's research funding, including continued funding to Ragnar Rylander and Peter N. Lee, both consultants who have played major roles in Defendants' campaign to influence the public and scientific view of ETS's harms. US 89416 (O); see US FF § III.A.(2)(i) (discussing evidence of Rylander and Lee's role in Defendants' ETS component of scheme to defraud).

In 1995, Wall was the Altria representative who conveyed Philip Morris's offer to Liggett that Philip Morris would pay Liggett's legal fees in smoking and health litigation only if Liggett agreed to continue using a particular lawyer and law firm, Latham & Watkins, that were already

familiar with Defendants' approach to defending tobacco litigation. US 86709 at 26 (A) (Philip Morris's Response to Requests for Admission). Since becoming Altria's General Counsel in 2000, Wall has continued to be involved in plotting the course for Altria's and Philip Morris's statements on smoking and health issues, including reviewing the statements on smoking and health Altria and Philip Morris have posted on their websites since October 1999. Keane WD, 10:14-11:4, 25:8-14; Parrish WD, 8:11-21.

In short, Wall's role in the development, maintenance, and execution of Defendants' scheme to defraud has been both active and sustained, and the evidence in the record establishes his intent.[75]

d. The false statements made in furtherance of the scheme to defraud are not entitled to First Amendment protection

It is well-established that where speech has been the vehicle of fraud, Courts may prohibit such fraudulent speech without running afoul of the First Amendment. "[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 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). As this Court noted earlier in this case, "The Supreme

[75] The trial record shows that other Altria attorneys participating actively to carry out the scheme to defraud. For example, Eric Taussig, another Altria lawyer, wrote multiple letters to former Philip Morris scientists Drs. DeNoble and Mele in April and September 1986, in which Taussig threatened them with legal action should they present or publish the results of their research relating to nicotine's action at particular brain sites and showing intravenous nicotine self-administration by rats. See US 22772 (A), US 44603 (A), US 21916 (A); see also DeNoble WD, 39:12-45:11 (discussing Taussig letters and phone calls); Mele WD, 28:13-32:21. As a result of Philip Morris's and Altria's actions, DeNoble and Mele's work on rat intravenous self-administration of nicotine has never been published. DeNoble WD, 45:9-11. Similarly, Taussig threatened former Philip Morris Director of Applied Research, Dr. William Farone, with a lawsuit for telling his college alumni magazine that Philip Morris's work on potentially safer cigarettes was constrained by its view that such work would constitute an admission that the current product was harmful. See US 90001 (A); Farone TT, 10/12/04, 2093:25-2097:21.

Court has recently reiterated, albeit in a different factual context, that 'the First Amendment does not shield fraud.'" United States v. Philip Morris USA, 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 anti-fraud laws. See, e.g., Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980); Donaldson v. Read Magazine, 333 U.S. 178, 190 & n.2 (1948) (governmental power to enact laws protecting people against fraud "has always been recognized in this country and is firmly established," and rejecting notion that "freedom of speech . . . include[s] complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes"). This rule is unsurprising, because fraudulent schemes inevitably involve some form of speech or communication.[76]

Indeed, in cases involving the same mail and wire fraud statutes at issue here, the Supreme Court and lower courts have rejected the contention that the First Amendment is a bar to liability where the fraudulent scheme involved speech. See Donaldson, 333 U.S. at 189-92; United States v. Ballard, 322 U.S. 78, 84 (1944); 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).[77]

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

[77] Courts have regularly 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.

(continued...)

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 Serv. v. Commodity Futures Trading Comm'n, 233 F.3d 981, 992 (7th Cir. 2000) (citations omitted). It therefore follows that commercial speech – which receives a lesser degree of protection under the First Amendment – may similarly be enjoined where found to be misleading or related to unlawful activity.[78] Thus, fraudulent representations that constitute commercial speech – such as Defendants' exploitation of deceptive and misleading brand descriptors like "light" and "low tar" in their marketing of cigarettes – may be enjoined without triggering constitutional concerns. As this Court observed, "[i]f 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. Philip Morris, 304 F. Supp. 2d at 71.

It is important to note that fraudulent representations are judged by the same standard of proof – preponderance of the evidence – applicable to the United States' civil RICO and RICO conspiracy claims. In its Memorandum Opinion accompanying Order #624, the Court noted that

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[77](...continued)
United States, 213 F. 320, 325 (8th Cir. 1914); United States v. Pike, 158 F.2d 46, 47 (7th Cir. 1946) (fraudulent advertisements); Crooks v. United States, 179 F.2d 304 (4th Cir. 1950) (per curiam) (fraudulent newspaper advertisements sent through the mails); United States v. Sylvanus, 192 F.2d 96, 103-106 (7th Cir. 1951); United States v. Owen, 231 F.2d 831, 832 (7th Cir. 1956); United States v. Pearlstein, 576 F.2d 531, 536 (3d Cir. 1978). See also United States v. Pirello, 255 F.3d 728, 730-31 (9th Cir. 2000).

[78] See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563 (1980) (the First Amendment does not protect commercial speech that is "more likely to deceive the public than to inform it"); Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999); United States v. DeFusco, 930 F.2d 413, 415 (5th Cir. 1991).

the "standard of proof is required [to show that speech is fraudulent] is a thorny issue . . . and remains to be decided." Order #624, Mem. Op. at 3 n.1. The Court did observe, however, that the Supreme Court's statement in Illinois ex rel. Madigan, 538 U.S. at 612 about "clear and convincing" evidence was "describing the Illinois law of fraud, not declaring a constitutional requirement applicable to all fraud actions involving speech." Id. at 2-3. The Court further observed that any language in Order #588 that might have suggested that Madigan mandates use of a clear and convincing standard of proof in all fraud actions is inaccurate. Id. at 3.

When deciding the standard by which fraudulent representations are to be judged, it is appropriate for the Court to look to the fact that the Supreme Court has suggested, and numerous courts have explicitly held, that the "preponderance of the evidence" standard governs civil RICO actions under Section 1964. In Sedima, SPRL, v. Imrex Co., 473 U.S. 479 (1985), which was a civil RICO action based on the same federal mail and wire fraud statutes at issue here, the Court observed that "[i]n a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard," and stated, "There is no indication that Congress sought to depart from this general principle here." Id. at 491.

The Supreme Court has further recognized that "[u]nlike a large number, and perhaps the majority, of the States, Congress has chosen the preponderance standard when it has created substantive causes of action for fraud." Grogan v. Garner, 498 U.S. 279, 288-89 (1991) (citing federal statutes and referencing Sedima's statements about the standard in civil RICO actions); see also Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (upholding preponderance standard in fraud action under Section 10(b) of the Securities and Exchange Act). Indeed, this Court has previously discussed the "substantial differences" between the federal mail and wire fraud statutes at issue here and common-law fraud. United States v. Philip Morris Inc., 273 F.

Supp. 2d 3, 6-7 (D.D.C. 2002). And lower courts have uniformly applied the preponderance standard to actions by the United States to enforce RICO's civil provisions. See United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985) (upholding and affirming district court's grounds for applying preponderance standard in action including mail fraud acts); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974).

The above authority confirms that actions under RICO's civil provisions proceed under the preponderance standard. In addition, in the context of fraud-based enforcement actions, the D.C. Circuit has found that placing the burden on the plaintiff to prove fraudulent misrepresentations and fraudulent intent by the defendant provides adequate protection against improper invasion of First Amendment rights. In Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995), the court stated: "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." 48 F.3d at 1254.[79]

6. Each Defendant Committed At Least Two Acts of Racketeering in Furtherance of the Scheme to Defraud

a. Defendants caused the alleged mailing and wire transmissions for the purpose of executing the scheme to defraud

In denying the United States' Motion for Partial Summary Judgment on Element That Defendants Have Caused Mailings and Wire Transmissions, this Court found summary judgment

[79] In contrast to labeling laws, here, RICO is aimed not at curtailing speech, but at curtailing unlawful activity. In particular, the instant RICO action is aimed at curtailing jointly devised and executed fraud.

inappropriate at the time of the issuance of that opinion, because the Court could not "evaluate, particularly in a summary judgment posture, who 'caused' a transmission independent of the further evaluation of whether the mail or wire transmissions were related to an existing scheme to defraud." United States v. Philip Morris USA, 316 F. Supp. 2d 13, 18 (D.D.C. 2004). Without question, the Court now has ample evidence of Defendants' scheme to defraud, and how Defendants' mail and wire transmissions related to their scheme to defraud. These overwhelming and indisputable facts were adduced during trial, in exhibits and testimony, and are replete throughout the United States' Final Proposed Findings of Fact.

The governing legal principles to establish a charge of mail or wire fraud under 18 U.S.C. §§ 1341 and 1343, set out previously in additional detail in the United States' Final Proposed Conclusions of Law, have been clearly satisfied. Many of the mailings include false statements and misrepresentations that are the gravamen of Defendants' scheme to defraud; others transmitted matters that assisted Defendants in carrying out their scheme. The United States has proven that Defendants have caused each of the alleged mailings and wire transmissions for the purpose of executing their scheme to defraud.

The United States established the mailings and wire transmissions underlying the racketeering acts[80] through prior stipulations by Defendants; admissions by Defendants; Defendants' advertisements and press releases to various newspapers and magazines[81] that were

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[80] Defendants also caused numerous other mailings and wire transmissions not specifically alleged as racketeering acts in furtherance of the scheme to defraud and the affairs of the Enterprise. They are detailed in the United States' Findings at § IV, ¶¶ 464-506.

[81] It is well established that when a defendant sends press releases and advertisements to newspapers and magazines for dissemination, it is reasonably foreseeable to the defendant that the newspapers and magazines would use the United States mails to send such matters to their subscribers, and therefore, the defendant "caused" the use of the mails within the meaning of the mail fraud statute. See, e.g., Carpenter v. United States, 484 U.S. 19 at 28 (1987); Atlas Pile,

(continued...)

thereafter disseminated to the public via: (1) the United States mails and wire transmissions; (2) televised statements[82] made by Defendants' representatives;[83] (3) Defendants' routine mailing practices;[84] and (4) other circumstantial evidence.[85] The United States detailed its proof regarding each racketeering act in its Post-Trial Proposed Findings of Fact, id. at § IV. ¶¶ 1-463.

b. Defendants are liable for the mailings and wire transmissions underlying the racketeering acts committed by CTR and TI

All Defendants, except for BATCo, are charged in the Amended Complaint with various mailings and wire transmissions of CTR and the Tobacco Institute while they were members of

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[81](...continued)
886 F.2d at 992); United States v. Bowers, 644 F.2d 320 (4th Cir. 1981); Pritchard v. United States, 386 F.2d 760, 764 (8th Cir. 1967); United States v. Weisman, 83 F.2d 470, 473 (2d Cir. 1936). Moreover, in Order #616, this Court found it "significant that in neither their Opposition to [that] Motion nor in their Opposition to the Government's Motion for Summary Judgment that Defendants Have Caused Mailings and Wire Transmissions have Joint Defendants contested the facts relating to publication, dates of circulation, or use of the United States' mails." Order #616, Mem. -Op. at 2 (citations omitted).

[82] 18 U.S.C. § 1343 explicitly provides that the statute applies when a person "causes to be transmitted by means of . . . **television communication** in interstate or foreign commerce" a communication to execute a scheme to defraud (emphasis added).

[83] In the United States' Final Proposed Conclusions of Law at 71-73, the United States detailed settled authority that to establish the requisite causation, it is not necessary to prove that the defendant personally mailed or transmitted the wire communication, or even knew about or intended the mailing or wire transmission to occur. Rather, it is sufficient that the defendant "caused" the use of the mails or the use of wire transmissions.

[84] Direct proof that the specific matter at issue was mailed or transmitted via the wires is not required. Rather, it is sufficient that the evidence shows that it was the defendant's routine or standard business practice to send or receive matters via the mails or wire transmission or other circumstantial evidence shows that it was more likely than not that the matter was sent or received via the mails or wires. United States' Final Proposed Conclusions of Law at 73 & n. 58 (supporting cases).

[85] A number of the racketeering acts involve correspondence mailed from one city to another. Others involve mailings prior to September 14, 1974, during the period that the United States Mails were virtually the only authorized means of mailing. See U.S. FF § IV. ¶¶ 6-9.

or involved in these organizations.[86] Defendants are liable for causing the mailings or wire transmissions involved in those on three independent legal grounds: (1) under liability principles as aiders and abettors, pursuant to 18 U.S.C. § 2(a); (2) pursuant to 18 U.S.C. § 2(b), for having "caused" an offense; and (3) under the predicate provisions of 18 U.S.C. §§ 1341 and 1343, the mail and wire fraud statutes, respectively.[87] All Defendants participated in the creation of, funding, or the activities of TIRC/CTR, and TI. See US FF §§ I.B & C and II. All Defendants except BATCo formed, funded, and staffed these groups for the purposes of furthering a joint venture, including to fund research that supported Defendants' position on smoking and health issues and to serve as a forum to issue public statements on smoking and health and related matters.[88] See id.

Under 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." See, e.g., In re Nofziger, 956 F.2d 287, 290-91 (D.C. Cir. 1992) ("[T]he law is well-settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating. . . . The doctrine is of ancient origin.") (citations omitted); accord United States v. Raper, 676 F.2d 841, 849 (D.C. Cir.

[86] For a listing of these Racketeering acts, see United States Final Proposed Conclusions of Law at n. 66.

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

[88] Even by Defendants' own "sterilized" accounts of these organizations, these trade associations were established for the purpose of jointly sponsoring "disinterested" research on behalf of the cigarette companies; to lobby and conduct public relations activities on behalf of the cigarette companies; and to otherwise act, at least in part, as Defendants' research and public relations arms.

1982).[89] As applied to the mailing or wire transmission element, when a defendant is proven to be a participant in a joint venture, and a document is transmitted via the mails or wires in furtherance of that joint venture, he may be liable for aiding and abetting, even if he did not know about the mailing or wire transmission, provided he in some way associated himself with the venture and assisted it.[90]

Defendants were indisputably associated with a joint venture with CTR and TI. Moreover, in addition to actually forming these two entities, the Cigarette Company Defendants were the primary source of the funding of CTR and TI, and Altria later approved funding for and financed CTR Special Projects; these Defendants provided directors and officers of the associations; reviewed, approved or recommended approval of various research proposals and public statements (including research reports and press releases); and provided sundry other forms of assistance which both enabled and encouraged the mailings and wire transmissions at issue. See U.S. FF §§ I.B & C and II. Indeed, Defendants' essential purpose in forming CTR and TI was to use the organizations to issue advertisements, press releases, and research reports that are the gravamen of many of the mailings and wire transmissions at issue.

Second, under 18 U.S.C. § 2(b), "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." The Court of Appeals for the District of Columbia Circuit interpreted 18 U.S.C. § 2(b) in two recent cases. See United States v. Hsia, 176 F.3d 517 (D.C. Cir. 1999); United

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[89] A defendant's liability for a racketeering act under RICO may be established on the ground of aiding and abetting.

[90] See, e.g., United States v. Teffera, 985 F.2d 1082, 1086 n.3 (D.C. Cir. 1993); United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993); see also United States v. Johnson, 700 F.2d 699 (11th Cir. 1983); United States v. Archambault, 62 F.3d 995 (7th Cir. 1995); United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989).

States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999). In Hsia, the defendant was charged with violating various laws by willfully causing illegal campaign contributions through straw donors, or conduits, thus causing false statements to the Federal Election Commission. Rejecting the district court's conclusion that such contributions were too "attenuated," the D.C. Circuit concluded that "Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may 'cause' another to commit the act, nor the degree of permissible 'attenuation' between these two people's actions." Hsia, 176 F.3d at 522 (citation omitted). In Kanchanalak, the court of appeals reiterated its holding in Hsia and concluded that, by its reasoning, "[b]y thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency." Kanchanalak, 192 F.3d at 1042. See also United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (use of intermediary does not insulate defendant for purposes of wire fraud liability so long as defendant was member of fraudulent scheme).

Finally, as demonstrated during trial, in exhibits and testimony, and throughout the United States' Post-Trial Proposed Findings of Fact, the Cigarette Company Defendants and Altria are liable for the racketeering acts committed by CTR and TI under the mail and wire fraud statutes, wholly independent of aiding and abetting liability. Therefore, the same evidence that establishes the six Defendant Cigarette Companies' and Altria's aiding and abetting liability also establishes that the mailings and wire transmissions of CTR and TI were reasonably foreseeable or otherwise caused by the six Defendants.[91] As such, the Defendants must be held liable for the

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[91] For example, certain Defendants created, designed, organized, and controlled the Special Projects program at CTR. See U.S. FF § I.D(2). Thus, these Defendants caused the mailings and wire transmissions made in execution of that program. Indeed, they often received such communications, and responded to them in writing, utilizing the mails and/or wires to transmit their responses, and the mail and wire transmissions by CTR were reasonably

(continued...)

mailings of their "co-schemers."[92]

c. A defendant is liable for aiding and abetting the commission of racketeering acts

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). The federal circuits have uniformly held in both criminal[93] and civil[94] RICO cases that a defendant's liability for committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act.

Moreover, imposition of aiding and abetting liability for racketeering acts in this case does not conflict with Third Circuit's ruling that in a civil action for treble damages brought by "a private plaintiff," a defendant's liability for an entire RICO violation may not be based upon aiding and abetting the RICO violations.[95] The rationale of those cases is that "Congress has not

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[91](...continued)
foreseeable to Defendants. Similarly, TI's communications disseminated through the mails and via the wires that touted the industry's joint position on smoking and health issues – including causation, addiction, nicotine, ETS, and youth marketing – were reasonably foreseeable to Defendants who founded, funded, and participated in the direction of TI.

[92] United States v. Rodgers, 624 F.2d 1303, 1308-1309 (5th Cir. 1980) ("co-schemers" liable for mail fraud); Maxwell, 920 F.2d at 1036; United States v. Amrep Corp., 560 F.2d 539 at 545 (2d Cir. 1977); United States v. Joyce, 499 F.2d 9, 16 (7th Cir. 1974) ("As a member of a mail fraud scheme, [the defendant] was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme.") (citations omitted).

[93] See, e.g., United States v. Coon, 187 F.3d 888, 896 (8th Cir. 1999); Shifman, 124 F.3d at 36-37; United States v. Rastelli, 870 F.2d 822, 832 (2d. Cir. 1989).

[94] See, e.g., Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994).

[95] See, e.g., Pa. Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 841-44 (3d Cir.
(continued...)

enacted a general civil aiding and abetting statute . . . under which a person may sue and recover damages from a private defendant", and that 18 U.S.C. § 2 "has no application to private causes of action." Rolo, 155 F.3d at 656-57 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)). However, this case, in contrast, is not a private action for damages, but rather is a RICO action for injunctive relief brought by the United States. The Third Circuit and other courts have held that in such government civil RICO suits, liability for predicate acts may be established by aiding and abetting under 18 U.S.C. § 2. See United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 283-89 (3d Cir. 1985); accord United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303 1338-39 (S.D.N.Y. 1993). As the court stated in Local 1804-1, 812 F. Supp. at 1347: "In a civil RICO suit [brought by the United States] the Court applies the criminal standard in determining aiding and abetting liability."

d. Mail and wire fraud offenses do not require affirmative misrepresentations of fact

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

[95](...continued)
2000); Rolo v. City Co. Liquidating Trust, 155 F.3d 644, 656-57 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000).

confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a promise." Id. at 314. Since intent to defraud is the central element, the Court concluded that a mail fraud offense did not require proof that the mailing was

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

Id. at 315.

In accordance with the Supreme Court's expansive reading of the mail fraud statute, the federal courts of appeals have repeatedly ruled that a mail or wire fraud offense does not necessarily require proof of any misrepresentation of fact or affirmative false statement, although such would be highly probative of a scheme to defraud. United States v. Philip Morris USA, 304 F. Supp. 2d 60, 70 (D.D.C. 2004). It is sufficient, therefore, if under the totality of the circumstances, the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property.[96]

As the Supreme Court explained in McNally v. United States, 483 U.S. 350 (1987), "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" Id. at 358 (citation omitted). Such deceptive or overreaching conduct within the scope of the mail and wire fraud statutes includes literally true statements, half-truths and

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[96] See, e.g., McEvoy Travel Bureau, Inc., 904 F.2d at 791-93; Cronic, 900 F.2d at 1513-14; Atlas Pile Driving, 886 F.2d at 991; Blachly, 380 F.2d at 671; Silverman, 213 F.2d at 405-06; Deaver v. United States, 155 F.2d 740, 743 (D.C. Cir. 1946).

material omissions.[97]

In this case, it is clear that the predicate acts of racketeering alleged by the United States, under the totality of circumstances, were made as part of an intentionally devised scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property.

7. The Racketeering Acts Constitute a Pattern of Racketeering Activity

In H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 242 (1989), the Supreme Court stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related," and that they either extended over "a substantial period of time," "or pose a threat of continued criminal activity." This factor is commonly referred to as the "continuity plus relationship test."

a. The racketeering acts are related

As for the requisite relationship, the Supreme Court stated "that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." Id. at 238. The Supreme Court added that the requisite relationship would be established when the racketeering acts "have the same or similar purposes, results, participants,

[97] See, e.g., Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) ("A half truth, or what is usually the same thing a misleading omission is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled"); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) (holding that misleading newspaper ads and letters which were mailed "need not be false or fraudulent on their face, and the accused need not misrepresent any fact" since "it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading"); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) ("A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved") (collecting cases).

victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events," but that such was not the exclusive means of establishing the requisite relationship. Id. at 240.

In accordance with Congress's intended flexible approach, the federal courts of appeals have repeatedly held that the racketeering acts need not be similar or directly related to each other; rather it is sufficient that they are related in some way to the affairs of the charged enterprise,[98] including, for example, that the racketeering acts furthered the goals of or benefitted the enterprise,[99] or the enterprise or the defendant's role in the enterprise enabled the defendant to commit or facilitated the commission of the racketeering acts.[100]

Here, the alleged predicate acts possess the requisite relationship under all of the permissible alternatives. All the racketeering acts have the same or similar purposes and methods of commission – i.e., the acts involve mailings or wire transmissions by Defendants to carry out shared purposes of the charged scheme to defraud consumers and potential consumers

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[98] See, e.g., United States v. White, 116 F.3d 903, 925 n.7 (D.C. Cir. 1997); United States v. Eufrasio, 935 F.2d 553 566-67 (3d Cir. 1991); United States v. Gonzalez, 921 F.2d 1530 1540 (11th Cir. 1991); United States v. Angiulo, 897 F.2d 1169, 1180 (1st Cir. 1990); United States v. Indelicato, 865 F.2d 1370, 1382-84 (2d Cir. 1989) (en banc); United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985); United States v. Carter, 721 F.2d 1514, 1526-27 (11th Cir. 1984); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir. 1982); United States v. Lee Stoller Enter., Inc., 652 F.2d 1313, 1319 (7th Cir. 1981); United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir. 1980); United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978).

[99] See, e.g., United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998); United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994); Eufrasio, 935 F.2d at 564-67; United States v. Salerno, 868 F.2d 524 533 (2d Cir. 1989); United States v. Phillips, 664 F.2d 971, 1011-12 (5th Cir. 1981).

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

of cigarettes. See H.J. Inc., 492 U.S. at 249-250. Moreover, all the predicate acts furthered the goals of the Enterprise and benefitted the Enterprise in that they were in furtherance of the overarching scheme to defraud the public. Additionally, Defendants' control of, or participation with others in, the Enterprise facilitated their commission of the racketeering acts.

b. The requisite continuity has been established

The Supreme Court made clear in H.J. Inc., 492 U.S. at 240-43, that a wide variety of proof may establish the required "continuity" and that no single particular method of proof is required. By way of illustration, the H.J. Inc. Court provided several alternative methods of establishing the "continuity" requirement, stating:

> [1] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. [Id. at 242].
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> . . .
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> [2] A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. [Id.].
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> . . .
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> [3] The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise." [Id. at 243].

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

The determination of continuity is not confined to the specific racketeering acts charged against each defendant standing alone. Rather, as the Supreme Court, the D.C. Circuit and other courts have ruled, the requisite continuity may be established by the nature of the enterprise and

other unlawful activities of the enterprise and its members considered in their entirety, including uncharged unlawful activities. H.J. Inc., 492 U.S. at 242-43; Richardson, 167 F.3d at 626.

Here, Defendants committed over 145 racketeering acts over 45 years which clearly constitutes a "substantial period" of time which easily satisfies "closed ended" continuity. Moreover, these racketeering acts "are a regular way of conducting defendant's ongoing legitimate business" (H.J. Inc., 492 U.S. at 243), and because Defendants continue to be in a position to continue their fraudulent activity, "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." Id. at 242. The evidence therefore establishes "open-ended" continuity, and all the several alternative methods of establishing the "continuity" requirement are satisfied. Indeed, in far less compelling circumstances than those found here, the circuit courts of appeals have frequently held in civil RICO cases that multiple acts of mail and/or wire fraud extending over considerably shorter periods of time than were sufficient to satisfy the requisite "relationship plus continuity."[101] Moreover, many of these cases involved the sale of lawful products or other property interests through schemes to defraud. At bottom, the requisite pattern of racketeering activity has been established.

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[101] See, e.g., Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1338 (7th Cir. 1997) (multiple mailings and wire transmissions over six years designed to lure the plaintiff into purchasing $800 million in stock of an otherwise lawful entity controlled by the defendant); United Health Care Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 571-72 (8th Cir. 1996) (multiple acts of mail fraud and wire fraud over two years to fraudulently divert insurance premium payments; Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 962-64 (7th Cir. 1996) (multiple mailings and wire transmissions during four year period to defraud investors in an otherwise legal cable television limited partnership); Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 522-24 (7th Cir. 1995) (multiple mailings and wire transmissions during three years to defraud the plaintiff of money through four schemes); Tabas v. Tabas, 47 F.3d 1280, 1293-95 (3d Cir. 1995) (multiple mailings during 3½ years to defraud heirs of their interest in a business); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560-61 (1st Cir. 1994) (multiple mailings of false insurance claims over two years); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (multiple mailings and wire transmissions to sell otherwise legitimate stock through fraud); Akin v. Q-L Inv., Inc., 959 F.2d 521, 533 (5th Cir. 1992) (multiple mailings over several years containing misrepresentations to sell limited partnership interests).

B. Evidence Further Establishes That Defendants Conspired to Violate RICO

1. Elements of a RICO Conspiracy Offense

Count Four of the First Amended Complaint alleges that from the early 1950s and continuing up to the date of the filing of the Amended Complaint, each Defendant conspired to conduct and participate in the affairs of the Enterprise, "through a pattern of racketeering activity consisting of multiple acts indictable under 18 U.S.C. §§ 1341 and 1343, in violation of 18 U.S.C. § 1962(d)." (Compl. ¶ 201). To establish this conspiracy violation under 18 U.S.C. § 1962(c) and (d), the United States must prove each of the following elements.

1. The existence of an enterprise;
2. That the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and
3. That each defendant knowingly agreed to the commission of a violation of 18 U.S.C. 1962(c).[102]

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

Although a substantive RICO offense requires proof that each defendant committed at least two racketeering acts, this Court has already decided, consistent with settled law, that to establish a RICO conspiracy charge, the United States is not required to prove that any defendant committed any racketeering act or any overt act. Philip Morris, 130 F. Supp. 2d at 99. The Court has further held that "liability for a RICO conspiracy under Section 1962(d) does not require the same proof of participation in the 'operation or management' of the alleged RICO enterprise, just

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

as it does not require proof of commission of all the other elements of the Section 1962(c) substantive offense." United States v. Philip Morris USA, 327 F. Supp.2d 13, 20 (D.D.C. 2004) (citing Salinas, 522 U.S. at 65, and Smith v. Berg, 247 F.3d 532, 537 (3d Cir. 2001).

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

a. There are two alternative methods of establishing a conspiratorial agreement to violate RICO

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

> In order to be guilty of a RICO conspiracy, a defendant must either agree to [personally] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise.[103]

"If the government can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts." Abbell, 271 F.3d at 1299.

To prove a RICO conspiracy under the first method, the plaintiff must prove that the defendant personally agreed to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise. In Salinas, the Supreme Court made clear that while evidence of such an agreement is sufficient to establish a RICO conspiracy, RICO does not require the plaintiff to prove that the defendant agreed to personally commit two predicate acts of racketeering. Salinas, 522 U.S. at 63-65.

Thus, to prove a RICO conspiracy under the second method,

> [t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the

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

> individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.

Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted).[104] Hence, it is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995), quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); Philip Morris, 130 F. Supp. 2d at 99 (citing Salinas).

Moreover,

> [r]egardless of the method used to prove the agreement, the government does not have to establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy. That each conspirator may have contemplated participating in different and unrelated crimes is irrelevant.

Starrett, 55 F.3d at 1544 (internal quotations and citations deleted).[105] Rather, to establish sufficient knowledge it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989) (collecting cases).[106] Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be

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

[105] Accord United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000); To, 144 F.3d at 744; United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985); Elliott, 571 F.2d at 902-03.

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

established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857 (citations and internal quotations omitted).

Moreover, 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.[107] 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 conspiracy even if the conspirator did not participate in, or was unaware of, such acts.[108] Moreover, such liability remains even if the defendant has ceased his participation in the conspiracy.[109]

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[107] 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. 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. 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)).

[108] 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. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1th 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).

[109] See, e.g., United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997); In Re

(continued...)

b. Each Defendant is liable for the RICO conspiracy charge under both of the independently sufficient methods of proof

Under the foregoing well-established legal standards, the Court should find that each Defendant conspired to violate RICO. Above all else, each Defendant committed numerous racketeering acts in furtherance of the affairs of the same Enterprise. "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." Elliott, 571 F.2d at 903; accord United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992); United States v. Crockett, 979 F.2d 1204 1218 (7th Cir. 1982); United States v. Carlock, 806 F.2d at 535, 547 (5th Cir. 1986); United States v. Melton, 689 F.2d 679, 683 (7th Cir. 1982); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981).

Moreover, each Defendant agreed to facilitate the commission of a substantive RICO offense with the knowledge that others were also conspiring to participate in the same Enterprise through racketeering activity. In that regard, the evidence shows that all Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of the shared objective – to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public. As addressed above and detailed in the United States' Post-Trial Proposed Findings of Fact, Defendants executed the scheme in several different ways. The evidence establishes overwhelmingly that each Defendant knew the general nature of the conspiracy and that it extended beyond the Defendant's individual role. Indeed, each Defendant took substantial steps to facilitate the scheme to defraud that was the central

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[109](...continued)
Corrugated Container Antitrust Litig., 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).

purpose of the conspiracy, including committing numerous racketeering acts in furtherance of the Enterprise's affairs. Accordingly, each Defendant entered into the requisite conspiratorial agreement. See Salinas, 522 U.S. at 66 ("even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d)."); accord, e.g., P & B Autobody, 43 F.3d at 1562-63.

c. The prohibition against intracorporate conspiracies under the antitrust laws does not apply to this case

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation "and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," 15 U.S.C. § 1. Copperweld, 467 U.S. at 777. But, the Supreme Court rested its decision in Copperweld on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See id. at 771-75. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, the Court held in Copperweld that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. Id. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

Numerous courts have held that these antitrust considerations simply do not apply to RICO. For example, in Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d

384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the court ruled that Copperweld does not apply to civil RICO conspiracy charges, explaining that "the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' The policy considerations discussed in Copperweld therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity." 747 F.2d at 403 n.22 (citation omitted). Similarly, in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the court stated:

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law – protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

875 F.2d at 1281 (citations omitted). In accordance with the foregoing reasoning, numerous courts have likewise ruled that the rationale of Copperweld does not apply to civil RICO claims and that, therefore, a civil RICO conspiracy claim properly applies to a conspiracy between a parent corporation and its subsidiary, between affiliated corporations, or between a corporation and its own officers and representatives.[110] Assuming arguendo that the rationale of Copperweld and its progeny applied to RICO conspiracy charges, the United States had adequately proven its RICO conspiracy claim against all Defendants.

[110] See, e.g., Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-67 (3d Cir. 1989). Moreover, Copperweld's prohibition on intracorporate conspiracies does not apply to criminal RICO conspiracy charges or other criminal conspiracy charges. See, e.g., Crockett, 979 F.2d at 1218 n.12; United States v. Hughes Aircraft Co., Inc., 20 F. 3d 974, 979 (9th Cir. 1994) (collecting cases).

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

The Court has already held that "liability for a RICO conspiracy under Section 1962(d) does not require proof of participation in the 'operation or management' of the alleged RICO enterprise." Philip Morris, 327 F. Supp. 2d. at 20. Accordingly, although evidence shows that each Defendant participated in the operation or management of the Enterprise, even assuming *arguendo* that a Defendant did not itself participate, or agree to participate personally, in the operation or management of the Enterprise, each Defendant is liable for the RICO conspiracy charge because each Defendant knowingly agreed to facilitate a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who participated in the operation or management of the Enterprise.

III

THE COURT MUST IMPOSE COMPREHENSIVE EQUITABLE REMEDIES TO PREVENT AND RESTRAIN FUTURE FRAUDULENT CONDUCT

A. Evidence Establishes a Reasonable Likelihood of Future RICO Violations by Defendants

1. Defendants' Past Conduct Alone Establishes a Reasonable Likelihood of Future Violations

The Court has already held that:

> To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting SEC v. Savoy Ind., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978)); SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994).
>
> To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." [SEC v. First City Financial Corp., 890 F.2d 1215,

> 1228 (D.C. Cir. 1989)] (citing Savoy Indus., 587 F.2d at 1168); Bilzerian, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." First City, 890 F. 2d at 1228 (citing SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984).

United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 148 (D.D.C. 2000). The Court also ruled that the requisite "reasonable likelihood" of future violations may be established by inferences drawn from past conduct alone. See United States v. Philip Morris USA., 316 F. Supp. 2d 6, 10 n.3 (D.D.C. 2004) (collecting cases).

Applying the above-referenced three factors, this Court found that the Complaint's allegations "overwhelmingly satisfied each of the [D.C. Circuit's] three First City factors," stating:

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

Philip Morris, 116 F. Supp. 2d at 149 (alteration in original).

It is clear that in suits for equitable relief brought by the United States under 18 U.S.C. § 1964(a), as involved here, "the government need not, as [the defendant] asserts, demonstrate a new RICO violation to justify issuance of the injunction." United States v. Local 560, Int'l Bhd. of Teamsters, 974 F.2d 315, 325 n.5 (3d Cir. 1992), aff'g 754 F. Supp. 395, 403 (D.N.J. 1991) ("[Defendant] erroneously argues . . . that to succeed the government must prove a new RICO

offense based on conduct which occurred after the March 16, 1984 Judgment Order"); accord United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192, 195 (S.D.N.Y. 1986) (rejecting argument that "the Government must show present RICO violations to secure [injunctive] relief").

Consistent with the law governing injunctive relief generally and in the RICO context specifically, courts have frequently granted injunctive relief in RICO and other cases without requiring proof that a defendant committed all the elements of a violation at some point after the filing of the complaint. Rather, it is sufficient that the United States demonstrates a reasonable likelihood that the defendant might continue unlawful conduct in the future, which may be inferred from past conduct.[111] Moreover, to make that determination the court does not begin "with a clean slate" as if it were "a new case;" rather, the court considers the totality of the evidence of the underlying case. See United States v. Local 560, Int'l Bhd. of Teamsters, 754 F. Supp. 395, 403 (D.N.J. 1991).

Moreover, this Court and numerous other 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. A contrary rule would not only be unprecedented, but would pose an undue burden and be unworkable in significant multi-defendant cases. For example, the United States has brought civil RICO

[111] See, e.g., United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377 (2d Cir. 1993); United States v. Local 30, United Slate, Tile & Composition Workers, 871 F.2d 401, 408-09 (3d Cir. 1989); United States v. Local 1804-1, Int'l Longshoremens Ass'n, 831 F. Supp. 177, 191 (S.D.N.Y. 1993); United States v. Local 295, Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19-22 (E.D.N.Y. 1992) (RICO injunction granted based upon evidence of past corruptions, and the court noted that "[i]nstitutional practices and traditions tend to endure long after specific individuals are gone") (id. at 19); Local 6A, 663 F. Supp. at 194-95.

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.[112] Nothing in these cases suggests 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.[113]

At bottom, the central rationale underlying co-conspirator liability dictates the conclusion that a defendant remains liable for the continuation of events it conspired with its co-defendants to set in motion, even if a particular defendant ceased its unlawful activity. Therefore, the United States is not required to prove that there is a reasonable likelihood that all Defendants will commit violations in the future. Rather, it is enough that there is a reasonable likelihood that the unlawful conduct set in motion by the conspirators will continue.

As detailed at length above, trial in this action has established that the allegations that "overwhelmingly satisfied" the three First City factors are now overwhelmingly established by the evidence in the trial record. Evidence demonstrates that the predicate acts alleged by the United States were in furtherance of an overarching scheme to defraud that was far from

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[112] See, e.g., United States v. Private Sanitation Indus. Ass'n., 793 F. Supp. 1114, 1120 (E.D.N.Y. 1992) (112 defendants); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1392 (S.D.N.Y. 1989) (over 40 defendants); Local 6A, 663 F. Supp. 192 (over 30 defendants).

[113] See, e.g., Private Sanitation Indus., 995 F.2d at 377-78; Local 30, 871 F.2d at 405-09; Local 295, 784 F. Supp. at 21-22; United States v. Local 30, United Slate Tile & Composition Workers, 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, 319-26 (D.N.J. 1984), aff'd 780 F.2d 269, 292-94 (3d Cir. 1986).

"technical in nature." Instead, as alleged, Defendants' misstatements and acts of concealment were made deceptively, fraudulently and deliberately as part of a multi-faceted conspiracy that affected almost all aspects of Defendants' businesses and had a deleterious impact on the health of the American public. The evidence admitted by the Court at trial also establishes that Defendants' business of manufacturing, selling and marketing cigarettes will present countless opportunities and temptations to violate the law in the future. First City, 890 F.2d at 1228.

The United States is therefore entitled to equitable relief on the basis of Defendants' extensive pattern of past wrongdoing alone, without any need to establish any Defendant's continuing unlawful conduct after the filing of the Complaint or after Defendants entered into the MSA with the settling states.[114] But trial in this action unequivocally demonstrated that Defendants have not ceased engaging in unlawful activity to this day: they continue, *inter alia*, to mislead smokers about the health effects of cigarettes, to suppress or conceal information, and to market to youth under the age of 21 and under the age of 18. The filing of the Complaint in this action by the United States did not put a stop to this unlawful activity.

As Defendants' senior executives took the witness stand at trial, one after another, it became exceedingly clear that these Defendants have not, as they claim, ceased their wrongdoing or, as they claimed at the outset of trial, undertaken fundamental or permanent change. Even after the Complaint in this action was filed in September 1999, Defendants have continued to

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[114] The D.C. Circuit and other courts have repeatedly held, under less compelling circumstances than those found here, that a plaintiff is entitled to relief upon evidence of a defendant's intentional pattern of past unlawful activities standing alone. See, e.g., Bilzerian, 29 F.3d at 695; SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993); First City, 890 F.2d at 1228-29; Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); Savoy Indus., 587 F.2d at 1168; SEC v. Commonwealth Chem. Sec., Inc., 574., 574 F.2d 90, 98-100 (2d Cir. 1978); SEC v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998); accord Philip Morris, 316 F. Supp. 2d at 10 n.3.

engage in conduct that is materially indistinguishable from their previous actions. Significantly, their conduct has been undertaken to further the objectives of the overarching scheme to defraud. It has misled consumers of cigarettes with the goal of maximizing Defendants' profits by recruiting new smokers, the majority of them under the age of 18, and preventing current smokers from quitting. On critical health issues, Defendants have continued to march in lockstep to achieve the goals of the Enterprise. The foregoing types of conduct are set out in detail in the United States' Findings, and are described summarily below.

2. Defendants Continuing Conduct Demonstrates a Reasonable Likelihood of Future Wrongdoing

a. Defendants have continued to engage in misconduct since the filing of the Complaint in this action

Some of Defendants' most deleterious recent conduct – continued denials of the health effects of exposure to secondhand smoke, use of misleading brand descriptors for cigarettes, and marketing to youth – is summarized above and described in detail in the United States' Findings. Defendants' conduct in the foregoing areas demonstrates an absence of meaningful change to the fraudulent conduct in which they have long participated in furtherance of the goals of the Enterprise and provides a compelling demonstration of the need for remedial relief from the Court. Additional evidence of the absence of change by Defendants is found throughout the record of this litigation and trial in this action.[115]

Indeed, during live testimony in open court in January 2005, more than forty years after the 1964 Surgeon General's Report, Reynolds American Executive Chairman Andrew Schindler

[115] Any court supervising a complex case must impose limits on discovery, and in this case, aside from certain witness-specific exceptions, the United States was limited to systematic document discovery only for documents created on or before December 31, 2000, making it impossible for the United States to develop systematic evidence concerning Defendants' post-2000 conduct. Even with these impediments in mind, though, there is ample evidence that Defendants continue to engage in fraudulent misconduct.

refused to admit that smoking causes disease. Schindler TT, 1/24/05, 10812:3-22; see also US FF § III.A.(1)(m), ¶ 366; § V.A.(4), ¶ 99. And in response to a direct question from the Court concerning letters that RJR wrote to widowers of deceased smokers and schoolchildren, denying that cigarettes caused disease, Schindler testified that if he were re-writing those letters on RJR's behalf today, he still would not give a straightforward acknowledgment that smoking causes disease: "I believe in this letter, in the one about school kids, Your Honor, I would have said cigarettes have significant and inherent health risks, and they contribute–" The Court: "Would you have said that cigarettes cause disease?" The Witness: "I would have, based on where we are now, it would have been significant health risks and may contribute to certain diseases in some people." Schindler TT, 1/24/05, 10810:9-21.

Joint Defendants remarkably assert in their current post-trial Proposed Findings of Fact, without any such caveats, that "Reynolds Concedes That Cigarette Smoking Causes Disease." JD FF ch. 8, § V.G.4 (title of section; emphasis omitted). In reality, the RJR website on which Joint Defendants rely is only a partial concession with the same two conditions that Schindler made: "R.J. Reynolds Tobacco Company (R.J. Reynolds) believes that smoking, **in combination with other factors**, causes disease **in some individuals**." March 18, 2005 RJR website printout (page 54 of 569) (JD-068012) (A) (emphases added), cited in JD FF ch. 8, § V.G.4, ¶ 315. The website minimizes smoking "as a risk factor for many chronic diseases," and states that "[m]ost, if not all, chronic diseases result from the interaction of many risk factors including genetics, diet and lifestyle choices." Id.[116]

RJR is not alone. Lorillard's CEO, Martin Orlowsky, likewise refused at trial to admit to

[116] Schindler acknowledged at trial that "[i]f R.J. Reynolds wanted to convey the message on its Website that smoking causes disease, it could say that unequivocally," and that he could make it happen "in a heartbeat," but he would not do so. Schindler TT, 1/24/05, 10816:25-10817:5, 10821:2-18; see also US FF § III.A.(1)(m), ¶ 366(iv).

the full extent of smoking's harm. He was asked, "Why hasn't Lorillard specifically stated publicly that smoking causes any diseases other than smoking emphysema, COPD or heart disease?" He responded: "We have – in certain instances, we do not know if in fact the evidence, the scientific evidence is such that it warrants saying it does cause. However, Lorillard's longstanding position, as long as I've been with the company, is that certainly smoking can, and is a risk factor for those diseases." Orlowsky TT, 10/13/04, 2303:7-15.

Lorillard's website includes a July 28, 2003 press release, in which its general counsel Ronald Milstein falsely stated that, "Research has shown time and time again that willpower is the only smoking cessation aid that always works." US 86693 (A). At trial, Milstein specifically refused to remove his statement from the website. Milstein TT, 1/7/05, 9288:12-19. Joint Defendants now assert that Milstein "intended his statement to be a case-specific reflection of the evidence in the Scott case" in Louisiana, following a jury verdict requiring cigarette manufacturers to provide smoking cessation programs to a plaintiff class. JD FF ch. 6, ¶ 281. But any statement about what "research has shown time and time again" is obviously not "a case-specific reflection." Moreover, it is simply false that "willpower . . . always works." To be sure, Joint Defendants now claim that Milstein's July 2003 assertion that "willpower . . . always works" was supported by a statement in the 2000 Surgeon General's Report that, "Historically, the majority of smokers (more than 90 percent) who successfully quit smoking did so 'on their own' – that is, without the assistance of formal cessation programs." 2000 Surgeon General's Report at 100, US 64316 at 0211 (A). But Joint Defendants omit that two sentences later, the Report directly contradicts Milstein's public statement by indicating that "[t]he success rate among . . . unassisted quitters is half that used for those who use some form of assistance." Id. Trial evidence demonstrated that Milstein's statements is of precisely the same character as many of the false statements about addiction that Defendants have been making for the past two

decades. Lorillard's insistence that it would neither remove nor alter its public website statement that "[r]esearch has shown time and time again that willpower is the only smoking cessation remedy that always works" is further confirmation that these Defendants are not committed to change.

Several additional examples of Defendants' wrongful behavior transpired before the Court during this litigation. For example, it is beyond dispute that Altria, Philip Morris, BATCo, and Liggett have violated the Orders of this Court:

- The Court adopted the Special Master's condemnation of Liggett's conduct in producing privilege logs with "**misleading** descriptions" that were **"quite disturbing"** and **"seriously undermine the entire system for privilege challenges and threaten the integrity of the process."** R&R #111 at 11 (emphasis added), adopted by Order #360; R&R #127 at 11 (emphasis added), adopted in relevant part by Order #410 (internal quotations omitted); see generally US FF § V.A.(4), ¶ 94.

- In the largest contempt ruling in this case, the Court sanctioned Altria and Philip Morris $2.75 million and limited their introduction of evidence as a result of these companies' senior officers and employees having systematically violated Order #1 in this case for a period of at least 2 years. See United States v. Philip Morris USA, 327 F. Supp. 2d 21, 23 (D.D.C. 2004), reconsideration denied, Order #903. In issuing its sanctions, the Court noted that "it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order #1," and found that "the reckless disregard and gross indifference displayed by Philip Morris and Altria Group toward their discovery and document preservation obligations" required a significant penalty. Id. at 25-26 (emphasis added).[117]

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[117] Even now, Joint Defendants still minimize the seriousness of Philip Morris and Altria's "reckless disregard and gross indifference," insisting that "at most, their conduct was careless, not criminal." JD FF ch. 8, § IV.G ¶ 1039. To the contrary, the Court previously found that "despite learning of the problem in February 2002, Philip Morris continued its monthly deletions of email in February and March of 2002," and delayed four months before reporting the destruction of evidence to the Court and the United States. Philip Morris, 327 F. Supp. 2d at 23-24. The same Defendants contend that (at most) the Court's Final Judgment and Order should impose only traditional injunctive relief, and avoid imposing structural remedies or Court-appointed officers to monitor and enforce Defendants' compliance. JD FF ch. 13, § III.C. At the same time, though, they contend that the Court should draw no negative inferences from their violating this Court's Order #1, on the remarkable ground that **because** they violated the Court's Order, they rendered the United States unable to prove "that anything material to this case was in fact lost." Id. ch. 8, § IV.G ¶ 1038. Joint Defendants would thus shift the burden of ensuring

(continued...)

- BATCo's conduct during this litigation was so egregious that the Court found it in civil contempt of Court and issued two monetary sanctions against it – the first eventually totaling $1.4 million in daily monetary sanctions, and the second for $250,000 – and limited BATCo's ability to introduce evidence and make arguments concerning various aspects of document destruction policies. United States v. Philip Morris USA, 287 F. Supp. 2d 5 (D.D.C. 2003); United States v. Philip Morris USA, No. 99-CV-2496 (GK), 2003 WL 22462167 (D.D.C. Oct. 20, 2003) (finding BATCo in contempt of Court for violating earlier orders; imposing daily monetary sanctions of $25,000 per day), monetary sanctions stayed by 219 F.R.D. 9 (D.D.C. 2003), contempt vacated as of January 15, 2004 by 220 F.R.D. 109 (D.D.C. 2004); United States v. Philip Morris USA, No. 99-CV-02496 (GK), 2005 WL 729434, at *2 (D.D.C. Mar. 28, 2005) (observing BATCo ultimately paid $1.4 million in daily sanctions for its previous contempt of Court, but that "BATCo does not seem to have learned any lesson from that experience"; finding BATCo violated separate order to produce knowledgeable witness for deposition, and moreover displayed "egregious lack of candor regarding Compliance with Order #341. In this instance, BATCo not only violated a Court Order, but also misled the Court in its submissions about whether it was going to comply with the Order, and then misrepresented the facts about what it had previously told the Court . . ."; imposing monetary sanction of $250,000 as well as evidentiary sanctions); see generally US FF § V.A.(4), ¶¶ 90-93. In yet another Order, the Court stated that the **"finding that BATCo did not act in good faith is fully justified by the record."** Order #332, Mem.-Op. at 6 (emphasis added) (internal citation omitted).

Defendants' defiance of this Court's orders continues. In Order #947, the Court rejected B&W's later argument that it could offer the same evidence and arguments that Order #904 prohibited BATCo from offering. To accept such an argument, the Court ruled, "would completely undermine the purpose of imposing sanctions against BATCo for its wilful and intentional failure to prepare its 30(b)(6) witness. The other Joint Defendants cannot, through this backdoor approach, benefit from BATCo's contemptuous conduct." Order #947 at 2 (emphasis added).

Notwithstanding the Court's clear warning that neither BATCo, nor other Defendants,

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[117](...continued)
that they comply with Court orders to the United States and the Court – an effort the Court has previously rejected: "Because we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the Government and what prejudice it has suffered." Philip Morris, 327 F. Supp. 2d at 25. Joint Defendants' wilful denial of the seriousness of their violating this Court's **first** Order amply demonstrates why the Court's **Final** Order must include adequate mechanisms to ensure full compliance.

could offer evidence or make arguments "relating to the document management issues addressed in the McCabe decision . . . for the purpose of avoiding discovery of such documents in United States litigation or preventing the public from learning the true effects of smoking," Order #904 at 2, Joint Defendants have done precisely this in their August 15, 2005 proposed findings of fact.[118] To be sure, the United States anticipates filing a motion to strike the portions of Joint Defendants' proposed findings of fact which violate Order #904 (and to seek other appropriate relief). Nonetheless, such a motion is no substitute for Defendants' compliance with the Court's already-existing Orders, and further demonstrates the necessity for the Court to impose a comprehensive package of relief – including Court-appointed officers to police and adjudicate Defendants' compliance with the Court's final judgment and order – and why the Court cannot merely impose a set of basic injunctions that impose various commands and prohibitions, but do nothing to address Defendants' corporate cultures or to ensure Defendants' compliance.

b. The MSA has not materially altered Defendants' conduct

Defendants vigorously assert that the MSA is fully adequate to prevent any recurrences of

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[118] See, e.g., JD FF ch. 8, § IV.C.(2), ¶ 996 (quoting Nicholas Cannar for proposition that "neither he nor anyone he knows of undertook action 'to avoid having BATCo research documents produced in any lawsuit in the United States.'"); id. § IV.H, ¶ 1042 (citing Cannar, Andrew Foyle, and Allison Kay Comer Kinnard for proposition that purpose of Lovells' review of BATCo R&D documents was to enable BATCo "to be able to answer any Requests for Production or Interrogatories emanating from U.S. Courts") ; id. ¶ 1048 (citing Kinnard and Cannar for proposition that "BATCo's Document Retention Policy was not designed to insulate BATCo or B&W from exposure to liability in smoking and health litigation."); id. ¶ 1051 (citing Cannar to support proposed finding that "BATCo never agreed with anyone else 'to avoid having BATCo documents produced in discovery in any lawsuit in the United States.'"); id. ¶ 1052 (proposed finding that, "The Court finds that BATCo's own document management practices/policy were not intended to, nor did they, result in substantial or direct adverse effects on the American public."); id. ¶ 1059 (proposed finding that, "The Court finds that plaintiff failed to prove that BATCo ever improperly withheld documents from U.S. plaintiffs in smoking and health litigation on grounds of privilege. The Court finds that the uncontradicted testimony in this case reveals that BATCo never 'warehoused' documents overseas or at law firms to avoid their discovery in litigation.").

the misconduct identified in this action. See, e.g., JD FF ch. 12, § II.B ("The MSA's Panoply of Injunctive Relief and Related Provisions Address the Misconduct Alleged by the Government"). To the contrary, though, the evidence amply establishes that the MSA is inadequate for any such purpose.[119] Four areas are discussed below; the Court has previously identified all four. The Court identified the first two areas in its 2000 decision denying Defendants' motion to dismiss the injunctive relief sought in the United States' Complaint:

> In arguing that the M.S.A. 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 M.S.A. has adequate enforcement mechanisms in the event of noncompliance.

United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 149 (D.D.C. 2000). The Court has already held that the third and fourth areas discussed below preclude any finding that the MSA precludes relief in this action. United States v. Philip Morris USA, 316 F. Supp. 2d 6, 11 (D.D.C. 2004).

1) Defendants are not complying with the spirit, and frequently violate the letter, of the MSA

The trial evidence amply shows that Defendants have not complied with the MSA. For example:

- Even in the core area of youth marketing, RJR did nothing to change its magazine placement policies after signing the MSA in November 1998 until the day that the California attorney general filed suit against it in March 2001 (in a suit which found that both RJR's initial and March 2001 policies violated the MSA). People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317, 322-23 & n.3 (Cal. Ct. App. 2004). Indeed, the appellate court affirmed the trial court's determination that RJR "'studiously avoided' measuring its advertising exposure to youth, probably because [it] 'knew the

[119] A defendant seeking to escape a permanent injunction bears the burden of demonstrating that "subsequent events made it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) (emphasis added); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

likely result of such analysis.'" Id. at 327 (quoting trial court decision); see generally US FF § V.A.(2)(c)(iii), ¶ 43.

- Likewise, after entering the MSA in November 1998, Lorillard did not change its principal "Pleasure" advertising campaign for Newport, the second-leading brand smoked among youth ages 12 to 17. Milstein TT, 1/10/05, 9312:1-9314:9; 9417:18-9421:25, discussed in US FF § V.A.(2)(c)(iii), ¶ 44. These are not the actions of companies which have fundamentally altered their conduct since entering the MSA.[120]

- Defendants increased price promotions more than seven-fold from 1998 to 2003 after the MSA banned outdoor and billboard ads, even though youth are particularly vulnerable to such price promotions.

- Defendants Philip Morris and Altria persist in sponsoring two Marlboro motor sports teams which receive heavy media coverage in the United States, despite the MSA's limitation of one sports sponsorship per MSA signatory; they rationalize this on the grounds that Altria is officially not a signatory to the MSA, and overlook that Philip Morris CEO and chairman Michael Szymanczyk sits on Altria's Corporate Management Committee. US FF § V.A.(2)(c)(ii), ¶¶ 35-41.

- Despite the same limitation of one sponsorship per signatory, Philip Morris decided in 2001 to sponsor Marlboro race cars in two different auto racing leagues in 2001 – the Indy Racing League and the CART racing league – and then retracted immediately when Washington State attorney general Christine Gregoire protested, indicating that Philip Morris was well aware that its decision violated the MSA. Id. § V.A.3(a), ¶¶ 55-56.

- Even though the MSA required Defendants to shut down and disband CIAR, Philip Morris has reconstituted it at the same address and with the same director as the Philip Morris External Research Program. Id. § V.H, ¶¶ 350-363.

2) The Court is unable to rely upon the hope of full enforcement of the MSA

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[120] Although the United States does not seek lobbying restrictions in this action, Defendants emphasize that the MSA limits them from lobbying "against specified measures designed to prevent youth access to tobacco products." JD FF ch. 12, § II.B, ¶ 18 (citing MSA § III(m), JD-045158 (A)). But in fact, Defendants **approve** of their lobbyists' lobbying against such youth tobacco control measures, so long as they assert that such lobbying is on behalf of **other** clients. Szymanczyk TT, 4/11/05, 18366:13-21. As Wisconsin State Senator Judith B. Robson wrote in a March 23, 2000 letter, "This is smoke and mirrors. If the tobacco companies can have their lobbyists appear under the guise of other entities, the entire prohibition against lobbying will be gutted. . . . The tobacco companies are smart enough not to have their lobbyists work directly on forbidden topics, but **they are achieving their goals with end-runs like this.**" (US 92114) (A) (emphases added); see generally US FF § V.A.(3)(a), ¶¶ 50-51. Once again, the Defendants have not fundamentally altered themselves in response to the MSA.

The second issue that the Court identified in its 2000 decision was whether "the M.S.A. has adequate enforcement mechanisms in the event of noncompliance." Philip Morris Inc., 116 F. Supp. 2d at 149. The evidence demonstrates the MSA's enforcement mechanisms are not currently adequate – and that the problem will only increase next year, in 2006.

As an initial matter, Defendants recognize that any hope of effective MSA enforcement depends upon a provision – which begins expiring in 2006 – that authorizes the state attorneys general to inspect Defendants' books and interview their personnel. Defendants highlight the availability of such inspection authority under the MSA, JD FF ch. 12, ¶ 58 (citing MSA § VII(g) at 52 (JD-045158) (A)), and assert that the Independent Investigating Officer (IO) proposed by the United States does not need any similar inspection authority, due to "the transparency created by: (1) the disclosure requirements of the MSA; [and] (2) the supervision of Defendants by the State Attorneys General under the MSA." Id. ch. 13, ¶ 673 (final bullet). But Defendants wholly ignore that the MSA inspection powers on which they rely begin to expire **next year**, in 2006. MSA § VII(g) at 52 (granting inspection authority to each State "following State-Specific Finality in a Settling State **and for seven years thereafter**") (JD-045158) (A) (emphasis added), discussed in US FF § V.G.(2), ¶ 317; see also Szymanczyk TT, 4/11/05, 18346:5-20 (Philip Morris CEO and chairman conceding that although MSA inspection rights under MSA § VII(g) expire seven years after state-specific finality, he had not mentioned that in his written direct testimony). Even if the Court accepts Defendants' view that the MSA currently has adequate enforcement mechanisms while the states' inspection authority remains intact, Defendants' own emphasis upon the importance of this inspection authority shows that the MSA's enforcement mechanisms will steadily become less and less adequate as the authority begins to expire in one state after another, starting just next year.

A further difficulty with MSA enforcement is that – as Defendants acknowledge – the

MSA requires "mandatory consultation and discussion" for every issue. JD FF ch. 12, ¶ 58 (citing MSA §§ VII.(b)-(c), XVIII(m) (JD-045158) (A)). This leads to extraordinarily cumbersome and time-consuming enforcement efforts. See, e.g., Ohio ex rel. Petro v. R.J. Reynolds Tobacco Co., 820 N.E.2d 910 (Oh. 2004) (over five years required to achieve final court ruling that RJR violated MSA by advertising cigarette brand logos on promotional matchbooks); People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004) (over four and a half years required to achieve ruling that RJR violated MSA by failing to modify magazine placement policies); see also US FF § V.A.(3)(b)(i), ¶¶ 64-65.

In addition, the MSA prohibits the states from seeking to enforce the MSA on one another's behalf, MSA § VII(b), (c)(1) at 49 (JD-045158) (A); and RJR has succeeded in getting the state courts to produce inconsistent interpretations of a single provision of the MSA. Contrast People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal. Rptr. 2d 151 (Cal. Ct. App. 2003) (finding MSA prohibits year-round auto racetrack billboard ads), with New York v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (N.Y. App. Div. 2003) (finding MSA allows same year-round ads), discussed in US FF § V.A.(3)(b)(ii), ¶¶ 68-69.

Defendants nevertheless assert that the MSA's "liaison mechanism for mandatory consultation and discussion" "has almost always resulted in a satisfactory resolution of [the states'] concerns." JD FF ch. 12, ¶ 58. What Defendants do not acknowledge is that they are free to ignore complaints brought to their attention through this mandatory process. And during trial, former Brown & Williamson executives Susan Ivey (now Chairman and CEO of RJR and President and CEO of RJR's parent company, Reynolds American Inc.) and Susan Smith (now Vice President of Marketing Services for RJR) acknowledged that although Brown & Williamson received complaints from NAAG and from Governor Chiles of Florida about its "B Kool" advertising campaign, the company took no action in response. Smith WD, 32:20-33:8;

Ivey WD, 11:4-12:1, discussed in US FF § V.A.(3)(a), ¶ 53.

3) The MSA does not compel all of the relief that is required

Defendants assert that the MSA will "address the misconduct alleged by the government." JD FF ch. 12, § II.B (section title; capitalization modified). To the contrary, the Court has previously recognized that the MSA does not include all of the measures necessary to prevent and restrain Defendants from engaging in future misconduct. As examples, the Court has previously recognized that the MSA does not (1) require Defendants to make corrective statements regarding health risks and nicotine addiction; (2) require Defendants to fund effective cessation programs; (3) appoint Court-appointed officials to implement the relief granted; (4) enjoin Defendants from future RICO violations; or (5) enjoin Defendants' alleged youth-marketing practices. Philip Morris USA, 316 F. Supp. 2d at 11.

Several specific ways in which the MSA's injunctions fall short of what is required to prevent and restrain future RICO violations are demonstrated by comparing its provisions to terms which Defendants agreed to accept in the 1997 Proposed Resolution. For example, the 1997 Resolution "provided a comprehensive set of remedies to restrict youth access to tobacco. . . . None of [which are] addressed by the MSA." Myers WD, 24:19-22. The 1997 Resolution also addressed "the cigarette manufacturers' use of terms such as 'Lights,' 'Low Tar,' and 'Ultra-Lights' to describe their brands," while the MSA is silent on the use of these descriptors. Id. at 24:16-18; 50:11-14. As detailed in the United States' Findings, other specific aspects of the 1997 Resolution that are included in the United States' requested relief, but are either absent from or included in weaker form in the MSA, include: a smoking cessation program; a public education campaign; economic incentives to avoid marketing to youth; a national tobacco document depository; and a ban on **all** brand name sponsorships – including not just auto racing but all sports. See US FF § V.A.(3)(d), ¶¶ 74-81.

As Matthew Myers testified, these differences between the Proposed Resolution and the MSA arose "not because any of the problems had been solved in the interim, nor are they because the evidence about what remedies would be most effective or what needed to be done had changed." Myers WD, 13:9-13; 22:13-22. To the contrary, these gaps in the MSA represent avenues Defendants have used to continue their enterprise of fraud. Moreover, far from being an idyllic, unattainable "wish list," Defendants agreed to each of these remedies as part of the Proposed Resolution. Id. at 4:6-5:19; 13:9-13.

4) The MSA does not reach all Defendants

Finally, three Defendants – BATCo, Altria, and Liggett – are not subject to all the provisions of the MSA. As the Court previously recognized, **"the MSA cannot preclude relief in this RICO action** because two of the Defendants, BATCo and Altria, are not even signatories to that Agreement." Philip Morris USA, 316 F. Supp. 2d at 12 (emphasis added). The point is compelled by Defendants' rationalization – discussed above – that Philip Morris and Altria are free to sponsor multiple Marlboro auto racing teams because their Marlboro Formula 1 sponsorship is officially controlled by Altria, and Altria did not sign the MSA. See also US FF § V.A.(3)(c). In addition, Liggett is not subject to the full terms of the MSA. See id.

B. The Court Should Impose Comprehensive Equitable Relief to Prevent and Restrain Future Unlawful Conduct on the Part of Defendants

1. Legal Standards Governing Remedies

Once liability is found, including the determination that Defendants are reasonably likely to engage in future unlawful activity, there is no ambiguity in the RICO statute as to the charge to the Court: The Court is authorized to "prevent and restrain violations of [RICO] by issuing appropriate orders." 18 U.S.C. § 1964(a). As fully explained below, the United States presented detailed evidence supporting specific equitable measures designed to accomplish the statutory

mandate of preventing and restraining future unlawful conduct by Defendants, including evidence demonstrating the need for a comprehensive remedial order, rather than just a prohibition on specified future activities. The comprehensive remedial scheme proposed by the United States and supported fully by the evidence adduced at trial meets the legal standard for forward-looking relief.

As articulated by the court of appeals, "Section 1964(a) provides jurisdiction to issue a variety of orders 'to prevent and restrain' RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations." United States v. Philip Morris USA, 396 F.3d 1190, 1198 (D.C. Cir. 2005), pet. for cert. filed, No. 05-92 (U.S. July 18, 2005).[121] The court of appeals further explained, "The words 'including, but not limited to' [in the RICO statute] introduce a non-exhaustive list that sets out specific examples of a general principle," finding that the general principle does not reflect a Congressional intent to "award remedies that addressed past harms as well as those that offered prospective relief." 396 F.3d at 1200.

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[121] The nature and scope of non-disgorgement remedies sought by the United States in this action were not before the court of appeals. Indeed, such remedies were not addressed in the briefs before the court of appeals or at oral argument. Nothing in the opinion of the court of appeals constitutes a "holding" on an issue that was not before the court and that was not even discussed; rather any such comments clearly are dicta insofar as they are sought to be applied to non-disgorgement remedies. Ultimately, however, whether the language of the opinion is dicta or binding is irrelevant to the question of whether the remedies sought by the United States are permitted by Section 1964(a), because all of the remedies are forward-looking and aimed at future violations.

For the same reason, it is irrelevant to the Court's consideration of the remedies sought by the United States whether the court of appeals' decision precludes remedies that are designed to cure the future effects of past RICO violations. For the reasons set out in the United States' Memorandum Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875 (R. 4847; filed Feb. 16, 2005), the United States continues to contend that the RICO statute does not foreclose remedies designed to cure the future effects of past violations; however, this Court need not decide that issue, since the United States' remedies are forward looking, specifically to address future violations.

The comprehensive remedial order advocated by the United States here – and supported by the evidence before the Court – is directed solely toward future violations: it does not constitute an award of remedies that address past harms; and it is consistent with what the court of appeals found to be Congress's general principle. Defendants have advanced an argument concerning the scope of available equitable relief under RICO that is entirely inconsistent with the text of 18 U.S.C. § 1964(a) and the February 4, 2005 decision of the court of appeals and, as explained in subsection D ("Specific Remedial Measures") below, contrary to the evidence before the Court. Specifically, Defendants have argued that remedies under Section 1964(a) should be limited to an injunction prohibiting Defendants from engaging in any future fraudulent or unlawful course of conduct. See, e.g., Defs. Mem. Regarding Non-Disgorgement Remedies Pursuant to Order #875 at 8-9; Weil WD. As an initial matter, Defendants' argument suggests that equitable relief in cases where RICO liability is established be limited to an admonition to violators not to repeat their misconduct in the future. Such an interpretation would result in a meaningless law and eviscerate the intent of the legislature to prohibit racketeering by eliminating any reason for persons to obey the statute. Importantly, where the law has been violated, the existence of the law itself has not been sufficient to prevent wrongful conduct. More specifically, the mail and wire fraud statutes have been law in this country for 50 years, and racketeering has been prohibited for almost 35 years, yet the existence of these specific legal prohibitions did not stop Defendants from engaging in a pervasive, 50-year scheme to defraud. Merely ordering a defendant not to violate the law, therefore, cannot mark the extent of available remedies if remedies are to effectively prevent and restrain future unlawful conduct.

Just as significantly, Defendants' proffered interpretation is also contrary to the language of the statute, which authorizes the Court to issue orders that prevent and restrain, including but not limited to examples as extreme as divesting a wrongdoer from its interest in the enterprise or

outright dissolution. See 18 U.S.C. § 1964(a). The specific examples in the statute go well beyond a mere injunctive prohibition and, as the court of appeals noted, the list contained in the statute is a non-exhaustive list setting out examples of the general principle that relief must be forward-looking and aimed at future violations. Philip Morris USA, 396 F.3d at 1198. Notably, the court of appeals engaged in the foregoing analysis in the process of defining what it viewed as restrictions in the Court's jurisdiction stemming from the text and structure of the RICO statute. Id. at 1197. The defined restrictions *do not* include a limitation to a simple prohibition on defined conduct. Rather, the only restrictions are those found in the statutory language, and equitable jurisdiction extends as far as the grant contained therein. Id.

Accordingly, the remedial order entered by the Court in this case should achieve the overarching goal of insuring that Defendants do not engage in future unlawful activity. Evidence conclusively demonstrates that in order to achieve this goal, the Court must impose comprehensive remedies, because these Defendants have repeatedly sought to escape both the letter and spirit of governing laws, regulations and agreements designed to limit their conduct such as the Cigarette Advertising Code and the MSA. That Defendants comprise a "rogue and deviant industry" is well-established. Brandt TT, 9/28/04, 973:22-974:12. This rogue and deviant industry has not been and will not be restrained by mere prohibitory language in a judicial decree – words will not restrain, but rather, without more, would constitute a futile gesture of wrist-slapping character. Instead, the Court must enter comprehensive, forward-looking remedies that prevent Defendants from engaging in unlawful activity with its crippling impact on the American public, given the real and substantial likelihood of future misconduct that is supported by the trial record and summarized in the United States' Findings.

2. Remedies Should be Comprehensive

The United States has introduced extensive evidence demonstrating the need for a

comprehensive set of remedies to prevent and restrain the substantial likelihood of Defendants' continuing fraudulent conduct. There are two principal reasons that a comprehensive set of remedies is necessary:

(1) Defendants' prior and present conduct – including their corporate environment and their conduct in this case – has demonstrated their willfulness and consummate skill at evading all efforts and violating laws, regulations, and agreements to prevent their fraudulent conduct that are any less than comprehensive; and

(2) the scientific evidence indicates that the very tobacco control measures that are necessary to prevent and restrain Defendants' fraudulent conduct in the future, while minimally effective in isolation, are most effective only when they are implemented in toto as a comprehensive plan.

Dr. David Burns testified: "It certainly is my opinion that [Defendants'] wrongdoing has been pervasive and in some instances has touched, probably, every smoker." Burns TT, 2/16/05, 13620:3-10. It is a natural corollary that, in order to prevent and restrain Defendants' pervasive fraudulent conduct in the future, the remedial scheme ordered by the Court must be comprehensive.

The United States presented substantial testimonial evidence demonstrating the need for comprehensive remedies:

- Dr. David Kessler, former FDA Commissioner, recounted Defendants' "significant attack on the [FDA]" and other obstructive actions taken during the FDA's investigation of the tobacco industry;

- Expert historian Dr. Allan Brandt depicted the "deviant" nature of Defendants' collective conduct as an industry;

- Dr. Max Bazerman, expert in behavioral decision research, described Defendants' corporate "culture" of fraud, establishing that the influences of incentives to engage in fraud permeate Defendants' corporate environment and that meaningful structural and other comprehensive remedies must be applied in concert to change it;

- Matthew Myers, who provided factual testimony contrasting the 1997 Proposed Resolution and the Master Settlement Agreement ("MSA"), evidenced Defendants' aggressive exploitation of "loopholes" or gaps of enforcement in the MSA;

- Dr. Timothy Wyant, expert statistician and biostatistician, testified about the enormous suffering and premature death that will be inflicted upon the "Youth Addicted Population" and the scientific evidence of the lifesaving effect of comprehensive remedies;

- Dr. Jonathan Gruber, expert in economics, testified on the need for a comprehensive scheme integrating outcome-based remedies with basic injunctive relief;

- Dr. Michael Eriksen, expert in public health, testified on the interaction of several remedies requested by the United States, which the scientific evidence indicates will work in synergy with each other to enhanced overall effect; and

- United States Surgeon General Richard H. Carmona testified on the scientific evidence establishing that, in order to be effective, tobacco control remedies – which the evidence has established will prevent and restrain Defendants' future unlawful conduct while saving countless lives – must be comprehensive.

The testimony provided by these witnesses, who brought to bear evidence from their various scientific disciplines, along with the related complement of strong and clear documentary evidence introduced in this case, establish amply the need for comprehensive equitable relief. This evidence makes clear that simple prohibitions on Defendants' future fraudulent conduct, standing alone, will not effectively prevent and restrain Defendants from continuing to commit fraud. Defendants' main challenge to this mountain of evidence was in the bald testimony of Defendants' witnesses Drs. Roman Weil and Dennis Carlton, who advocated that basic injunctive relief is all that is needed. Weil WD, 7:22-25; Carlton TT, 6/2/05, 22752:16-22753:3, 22778:6-20, 22810:14-18. As discussed in the United States' Findings, the testimony of Drs. Weil and Carlton is not credible. US FF § V.A.(4), ¶ 113; § V.D., ¶¶ 232-235, 241; § V.G.(5), ¶¶ 347-349. Moreover, Defendants have offered no persuasive testimonial or documentary evidence to counter the voluminous evidence introduced by the United States establishing that preventing and restraining Defendants from engaging in ongoing fraud in the future will require imposing a comprehensive remedial structure.

a. Defendants are likely to evade, contravene, and subvert basic prohibitions if only traditional injunctive relief is imposed

Defendants' conduct over their 50-year conspiracy to defraud demonstrates Defendants' track record of evading and contravening restrictions, court orders, voluntary agreements and requirements of litigation settlements, such as the Advertising Code of 1964; the Broadcast Ban of 1971, and the MSA. See generally US FF § V.A.(2)-(3). As set out in detail the United States' Findings, the 1964 Advertising Code created an Ad Code Administrator who was responsible for enforcing its generally-worded limitations on youth and health-claim marketing; within two years, Lorillard withdrew from the Ad Code Administrator provision, and within six years, the Defendants eliminated the position completely, making the Ad Code unenforceable. US FF § III.E.(3)(a), ¶¶ 4068-4070; § V.A.2.(a), ¶¶ 14-21. The 1971 Broadcast Ban prohibited television and radio advertisements (although not marketing that was broadcast by television or radio); the Defendants responded by **quintupling** their spending on outdoor and billboard ads in a single year (from under $12 million in 1970 to over $60 million in 1971), increasing their print advertising by two-and-a-half times in a single year (from $64 million in 1970 to $158 million in 1971), and sponsoring numerous sporting and entertainment events which received extensive television coverage. Id. § V.A.(2)(b), ¶¶ 22-29. The inadequacies of the MSA and Defendants' efforts to circumvent or evade its negotiated proscriptions are convincingly demonstrated by the trial record and summarized at greater length above.

In addition, Dr. David Kessler, who, as FDA Commissioner, led the investigation of the tobacco industry in the mid-1990s, described, based on his own personal knowledge, Defendants' efforts to circumvent the FDA investigation:

> Based on my experience, cigarette manufacturers and the Tobacco Institute did the opposite [of the close cooperation they promised in the Frank Statement]. **Parts of the industry waged, I think it is fair to say, a significant attack on the Agency**. At the very least, I think it is fair to say that some in the industry, at times, were **not forthcoming** with the Agency. Beyond that, there were times,

> through the course of our investigation, where we felt that **we were misled by statements of cigarette company officials about significant issues that we were investigating**.

Kessler WD, 1:10-17; 6:17-20; 65:6-66:2 (emphasis added); see also id. at 22:13-23:1; 28:10-29:3 (describing how Philip Morris and Brown & Williamson first denied, then admitted when confronted with direct evidence, their manipulation of nicotine in the cigarettes they sold).

The 2000 Surgeon General Report describes Defendants' consistent efforts to undermine past informational and tobacco control efforts, stating that "what may be the foremost obstacle to changing the social norm of smoking [is] the multifaceted actions of the industry in preventing prevention. . . . . Taken together, and backed by the enormous resources of the industry, these efforts have considerable impact in promoting tobacco use and retarding efforts to reduce or prevent it." US 64316 at 0156 (A). The 2000 Report also provides a summary, supplied by the Advocacy Institute, of Defendants' "tactics," which are categorized as: "intimidation, alliances, front groups, campaign funding, lobbying, legislative action, buying expertise, philanthropy, and advertising and public relations." Id. at 0156-0157.

Such experiences demonstrate, as Dr. Dolan testified, "If an agreed-to restriction on marketing practices makes marketing less efficient, Defendants could simply substitute additional dollars or effort to compensate for this, as they have in the past." Dolan WD, 146:17-20. As Dr. Gruber testified, "[D]efendants have shown an ability to adapt in order to circumvent the intent of restrictions on their behavior," and have a "history of strategically moving from one marketing medium to another and effectively harnessing new mediums in unpredictable ways." Gruber WD,10:2-4, 12:4-14 (citing Dolan WD, 146; Krugman WD, 101-102).

This past and current history indicates that, whatever the Court does, it cannot rely upon traditional injunctive relief alone, because Defendants will evade and undermine the terms of any traditional injunction, as well as shift their massive resources to areas that are not expressly

prohibited. Especially when considered in conjunction with Defendants' repeated violations of, and demonstrated contempt for, this Court's Orders, see Legal Brief, § III.A.2.a, supra; US FF § V.A.(4), ¶¶ 89-98, Defendants cannot be trusted simply to comply with a Final Judgment and Order that imposes solely prohibitive injunctions. This scientific and historical evidence underscores the reality that Defendants will evade and undermine remedies that are less than comprehensive.

b. Fraud pervades the structure of Defendants' corporate environment

This foregoing litany of Defendants' openly violating and disregarding regulations, laws, agreements, and Orders of the Court provides every reason to believe that these Defendants would disregard and subvert – in similar fashion – basic injunctive relief and any other relief short of a complete, comprehensive remedial scheme. Indeed, these actions are true to Dr. Brandt's characterization of Defendants as a "deviant" and "rogue industry," and reflect that these Defendants' businesses behave and operate in a markedly different way than those of most industries. Brandt TT, 9/27/04, 678:11-17; 680:7-11; accord Brandt TT, 9/28/04, 973:22-974:12 ("I describe [Defendants as a 'deviant' and 'rogue industry'], because I think when an industry comes to have a product that is identified as a major cause of human . . . disease and sickness, and yet takes the position to denigrate and try to attack that evidence without really taking it seriously in terms of their commitment to the public, then **I don't think that that industry's acting the way I anticipate most businesses operate.** So that, I think, makes the industry **deviant and/or rogue** and, **in other words, outside the boundary of what my expectation would be about an industry** whose product – principal product is implicated with such serious disease.") (emphasis added). As Fred Gulson put it more colorfully when describing lawyers for BATCo affiliate BATAS, they "might have passed by the fountain of ethics; they gargled, they

did not swallow." Gulson TT, 2/17/05, 13838:18-19.

The foregoing observations are confirmed by Dr. Max Bazerman, an expert in behavioral decision research with a specific focus in managerial and organizational contexts, who concluded, based on his review of the record in this case, that a "culture" of fraud pervades all facets of Defendants' companies, influencing both how Defendants design and market cigarettes and their public communications about them, and that Defendants' current business practices are a veritable breeding ground for fraud. Bazerman WD, 1:16-19; 4:13-16; 43:10-13; 45:4-6. As a result, without a Court-compelled modification of their business practices, Defendants will continue to commit fraud as long as it is profitable for them to do so. Id. at 1:20-22; 19:19-21; 47:3-12; 48:10-16; Bazerman TT, 5/4/05, 20324:8-13; 20494:21-20495:3; Harris TT, 10/14/04, 2519:24-2520:6. Dr. Bazerman added that preventing and restraining Defendants from engaging in fraud in the future thus requires modifying their business practices and policies and removing the economic and other incentives that have led and still lead Defendants to commit fraud. See US FF § V.G.(1)-(4); Bazerman WD, 1:14-2:10; 2:20-3:3; 45:1-6; Bazerman TT, 5/4/05, 20322:18-20324:12.

Dr. Bazerman further testified that implementing the changes necessary to eliminate ongoing fraud by these Defendants requires that the structural corporate changes that he proposes be **combined with other remedies as part of an integrated remedial scheme**. Bazerman WD, 42:16-43:17 ("I would recommend to the Court that the package of structural changes must be comprehensive"). As Dr. Bazerman testified: "In addition [to the corporate changes], there are other Court interventions that also can affect incentives and biases that I would recommend the Court consider." Dr. Bazerman elaborated, stating that "[t]he structural changes to defendant firms could be supported by additional efforts," including several of the other remedies requested by the United States: funding of a cessation program, such as that proposed by Dr. Fiore;

disclosure of industry documents and information; and changes to advertising and promotion of Defendants' cigarettes, such as the remedies proposed by Drs. Gruber and Eriksen. Id. at 18:13-19:5; 46:23-47:2; 59:12-60:2; accord US FF § V.G.(3).

c. The court can and should consider the public interest in fashioning its remedies order

Defendants vehemently insist that the United States improperly asks the Court to impose relief in order to advance the public health, rather than to prevent and restrain future RICO violations. See, e.g., JD FF ch. 1, ¶¶ 1-4; ch. 13, ¶¶ 2, 80-83, 391-393, 550, 760. To the contrary, as discussed below and at even greater length in the United States' Findings, the United States' proposed remedies are necessary to prevent and restrain future RICO violations.

To be sure, many of these remedies are also in the public interest and should advance the public health. This is entirely proper. As Defendants elsewhere concede, the Court **should** consider the public interest as it fashions its remedies order: "[O]ne factor in granting any permanent injunctive relief is 'whether the public interest favors granting the injunction'." JD FF ch. 13, ¶ 53 (quoting ACLU v. Mineta, 319 F. Supp. 2d 69, 87 (D.D.C. 2004)). The Supreme Court has repeatedly stated that "[c]ourts of equity may properly take into account the public interest." Brown v. Bd. of Education of Topeka, Kansas, 349 U.S. 294, 300 (1955); see also United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 496 (2001) ("For several hundred years, courts of equity have enjoyed sound discretion to consider the necessities of the public interest when fashioning injunctive relief.") (internal quotation marks and citation omitted). Indeed, a court fashioning equitable relief is **expected** to consider the public consequences of its order: "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Merely because the

United States' proposed remedies have the added benefit of saving lives does not prohibit the Court from using them to prevent and restrain future RICO violations.

Against this background, a brief summary of the benefits to the public interest from the United States' proposed remedies is appropriate. Dr. Timothy Wyant testified to the enormous human toll that will arise by the year 2050 to the population of 57 million smokers who became addicted to smoking as youth between 1954 and 2000. Wyant WD, 13:1-23 (estimating that "through the year 2050, smoking will cause 13.4 million of these adults to die prematurely. We also calculated that because of their premature deaths, these 13.4 million persons will be deprived of a total of 173.5 million years of life."), discussed in US FF, § V.A.1. But if a comprehensive remedial order can reduce smoking rates "on the order of 10% to 20%[, it] will translate to millions of premature deaths averted and tens of billions of health care dollars saved." Wyant WD, 29:22-30:5, 59:4-8.

Preventing and restraining future RICO violations frequently requires courts to impose multiple remedies simultaneously. See, e.g., United States v. Local 30, United Slate, Tile & Composition Roofers, 871 F.2d 401, 407-08 (3d Cir. 1989) (affirming district court's barring 13 individual union members from union's affairs, imposing audit requirements, and instituting a "decreeship" and court-appointed officer to ensure union's compliance; finding that the union's "long history of violence and threats . . . would not easily be eliminated merely by the removal of those thirteen individuals"). As discussed below, the remedies proposed by the United States work together to prevent and restrain future misconduct. As Drs. Eriksen and Fiore testified, the components of a comprehensive plan also work in synergy with each other, giving each greater impact than the components otherwise would have in isolation: "the scientific evidence suggests that counter-marketing efforts are most effective when conducted as campaigns and coordinated with and integrated into other elements of a comprehensive tobacco control program." Eriksen

5/9/05 WD, 4:8-11; see also Eriksen WD, 3:17-24 (scientific counter-marketing guidelines mandate that counter-marketing programs "must be integrated into [a] larger tobacco control program"); Fiore WD, 18:21-19:22. In addition, as Dr. Eriksen testified, the scientific evidence demonstrates that states that implemented comprehensive tobacco control programs that included counter-marketing campaigns (including California, Massachusetts, Arizona, Oregon, Florida and Maine) were more successful at preventing youth initiation than other states. Eriksen 5/9/05 WD, 8:18-9:5.

Surgeon General Carmona testified at length about the scientific evidence supporting the requirement that tobacco control remedies be comprehensive. The Surgeon General's "Vision for the Future," contained in Chapter 8 of the 2004 Surgeon General's Report, "review[s] the need for a continued, sustained, effort, a comprehensive approach, and a comprehensive plan for the future." Carmona WD, 7:16-25; US 88621 at 0907-0911 (A). A subsection of Chapter 8, entitled "The Need for a Comprehensive Approach," observes: "A comprehensive approach–one that optimizes synergy from a mix of educational, clinical, regulatory, economic, and social strategies–has emerged as the guiding principle for effective efforts to reduce tobacco use." US 88621 at 0909 (A) (emphasis added); see also Carmona WD, 18:6-16. As the Surgeon General testified at trial, "one of the reasons you need a multi-level strategy" to address smoking is to address "the billions of dollars spent by the tobacco industry to advertise and promote cigarettes (e.g., $11.2 billion in 2001)." Carmona TT, 5/3/05, 20107:20-20108:17; Carmona WD, 19:12-16.

Defendants' past, present and continuing conduct – including their evasion of the MSA's provisions and their contempt of Court and sanctionable behavior in this case – as well as the testimony of the numerous expert and learned witnesses and documentary evidence, amply establish that, in order to effectively prevent and restrain the threat of continuing wrongful

conduct by Defendants, the remedies imposed by the Court must be comprehensive.

C. Court-Appointed Monitors Should Be Utilized to Implement and Enforce the Court's Remedial Order

1. Based on the Equitable Principles of 18 U.S.C. § 1964(a) and Governing Law, the Court Has Broad Authority to Appoint Officers and Agents As Part of a Comprehensive Remedial Structure

Under 18 U.S.C. § 1964(a), this Court has authority to enter "appropriate orders" that will prevent and restrain any future violations of the RICO statute. For the reasons set forth below, the use of court-appointed officers to implement and enforce the Court's final decree in this case comports with the remedial goals of the RICO statute. Appointing officers with sufficient oversight responsibilities and powers to prevent and restrain future RICO violations not only is appropriate, but is necessary to ensure compliance by these Defendants, who have engaged in a massive scheme to defraud the public that continues to this day.

a. The use of court officers and agents is a traditional feature of remedial structures in civil RICO cases brought by the United States

The Supreme Court recognized the broad authority of the district courts to take appropriate measures in civil RICO cases to accomplish the "remedial purposes" of RICO. Sedima, 473 U.S. at 497-498 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947). The remedial purposes of RICO, including orders under Section 1964(a), are directed toward expunging unlawful influences that act within organizations in order to prevent future violations. Philip Morris USA, 396 F.3d at 1200. Notably, the statute has been applied to fraud cases where "legitimate" businesses have "engaged in a pattern of specifically identified criminal conduct." Sedima, 473 U.S. at 499 (noting that "legitimate enterprises . . . enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). In the case sub judice, this Court has the authority to enter appropriate relief that will prevent and restrain Defendants from engaging in fraudulent practices that have spanned decades.

To ensure that the criminal, fraudulent conduct does not continue, the relief ordered under Section 1964(a) must also be "broad enough to do all that is necessary." United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995) (quoting S. Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969)). Traditionally, courts have appointed investigating officers, liaisons, monitors, and other agents to assist in formulating, implementing, and enforcing remedial schemes in civil RICO cases brought by the United States.[122] While these civil RICO cases have been in the context of labor unions, they are instructive and applicable here, as RICO applies to private businesses with equal force.[123]

Two labor cases in particular resulted in court-ordered remedial monitoring schemes after findings of liability against the defendants. In United States v. Local 560, Int'l Bhd. of

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[122] In fact, the Carson decision was the result of an appeal taken by a former union official from consolidated civil RICO cases against the Locals of the International Longshoremen's Association. See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177 (S.D.N.Y. 1993) (remedies opinion). Prior to trial, the cases resulted in Consent Decrees that provided for the appointment of monitors to oversee the activities of the Locals. See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, No. 90-0963, 1992 WL 77637 (S.D.N.Y. Mar. 24,1992) (quoting language from Consent Decree governing Local 1814 regarding membership of union official "subject to the authority of the Monitor."). Donald Carson was one of several remaining defendants found liable after trial on the merits. United States v. Local 1804-1 Int'l Longshoremen's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993) (liability opinion). The district court permanently enjoined defendants, including Carson, from participating in the affairs of the union, among other things. Local 1804-1, 831 F. Supp. at 191. The imposition and breadth of the injunction against Carson was upheld on appeal. Carson, 52 F.3d at 1183-85.

[123] See Sedima, 473 U.S. at 499. Labor unions, like corporations, are private, legitimate entities. Unlike corporations, however, unions operate within the context of specific federal regulations to advance and protect highly significant first amendment association rights, while tending to promote stability in labor-management relations and peaceful resolution of labor-management disputes. See generally 29 U.S.C. § 151 et seq. Notwithstanding union members' significant First Amendment rights and the significant societal interests that unions promote, courts have upheld imposition of court-ordered trustees and disciplinary procedures against unions and their members. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 974 F.2d 315, 339-46 (3d Cir. 1992). See also Carson, 52 F.3d at 1185; United States v. International Bhd. of Teamsters, 19 F.3d 816, 823 (2d Cir. 1994); United States v. United Private Sanitation Indus. Ass'n, 995 F.2d 375, 377-78 (2d Cir. 1993).

Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), the district court enjoined certain individuals, who were named defendants, from any future contacts with the union and removed the existing Executive Board in favor of a trusteeship. The trustees would oversee the daily operations of the organization so that "the pattern of abuse [could] be broken and future violations prevented." Local 560, 581 F. Supp. at 326. Unlike the trusteeship that operated the union in Local 560, a form of "Decreeship" was created to enforce the remedial order imposed on a roofers' union in Local 30, United Slate, 686 F. Supp. at 1168. The decree entered in Local 30, as a preliminary injunction which was subsequently converted into a final decree, appointed a Court Liaison Officer ("Officer") and empowered the Officer to set conditions for all collective bargaining; granted the Officer access to all union records; and permitted the Officer to appoint deputy officers, assistants and support services as necessary to carry out the provisions of the decree. Local 30, United Slate, 686 F. Supp. at 1171-74. In addition, the Decree required the union to devise a new grievance procedure and ordered an audit of all financial matters involving the union. Id. at 1172. Importantly, in both of these cases, the Third Circuit affirmed and approved the use of court-appointed trustees and officers. See Local 560, 780 F.2d at 295-296 (holding that equitable powers granted under Section 1964 permit district courts to appoint Trustee); Local 30, United Slate, 871 F.2d at 408.

Similarly, in United States v. Local 295, Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y 1992), the district court appointed a permanent trustee over Local 295 upon a finding that the temporary trusteeship in place pursuant to a related Consent Decree would not effectuate the remedial purposes of RICO. The court based its decision on the criminal convictions of several union officials, which led to findings of liability against these officials in the civil RICO case on summary judgment. See United States v. Local 295, Int'l Bhd. of Teamsters, No. 90-0970, 1991 WL 35497 (E.D.N.Y. Mar. 8, 1991). Pointing to the ongoing and pervasive

corruption of Local 295, the court noted that it faced "an extraordinary situation," which required "a special remedy from the court." Local 295, 784 F. Supp. at 18. Yet, as the court also noted, trusteeships under civil RICO are no longer unprecedented concepts, but are "quickly being recognized as an extremely valuable part of effective law enforcement." Id. (quoting S. Rep. No. 407, 101st Cong., 2d Sess., at Sec. I (1990)).

The recognition of court-appointed officers as tools for effective enforcement of court orders under civil RICO is also apparent in the line of cases where Consent Decrees have provided for the appointment of such officers to accomplish the remedial goals of the Decrees. These cases demonstrate that court-appointed officers assume different names, responsibilities, and roles depending upon the behavior to be remedied and the goals of the decree. For example, in egregious cases of widespread corruption, trusteeships have been established to run the daily operations of unions.[124] In other cases, monitors have been authorized to investigate and review certain operations of the organizations they are monitoring.[125] Consent Decrees have also provided for the appointment of multiple officers with distinct roles operating within the same organization. For instance, in United States v. International Bhd. of Teamsters, 931 F.2d 177 (2d Cir. 1991), the United States reached a settlement of approximately eight civil RICO cases

[124] United States v. Local 6A, Cement and Concrete Workers, 832 F. Supp. 674, 677 (S.D.N.Y. 1993); United States v. Bonnanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1419 (E.D.N.Y. 1988).

[125] United States v. Local 282, Int'l Bhd. of Teamsters, 13 F. Supp. 2d 401 (E.D.N.Y. 1998) (general enforcement authority to deter future labor racketeering); United States v. Hotel Employees and Restaurant Employees Int'l Union, 974 F. Supp. 411 (D.N.J. 1997) (authority to review and veto union actions); United States v. Mason Tenders District Council of Greater New York, No. 94-6487, 1994 WL 742637, (S.D.N.Y. Dec. 27,1994) (authority to review expenditures, investments and contracts of the union); United States v. Hanley, No. 90-5017, 1992 WL 684356 (D.N.J. Dec. 3, 1992) (authority to review and approve union candidacy petitions); Local 1804-1, 1992 WL 77637 (authority to review eligibility for pension benefits of enjoined defendants); United States v. Local 359, United Seafood Workers, 705 F. Supp. 894, 896 (S.D.N.Y. 1989) (duty to ensure compliance with consent judgment and default judgment).

against various joint councils and union locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (collectively,"IBT affiliates"). In a March 14, 1989 Consent Decree, three types of court officers were appointed to oversee the IBT affiliates: (1) an Election Officer to supervise the election of union officers; (2) an Investigations Officer to prosecute disciplinary charges against union officers, members, employees or affiliates; and (3) an Independent Administrator authorized as an impartial decision maker in disciplinary cases brought by the Investigations Officer. Id. at 180. See also United States v. District Council of New York City, 941 F. Supp. 349 (S.D.N.Y. 1996) (appointing Investigations and Review Officer and five member Independent Hearing Committee); United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995) (appointing Trustee to oversee daily operations and Court Officer to investigate corruption); Mason Tenders, 1994 WL 742637 (appointing Monitor and Investigations Officer). As these cases demonstrate, court-appointed monitors are a standard feature of RICO remedial schemes and are used to remedy widespread corruption while ensuring compliance with complex decrees designed to prevent and restrain future RICO violations.

b. Court-appointed monitors are used in many contexts to enforce complex remedial decrees

Defendants' contention that the use of court-appointed officers is a novel and extraordinary remedy is simply wrong. Not only are monitors used frequently in the context of remedial schemes under RICO as described above, they also are routinely appointed to assist with the implementation and enforcement of remedial decrees in many other contexts. In Local 28 of Sheet Metal Workers' Int'l Ass'n. v. EEOC, 478 U.S. 421 (1986), the Supreme Court approved the appointment of an administrator to oversee a remedial decree based on the complexity of the decree's implementation and on the prospect of non-compliance. Specifically, the Supreme Court stated that "in light of the difficulties in monitoring compliance with the

court's orders, and especially petitioners' established record of resistance to prior state and federal court orders designed to end their discriminatory membership practices, appointment of an administrator was well within the District Court's discretion." Local 28, Sheet Metal Workers, 478 U.S. at 482 (citing cases).

The appointment of monitors and administrators for the purpose of implementing and monitoring remedial decrees also has been discussed with approval by this Circuit's Court of Appeals. In In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165 (D.C. Cir. 1991), the trustees of two multi-employer trust funds sued the Bituminous Coal Operators' Association concerning a dispute over the level of employer contributions to the employee trust funds, and the district court entered a broad order of reference to a master which essentially permitted the master to act as a "surrogate judge." 949 F.2d at 1168. While finding that the broad scope of the particular reference at issue went beyond the district court's reference authority, the Court of Appeals specifically recognized that "further reference to the special master, at the remedy-implementation stage, if and when liability has been determined by the district judge" would be appropriate. The Court of Appeals also expressed agreement with basic principles concerning reference of remedies issues to a master as stated by the Eighth Circuit in In re Armco, 770 F.2d 103 (8th Cir. 1985):

> If the district court determines that liability rests with some or all of the parties, it may request the master to conduct evidentiary rehearings with respect to damages and alternative relief and make recommendations with respect to these matters. **It may also direct the magistrate to monitor and supervise any injunctive relief granted and to make reports to it with respect to compliance with any decrees entered**.

Id. at1169 (quoting Armco, 770 F.2d at 105) (emphasis added); see also United States v. Microsoft, 147 F.3d 935, 954 (D.C. Cir. 1998) (describing the use of masters to oversee compliance with a remedial order a "well-established tradition.").

Other Courts of Appeals similarly have endorsed the use of monitors or masters to assist a district court in overseeing remedial decrees such as that proposed by the United States in this case. For example, in National Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536 (9th Cir. 1987) ("NORML"), a master was appointed pursuant both to Fed. R. Civ. P. 53 and the All Writs Act, 28 U.S.C. § 1651(a), to monitor a law enforcement entity's compliance with an injunction prohibiting the use of certain search and seizure methods. The law enforcement entity opposed the reference, which gave the master broad authority to monitor its activities and to initiate and conduct evidentiary hearings concerning its violation of the terms of the injunction. NORML, 828 F.2d 539-40. The Ninth Circuit approved the appointment of the master to perform these extensive monitoring and enforcement functions and determined that the prospect of the law enforcement entity's non-compliance with the injunction was a sufficient "exceptional condition"[126] justifying reference to a master. Id. at 542-43. In addition, the Ninth Circuit approved the All Writs Act as a basis for the district court's authority to refer these matters to a master, noting the district court's "inherent authority" to take action "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued. . . ." Id. at 544.[127]

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[126] Prior to the December 1, 2003 amendments to Fed. R. Civ. P. 53, a nonconsensual reference to a master was permitted only if justified by an "exceptional condition." See Fed. R. Civ. P. 53(b) (2002) (amended 2003). The 2003 amendments changed this aspect of the Rule. See discussion of Article III, infra.

[127] See also In re Donald Pearson, 990 F.2d 653, 659 (1st Cir. 1993) (approving non-consensual appointment of master to evaluate and make recommendations concerning efficacy of consent decree); Hoptowit v. Ray, 682 F.2d 1237, 1263 (9th Cir. 1982) (approving appointment of master to monitor compliance with court's orders and approve plans ordered submitted by the court based on complexity of litigation and of compliance with court's orders); United States v. Suquamish Indian Tribe, 901 F.2d 772, 774-75 (9th Cir. 1990) (approving non-consensual appointment of master for recommendation on substantive rights of parties where appointment made for the purpose of assisting the district court in the enforcement of its decree and justified

(continued...)

2. Court-Appointed Officers Are Necessary in This Case To Provide Efficient and Effective Enforcement of the Required Comprehensive Remedial Structure

It is clear that this Court, sitting in equity, has the power under RICO to order comprehensive structural remedies and appoint officers to implement and enforce those remedies. The United States' Proposed Final Judgment and Order lays out a comprehensive remedial structure designed to prevent and restrain Defendants from continuing to engage in fraudulent activity. An integral part of that comprehensive remedial structure is the appointment of court officers, specifically an Independent Investigations Officer ("IO") and Independent Hearing Officer ("IHO"), to implement, monitor, and enforce the provisions of the Final Judgment and Order.

a. The comprehensive and complex nature of the remedies in this case both justify and necessitate the appointment of an IO and an IHO to assist in the implementation, monitoring, and enforcement of this Court's Final Judgment

The comprehensive remedial structure proposed by the United States comprises multi-faceted, comprehensive injunctive relief that: (1) requires Defendants to fund a National Smoking Cessation Quitline Network; (2) requires Defendants to fund public education and counter-marketing programs; (3) establishes youth smoking reduction targets and penalties; (4) requires Defendants to make specific corrective communications through various means; (5) requires Defendants to make specific disclosures of their internal documents; (6) imposes a comprehensive review of Defendants' business policies and practices for the purpose of changing

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[127](...continued)
by the complexity of litigation and of compliance with decree); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 962-63 (2d Cir. 1983) (approving non-consensual reference to a master that gave master authority to, among other things, make "recommendations regarding compliance with or interpretation of the Consent Judgment, which became binding on all parties unless written objections" were submitted to district court).

those practices that encourage violations of RICO; and (7) prohibits certain practices related to Defendants' marketing activities and other communications. Clearly, the implementation and enforcement of this comprehensive remedial structure would be a time-consuming and resource-intensive task for the Court to manage on its own.

There are four principal functions of court-appointed agents which will provide efficient mechanisms to ensure effective implementation and enforcement of a remedial order of this Court. First, as in the civil RICO cases governing labor unions discussed supra, the Court should rely on an IO, with requisite expertise and access to relevant information, to conduct an independent review of Defendants' business policies, practices, and operations and to recommend changes to Defendants' businesses that will prevent and restrain future RICO violations. Second, the IO should be empowered to monitor and enforce the injunctive relief imposed by the Court. For example, the IO can readily make the requisite computations and enforce the injunction imposing penalties upon Defendants if they miss targets for reducing youth smoking. See US FF § V.D. The IO can also insure that cessation and counter-marketing funding achieves the purposes for which it is ordered. Third, the IO will also implement and oversee the funding of third-party counter-marketing programs and smoking cessation programs. Such oversight by the IO eliminates the burdensome oversight obligations on the part of the Court, yet ensures Defendants' compliance with the Court's final order. Fourth, the IHO operates to streamline the resolution of violations of this Court's order by providing an efficient mechanism to address alleged violations, subject to specific procedures and judicial review.

Without the appointment of an IO and IHO, the difficult nature of enforcement of the Court's remedial decree would begin with the comprehensive review of Defendants' business policies and practices that is necessary to assure that the policies and practices that encourage RICO violations are amended and/or eliminated. The delegation, with Court oversight, of the

responsibility for this review and for developing proposed changes to Defendants' business practices to an IO is essential, as it would be extraordinarily resource-intensive for the Court itself to conduct the comprehensive review to determine, for example, how to amend Defendants' compensation and promotion policies or their oversight and reporting arrangements in a manner that would produce outcomes inconsistent with future misconduct. See United States' Proposed Final Judgment and Order, 32-33. The performance of this review and the initial development of proposed changes to Defendants' business practices by the IO rather than by the Court will assist the efficient implementation of the Court's decree by eliminating the need for the Court to engage in the time-consuming process of coordinating the review and identifying individuals with the expertise necessary to evaluate and make recommendations about Defendants' business practices and policies. See Salazar v. District of Columbia, No. 93-452, 1997 WL 306876, at *2 (D.D.C. 1997) ("Enforcement of this decree will be a complex and time-consuming task. Monitoring of its provisions is absolutely essential if they are to have their full impact. Certain issues related to enforcement of the decree need further study as to feasibility and cost. Developments in computer technology will have to be considered.").

Without a built-in mechanism for review of Defendants' compliance with the decree, its enforcement will also be hampered by the difficulty of detecting possible violations. The injunctive relief proposed by the United States will require Defendants to take numerous affirmative actions in order to come into compliance with the decree's extensive provisions. The appointment of an IO is necessary to assure that each of these multiple Defendants takes the action necessary to comply with the comprehensive remedial scheme. In addition, violations of the final decree may be difficult to remedy without proper mechanisms in place to detect such violations and initiate action to correct them. Without the appointment of an IO and an IHO to handle these tasks, subject to review by the Court, the Court's remedial decree will be rendered

ineffective. The alternative to the proposed activities of the IO and the IHO is continued litigation through contempt proceedings initiated by the United States and litigated before this Court for every alleged violation of the decree by Defendants. See United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 334 (1961). Not only would this scheme for remedying violations consume the valuable time and resources of the Court, but it also "would, judging from the history of this litigation, take years to obtain" orders to correct Defendants' violations. Id.; see also US FF § V.A(3)(b)(i) (discussing extraordinarily time-consuming process for MSA enforcement).

It is evident from the course of this litigation and the comprehensive nature of the proposed remedy that an efficient monitoring and enforcement mechanism is vital to the success of this Court's remedial order in preventing and restraining future fraudulent conduct by Defendants. See Salazar, 1997 WL 306876, at *2 ("On the basis of the extensive record complied in this case, and given the need for both on-going monitoring requiring analysis of complex reports and studies as well as evaluation of new and costly enforcement mechanisms, the Court concludes that exceptional circumstances do exist to warrant appointment under Fed. R. Civ. P. 53(b) of a Monitor to aid in the enforcement of this decree.").

b. The high likelihood of Defendants' non-compliance necessitates appointment of an IO and IHO

Based on Defendants' conduct in this litigation, the Court can anticipate that achieving Defendants' compliance with its final injunction will be an extremely difficult task. As set out above, as a result of numerous instances in which Defendants flatly refused to comply with the orders of this Court, substantial time and resources of the Court were spent considering briefing of the parties and rendering decisions designed to bring Defendants into compliance with its previous orders. See Section III.A.1.a, supra (discussing sanctions orders against BATCo,

Liggett, Philip Morris, and Altria).

Defendants also systematically attempted to avoid their discovery obligations through their continued assertion of attorney-client and other privileges to approximately 37,000 "Bliley documents" even after this Court determined in Order #149 that Defendants had waived any privilege they held in these documents. See, e.g., R&R #85, adopted by Order #263, at 9-12. After the issuance of Order #149, Defendants continued to assert privilege to "Bliley documents" on their privilege logs and to duplicates of those documents that differed only in bates numbers. Thus, over one year after the entry of Order #149, following extensive discussions with Defendants concerning their obligation to release documents subject to Order #149, the United States filed a motion for clarification of Defendants' discovery obligations pursuant to Order #149.

These incidents – in which the Court was required to take action in order to coerce Defendants' compliance with basic obligations that already had been established by its orders – demonstrate that the appointment of an IO and an IHO is appropriate and necessary to monitor Defendants' compliance with the terms of this Court's final judgment. Defendants have demonstrated through their history of non-compliance with this Court's directives – which occurred both through blatant and wilful disregard of the Court's orders as well as through tactics designed to disguise their non-compliance – that they are more than willing to disregard the Court's legitimate orders. The enormous amount of time and dedication of resources necessary to scrutinize Defendants' compliance with the terms of a complex remedial decree dictates that the court appoint an IO and an IHO to assist with these monitoring and enforcement functions. See Local 28 Sheet Metal Workers, 478 U.S. at 481-82 (defendants' resistance to prior state and federal court orders designed to remedy their unlawful conduct justified appointment of an administrator to assure compliance with the court's remedial order).

3. Defendants' Arguments Opposing the Appointment of an IO and IHO Are Meritless

In various pleadings and arguments during trial, Defendants have contended that the Court lacks authority to appoint an IO and an IHO to monitor and enforce its remedial decree. Defendants' arguments are unpersuasive.

a. The use of court-appointed officers to implement remedial orders and monitor private corporations is not prohibited under the governing law

Defendants claim that their businesses are distinguishable from the labor unions infiltrated by organized crime and the public entities, such as prisons and schools, which are subject to institutional reform litigation; thus, they should not be subject to the same types of comprehensive remedial schemes utilizing monitors. Such arguments are unpersuasive for three reasons. First, nothing in the governing law on RICO specifically, and the use of court-appointed officers generally, proscribes the use of court-appointed agents to formulate, implement, and enforce remedies imposed upon private corporations. Second, in numerous other contexts, monitors, masters, and other assistants to the federal courts have been appointed for the purpose of monitoring the conduct of private entities and the use of such court-appointed agents has been discussed with approval in those cases.[128] Third, a private corporation **has** been subject to a court-appointed monitor as part of preliminary relief in a civil RICO action.

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[128] See Stauble v. Warrob, Inc., 977 F.2d 690, 695 (1st Cir. 1992) (noting, in litigation between two corporations and shareholder who alleged various acts of corporate fraud, that master could be appointed to address remedial matters following a finding of liability by an Article III judge); Bituminous Coal Operators, 949 F.2d at 1169 (noting, in litigation between trustees of multi-employer trust funds and Bituminous Coal Operators' Association, that reference to a master during the remedial phase, following a finding of liability, would be appropriate); In re Armco, 770 F.2d at 105 (stating, in litigation against private corporations alleging violations of environmental laws, that if district court finds liability, it may direct a master "to monitor and supervise any injunctive relief granted and to make reports to it with respect to compliance with any decrees entered").

In United States v. Ianniello, 646 F. Supp. 1289, 1292 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987), the district court appointed a receiver "to take charge of" and operate the affairs of a restaurant during the pendency of a civil RICO trial against the restaurant's owners, who were alleged to have illegally diverted the restaurant's receipts.[129] Granting the United States' request for appointment of the receivership, the district court denied defendants' claims that a receivership served "to banish the individual defendants from participating in the bar and restaurant business in New York State," and thus conflicted with their rights and the Twenty-first Amendment's bestowal of broad regulatory authority upon the states. Ianniello, 646 F. Supp. at 1298. The Second Circuit upheld the district court's finding that the receivership was an appropriate order under 18 U.S.C. § 1964(a) and (b) to prevent and restrain the skimming of receipts. Ianniello, 824 F.2d at 208. ("Under these sections, the district court has considerable discretion to frame the scope of a receivership to meet the needs of the case."). Accordingly, the use of court-appointed agents may be imposed upon these Defendants to meet the remedial needs of this case.

b. The use of court-appointed officers in remedial schemes does not contravene the District Courts' powers under Article III or the law of the D.C. Circuit

Defendants assert that appointment of an IO and an IHO would unconstitutionally permit the exercise of the judicial power established in Article III of the Constitution by a non-Article III adjudicator. See U.S. Const., art. III. However, review of the numerous cases that have analyzed this issue reveal that a violation of Article III occurs when the use of a master or monitor includes

[129] The district court in Ianniello noted the distinction between the case before it concerning appointment of a receiver pendente lite and Local 560, which appointed a trustee to conduct the affairs of the union as a remedial measure after full trial. The court in Ianniello relied upon 18 U.S.C. § 1964(b), which allows entry of restraining orders pending final determination.

the non-consensual reference of "a fundamental question of liability" without independent, non-deferential review of master or monitor's findings of fact and conclusions of law by the district court. See, e.g., Stauble, 977 F.2d at 695-97. The United States' Proposed Final Judgment and Order does not violate Article III because: (1) the functions of the IO and the IHO are to assist in the implementation, monitoring, and enforcement of the Court's final decree, not to decide fundamental questions of liability, and (2) the Proposed Final Judgment and Order includes a process for review by the district court of any decision or Order of the IHO upon an appeal by the parties.[130]

Much of the case law analyzing the question of whether a district court violates Article III through the use of monitors, masters, or other personnel to assist in the performance of certain judicial tasks has arisen in the context of Fed. R. Civ. P. 53, which, prior to the December 1, 2003 amendment, permitted a non-consensual reference to a special master only if an "exceptional condition" existed. See Fed. R. Civ. P. 53 (2002) (amended 2003). In numerous cases evaluating the constitutionality of non-consensual references to masters (most of which pre-date the 2003 amendment to Fed. R. Civ. P. 53), it was routinely recognized that reference of matters relating to the implementation of remedies – after a finding of liability had been made by an Article III judge – was not unconstitutional. For example, in Stauble, while noting that "the

[130] In fact, the standard of review applicable to IHO decisions under the United States' Proposed Final Judgment and Order is "the same as under the Administrative Procedure Act," 5 U.S.C. §§ 701, et seq. ("APA"). Specifically, the standard requires the reviewing court to examine all questions of law de novo and will overturn the hearing officer's decision if such action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." District Council of New York City, 941 F. Supp. at 362 (quoting 5 U.S.C. § 706(2)(A)). Findings of fact by the hearing officer "are entitled to affirmance on review if they are reasonable and supported by substantial evidence in the record as a whole." Id. (citation omitted). This standard of review has been approved in civil RICO cases using independent hearing officers. See, e.g., District Council of New York City, 941 F. Supp. at 361-62; Local 6A, Cement and Concrete Workers, 832 F. Supp. at 685.

Constitution prohibits us from the non-consensual reference of a fundamental issue of liability" to a master, the First Circuit stated that: "To be sure, Article III does not require that a district judge find **every** fact and determine **every** issue of law involved in a case. In respect to preparatory issues . . . or consummatory, remedy-related issues . . . a master may be appointed to make findings of fact and recommend conclusions of law." Stauble, 977 F.2d at 695 (emphasis in original). See also In re Pearson, 990 F.2d 653 (1st Cir. 1993) (rejecting argument that non-consensual appointment of master to evaluate efficacy of remedial decree violated Article III); Bituminous Coal Operators, 949 F.2d at 1168-69 (noting that, while wholesale reference of liability to master violated Article III, reference to master for remedy-implementation after finding of liability would be appropriate).

In 2003, Rule 53 was amended to permit a non-consensual reference to a master to "address pretrial and **post-trial matters that cannot be addressed effectively and timely** by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C) (emphasis added).[131] The Advisory Committee Notes to this amendment explained that reference of pretrial and post-trial matters to a master "may include matters that could be addressed by a judge . . . or duties that might not be suitable for a judge. Some forms of settlement negotiations, **investigations, or administration of an organization are familiar examples** of duties that a judge might not feel free to undertake." Fed. R. Civ. P. 53, Advisory Comm. Notes (2003 amendments) (emphasis added). The Advisory Committee also noted that:

> Courts have come to rely on masters to assist in framing and enforcing complex decrees. . . . Amended Rule 53 authorizes appointment of post-

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[131] Although the United States' Proposed Final Judgment and Order does not contemplate the appointment of a Rule 53 master, consideration of the parameters of the rule is instructive to the extent that it permits appointment of masters to conduct functions at the remedy-implementation stage that are analogous to those set forth in the United States' Proposed Final Judgment and Order.

> trial masters for these and similar purposes. . . . Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. . . . The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Id.

Unlike the delegation of authority to the IO and IHO set forth in the United States' Proposed Final Judgment and Order, cases in which Article III was deemed violated by appointment of a master or monitor were those in which fundamental questions of **liability** were delegated in whole to a master without a non-deferential review by the district judge. See, e.g., La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Bituminous Coal Operators, 949 F.2d 1165; Stauble, 977 F.2d at 695-97. Because the functions of the IO and the IHO are directed toward implementation, evaluation, and enforcement of the Court's remedial decree, no fundamental issue concerning Defendants' **liability** for violations of RICO will be the subject of analysis and/or recommendation by the IO or IHO. Further, because Defendants may appeal the IHO's final determinations to the district court, the IHO is not in the position of acting as a surrogate Article III adjudicator on any issue unless Defendants choose not to appeal an IHO determination.

During closing arguments, the Court raised questions about the decisions rendered by the Court of Appeals in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) ("Cobell 2003"), and Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) ("Cobell 2004"), which were decided based on an abuse of discretion standard under Rule 53. Both Cobell cases are distinguishable from the case at bar. First, in Cobell 2003, the Court of Appeals reversed the district court's orders granting the continued appointment of a Monitor over the defendants' objections and expanding the Monitor's role by appointing him "Special Master-Monitor." 334 F.3d at 1143. In reversing the appointment of the Monitor, the Court of Appeals concluded, in part, that there was no

injunctive court decree in place for the Monitor to enforce after the initial appeal was remanded and the district court referred the decision to the Department of Interior's administrative process to devise a remedial plan in accordance with the court's directives. Id. In reversing the expansion of the Monitor's role, the Court of Appeals held that, after serving in an investigative role and permitted to entertain ex parte communication, it was impermissible for the Monitor to then assume the role of a hearing officer. Id. at 1141. Importantly, the Court of Appeals stated, "our holding is a narrow one, tethered to the peculiar facts recounted [in the opinion]." Id. at 1141. Second, in Cobell 2004 the Court of Appeals reversed a different order appointing another Monitor to oversee aspects of the trust accounting on the basis that the injunction entered by the district court was not complex, nor "a true remedial injunction with specific duties tied to specific violations cognizable under the APA." 392 F.3d at 477.

Neither of the Cobell decisions preclude the appointment of an IO and IHO in this case, where the IO and IHO will be separate individuals, each with separate roles and duties to monitor and enforce a remedial order of this Court. Morever, the Court of Appeals decisions in Cobell did not hold that monitors could not be appointed in any context. To the contrary, Cobell 2004 states that the "appointment of a true judicial monitor" may eventually become appropriate in that case and generally is appropriate in cases where the remedy is complex, compliance is difficult to measure, or observation of the defendants' conduct is restricted. Id. at 477 (citing Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 828 (1978)).

c. There is no procedural irregularity in the submission of the United States' Proposed Final Judgment and Order

Relying on United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) ("Microsoft II"), Defendants contended during closing argument that the timing of the United States'

submission of its Proposed Final Judgment and Order constituted a fatal procedural irregularity precluding its entry. See Defs.' Closing Stmt., 6/8/05, 23123:17-23124:5, 23178:8-14. Defendants are wrong. Following the liability phase in Microsoft II, the district court invited the plaintiffs to submit a proposed remedial order, which it entered over Defendants' vigorous and noted objections without holding any evidentiary hearings whatsoever concerning any aspect of the complex and far-reaching relief proposed by the plaintiffs. This Circuit's determination of error was based on the district court's resolution of "remedies-phase factual disputes by consulting only the evidence introduced during trial and plaintiffs' remedies phase submissions, without considering the evidence Microsoft sought to introduce." Microsoft II, 253 F.3d at 103. Microsoft II did not establish any requirement that a proposed order be submitted in advance of a remedies-phase trial; rather, it confirmed the unremarkable notion that a district court may not accept remedies evidence from only one party to a case, and order a remedy based on that evidence in the face of vigorous factual disputes between the parties, without affording the other party an opportunity to challenge that evidence and present its own. The existence of the proposed order in Microsoft II was significant only because it provided the avenue by which the district court violated the defendant's rights, not because the Microsoft II court established a procedural requirement that a proposed order be submitted in advance of a remedies trial.

It is difficult to imagine that Defendants have forgotten that they – unlike the defendant in Microsoft II – had a remedies-phase trial. Their argument about the United States' Proposed Order is a red herring: Defendants are free to argue, as they undoubtedly will, that the evidence presented by the United States is not sufficient to support the remedies set forth in its Proposed Order. However, any notion that the Defendants' procedural rights have been violated following a month-long remedies trial during which they had the opportunity to challenge the evidence supporting the United States' proposed remedies and to enter their own evidence concerning the

efficacy and feasability of those remedies, is baseless.

D. Specific Remedial Measures

The Court's comprehensive remedial order should: (1) require Defendants to fund an effectively promoted smoking cessation program; (2) require Defendants to fund public education and counter-marketing designed to prevent youth from smoking and provide health accurate disease-risk information to smokers and nonsmokers; (3) require Defendants to meet youth smoking rate reduction targets for their cigarette brands; (4) publicly disclose documents and other information; (5) make affirmative communications concerning the health consequences of smoking, the addictiveness of cigarettes, their marketing activities and other topics; (6) change corporate structures and reporting arrangements so as to allow future conduct to change; (7) prohibit misleading statements and marketing; (8) ban the use of brand descriptors like "light" that convey health reassurance where none exists; and (9) prohibit youth appealing marketing activities, including the use of price promotions on the leading youth brands, flavored cigarettes, and racing sponsorships. Each of the remedies is addressed in turn.

As a preliminary matter, however, Defendants have moved for judgment on partial findings as to the first two elements of a comprehensive remedial order pursuant to Federal Rule of Civil Procedure 52(c). The Court should reject the arguments raised in Defendants' Rule 52(c) Motion, which asserts that the cessation remedy is "categorically barred by the D.C. Circuit's prior opinion dismissing the Government's disgorgement claim." Defs. 52(c) Mem. at 1. Defendants' reliance on the decision of the court of appeals and Order #886 is misplaced here, because neither smoking cessation nor public education and counter-marketing are designed to restrain effects of past violations. Rather, the remedies are permissibly directed toward future conduct and designed to prevent future violations. Philip Morris USA, 396 F.3d at 1200. In contrast, the court of appeals found disgorgement to be measured by past conduct without regard

to whether a defendant will act unlawfully in the future. Id. at 1198.

In addition, Defendants' attempt to argue that any forward-looking remedy that deters future unlawful conduct is barred in a civil RICO action, Defs. 52(c) Mem. at 7-8, is simply wrong. The court of appeals did not hold that any remedy that deters is prohibited under RICO; the court of appeals instead held that simply because a remedy deters does not mean that it is necessarily forward-looking. Accordingly, the court rejected the argument that a backward-looking remedy – which the court found disgorgement to be based on its focus on past profits – could be deemed forward-looking based on the fact that it also deterred future unlawful conduct by constituting a threat that profits might be taken away again. To extend this holding and apply the standard urged by Defendants would eliminate all remedies under RICO and is contradicted by Defendants' own position that deterring remedies are permissible. Specifically, an injunction that prohibits specified conduct with contempt penalties for violations acts to deter future unlawful conduct – such is the intent of the remedy. Defendants concede that "[t]he Court, of course, can assess penalties for any future violation of an injunction or other element of the court's decree that in fact takes place." Id. at 14. But Defendants' argument that any deterring remedy is prohibited would preclude all remedies that fulfill the statutory mandate of preventing and restraining, not just those that are that address past harms or past profits, and would eviscerate the RICO statute. The argument should be rejected.

Substantively, a smoking cessation program and a public education and counter-marketing campaign are forward-looking remedies that will prevent and restrain future unlawful conduct by Defendants, as fully addressed below.

1. Funding for Smoking Cessation

a. For decades, Defendants have sought to keep smokers from quitting through fraudulent marketing and cigarette design

As set out in detail above and in the United States' Post-Trial Proposed Findings of Fact, Defendants engaged in sustained and highly sophisticated marketing and promotional campaigns intended to portray light and "low tar" cigarettes as less harmful than regular cigarettes in order to keep smokers from quitting. Indeed, in the late 1980s Philip Morris even pointedly referred internally to ex-smokers and potential quitters as a "textbook example of a market opportunity." US 38763 at 1845 (A). Defendants' efforts were intentional and of wide-ranging impact.

Defendants' campaign of deception has directly affected Americans' decisions to smoke. As a result of Defendants' conduct, health concerned smokers have switched from regular cigarettes to those with lower reported tar yields rather than quitting smoking altogether. Evidence adduced at trial demonstrates that smokers of "light" and "ultra light" cigarettes are less likely to quit smoking than are smokers of regular cigarettes. Additionally, as a result of Defendants' fraudulent marketing and deceptive design of "light" and "ultra light" cigarettes, many smokers of these cigarettes consume more cigarettes than do smokers of regular cigarettes. Defendants' conduct relating to "low tar" cigarettes furthers the aims of the Enterprise and the scheme to defraud by providing a false sense of reassurance to smokers that weakens their resolve to quit smoking, and serves to draw ex-smokers back into the market. In short, Defendants' concerted and ongoing campaign of deception regarding "low tar" cigarettes has been a calculated – and extremely successful – scheme to increase their profits at the expense of the health of the American public.

b. The Court should require Defendants to fund a smoking cessation program to prevent and restrain Defendants' fraudulent activity

1) The funding requirement is forward-looking

In the face of Defendants' persistent marketing of low tar cigarettes as less harmful alternatives to quitting, it is not surprising that, as addressed in Section II.A.5.a.(5), supra, 50% of those who smoke light and ultrahigh cigarettes mistakenly believe that they have taken a step for their health or toward quitting. Weinstein WD, 53:3-18. The 50% who wrongly believe that there are health benefits associated with a switch to low tar cigarettes represents an extraordinary number of American smokers. Of the almost 47 million Americans who smoke cigarettes today, more than 81% (or more than 38 million persons) smoke "light" or "ultra light" cigarettes. This means that more than 19 million persons are at extraordinary risk for the disease and death caused by smoking while mistakenly believing that they have done something to reduce their disease risk. Tragically, research shows that 70% of those smokers want to quit, but in any given year only 40% of smokers of "light" or "ultra light" cigarettes will make a quit attempt, and fewer still – only 2.5% – will quit successfully. Fiore WD, 69:5-8; Fiore TT, 5/17/05, 21280:1-21283:15.

As a result of Defendants' pervasive marketing efforts, the Court can find as a matter of fact that smokers will continue to be affected by Defendants' fraudulent conduct occurring after the date of a final judgment in this case. For this reason, the Court should require Defendants to fund a smoking cessation program targeted at a population equal in size to those smokers who are reasonably likely to be the future victims of Defendants' conduct, specifically addressing Defendants' future violations with forward-looking relief. The devastating impact of Defendants' unlawful conduct makes this a critical part of any order that will effectively prevent and restrain future wrongdoing. Put simply, if the Court's remedial order does not address this

aspect of Defendants' likely post-judgment fraudulent conduct, their profit-taking will continue with a resulting cost to the American people that will be measured in disease and death.

Defendants cannot claim that the requirement that they fund a smoking cessation program is prohibited based on what the court of appeals stated about disgorgement, for smoking cessation is not like disgorgement as viewed by the court of appeals. While disgorgement "makes RICO violations unprofitable," it is a remedy "aimed at separating the criminal from his **prior** ill-gotten gains." Philip Morris USA, 396 F.3d at 1200 (emphasis added). On the other hand, funding a smoking cessation program in an amount determined by the reasonably likely future effects of Defendants' post-judgment fraudulent activity in order to eliminate the impact of Defendants' future fraud is quintessentially forward-looking. It is based on a factual finding, supported by the trial record, concerning the reasonable likelihood of future unlawful activity by Defendants, and it is tailored to that likely future conduct. As discussed below, that factual finding should guide the Court in determining the amount that Defendants should be required to pay for the initial term of the smoking cessation program.

2) Defendants are incorrect in contending that cessation funding is barred by the D.C. Circuit's opinion

Defendants make not only the flawed assertions that cessation funding is aimed at curing the future effects of past violations or, alternatively, is equivalent to disgorgement because it deters future violations, they also challenge a cessation funding requirement that is premised on a finding that Defendants are likely to continue violating RICO in the future. The law clearly supports the imposition of remedies based on a finding that a defendant is reasonably likely to engage in unlawful conduct. Nothing from the D.C. Circuit's opinion upsets this well-settled principle, and, as set out above, this Court has previously recognized the same. Philip Morris, 316 F. Supp. 2d at 10 n.3. Accordingly, in Local 30, United Slate, 686 F. Supp. at 1162-1174,

the district court imposed similar relief that was implemented over the following years based upon a finding at the time of judgment that there was a reasonable likelihood of future unlawful conduct. In affirming the relief granted, the Third Circuit rejected the defendants' argument that the scope of relief should have been limited to removing corrupt defendants from the union, and agreed with the district court's finding that additional relief would be necessary to prevent and restrain future unlawful activity.

Defendants do not appear to dispute the foregoing authority, and they are therefore forced to base their opposition to the legal basis for a cessation remedy on their assertion that it amounts to a conclusive presumption that Defendants will violate the law in the future in the face of an injunction. Specifically, Defendants assert that the United States' argument that the Court should find that Defendants are likely to continue unlawful conduct in a manner supporting the need for cessation funding "rests on the notion that Defendants **cannot** be 'prevented or restrained,' and that the future violations will occur **regardless** of whether the cessation program is ordered." Defs. 52(c) Mem. at 15 (emphasis in original). Defendants therefore argue that a cessation remedy is barred: (1) by "the D.C. Circuit's [prevent and restrain] standard" because it "would at most remedy the *effects* of violations after they occur"; and (2) by "the use of propensity evidence to determine guilt" and "the due process proscription on the use of 'irrebuttable presumptions.'" Id. at 15 n.7. These contentions should be rejected.

As an initial matter, Defendants' first argument is based on an erroneous factual contention. Contrary to Defendants' assertion, the proposed cessation remedy does not amount to a concession that the remedies proposed by the United States, once fully implemented, will not prevent and restrain future RICO violations. Rather, a necessary corollary of the finding that the United States' proposed set of remedies is necessary to prevent and restrain RICO violations is that until those remedies take full effect, RICO violations will continue. There is simply no

contradiction in concluding that full imposition of a comprehensive set of remedies will be sufficient once they take full effect, while also determining that until the remedies take full effect, violations will continue. This argument does not amount to a concession either that the remedies are inadequate or that no remedies would be adequate.

Two different considerations support the conclusion that Defendants will continue to engage in unlawful conduct during the first year after the entry of judgment by the Court. First, many of the remedies are necessarily imposed gradually over time, and cannot by their plain terms take full effect by the end of the first year. For instance:

- In order to have sufficient impact, corrective statements are proposed over a gradual publication schedule under which the last newspaper advertisements appear on the 40th Sunday after judgment.
- Onserts appear bi-monthly for a two year period, beginning no later than the 4th month following judgment. Accordingly, the onserts aspect of the corrective statement requirement will not be complete until after the first-post-judgment year.
- Public education and counter-marketing funding is required on an ongoing basis for ten years.
- The first youth smoking reduction target occurs at the end of 2007. The initial reduction will not likely be fully met by the end of the first year after judgment.

The comprehensive set of remedies will only have been partially implemented by the end of the first year. Given this, and the Court's finding that the comprehensive set of remedies is necessary in **full** to prevent and restrain violations, it follows inexorably that some violations will continue during the first year. Cf. United States v. Local 560, Int'l. Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd 780 F.2d 267 (3d Cir. 1986) ("This trusteeship shall continue for such time as is necessary to foster the conditions under which reasonably free supervised elections can be held, **presumptively for eighteen months**") (emphasis added).

The second set of considerations supporting the conclusion that the remedies will not be fully effective during the first year is the equally incontrovertible fact that magazines containing

youth appealing advertisements and marketing that makes false health claims, including cigarette packages containing misleading brand descriptors will not **instantly** go out of circulation or disappear from retail distribution on the day judgment is entered. The relevance of the continued presence of the packages, advertising and promotional material in the marketplace is not that these constitute post-judgment violations in and of themselves, but rather that this undisputable phenomenon means that there will be a period of transition when consumers will continue to be deceived by Defendants' actions. These realities necessarily mean that during this first year certain of the proposed remedies will be undermined by contrary messages. This does not amount to a concession that the remedies are inherently inadequate, as Defendants suggest; rather, the remedies will be adequate once they take their full effect.

The entry of judgment against Defendants based on such findings does not violate any bar on the use of "propensity evidence" to determine guilt,[132] nor does it violate what Defendants allege to be the "due process proscription on the use of 'irrebuttable presumptions.'" Defs. 52(c) Mem. at 15 n.7. It is not an irrebuttable presumption when, as the United States appropriately urges here, a court exercises its discretion to find certain factual matters from proven facts, such as an inference drawn not only from Defendants' past 50 year pattern of misconduct, but also from Defendants' on-going misconduct. See generally Ulster County Court v. Allen, 442 U.S. 140, 157 (1979) ("The most common evidentiary device is the entirely permissive inference or presumption, which allows – but does not require – the trier of fact to infer the elemental fact

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[132] Old Chief v. United States, 519 U.S. 172, 180-82 (1997), cited by Defendants, has no application to this civil case at all. Old Chief held in a criminal case that the district court abused its discretion under Federal Rule of Evidence Rule 403 when it rejected the defendant's offer to stipulate to his prior conviction, which was an element of the charged offense of possession of a firearm by anyone previously convicted of a prior felony. Old Chief did not address, much less turn on, the issues of rebuttable presumptions, permissible inferences or sufficiency of the evidence to support a finding of reasonable likelihood of future unlawful conduct.

from proof. . . . In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof" it is proper). Indeed, under the Defendants' analysis it would be an improper irrebuttable presumption for the court to find a reasonable likelihood of future unlawful conduct from the defendants' past unlawful conduct alone, but this Court has recognized the propriety of such inferences based on well-settled authority. Philip Morris, 316 F. Supp. 2d at 10 n.3 ("To the extent that Defendants are arguing that past RICO violations alone cannot demonstrate a reasonable likelihood of future RICO violations, they are wrong. 'The likelihood of future wrongful acts is frequently established by inferences drawn from past conduct.'" (quoting Local 30, United Slate, 871 F.2d at 409).

Defendants are then left with the argument that remedies that undo the future effects of future violations, as opposed to past violations, are barred by the court of appeals decision. Defendants cite to nothing in the decision as support for their assertion, but instead attempt to convince the Court that undoing the future effects of future violations is prohibited because it remedies the effects of violations after they occur. Defendants express the circular argument that "[i]f a conclusive presumption of future violations would allow a court to impose a remedy designed to anticipate and remedy those future violations, such as the Government's smoking cessation scheme, there seems to be no logical reason why disgorgement would not be similarly available." Defs. 52(c) Mem. at 15. Defendants' assertion that any remedy aimed at future violations is, at bottom, a remedy that redresses future violations at a future time, making them past violations at the time they are addressed and therefore no different from disgorgement, borders on the absurd. The adoption of such an argument would amount to a prohibition of any remedy aimed at future violations, in contravention of the explicit language in the court of appeals decision. See Philip Morris USA, 396 F.3d at 1198.

c. **The program should be funded in an initial amount of $2 billion per year for five years**

The United States called Dr. Michael Fiore to provide testimony regarding the scientific evidence supporting the components, potential reach and effectiveness of interventions for the treatment of tobacco dependence. With smoking cessation, as with the other scientific issues in this litigation, the United States called an expert witness with unparalleled qualifications in the field for which the testimony was offered. Dr. Fiore is simply the world's foremost expert on the treatment of tobacco dependence and the population-wide delivery of smoking cessation services. As the Court is aware, Dr. Fiore's professional work in the field has spanned almost two decades and involved virtually everything from treatment of individual patients to the design and implementation of population-wide smoking cessation programs.

As with other areas of expert testimony in this case, Defendants did not call an expert with significant or appropriate qualifications or experience and expertise. Defendants elected to call Dr. Donald Rubin, a statistician who has never designed a smoking cessation program, Rubin TT, 5/24/05, 21993:19-21, never conducted research on effective strategies for smoking cessation or nicotine replacement therapy, id. at 21993:22-25, 21994:21-23, never served as a government or state consultant for cessation programs, id. at 21994:1-3, 18-20, and conceded that he is not an expert in the treatment of tobacco dependence. Id. at 21994:4-6. While lacking experience in the treatment of tobacco dependence or smoking cessation programs, Dr. Rubin did, like the majority of Defendants' expert witnesses, possess significant experience testifying on behalf of Defendants in tobacco litigation. Dr. Rubin received between $1.5 million and $2 million providing testimony and consulting for Defendants between 1997 and 2002 alone, id. at 21973:6-12, 21976:20-21978:2, and Defendants paid Dr. Rubin between $200,000 and $250,000 in 2004, representing between 25% and 33% of his gross consulting income. Id. at 21978:3-10.

He was compensated for his work in this case at $1250 per hour for consulting time and $1600 per hour for testimony, including time spent testifying at trial. Id. at 21976:6-11. By contrast, this case marks the only time that Dr. Fiore has testified as an expert witness – he has chosen to focus instead on treatment of tobacco dependence, research into smoking cessation therapies and improving population-wide efforts to reduce smoking prevalence. Fiore WD, 16:7-12.

Dr. Fiore's testimony concerning the necessary components of a smoking cessation program was not disputed by Defendants[133] and is supported by a substantial body of scientific study. Trial established that an evidence-based smoking cessation program should include: (1) a national tobacco quitline network that will provide access to evidence-based counseling and medications for tobacco cessation; (2) an extensive paid media campaign to encourage smokers to seek assistance to quit using tobacco; and (3) research agenda to achieve future improvements in the reach, effectiveness and adoption of tobacco dependence interventions and physician and clinician training and education. See, e.g., Fiore WD, 17:22-18:20. The United States' Findings set out the evidentiary support for particular components in greater detail.

Given the absence of any dispute as to the components of a program, the remaining questions confronting the Court are: (1) how many people must a smoking cessation program serve in order to prevent and restrain future unlawful conduct by Defendants? (2) what should its duration be? and (3) what is the expected cost? Each of the these questions is answered in turn.

1) The program should allow 2,330,000 smokers to quit

The Court should require Defendants to fund a smoking cessation program that will allow the number of persons who will be victims of Defendants' fraudulent marketing and design of

[133] Defendants' own expert, Dr. Rubin, admitted that the Court should look to someone like Dr. Fiore to identify the components of a smoking cessation program. Id. at 22000:22-22001:4.

cigarettes during the first year after the date of a final remedial order in this action to quit smoking successfully. The calculation of this number of smokers should be made following a specific determination by the Court that a comprehensive set of remedies will not prevent and restrain all post-judgment unlawful activity by Defendants **until** fully implemented. Specifically, Defendants' conduct will continue to: (1) act as a substantial contributing factor to youth smoking initiation; and (2) cause smokers to switch to lower tar cigarettes in the mistaken belief that they are less hazardous.

As to the former category of smokers, given the myriad ways that Defendants market cigarettes so as to appeal to youths – from magazine advertising to posters and displays at retail locations to direct mail – it would be unrealistic to expect Defendants' marketing to cease acting as a substantial contributing factor immediately; the existing marketing and advertising in the marketplace will not disappear overnight, after all. Instead, it is likely that Defendants' existing marketing will continue to contribute to youth smoking initiation for at least one year. These youth who become daily smokers – approximately 2,000 per day – will eventually join the enormous group of Americans who want to quit smoking but, sadly, are unable to do so and often find a psychological refuge that is just as deadly as the high tar cigarette habit: Defendants' light cigarette brands. Biglan WD, 403:1-5 (about 1,250 young people per day become established smokers (more than 100 cigarettes lifetime) at ages 15 through 17, while about 725 per day become established smokers at ages 11 through 14).

Similarly, as to the latter category of smokers, Defendants' decades of efforts to market their "health reassurance" brands, combined with the extent to which those brands are currently advertised and promoted as "light," "medium," and "mild," provides an evidentiary basis for the Court to conclude that smokers will continue to switch to lower tar cigarettes as an alternative to quitting for at least one year. This will occur even with the elimination of brand descriptors due

to an unavoidable wind down period, the existence of marketing messages that will not disappear immediately, and the inference that the Court can draw from these Defendants' historical and recent conduct: for a period of at least a year before the full effect of the Court's remedial order on their activities, Defendants will find ways to continue to take advantage of the extraordinary market opportunity that exists in the form of smokers who want to quit.

The number of smokers that a smoking cessation program should serve in order to address future violations should equal the number of new youth smokers and the number of smokers who will switch to lower tar cigarettes in the mistaken belief that they are less hazardous during the next year. As set out above, there are, and will likely continue to be, approximately 2,000 new established youth smokers under 18 years old per day, for a total of 730,000 in the next year. In addition, 4-9% of smokers switch brands every year, and 75% of switchers switch down in tar. US FF § V.B. This represents between 1.4 million and 3.2 million smokers every year.[134] Because 50% of the smokers who smoke low tar cigarettes hold the mistaken belief that low tar cigarettes are less hazardous than higher tar cigarettes or constitute a step toward quitting, between 700,000 and 1.6 million of the smokers who switch down in tar every year (i.e., 50% of 1.4 to 3.2 million annual switchers to "low tar") hold the mistaken belief that they are taking a step for their health or toward quitting. Weinstein WD, 53:3-18; US FF § V.B. Utilizing these calculations, based on figures which were not disputed by Defendants at trial, yields a total of 2,330,000 smokers.

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[134] This number is far fewer than the number of smokers currently affected by Defendants' ongoing fraud, and reflects the impact of what will be a partial implementation of remedies in the first year. More specifically, 70% of current light and low tar smokers want to quit smoking. Half of them hold the mistaken belief, perpetuated by Defendants' marketing, that they have taken a step for health or toward quitting. This constitutes as many as 19.25 million smokers.

2) The program should last for at least five years

Evidence introduced at trial establishes that smokers utilizing telephone counseling and medications through a national smoking cessation quitline network can be expected to have a success rate of 20%. As a result, if Defendants are required to fund a program that will allow 2,330,000 to quit smoking, the program must provide treatment to five times that number of smokers in order to achieve its goal.

The 20% effectiveness rate finds ample scientific support. First, Dr. Fiore testified to the expected effectiveness of the national smoking cessation quitline network based on his two decades of experience with the treatment of tobacco dependence. Fiore WD, 70:3-11; Fiore TT, 5/17/05, 21281:9-15, 21301:20-21302:20. Dr. Fiore's testimony was not challenged by Defendants on cross-examination. Second, while Defendants sought to counter Dr. Fiore's opinion through the testimony of Dr. Rubin, an examination of the scientific evidence demonstrates that little if any weight should be afforded Dr. Rubin's high-priced criticisms. The scientific evidence falls into two categories: (1) data on efficacy and effectiveness of treatment interventions from clinical trials; and (2) the results of those interventions in real-world, population-wide applications through telephone quitlines.

Dr. Rubin argued that the effectiveness of treatment interventions should be calculated based on estimates of effectiveness within different weighted subpopulations. Rubin WD, 76:8-11. But, in admitting in his written direct examination that he was unaware of whether the types of studies of subpopulations he would review even existed, Dr. Rubin approvingly cited the 2000 Guideline as a source for reviews of clinical efficacy – the very source cited and relied on by Dr. Fiore. Id. at 69:10-70:7. And in cross-examination at trial, when confronted with the Guideline, which was the product of a review of 6,000 studies, Dr. Rubin was forced to admit that the clinical trials data supported Dr. Fiore's estimate of the effectiveness of a national quitline

network delivering counseling and medications. The results of meta-analyses reported in the 2000 Clinical Practice Guidelines efficacy (expressed as an odds ratio of successfully quitting with medication compared to a placebo) and effectiveness (expressed as percent abstinence, i.e., quit rate) that supports Dr. Fiore's testimony. JD-001210 (A); Rubin TT, 5/24/05, 22020:24-22030:12.

Dr. Rubin retreated to an attempt to distinguish between "effectiveness," which provides percentages of those receiving treatment who quit successfully, and "efficacy," which provides an odds ratio comparing the impact of an intervention to the absence of the intervention, arguing that it would not be proper to draw conclusions from the effectiveness of clinical trials. Rubin WD, 71:10-15. But Dr. Fiore explicitly recognized the difference in his own testimony, explaining to the Court:

> An odds ratio gives you a relative measure of the effectiveness of the treatment that takes into account differences between the populations of smokers treated, the intensity of the counseling condition, and other factors that might either increase or decrease the absolute quit rates. So, for example, if one is concerned that participants in a smoking cessation study are already motivated to quit, based on the fact that they have agreed to participate, the result might be a higher absolute quit rate in both the control (or placebo) group and the group receiving therapy.

Fiore WD, 47:11-17. Accordingly, it is important to look not only at clinical effectiveness, but also at the real world application of tobacco dependence interventions in populations. Doing so provides further support for Dr. Fiore's 20% estimate and resoundingly demonstrates the validity of reliance on clinical trial meta-analyses. US FF § V.B.

In the end, there is ample scientific support for the determination that a national smoking cessation quitline network will help 20% of those who utilize it to quit smoking, and 11,650,000 smokers must be treated to achieve a goal of 2,330,000 successful quit attempts. The United States requests that Defendants be required to fund the treatment of 11,650,000 smokers over a

period of five years, at a rate of 2,330,000 per year. The 2,330,000 annual rate represents almost exactly 5% of the population of smokers in the United States.

Dr. Fiore provided the Court with a detailed explanation of the bases for his opinion that an effectively promoted, barrier-free national smoking cessation quitline network can achieve a 10% utilization rate. Dr. Fiore's opinion was based on the impact that barriers to access, including inadequate promotion and limited state resources, have on utilization of existing smoking cessation services. Fiore TT, 5/17/05, 21286:7-21. Evidence cited by Dr. Fiore demonstrates that removal of barriers and effective promotion dramatically increase utilization rates. See US FF § V.B. Additionally, the manner in which Dr. Fiore arrived at his opinion on potential utilization rates for a national smoking cessation quitline network is rooted in established scientific process. Fiore TT, 5/18/05, 21613:9-21614:17 (citing the appropriateness of making scientific judgments about a national cessation program based on experiences in states and health plans). As Surgeon General Carmona explained:

> Foundation for scientific knowledge comes in many ways. If you had local state programs, Dr. Fiore's experience with programs in his own state of Wisconsin where there has been validity ascertained scientifically prior could then be brought up to be used as a national model. Not to say that we'd accept it on face value, we review the data and maybe it gets interposed in other programs as a pilot project where we will then monitor it over time. There is sufficient scientific information to bring it forward.

Carmona TT, 5/3/05, 20134:7-15.

Defendants' cross-examination of Dr. Fiore on the issue of utilization rates did not provide a basis for rejecting Dr. Fiore's opinion. Rather, Defendants elected to question Dr. Fiore repeatedly about existing state quitlines – quitlines that are impacted significantly by existing barriers to access, and are therefore instructive as to potential utilization only in the way

that they were analyzed by Dr. Fiore in arriving at the 10% estimate.[135] Given the support for Dr. Fiore's conclusion that a 10% utilization rate can be reached with aggressive promotion and the removal of barriers, the 5% utilization rate necessary to sustain the program requested by the United States is eminently achievable.

3) The program should be funded at $2 billion per year

While Defendants cross-examined Dr. Fiore on the issue of utilization rates, they elected not to challenge his opinions on the cost of a national quitline network on a per smoker basis. There was no challenge to – and there is no evidence in the trial record to dispute – the costs estimated by GHC for the Subcommittee on Cessation. Indeed, counsel for Defendants admitted the same: "I focused exclusively on the issue of utilization rates." Fiore TT, 5/18/05, 21580:10-11. Those costs, contained in a spreadsheet marked as US 89470, account for the benefits stemming from the economies of scale that will serve the delivery of smoking cessation services on the national level. Fiore TT, 5/18/05, 21579:20-21580:3.

The cost for each smoker who calls a large-scale, smoking cessation quitline will be $419. See US 89470 at 0057 (A). Similarly unchallenged by Defendants is the conclusion that 1.6 callers are required for every smoker who will utilize counseling and medications as treatment for tobacco dependence. Id. at 0058; Fiore WD, 52:7-12. Accordingly, to obtain the cost per utilizing smoker it is necessary to multiple $419 by 1.6, yielding $670.40. For 2,330,000 smokers per year, the annual cost for treatment through the quitline is $1,562,032,000.

[135] Defendants also tried to suggest that the utilization achieved without promotion by Group Health Cooperative ("GHC") for its Washington-based managed care organization could not be deemed representative of the general population. But the extent of the evidence offered by Defendants on this point was a roundtable discussion in a newsletter that simply offered speculation as to whether there might be differences between the GHC population of enrollees and the wider population. JD-055362 (A). Importantly, the speculation offered by Defendants is directly contradicted by the evidence of the effect of promotion and removal of barriers in the trial record.

The Court should also require Defendants to fund promotion of the smoking cessation program. As the Court is aware, the Subcommittee on Cessation recommended that $1 billion per year be allocated to promote a national program. The recommendation was based, in part, on the need to counter the more than $12 billion that is spent by Defendants each year to promote cigarettes. Fiore WD, 54:10-15, 57:9-58:2. The $1 billion amounts to less than 10% of tobacco industry marketing expenditures.

At trial, Defendants challenged the $1 billion figure with testimony submitted to the Subcommittee on Cessation during the proceedings it held before publication of the National Action Plan. Upon examination, however, the testimony undermined neither the conclusions of Dr. Fiore nor the conclusions of the Subcommittee, for none of the citations offered by Defendants address the cost of a promotional campaign of the scope required to support a widespread, national cessation effort. As Dr. Fiore explained, a media campaign should have four goals: (1) to promote the use of a national tobacco quitline and other effective cessation interventions; (2) to motivate tobacco users to make a quit attempt and increase demand for effective cessation services; (3) to motivate parents to quit; and (4) to reach all segments of the population. Fiore WD, 53:16-54:9. Accordingly, while some of those offering testimony to the Subcommittee on Cessation as it developed its recommendation suggested that a television-only campaign would cost only $100 million dollars per year, the Subcommittee on Cessation called for a comprehensive, multifaceted media campaign to achieve multiple objectives in support of the overarching goal of maximizing utilization.

Moreover, Defendants offered no counter to the instructive experience offered by the impact of the Fairness Doctrine on smoking prevalence. As set out above, decisions and judgments that scientists and experts make for public health today must be based on prior experience. Fiore TT, 5/18/05, 21520:16-18; Carmona TT, 5/3/05, 20134:3-20. From 1967 to

1970, when the Federal Communications Commission required licensees who broadcast cigarette commercials to provide free media time for anti-smoking public service announcements under the Fairness Doctrine, the time donated for the anti-smoking messages amounted to approximately $375 million per year in 2005 dollars. Peer-reviewed literature supports the effectiveness of the Fairness Doctrine spending equivalent. Fiore WD, 57:9-58:20; Fiore TT, 5/18/05, 21520:11-21521:2.

The Court should therefore use $375 million as a minimum for promotion of the program to be funded by Defendants. When added to the $1.56 billion required for the quitline each year, Defendants should be required to pay at least $1.93 billion, and as much as $2.56 billion, each year for smoking cessation to prevent and restrain their otherwise likely future unlawful activity. The United States suggests that the Court, in the considerable discretion afforded it in equity, require that the funding be $2 billion per year.

d. The Court should enlist the services of the CDC Foundation to administer the smoking cessation program

The CDC Foundation was established by Congress as an independent, non-profit organization whose mission is to support the disease prevention and health promotion efforts of the Centers for Disease Control and Prevention (CDC). The organization has brought outside partners and resources together with CDC's world-class scientists to implement programs that improve the lives of people in the United States and around the world. Significantly, the CDC Foundation can maximize the effectiveness of funds for cessation by working with CDC and its partners to improve tobacco cessation programs in states and communities, thereby facilitating a tobacco quitline **network** that takes full advantage of and builds on existing local resources, as recommended by Dr. Fiore.

Additional information about the CDC Foundation is available at its website

(http://www.cdcfoundation.org). The United States is authorized to represent that the CDC Foundation is able and willing to administer funding ordered by the Court for a smoking cessation program pursuant to the terms of the United States' Proposed Final Judgment and Order. The United States further advises the Court that the CDC Foundation is cognizant of the importance of expert administration, guidance and input in building an appropriate vehicle for distribution of funds pursuant to the Court's remedial order. If cessation funding is ordered, the CDC Foundation intends to establish a separate operating arm of the Foundation to administer the program with oversight and guidance from Foundation leadership and an independent advisory body.

The advisory body will be charged with proposing an appropriate structure, operating principles, delivery mechanisms and measures of effectiveness for the overall program. Members of the advisory body will represent a spectrum of organizations concerned with tobacco use prevention and cessation, and may include renowned public health experts, tobacco experts, medical directors from major health care providers, governors, business/health systems specialists, insurance representatives, health commissioners, and representatives from community health groups. In conjunction with the advisory committee and CDC scientists, the CDC Foundation will develop a business plan that outlines specific strategies and time lines to implement a far-reaching cessation program. The Court should consider including the foregoing parameters in its remedial order.

e. The funding obligation should be extended in the event of future misconduct beyond the first post-judgment year

The United States has proposed a comprehensive remedial order that combines funding obligations, youth smoking reduction targets, document disclosure, corrective statements and review of corporate practices with certain prohibitions, among them a prohibition against:

(1) committing any act of racketeering, as defined in 18 U.S.C. § 1961(1) relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States; and (2) making, or causing to be made in any way, any material false, misleading or deceptive statement or representation, or engaging in any public relations endeavor that misrepresents or suppresses information, concerning cigarettes that is disseminated to the United States public. If, despite these prohibitions, the Court finds that Defendants are engaging in prohibited activities with the intent to prevent smokers who want to quit from doing so or fraudulently to induce new smokers to begin daily smoking, the Court should extend the smoking cessation program funding obligation.

The extension of the funding obligation in the event of future violations is equivalent to a contempt sanction and appropriate relief under Section 1964(a). As Judge Williams observed in his concurring opinion,

> The equity court, empowered under § 1964(a) to ''prevent and restrain'' future violations, has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior. It can, for example, establish schedules of draconian contempt penalties for future violations, and impose transparency requirements so that future violations will be quickly and easily identified.

Philip Morris USA, 396 F.3d at 1203.

The proposed remedies order filed by the United States on June 27, 2005 requires Defendants who are found to have engaged in prohibited conduct with the intention of preventing smokers who want to quit from doing so or fraudulently inducing new smokers to begin daily smoking to fund the National Smoking Cessation Quitline Network for an additional five years in the following amount: $670 times the number of smokers contained in 15% of the total United States' smoking population, plus $375,000,000 for promotional expenditures, with the resulting total amount paid in each of the five years.

As set out above, evidence establishes that an annual call rate of 16%, with a 10% utilization rate, is achievable for a comprehensive smoking cessation quitline that is aggressively promoted. The achievable total utilization gives a cost of $3.2 billion per year, using $419 per caller to calculate the total cost for quitline services. The 15% call rate calculation, based on 47 million smokers, yields a total of $4.7 billion ($670 multiplied by 15% of 47 million). Requiring Defendants to continue to fund the program at a level calculated based on 15% utilization will therefore insure that the program contains not just the quitline services recommended by Dr. Fiore, but also sufficient funding for research and physician training, as well as up to $1 billion for promotion – an amount equal to the recommendation of the Subcommittee on Cessation.

Any Defendants' plea that the amount of the continuing funding obligation is too high should be rejected by the Court. Defendants can avoid paying for additional cessation services if they simply comply with the Court's remedial order and obey the prohibitions contained therein. If they fail to do so, they will suffer contempt penalties that will not only act as sanctions for future violations, but will also insure that Defendants do not reap any long term financial benefit from continued smoking by victims of their future fraud. Instead, the program will reduce the total number of smokers and diminish Defendants profits. As Judge Williams further observed in his concurring opinion, "But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught)." Id. at 1203.

2. Funding for Public Education and Counter-Marketing

The foregoing observation from Judge Williams provides an appropriate starting point to analyze how the Court can prevent and restrain future racketeering activity by requiring Defendants to fund public education and counter-marketing activities. Counter-marketing in

conjunction with other remedies will diminish the future "returns" to Defendants of making fraudulent and deceptive statements and fraudulently marketing to youth because it will reduce the profitability of such conduct. As discussed below, Defendants benefit financially by making fraudulent statements and conveying false images about the health effects of smoking and by fraudulently marketing to youth, who are influenced by Defendants' efforts. Cf. In re Salomon Analyst AT&T Litig., 350 F. Supp. 2d 455, 459 (S.D.N.Y. 2004) (discussing allegations regarding the incentives, including additional compensation, for research analysts at Solomon Smith Barney ("SSB") to inflate their ratings of companies: "the carrot of additional compensation . . . provided the motivation for SSB analysts to falsify their research reports and ratings to make them more favorable than their honestly-held opinions about the companies and their stock"). Public education and counter-marketing are effective at changing the information environment in which Defendants operate, thereby removing the economic incentive for Defendants' to make false statements about the health effects of smoking and to fraudulently market to youth by eliminating or diluting the effectiveness of such profit-driven conduct.

Judge Williams's point also illustrates the fallacy of much of what Defendants present as legal argument under the guise of factual findings in their August 15, 2005 proposed findings of fact. Defendants mistakenly argue that public education and counter-marketing are aimed at "preventing **effects** of alleged [past] violations after they have occurred, not at preventing future violations from taking place." JD FF, ch. 13, ¶ 390 (emphasis in original). But Defendants' unsupported assertion ignores Judge Williams's recognition that the returns to crime are one of "the forces most affecting the likelihood of criminal action." Philip Morris USA, 396 F.3d at 1203. It also ignores entirely the history of Defendants' conduct, which establishes a reasonable likelihood that they will continue to engage in unlawful conduct absent a remedial scheme that removes the incentive for them to do so.

Defendants also seek to equate public education and counter-marketing with disgorgement by asserting that because it reduces their incentive to commit fraud in the future, it constitutes a simple deterrent that is prohibited by the opinion of the court of appeals. But, as set out above, this conflation would preclude all remedies designed to prevent and restrain as "deterring" remedies. Defendants cannot contest the fact that prohibitions on certain future activities with financial penalties for non-compliance act as a deterrent (although, as discussed above, simple prohibitions, even with attendant non-compliance penalties, have never been enough in and of themselves to stop Defendants from attempting to reap the financial rewards from unlawful conduct). And Defendants have not suggested that an order prohibiting specified future activities with the threat of financial contempt findings is an impermissible remedy under the law, nor could they so suggest. For this reason, the argument that "any remedy that deters is prohibited" must be rejected, as must Defendants' attempt to equate disgorgement, which takes **past profits**, to public education and counter-marketing, which changes **future** conditions in order to contribute to the elimination of the likelihood of **future** violations. Indeed, Defendants are forced to note in their Rule 52(c) motion that the court of appeals rejected disgorgement based on a determination that it "'is awarded without respect to whether defendant **will act unlawfully in the future**' and is 'measured by **past** conduct.'" Defs. 52(c) Mem. at 7 (quoting 396 F.3d at 1198) (emphasis added). In stark contrast to disgorgement, Defendants themselves concede that they "might have less incentive to engage in **future frauds** if those who might otherwise be deceived can successfully be 'inoculated'" (JD FF, ch. 13, ¶ 390 (emphasis added))[136] through public education and counter-marketing. The remedy is aimed squarely at

[136] Defendants incorrectly assert in their Rule 52(c) motion that the Court has already read the D.C. Circuit opinion to foreclose remedies that deter future unlawful conduct, citing Order #886 at 4. A review of the cited opinion reveals no such holding from this Court.

preventing and restraining future violations.

a. Defendants engage in fraudulent conduct to maximize their profits

As the evidence entered at trial proves, Defendants embarked on a fifty year scheme to defraud the American public about the health effects of active and passive smoking. Defendants did this knowing that in the face of the overwhelming scientific evidence about the adverse heath effects of active and passive smoking, they needed to exploit the denial and rationalization of smokers by falsely claiming that the adverse health effects of smoking had not been proven. As set out above in Section II.A.5.a of this Post-Trial Brief and Section III.A of the United States' Findings, providing consumers with a "psychological crutch" through their false public statements and denying the health effects of smoking and misleading advertising was vital to the economic viability of the industry.

b. Reducing the economic incentives for Defendants to commit fraud is required to prevent and restrain Defendants from committing future RICO violations

Counter-marketing campaigns have been linked to significant reductions in youth smoking initiation, as well as declines in adult smoking prevalence. Accordingly, as discussed below, counter-marketing: (1) dilutes the impact of Defendants' fraudulent statements made for the purpose of maintaining and attracting new smokers; and (2) dilutes the efficacy of Defendants' marketing efforts targeted towards underage smokers. Counter-marketing will prevent and restrain Defendants from making fraudulent statements and marketing to youth by eliminating or substantially reducing the economic incentive to engage in such conduct, and tipping the future risk-reward balance cited by Judge Williams.

Changing economic incentives has been recognized as essential to preventing future corporate misconduct. The "largest accounting fraud in history" transpired at Worldcom and led to an SEC enforcement proceeding which ultimately resulted in the Court requiring "the

development of recommendations intended to prevent any reoccurrence of the governance abuses that were instrumental in the collapse of Worldcom." Restoring Trust: Report to Hon. Jed. S. Rakoff on Corporate Governance for the Future of MCI Inc. Prepared by Richard C. Breeden Corporate Monitor, SEC v. Worldcom Inc., No. 02-Civ. 4963, 2003 WL 22004827, at *1 (S.D.N.Y Aug. 26, 2003). The corporate monitor charged with developing these recommendations first examined what factors contributed to the abuses at Worldcom and concluded that, "corporate culture under [the CEO] Ebbers did not reward efforts to reinforce legal compliance, ethics, internal controls, transparency, diversity or individual responsibility. Revenue growth and personal compensation were the exalted elements in the Ebbers corporate culture." Id. at *15. The corporate monitor made numerous recommendations to structure executive compensation in a manner that would avoid the "strong incentives" that previously existed at Worldcom for Ebbers and other senior executives to engage in fraudulent conduct, such as hyping the stock and releasing "misleading or outright false information." Id. at *39.[137] Similarly, this Court must implement a remedial scheme that changes the "strong incentive" for Defendants to make fraudulent statements on the health effects of smoking and to fraudulently market to youth.

The testimony of the United States' experts establishes that Defendants' fraudulent

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[137] See also, e.g, Swack v. Credit Suisse First Boston, No. Civ. A. 02-11943, 2004 WL 2203482, at *15-*16 (D. Mass. Sept. 21, 2004) (denying motion to dismiss and finding that scienter sufficiently pled under Section 10(b) of Securities Exchange Act of 1934 where plaintiff pled defendant's "continued employment and compensation" as motive for his fraudulent conduct); Nat'l Comms. Ass'n v. AT&T Corp., No. 92 Civ. 1735, 1998 WL 851588, at *6 (S.D.N.Y. Dec. 8, 1998) (denying AT&T's motion of judgement as a matter of law; finding that there was "ample evidence . . . including the testimony of one of its expert witnesses, **that AT&T possessed an economic motive**" to engage in willful misconduct) (emphasis added); In re Kidder Peabody Sec. Litig., No. 94 Civ. 3954, 1995 WL 590624 at *5 (S.D.N.Y. Oct. 4, 1995) (denying motion to dismiss and finding that scienter sufficiently pled under Section 10(b) of Securities Exchange Act of 1934 where defendant had motive to engage in fraudulent conduct in order to show profitability).

conduct was highly profitable, and that Defendants will continue to commit fraud absent Court intervention reducing the economic benefit of such conduct. As Dr. Bazerman observed in testimony that went unchallenged, "Evidence demonstrates that these frauds have been highly profitable . . . Therefore, **absent Court intervention**, there is no reason to assume that these fraudulent behaviors **will cease to be profitable** for defendants in the future and as a result, defendants will experience incentives to engage in them." Bazerman WD, 20:7-15 (emphasis added). With respect to Defendants' marketing to youth, Dr. Bazerman concluded that "[a]s long as expected profit from cigarette sales to young people exists, the misconduct of marketing cigarettes to young people will continue." Id. at 46:15-16. As Dr. Bazerman testified, Defendants' "incentives to maximize profit are outweighing the incentives to avoid the misconduct of targeting underage individuals in the defendant companies' marketing efforts." Bazerman TT, 05/04/05, 203226:2-10. Similarly, Dr. Harris testified that Defendants act collusively to advance their shared economic interests, specifically that Defendants "have engaged during the past five decades in a sustained cooperative arrangement in which they have jointly denied that smoking caused disease." Harris WD, 22:19-23:14.[138]

Dr. Bazerman's considerable professional experience also confirms the lessons reflected in Worldcom. In trial testimony, Dr. Bazerman explained his work related to systematic bias in the accounting industry. Specifically, he co-authored a paper in 1997 concluding that auditors are more likely to provide self-serving, biased, positive audits when they have the opportunity to sell consulting services to their clients and recommended restructuring the auditing industry so that incentives that create corruption and bias would be eliminated. The recommendations

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[138] Defendants' desire to maximize their profits is a legitimate objective; obviously, they are in business to make a profit and maximize shareholder value. However, preying upon vulnerable youth (while publicly stating they do not market to youth) and knowingly conveying false information are not legitimate methods to maximize profits.

included restructuring so that auditing firms would only audit and not provide other services to their audit clients, limits to fixed-term, non-renewable contracts, and a prohibition on the ability of employees of audit firms to accept positions with their clients until an extended period of time elapsed between the audit and an offer of employment. Bazerman WD, 38:14-39:10. Dr. Bazerman appeared before the SEC in 2000 and made similar recommendations "designed to address a market opportunity that provided an incentive for misconduct by auditing firms." Id. at 39:11-39:23.

The SEC did not adopt Dr. Bazerman's recommendations, but instead imposed disclosure requirements on auditors that required them, in part, to reveal that they sold other services to the companies they were auditing. Id. at 40:17-19. As Dr. Bazerman explained, the disclosure requirement was not enough on its own, and "[w]ithout any strong action, the disasters at companies such as Enron, Adelphia and Worldcom soon followed." Id. at 40:19-22. Finally, Congress acted, passing the Sarbanes-Oxley Act of 2002, which contains certain of the primary recommendations that Dr. Bazerman made as early as 1997.

In the instant case, public education and counter-marketing will dilute the economic benefit to Defendants, and corresponding incentive, of making fraudulent statements on the health effects of smoking and fraudulently marketing to youth. As Dr. Bazerman explained, "If a counter-marketing campaign is effective in the long-term, it will remove from the marketplace a population of consumers and potential consumers of defendants' products, namely children. Thus, their incentive to market to this population will be eliminated and their behavior will change accordingly." Id. at 65:15-20. As fully explained below, public education and counter-marketing campaigns have proven effective at reducing the smoking population among both youth and adults, thereby reducing the economic incentive to Defendants to continue engaging in their fraudulent conduct.

c. Public education and counter-marketing are effective at changing the information environment in which Defendants operate

Providing accurate information to the public about the health effects of passive and secondhand smoke will change the information environment, reduce smoking incidence among adults and youth, and reduce the potential rewards to Defendants from fraudulent conduct. The 2000 Surgeon General's Report, *Reducing Tobacco Use*, recognized the need for counter-marketing to combat the misleading messages communicated about smoking through the billions of dollars spent by the tobacco industry on advertising:

> Countermarketing: Changing a social environment that fosters a norm of tobacco use is an essential element of national, state, and local programs. This change requires strategies to counter the billions spent in advertising and promotion that reach young people and adults with misleading images about tobacco.

US 64316 at 0483 (A).[139] Prior experience demonstrates that changing the information environment by implementing a large-scale national counter-marketing campaign which provides accurate information regarding smoking counteracts Defendants' marketing efforts and reduces the incidence of smoking among adults. Between 1967 and 1970 the Fairness Doctrine required television and radio stations to air one anti-tobacco advertisement for every three tobacco

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[139] Similarly with respect to lower tar cigarettes, Surgeon General Carmona cited the need to provide consumers with accurate information in discussing the 2004 Report's conclusions that lower tar cigarettes provide no clear health benefit:

> [T]he purpose of that statement is so those who deal with advocacy groups, with increasing health literacy to the American public for a better understanding **[so] that they are not duped into using a product thinking it is healthier**, that they are aware and make the appropriate decision based on the good science.

Carmona TT, 5/3/05, 20114:19-20115:3 (emphasis added); see also Carmona TT, 5/3/05, 20118:19-20119:1 ("I will state my concern as it relates to the health of the American public that my goal is to make sure that the American public is aware that there is no health benefit in smoking these light, low-tar type of tobacco products. So, how we get there is another issue. My job is to increase the health literacy of the American public so that they are aware and not duped into thinking that this is a healthier way to smoke.").

advertisements. For the first time in time in the Twentieth Century, adult smoking prevalence fell for three consecutive years between 1967 and 1970. US FF § V.C ¶ 180. Dr. Eriksen specifically referenced "the scientific evidence from the time of the Fairness Doctrine" as support for the efficacy of counter-marketing in reducing cigarette smoking. Eriksen WD, 7:18-8:8. The smoking trends that occurred during the Fairness Doctrine demonstrate that public education and counter-marketing dilute the efficacy of Defendants' fraudulent statements directed at maintaining current smokers and attracting new smokers to the market.

The Centers for Disease Control has more recently recognized the importance of counter-marketing in reducing smoking incidence. CDC's 1999 publication, Best Practices for Comprehensive Tobacco Control Programs included counter-marketing as one of nine core components of a comprehensive tobacco control program. See US FF § V.C ¶ 177. The 2000 Surgeon General's Report recognized the need for a sustained counter-marketing campaign to change the information environment with respect to tobacco: "In light of the ubiquitous and sustained pro-tobacco messages, countermarketing efforts of comparable intensity and duration are needed to alter the social and environmental context of tobacco use." US 64316 at 0518 (A). In its 2001 Report, the CDC's Task Force on Community Preventive Services concluded that there was "strong evidence" that media campaigns in conjunction with other interventions increase smoking cessation among adults. Eriksen WD, 10:4-14; see also US 64316 at 0135 (A) (2000 Surgeon General's Report, Reducing Tobacco Use, concluding that "Countermarketing activities can promote smoking cessation and decrease the likelihood of initiation").[140]

[140] In addition, after the Florida truth campaign had been underway for one year, Florida saw a 20% reduction in smoking among middle school students and an 8% reduction in smoking among high school students. After two years, there was a 40% reduction in smoking among middle school students and an 18% reduction among high school students. Eriksen TT, 5/16/05, 21056:3-24; Healton WD, 19:9-20:1.

As fully set out in the United States' Findings, providing youth with accurate information about smoking through public education and counter-marketing is effective at reducing the number of youth smokers. Changing the information environment through public education and counter-marketing has proven effective at reducing youth smoking, thereby diluting the economic incentive for Defendants to continue to fraudulently market to youth. As Dr. Bazerman testified, based on the evidence of the short term effects of a counter-marketing campaigns in reducing youth smoking, a sustained counter-marketing campaign directed at youth has the potential to eliminate the population of underage smokers (and, importantly, nonsmokers susceptible to marketing messages) over the long-term, thereby reducing the economic incentive to fraudulently market to this population in the future. Bazerman WD, 65:15-66:7. Put simply, the economic incentive to spend money on marketing to this group would be severely reduced, in that counter-marketing would lead to changes in attitudes and beliefs, and ultimately in smoking behavior among youth. Changes to market incentives that drive corporate behavior in other industries, as cited above and further explained in Dr. Bazerman's testimony and the United States' Findings, provide further support for this conclusion.

d. The Court should require Defendants to fund a public education and counter-marketing campaign administered by the American Legacy Foundation

As the Court is aware, the American Legacy Foundation was created pursuant to the provision in the MSA establishing a national foundation for the purpose of, among other things, "carrying out a nationwide sustained advertising and education program to (A) counter the use by Youth of Tobacco Products, and (B) educate consumers about the cause and prevention of diseases associated with the use of Tobacco Products." MSA § VI(f)(1). To fulfill its mission, the Foundation has implemented a nationwide counter-marketing campaign, the truth® campaign, which has proven effective at reducing smoking among youth. As the Court is aware, truth®

advertisements communicate information on the health consequences of smoking and the marketing practices of the tobacco industry in a manner that resonate with adolescents. Healton WD, 15:5-21. In addition, Legacy has recently launched a public education campaign in collaboration with the Ad Council to educate the public about the dangers of secondhand smoke. Id. at 10:2-19. A comprehensive peer reviewed analysis of the truth® campaign demonstrated that the campaign contributed the approximately 22% of the overall decline in youth smoking rates between 2000 and 2002. There were approximately 300,000 fewer youth smokers as a result of the campaign. Id. at 24:4-25:16; US 89452 (A). Importantly, while Defendants called an expert witness to criticize a research paper concerning the impact of truth® on youth smoking rates, Defendants themselves have admitted the effectiveness of Legacy's efforts to reduce youth smoking. US FF § V.C ¶¶ 218-219; JD-052837 at 5322 (A) (April 2, 2004 letter from CEO of Philip Morris, Michael Szymanczyk, stating that "[w]e continue to believe that much of Legacy's work has been significant in contributing to reductions in underage smoking").[141]

Evidence adduced at trial establishes that $400 million annually for ten years is required in order for the American Legacy Foundation to implement a comprehensive public education and counter-marketing campaign. US FF § V.C ¶ 192. A public education and counter marketing campaign funded at this level will prevent and restrain Defendants from committing

[141] Defendants called no witness with sufficient qualifications to challenge the effectiveness of public education and counter-marketing campaigns generally, or the truth® campaign specifically. The only witness Defendants called to address to issue of truth® was Dr. Janet Wittes, a biostatistician with no expertise in developing or evaluating counter-marketing public education campaigns**.** Wittes TT, 6/1/05, 22487:17-19. Dr. Wittes admitted that she had no opinion about the effectiveness of counter-marketing or the truth® campaign. Indeed, she conceded on cross-examination that she had never even seen a truth® advertisement and was not offering the opinion that the truth® campaign had been ineffective at reducing youth smoking. Id. at 22485:21-23, 22487:2-23. A review of her testimony demonstrates that **she had no idea whether her criticisms of the Farrelly study designs had any impact on the accuracy of the study results**. Id. at 22507:21-22508:16; 22576:9-13; 22577:19-22578:8; 22579:9-18.

future RICO violations, specifically making fraudulent statements of the health effects of smoking and fraudulently marketing to youth, by reducing the economic incentive to engage in such conduct. Children and adults in this country have been, and continue to be, inundated with Defendants' fraudulent statements and misleading advertising. Providing accurate information on the health effects public education and counter-marketing is essential to any remedial scheme. The more information adults and children possess about the health effects of active and passive smoking, the less effective Defendants' false statements and misleading advertising will be at achieving the objective of maintaining current smokers and enticing youth to become smokers, specifically changing the "forces most affecting the likelihood of criminal action." Philip Morris USA, 396 F.3d at 1203.[142]

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[142] In their Proposed Findings of Fact, Defendants assume ipso facto that if this Court orders the continued funding of the American Legacy Foundation that the vilification clause in Section VI(h) of the MSA would apply to the funding commitment. JD FF § XIII ¶510. There is no basis in fact or law to support this Court making any funds it directs Defendants to pay to Legacy subject to this provision. The United States' proposed remedies order has its own safeguard to insure that money dedicated to public education and counter-marketing is utilized for its intended purposes: court-appointed monitors will have the authority to oversee the use of funds by the Foundation. Providing Defendants a vehicle to create rights of action and avenues of interference, as they request, would undermine the effectiveness of the Court's remedial order.

Defendants, however, do not stop at a mere attempt to have the Court find that the vilification clause will apply to the provision of funds for public education and counter-marketing. They request that the Court make specific findings as to whether certain of Legacy's truth® advertisements and other activities violate the vilification clause contained in the MSA. JD FF, ch. 13 ¶¶ 511-521. This Court has more than enough complex factual and legal issues to decide in this case without the additional burden of unnecessarily making findings on this issue. Furthermore, the issue of vilification has already been decided by the Delaware Court of Chancery in a long-standing, strongly-contested lawsuit in which Lorillard is a party. Just two days ago the court in that case granted Legacy's Motion for Summary Judgment against Lorillard. American Legacy Foundation v. Lorillard Tobacco Co., No. 19406, Lamb, V.C., slip op. at 2 (Del. Ch. Aug. 22, 2005). The court explicitly held that the very same truth® advertisements Defendants reference in their Proposed Findings of Facts were in compliance with Section VI(h) of the MSA. Id. at 12, 48-49, 53, 70, 72-74, 77, 83.

3. Youth Smoking Reduction Targets

a. The youth smoking reduction remedy is a reasonable, narrowly tailored remedy that will act to prevent and restrain future RICO violations

The evidence in this case clearly establishes that Defendants' RICO violations have made their products more appealing to youth. The remedy proposed by Dr. Jonathan Gruber to reduce youth smoking (the "Youth Smoking Reduction Remedy"), seeks to eliminate this fraudulent activity in the future. The Youth Smoking Reduction Remedy imposes targeted reductions in youth smoking of 6% per year between 2007 and 2013, for a total reduction of 42% among those 12-20 years old. It is thus a forward-looking remedy aimed at preventing and restraining future racketeering violations. Philip Morris USA, 396 F.3d at 1998. If Defendants fail to meet the yearly targeted reductions, they will be assessed $3,000 per youth above the target levels.

1) The youth smoking reduction remedy prevents and restrains future RICO violations

The Youth Smoking Reduction Remedy will prevent and restrain future racketeering activity by reducing the economic incentive for Defendants to engage in future RICO violations that make their brands appealing to young people. Gruber WD, 7:22-8:2; 28:1-5; Gruber TT, 5/10/05, 20610:20-20611:5 ; see also Bazerman WD, 46:23-47:2 ("Dr. Gruber's expert report proposes a mechanism aimed at eliminating the economic incentives that defendants experience to market cigarettes to young people"). The Youth Smoking Reduction Remedy reduces this incentive by imposing an assessment on Defendants for failing to reduce youth smoking to target levels. The assessment, imposed for each youth in excess of the target levels, exceeds Defendants' financial gain from each such youth. This remedy creates incentives for Defendants to avoid any RICO-violating activities that make their products appealing to youth by removing their ability to profit from youth smoking – profits that RJR estimated in 1989 would earn it

alone an additional $2.1 billion per year just for smokers from ages 18-20. Gruber TT, 5/10/05, 20610:20-20611:1; Gruber WD, 14:10-18; US 20007 (O).

Defendants argue that the Youth Smoking Reduction Remedy does not prevent and restrain future misconduct, but is instead focused only on reducing youth smoking. This argument is undercut by the record in this case, including the testimony of Defendants' own expert, Dr. Roman Weil, who agreed that the Youth Smoking Reduction Remedy will operate to prevent and restrain future racketeering violations. Dr. Weil conceded that the Youth Smoking Reduction Remedy "does give Defendants economic incentives to achieve the targeted reductions in youth smoking." Weil WD, 6:3-4. Indeed, in an exhibit prepared and highlighted at trial by Dr. Weil, he made clear that "where a Defendant cigarette manufacturer is above its youth smoker target and committing [a] future RICO violation would likely increase the number of youth smokers of its brands, [the Youth Smoking Reduction Remedy] increases that Defendant's economic incentives **to avoid future RICO violations**." Weil WD, 17:9-18:2 (emphasis added); Weil TT, 5/31/05, 22319:17-22320:1; JDEM-060674 (A). Thus, as Dr. Weil admits, the Youth Smoking Reduction Remedy will, in fact, create an economic incentive for Defendants "to avoid future RICO violations." Weil WD, 18:2.

Notably, this Court has also previously rejected Defendants' argument. In overruling Defendants' objection that Dr. Gruber's testimony "is not specifically tailored to prevent or restrain future misconduct," the Court rejected Defendants' argument as "not true," determining that "[a]ll of [Dr. Gruber's] testimony was how the remedies he was proposing in his view could prevent and restrain any future misconduct, and obviously he was focusing on reduction of youth smoking." 5/10/05 Tr. 20781:4-9.

2) The youth smoking reduction remedy is reasonable

The Youth Smoking Reduction Remedy is a reasonable approach to preventing and

restraining Defendants' future racketeering activities. The targets themselves are reasonable and attainable, and importantly, no financial assessment is imposed on Defendants unless they fail to meet the targeted reductions in youth smoking. Gruber WD, 8:4-5. Further, Defendants are given complete control over how best to meet the targets.

a) The reduction targets are reasonable

The youth smoking reduction targets are reasonable and attainable for four reasons. First, Defendants agreed to these same targets as part of the 1997 Proposed Resolution, albeit on a slower timetable. Id. at 15:15-16:16; US 18255 (A); US 18263 (A). This is evidence strongly suggesting that Defendants know that they are in fact able to meet such targets, and the Court can draw such an inference. Indeed, under the Youth Smoking Reduction Remedy, Defendants effectively receive credit for the 30% reduction in youth smoking that has already occurred from 1997 to 2003. Gruber WD, 16:17-17:3.

Second, the testimony from marketing and public health experts such as Drs. Biglan, Chaloupka, Dolan, Krugman and Eriksen overwhelmingly established that Defendants' marketing campaigns appeal to youth and lead to youth smoking, and that Defendants' pricing strategies lead to youth smoking. The significant impact of Defendants' pricing strategies on youth smoking is well established. As Dr. Chaloupka testified, Defendants' "price-related marketing activities reduced the average price per pack by at least 11.6 percent, which, based on the estimates described above, means that as many as 100,000 teenagers would have initiated daily smoking in 2002 as a result of these marketing activities." Chaloupka WD, 93:15-94:7.

Third, prior price increase experience in the tobacco market demonstrates that Defendants can meet the youth smoking reduction targets solely by instituting price increases that are equivalent to increases that have been instituted in the past. Because the price elasticity of youth demand is -1 (i.e., each 10% increase in cigarette prices leads to a 10% reduction in youth

initiation), meeting the 42% smoking reduction among youth required under this remedy, solely by raising prices, would require Defendants to raise their prices by 42% over the seven-year period from 2006 to 2013. Gruber WD, 19:15-20:21. Such a reduction is feasible given that Defendants have instituted similar price increases over similar seven-year time periods in the past. For example, from 1993-2000, real net cigarette prices rose by 46%, slightly in excess of the price increase that would be required for Defendants to meet the targets contained in the Youth Smoking Reduction Remedy, if they chose to meet those targets solely by raising prices on their leading youth brands (Marlboro, Newport, Camel, Kool) without a commensurate increase in the use of price promotions to offset those price increases. Id. at 20:21-21:4.

Fourth, the Youth Smoking Reduction Remedy gives Defendants complete control over how best to reach the targets. As Dr. Gruber testified, "one thing I view as a great merit of this outcome-based remedy is it lets defendants choose the mix that most efficaciously meets these targets, choose the mix of price and non-price." Gruber TT, 5/10/05, 20594:22-25. As the evidence has shown in this case, Defendants have a variety of mechanisms, including both advertising and promotional restrictions through which they can reduce youth smoking of their cigarette brands.

Defendants nonetheless ignore this testimony and contend that a 42% price increase would devastate them, because they would suffer insurmountable losses of market share. Dr. Weil asserts that Defendants' loss of market share as the result of the proposed remedies in this case would exceed the loss of market share experienced by Defendants following the MSA. Weil WD, 25:1-14. This is not borne out by the evidence:

- Dr. Weil confirmed that the cost of the remedies sought by the United States is only half of the cost of Defendants' payments under the MSA. Weil TT, 5/31/05, 22335:4-22336:8. Despite this fact, Dr. Weil fails to explain why Defendants' loss of market share would be greater than the loss of market share following the MSA.

- Dr. Weil admitted on cross-examination that he had not reviewed peer-reviewed literature, nor published any, that found that the MSA had little or no impact on the viability of Defendants' businesses, even though he was opining on the impact of even lower payments resulting from potential remedies in this case. Id. at 22336:16-24, 22361:16-24.

- Dr. Carlton was forced to concede after questioning by the Court that the post-MSA history did not support the idea that raising prices hurt Defendants' profitability. Carlton TT, 6/2/05, 22785:15-22786:16. He simply had a "hunch" that Defendants' profits would decline under the Youth Smoking Reduction Remedy. Carlton TT, 6/2/05, 22786:1-13, 22787:6-9.

- Dr. Weil was unable to state whether the change in market share following the MSA was the result of cost differentials between Defendants and Subsequent Participating Manufacturers. Weil TT, 5/31/05, 22357:15-22358:23. In fact, Dr. Weil admitted that during the period since the MSA, American consumers have, in general, been more attracted to generic cigarettes while the overwhelming majority of Defendants' sales are in premium brands. Id. at 22358:24-22360:4.

- Dr. Carlton failed to cite any evidence supporting a claim that raising prices on premium brands would cause youth to smoke generic brands. Carlton TT, 6/2/05, 22823:13-22; 22825:20-22826:12. In fact, the evidence adduced at trial was overwhelmingly to the contrary.

In short, Defendants' experts have failed to review the relevant literature, failed to understand the numbers they relied upon, and failed to do the analysis necessary to support the broad assertions that they have made. The evidence adduced at trial demonstrates that the targets contained in the Youth Smoking Reduction Remedy are reasonable and attainable.

b) The methodology of counting youth smokers is sound and reasonable

The youth smoking figures used in the Youth Smoking Reduction Remedy will be based upon the National Survey on Drug Use and Health ("NSDUH"). The NSDUH is a nationally representative survey that provides the large sample sizes and brand-specific smoking information necessary to measure youth smoking in applying the Youth Smoking Reduction Remedy. Gruber WD, 18:5-15.

To the extent that Defendants argue that the Youth Smoking Reduction Remedy does not

account for smokers who switch brands over their lifetime or smokers who occasionally smoke other brands, Dr. Gruber has squarely addressed this issue. Gruber WD, 19:5-14. First, because joint and several liability applies, this argument is moot. Second, even assuming no joint and several liability, the approach in the Youth Smoking Reduction Remedy is appropriate because its intent is to ensure that a Defendant is not encouraged to attract youth to its cigarette brands. As Dr. Gruber testified, " If assessments on defendants are reduced to account for brand loyalty, then defendants could undo the incentives from this remedy by increasing their brand loyalty." Id. at 19:5-14.

Under the Youth Smoking Reduction Remedy, if Defendants fail to meet the targeted reductions, they will be assessed $3,000 per youth by which they exceed the target level. This $3,000 amount is the upper limit on the lifetime proceeds a Defendant could expect to earn from making its brands appealing to youth. Id. at 8:5-11, 22:2-7. Dr. Gruber employed a thorough and exacting five-step process to compute this upper limit on lifetime proceeds. Id. at 22:8-26:4.

b. This outcome-based remedy is a critical adjunct to basic injunctive relief

As Dr. Gruber testified, the Youth Smoking Reduction Remedy is an "outcome-based" remedy, in that it ties the financial assessments to the "outcome" of youth smoking levels. Id. at 8:18-9:4. This remedy is thus designed as a complement to the basic injunctive relief sought by the United States.[143] To be effective, the Court's remedies order should include outcome-based

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[143] Dr. Weil suggests that basic injunctive relief is preferable because it is "targeted." Weil WD, 7:22-25. His assertion lacks support in the record. First, Dr. Weil admitted that he has "no expertise with which to evaluate whether ascertaining the truth or falsity of Defendants' future public statements would be easy or hard." Second, Dr. Weil admits that he didn't systematically look at the potential side effects of the injunctive relief that [he] proposed to the court. Id. at 8:16-18; Weil TT, 05/31/05, 22302:12-15. Third, when asked whether he had done an analysis to support the costs he asserted that the Court would incur to enforce basic injunctive relief, Dr. Weil admitted that he "did not." Id. at 22311:7-15.

(continued...)

components such as the Youth Smoking Reduction Remedy. The outcome-based approach prevents Defendants from simply retooling their marketing efforts to avoid a Court injunction but still reach youth through some novel approach; something they have been successful at doing in the past. Indeed, since the MSA, Defendants' advertising and promotional expenses have more than doubled, from $6.73 billion in 1998, the year the MSA was signed, to more than $15 billion in 2003.

The Youth Smoking Reduction Remedy's outcome-based approach will create an incentive for Defendants to avoid future RICO violations. Moreover, because Defendants possess superior knowledge about how they market their cigarette brands in ways that appeal to youth, the Youth Smoking Reduction Remedy's outcome-based approach will allow Defendants to choose the avenue to meet the targets. In short, the outcome-based approach is an efficient and effective means of removing the economic incentive for Defendants to engage in future RICO violations that make their cigarette brands appealing to young people. Weil WD, 9:5-16.

4. Disclosure Requirements

Remedies that compel the disclosure of information will assist in preventing and restraining future frauds. These remedies include document depositories and document websites of documents produced in litigation discovery; disclosure of disaggregated marketing and sales data; and information on health and safety risks. Imposing such disclosure requirements will be a powerful restraint on Defendants' future fraudulent conduct.

The Supreme Court has recognized that "disclosure requirements deter actual corruption

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[143](...continued)
Dr. Carlton's suggestion that only basic injunctive relief would be a sufficient remedy fares no better. He testified that he had not done any analysis of whether an injunction plus sanctions would affect youth smoking, nor had he done any analysis of the practicalities of such a remedy. Carlton TT, 6/2/05, 22706:5-8; 22708:10-20.

and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) (discussing campaign contribution disclosure requirements); see also Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 222 (1999) (O'Connor, J., concurring in part and dissenting in part). The Supreme Court has recognized that compelled disclosures of information can prevent future frauds in numerous other contexts over the past century. In Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-38 (1980), the Supreme Court struck down an ordinance that sought to reduce fraud by charitable organizations by dictating what percentage of their income they could spend on particular activities, and observed that "[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 637-38 (footnote omitted.) Additional cases range from controlled substances[144] to labeling laws for animal feed.[145]

The Supreme Court has specifically authorized a court-imposed injunction of the general kind the United States seeks here, i.e., commanding defendants who have been found to have engaged in past fraud to make ongoing public disclosures in the future to prevent them from engaging in similar fraudulent conduct in the future. In SEC v. Capital Gains Research Bureau,

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[144] Whalen v. Roe, 429 U.S. 589, 598 (1977) (mandatory discloses of controlled drug prescriptions to state health department "could reasonably be expected to have a deterrent effect on potential violators").

[145] Savage v. Jones, 225 U.S. 501, 524 (1912) ("The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, – a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable."). See also Izykowski v. Int'l Bhd. of Elec. Workers, 768 F. Supp. 368, 374 (D.D.C. 1991) (upholding as "clearly permitted as a reasonable rule" union rules requiring candidates for local union office to disclose campaign funding sources in order "to prevent fraud") (internal quotation marks and citation omitted), vacated as moot, 953 F.2d 688 (D.C. Cir. 1992) (per curiam); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1215-25 (D.C. Cir. 2004) (affirming forward-looking requirement to disclose certain computer code to prevent future anticompetitive behavior).

Inc., 375 U.S. 180 (1963), the Supreme Court held that because the Investment Advisers Act of 1940 authorized the trial court "to enjoin any practice which operates 'as a fraud or deceit upon any client or prospective client'," the trial court was authorized to issue an injunction requiring the defendant to make ongoing public disclosures as a "mild prophylactic" to prevent it from repeating its past fraudulent and deceitful practices. 375 U.S. at 185, 193, 198-99.

As discussed immediately below, certain Defendants are currently subject to some public disclosure requirements for documents which will end between 2008 and 2010. Extending those obligations, and subjecting all Defendants to ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds.

a. Public disclosure of documents produced or used in litigation or administrative actions

Requiring Defendants to make public the documents that they produce or use in litigation or administrative actions, with certain safeguards to protect privileged and confidential trade secret information, is the first step towards using disclosure to prevent and restrain Defendants from engaging in future fraudulent activities. Several Defendants are currently subject to existing document depository and website obligations, and they cite these current (but shortly expiring) obligations as preventing them from engaging in future unlawful conduct. For example, in a section of their proposed findings of fact asserting that the MSA "Address[es] the Misconduct Alleged by the Government," Joint Defendants state that the MSA "contains comprehensive provisions for public disclosure of documents. Under these provisions, Defendants are required to establish at their own expense a series of Internet websites making publicly available tens of millions of pages of internal documents." JD FF, ch. 12, ¶ 20 (citations

omitted).[146] Compelling such ongoing disclosures in the future will thus help prevent future fraudulent activity. Capital Gains Research Bureau, 375 U.S. at 191-92.

Defendants' current Minnesota and Guildford document depository obligations expire shortly: in May 2008 for the Minnesota and Guildford Depositories under the Minnesota settlement, and in June 2010 for document websites under the MSA. Minnesota consent judgment § VII(C)-(E) (JD-093326) (A); MSA § IV at 36-41 (JD-045158) (A). Moreover, Liggett and Altria are not subject to any document obligations at all, either depository or website; and BATCo has no document website obligations. US FF § V.F, ¶¶ 289, 295.

Document depositories provide hard copies of documents and thus reduce Defendants' ability to remove documents from public access. However, the Court needs to ensure that sufficient public access is provided to document depositories to safeguard their role, and ensure that independent third parties run document depositories. Public access to the Guildford Depository is severely restricted, with only one organization allowed access per day, and no more than six visitors per day, and copying requested documents often takes weeks or months. Health Committee, U.K. House of Commons, The Tobacco Industry and the Health Risks of Smoking, vol. 1 (2000), (¶¶ 234, 237), US 93249 at 1282-1283 (O); US 88132 at 7994 (A).[147]

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[146] See also id., ch. 12, ¶ 266; id., ch. 8, ¶ 959. Such legally binding, ongoing document disclosure obligations "ensure that the information known by the tobacco companies is available and readily accessible to the public." Szymanczyk WD, 202:15-19; see US FF § V.F, ¶ 282.

[147] In addition, having an independent third party run any document depository is needed to prevent Defendants from gathering inappropriate information about – and from – members of the public and public health researchers who use the Court-ordered document depositories. For example, BATCo has its lawyers prepare daily "Guildford Reports" to summarize the documents that Guildford Depository visitors request, read, and/or ask to be copied. See R&R #112 at 10, adopted by Order #359. Because the Court will be ordering public disclosure to ensure transparency and prevent future misconduct, the Court should prohibit Defendants from such surveillance of members of the public and researchers who utilize the information that is made available by the Court's Order.

Document websites have several significant features that document depositories do not. Collections of tobacco documents placed on the internet following the litigation of the 1990s, unlike the majority of non-digitized archival materials, are generally searchable through the web. In addition, not all members of the public are able to travel to Minnesota to access the Minnesota Depository, so a document website increases the availability of the documents to the public. Brandt WD, 28:1-8; Szymanczyk WD, 202:4-6. As the Supreme Court has observed, "as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive." Capital Gains Research Bureau, 375 U.S. at 200.

To make their public document disclosures fully usable, Defendants must also be compelled to provide meaningful finding tools. See State ex rel. Humphrey v. Philip Morris Inc., 606 N.W.2d 676, 692 (Minn. App. 2000) ("There is compelling public interest in the indices, which will assist the government and others researching the content of the millions of documents produced in this case"). Both document depositories (of hard copies of documents) and document websites (of documents freely accessible to the public via the Internet) must include finding tools with databases searchable by multiple fields (called "bibliographic fields"), such as Bates number, date, author, title, etc. The MSA specifies some 29 fields for such data, MSA App. I at (b)(2) (JD-045158) (A); similar fields with more precision should be adopted here.[148]

Disclosure of public records is needed to ensure transparency and to prevent future

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[148] Defendants must be compelled to provide these bibliographic fields on a document-by-document basis. BATCo contends that there are 8 million pages of documents from August 1994 and earlier at its Guildford Depository, but its indices allow searches only by "folder" or "file," rather than by document, and such folder-level indices are woefully deficient. As the U.K. Health Committee reported, "a search for 'disease' yielded only sixty nine entries. This was because only the title of the file was indexed and, as we discovered, **this often gave absolutely no indication of the contents**." Health Committee (¶ 238), US 93249 at 1283 (O) (emphasis added).

fraudulent activities, such as misrepresenting Defendants' knowledge about the health hazards of their products, suppressing research into less hazardous products, denying the addictive nature of their products, denying that they manipulate nicotine deliveries, and the multiple other frauds proven at trial in this case.

b. Information about documents withheld on grounds of privilege or confidentiality

The tobacco industry withholds enormous volumes of documents on grounds of privilege. The defendants in the Minnesota litigation withheld some 230,000 documents (estimated to contain over 1,000,000 pages) on grounds of privilege or protection, State of Minnesota v. Philip Morris, 606 N.W.2d at 682. The volume of documents over which Defendants assert privilege is, if anything, now substantially larger. For example, BATCo alone served privilege logs in this action with 91,723 entries for 72,593 different documents that BATCo withheld from production on grounds of privilege or protection. See R&R #112 at 4 & n.3, adopted by Order #359.

Providing the public with a reasonable method to determine which documents Defendants withhold on grounds of privilege or confidentiality requires that Defendants must be compelled to provide full bibliographic information for all withheld documents, including titles (as well as a summary of the basis for the privilege or confidentiality assertion).[149] Defendants' privilege logs often obscure crucial information, further demonstrating why Defendants must be compelled to

[149] A notable example is BATCo's withholding hundreds of the "Guildford Reports" that it has its lawyers prepare to discuss the documents that are read by members of the public who use the Guildford Depository. Discovery litigation during this lawsuit revealed that BATCo's privilege logs do not include titles, and a search for the word "Guildford" in those logs yielded only one document. See R&R #112 at 6, adopted by Order #359. The Special Master determined that determining which of the 91,000+ privilege log entries in BATCo's privilege logs were "Guildford Reports" was possible only by first searching a separate database which included document titles for 83,275 documents (called the "BATCo Potentially Privileged Log"); and even with access to the separate database with titles, multiple steps were still required to determine whether BATCo had asserted privilege for a particular Guildford Report. Id. at 10.

provide full bibliographic information for all documents they withhold on grounds of privilege or confidentiality (rather than merely replicating their current privilege logs), with compliance monitored by court-appointed officers.[150]

Compelling Defendants to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality is the only way to allow transparency and ensure that Defendants do not engage in similar "egregious" conduct in the future. Without a Court-ordered mechanism to ensure that all appropriate documents are either disclosed, or are disclosed as being withheld, Defendants will be able to suppress documents from the public. Defendants must similarly be required to identify all document fields and give meaningful explanations for all documents that they withhold on grounds of confidentiality.

Defendants should also be compelled to provide regularly-updated information concerning all waivers and losses of privilege and confidentiality. Indeed, in Order #51, § III.G.9, this Court ordered Defendants to identify all documents being withheld on grounds of privilege over which their privilege assertion had previously been ruled waived or invalid. Imposing such a requirement on an ongoing basis is necessary to ensure that accurate and current information is available concerning which withheld documents have been adjudicated non-privileged or non-confidential. Such a requirement is also necessary to ensure that once a Defendant waives privilege over particular documents, the public is on notice when the Defendant refuses to make those documents public. Contrast US FF §§ V.A.(3)(b)(i), ¶¶ 66-67

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[150] This Court twice adopted Special Master recommendations concerning the "egregious" failures in Liggett privilege logs, which effectively hid hundreds of documents through "misleading descriptions [which were] egregious" and hid multiple documents in a single Bates number with a description that provided no notice whatever of what was being withheld; the Court ultimately ordered privilege waived for over 500 Liggett documents as a result of this conduct. R&R #111 at 11, adopted by Order #360; R&R #127 at 11, adopted in relevant part by Order #410.

(discussing Liggett's voluntarily waiving privilege over all pre-1997 internal Liggett-only documents, but nonetheless asserting privilege over numerous such documents in this action) with Liggett FF § IX, ¶¶ 46-47 (Liggett highlighting its voluntary waiver of attorney-client privilege over all such documents, but not acknowledging that it asserted privilege over many of the same documents in this lawsuit).

c. Disclosure of disaggregated marketing and sales data

Extensive trial testimony disclosed the need for disaggregated data to be released. See US FF § V.F.(4), ¶¶ 302-306. Even defendants' own expert witness James Heckman requested, but was unable to obtain from the Lexecon litigation consulting firm and/or Defendants' attorneys, Defendants' disaggregated marketing and sales data so he could evaluate for himself the effect of Defendants' marketing activities upon youth smoking. Heckman TT, 4/13/05, 18944:15-18949:12, discussed in US FF § V.F.(4), ¶ 306.

Significantly, Defendants make selective and strategic disclosures of certain aspects of their disaggregated data when they believe doing so is to their benefit. For example, Philip Morris refuses to disclose to the public its overall marketing expenditures, or any specific category of marketing expenditures, Beran TT, 4/18/05, 19324:22-19325:16; Eriksen WD, 87:22-88:2; but as of April 2005, its website includes a web page entitled, "Press Kits: Responsible Marketing," which features precisely one "Fast Fact": "PM USA has reduced its magazine advertising by 94% since 1998." US 92120 (A). But magazine advertising accounted for only 1% of the industry's overall marketing expenditures in 2003, according to the FTC's just-released Cigarette Report for 2003 (2005); the total marketing expenditures for 2003 were $15.16 billion (an increase of 21.5% from just one year earlier, up from $12.46 billion in 2002). Indeed, in 2003 the tobacco industry spent $14.99 billion (99.0% of the 2003 total) on marketing categories **other** than magazine advertising. FTC, Cigarette Report for 2003 (2005) at tbl. 2C.

Philip Morris's "responsible marketing" web page selectively discloses that since 1998, Philip Morris has reduced its expenditures in this one category which accounts for 1% of the industry's total, but does not publicly disclose Philip Morris's marketing expenditures in the categories that constitute the other 99% of the industry's marketing expenditures. Indeed, the web page does not even publicly disclose whether Philip Morris has increased or decreased its spending in those other categories since 1998; the industry has increased overall marketing expenditures by 125% from 1998 to 2003 (from $6.73 billion in 1998 to $15.16 billion in 2003). FTC, Cigarette Report for 2003 (2005) at tbls. 2B & 2C.

Similarly, through its Retail Leaders Program, Philip Morris gives price incentives and discount promotions to 200,000 retail outlets in the United States – outlets which sell 85% of the cigarettes sold at retail in the United States. Willard TT, 4/14/05, 19083:1-19084:20, discussed in US FF § V.F.(4), ¶ 304. Philip Morris eagerly provides one piece of disaggregated data about its Retail Leaders Program, namely, that over the four years from 2001 to 2004, it averaged spending $125 million per year (totaling $500 million) on one component that it considers to be a youth smoking prevention program; but Philip Morris refuses to provide disaggregated data for its spending on other aspects of this program or on the sales that result from it and other promotions. Szymanczyk WD, 153:1-154:7; Szymanczyk TT, 4/7/05, 18217:1-18218:3; Beran TT, 4/18/05, 19343:4-19344:2, both discussed in US FF § V.F.(4), ¶ 304.

Similarly for strategic reasons, Lorillard selectively discloses disaggregated figures for carefully chosen marketing categories for its Newport brand – for magazine advertising and for overall advertising – to argue that Newport's increasing share of the youth market cannot be due to its magazine advertising or overall advertising, because its youth popularity has increased even as its magazine advertising and overall advertising expenditures have decreased. Lindsley WD, 76:22-77:5, 78:1-6, 80:1-81:4, with 3/21/05 errata (JDEM-020180A, JDEM-020186A); Lorillard

closing arg., TT, 6/8/05, 23278:5-16. Lorillard made no objection to testimony in open court from Victor D. Lindsley, Lorillard's Senior Group Brand Director for Newport, for Lorillard's marketing expenditures for Newport in 2001 in all marketing categories other than its Excel Merchandising Program trade promotions ($450 million). By 2004, just three years later, Lorillard increased its marketing expenditures for Newport in all marketing categories (other than its Excel trade promotions) by nearly 150%, to $1.1 billion. Lindsley TT, 3/29/05, 17210:16-17212:9.

Defendants have demonstrated that they make selective and partial disclosures of disaggregated data for strategic reasons, but avoid disclosing full information about their expenditures and sales data. Providing "greater transparency to the public as to what is being spent and what effect it's having" requires compelling Defendants to disclose disaggregated marketing and sales data. Eriksen TT, 5/16/05, 21134:25-21136:1. Without such disclosures, Defendants will be able to continue their current practices. Compelling such disclosure is thus needed to prevent and restrain future frauds such as denying that their brand-level marketing expenditures have an impact on youth, but in reality, "studiously avoiding" analyzing the data themselves.

d. Health and safety risk information

As Professor Bazerman stated, "Evidence exists that defendants have not been forthcoming with accurate and complete information concerning the health and safety risks associated with cigarette smoking." Bazerman WD, 62:37-63:1, discussed in US FF § V.F.(5). Defendants are uniquely situated to identify information in their own files which bears upon the health and safety of their products. Commanding them to disclose all health and safety information – regardless of whether or not it is produced or used in litigation or administrative actions – is necessary to prevent and restrain future fraudulent activity. Notably, Defendants

have repeatedly committed themselves in the past to disclosing all evidence concerning health and safety information, but have not done so. See generally US FF § III.B (discussing myth of independent research). As this Court has recognized, information concerning "the substance of smoking and health issues . . . would be of immediate and personal medical interest to the public," Order #975, Mem.-Op. at 3, making such information particularly subject to Court-ordered disclosure.

5. Affirmative Communications

As proven at trial and detailed in the United States' Post-Trial Proposed Findings of Fact § III, Defendants' half-century long scheme to defraud has been carried out in significant part through public statements on smoking and health issues that have been shown to be outright falsehoods, deceptive and misleading statements; statements that even if literally true, are misleading in context; and statements containing material omissions of fact. Defendants have continued to make statements on key smoking and health issues that are purposely selective and intentionally omit material information to the present day, continuing during a period in which certain Defendants have operated under an agreement not to make material misrepresentations of fact. MSA § III(r) at 36 (JD-045158) (A). Such statements are consistent with Defendants' past fraudulent conduct and are statements that implicate the broad federal mail and wire fraud statutes.

As reflected in the United States' Findings and throughout this Post-Trial Brief, the United States offered several such example of recent statements. Thus, Defendants have shown by their conduct that general proscriptions are insufficient to prevent Defendants' from continuing to make statements that appear intended to allow Defendants to claim they have "come clean" on smoking and health issues, but that in fact differ little if at all in content or character from past statements. Accordingly, a prescriptive injunction ordering Defendants to

issue affirmative, specific corrective communications is appropriate and necessary to prevent and restrain Defendants from making materially misleading public statements on smoking and health matters currently and in the future.

This First Amendment does not preclude affirmative disclosure requirements where necessary to prevent consumers from being confused or misled, and Defendants' interests in avoiding compelled speech are in this case easily overcome by a the government's interest in preventing future consumer deception or confusion. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (upholding disclosure requirement in attorney advertising regarding terms of 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 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); Warner-Lambert Co. v. FTC, 562 F.2d 749, 769-70 (D.C. Cir. 1977); Pearson v. Shalala, 164 F.3d 650, 657, 659 (D.C. Cir. 1999).

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 v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 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 (emphasis added).

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 future effects that will be caused if Defendants are permitted to continue their promotion of cigarettes without such statements. See US FF § III; 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, preventing Defendants' from continuing to disseminate misleading and deceptive public statements and marketing messages by requiring them to pay for and sponsor truthful corrective communications. See Zauderer, 471 U.S. at 651. Such a remedy will prevent and restrain Defendants because it will have a tendency either to force Defendants to cease making partial, misleading, or evasive statements, or to conform the public statements they make on their own

initiative to the statements approved by the Court.

Here, the evidence introduced by both parties present the court with a solid evidentiary basis by which to tailor a narrow, effective remedy to prevent Defendants from continuing to make statements and representations that fall under 18 U.S.C. §§ 1341 & 1343. The United States' introduced evidence documenting all of the various fora Defendants have utilized to execute their public relations campaign of fraudulent public statements. At the same time, Defendants – and Altria and Philip Morris in particular – put into the record, mainly during their examination of current executives, evidence of their more recent efforts to promote their corporate Internet website, and to promote themselves as responsible corporate actors. Together, this evidence provides the Court with a blueprint of how to structure an appropriate remedy that uses the same media Defendants have themselves historically used to promulgate their fraudulent smoking and health messages, as well as the additional fora that Defendants have exploited for their multifaceted modern affirmative communications campaign. See US FF § V.E. Thus, for example, the Court should order Defendants to issue corrective statements in major general circulation newspapers, just as Defendants have used newspapers to carry out the fraudulent scheme, from the Frank Statement in January 1954 to Philip Morris's use of 30 major newspapers in November 2002 to distribute pamphlets promoting its website. JD-041513 (A); Keane WD, 43:13-17; see also JD-052908 (A) (listing the 30 newspapers in which the insert was included). At the same time, it requires Defendants to make affirmative communications for a limited period of time on package onserts, a forum that Defendants have developed and increasingly used for their own purposes in recent years.[151]

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[151] The United States does not seek to compel specific warning statements on cigarette packages, as that term is defined in FCLAA, 15 U.S.C. § 1332(4), or in advertisements. The onserts Defendants have utilized, and that are part of the corrective communications remedy, are (continued...)

6. Corporate Structural Changes

The United States presented substantial evidence proving that Defendants used various aspects of their business operations, such as their Research and Development, advertising, marketing, and public relations functions, to perpetrate a fifty-year scheme to defraud the public which continues to this day. Based on the evidence, it is clear that the current business model of the still-operating Defendants is one that permits and encourages fraud in the pursuit of profits. See US FF § V.A(5). Due to the pervasive and continuing nature of Defendants' fraudulent conduct, a comprehensive, independent review of Defendants' corporate policies and practices is necessary to eliminate those practices and policies that permit and encourage fraud. As discussed below, such a remedy is an "appropriate order" that will prevent and restrain future violations of the RICO statute. See 18 U.S.C. § 1964(a).

a. The evidence demonstrates the importance of addressing Defendants' corporate policies, practices and conduct

Through the testimony of Dr. Max Bazerman, the United States presented a framework for a comprehensive remedial plan addressing the business practices, policies, and conduct of the still-operating Defendants. The United States proffered, and the Court accepted, Dr. Bazerman as an expert in the field of behavioral decision research, with a specific focus on managerial and organizational contexts.[152] Dr. Bazerman's experience in his field is directly relevant to the

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[151](...continued)
affixed to the cigarette package, and are not part of it. Moreover, 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).

[152] Defendants challenged Dr. Bazerman's testimony under Fed. R. Evid. 702 and Daubert. The Court ultimately overruled Defendants' objections and clearly stated that Defendants' position "would lead to a conflation of the admissibility with the merits." TT, 5/10/05, 20695:17-19 (citing Ambrosini v. Labarraque, 101 F.3d 129, 141 (D.C. Cir. 1996)). Disregarding the Court's order governing the **admissibility** of Dr. Bazerman's testimony,
(continued...)

issues pertaining to Defendants' corporate decision making and its effect on their conduct, policies, and practices. Dr. Bazerman is a distinguished Professor of Business Administration at Harvard Business School, who has extensively researched misconduct and unethical behavior in organizational contexts. Bazerman WD, 4:13-16. Significantly, for over twenty years, Dr. Bazerman has also consulted to "real world" corporations that include renowned multinational businesses in various industries, taught corporate executives in ethical aspects of decision making, and worked with corporations undergoing significant changes to their business models. Id. at 11:13-12:5; Bazerman TT, 5/4/05, 20489:24-20491:7; Bazerman TT, 20494:6-20495:3.

For his analysis in this case, Dr. Bazerman reviewed relevant portions of the trial record, Defendants' internal and public business documents, and Defendants' public statements, including their websites.[153] Applying recognized theories and principles of behavioral decision research to the facts of this case, Dr. Bazerman arrived at conclusions regarding the incentives and biases operating on Defendants' managers and executives. As two of his major conclusions about Defendants' conduct:

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[152](...continued)
Defendants filed their Motion to Strike "Remedies" Opinions That Fail to Meet Federal Rule of Evidence 702's Standard Governing the Admissibility of Expert Testimony raising the very same objections that the Court previously denied with respect to Dr. Bazerman. While the Motion is still outstanding, Defendants raise the threshold admissibility issue yet again by arguing this **legal** evidentiary issue in their Post-Trial Proposed Findings of Fact. See JD FF, ch. 13, at 233-238. Although Defendants obstinately continue to conflate admissibility with the merits, the United States steadfastly maintains, and the Court has previously accepted, that Dr. Bazerman's testimony is admissible and highly relevant to the issues before this Court.

[153] See Bazerman WD, 18:13-19:5. Defendants' attempt to discredit Dr. Bazerman's testimony by pointing to the "vast amount of material" that Dr. Bazerman was unable to review is meritless, given the immense amount of material that Dr. Bazerman did review in forming his opinions. Compare JD FF, ch. 13, at 217, with Expert Disclosure for Max H. Bazerman, Ph.D., filed 3/21/05 [R. 5044]; Amended and Supplemental Expert Disclosure for Max H. Bazerman, Ph.D., filed 3/25/05 [R. 5080]; and Second Supplemental Expert Disclosure for Max H. Bazerman, Ph.D., filed 4/7/05 [R. 5183].

- First, Dr. Bazerman determined that Defendants have incentives to engage in fraud in large part because this conduct has been highly profitable. See Bazerman WD, 20:7-15. As Dr. Bazerman succinctly stated, "[Defendants'] fraudulent behavior crosses over all aspects of the businesses of defendant firms, including how they design and market their products as well as how they communicate with the public about them." Id. at 43:11-13. The Court should, upon review of the evidence adduced at trial concerning Defendants' unlawful conduct, reach the same conclusion. See US FF §§ V.A(5) & V.G(3) (providing examples and analysis of economic incentives for Defendants to execute their schemes to defraud).

- Second, Dr. Bazerman concluded that Defendants' fraudulent behaviors will continue absent changes to their business practices, polices, and conduct. Bazerman WD, 43:10-17 (emphasizing that remedying Defendants' fraud requires moving to a "fundamentally different" business model that maximizes profitability but deters misconduct).

The foregoing conclusions mandate remedial action of the type recommended by the United States, as the evidence in this case shows that Defendants are unable and unwilling to make changes to their conduct voluntarily. See, e.g., US FF § V.G(3) (describing Defendants' refusal to change executive compensation policies in ways to encourage reductions in youth smoking). Accordingly, there is a need for further examination of business practices and policies that, if left unaltered, may hinder the effectiveness of a remedial order of this Court. See Salazar v. District of Columbia, No. 93-452, 1997 WL 306876, at *2 (D.D.C. 1997) (appointing Monitor in case where "[c]ertain issues related to enforcement of the decree need[ed] further study as to feasibility and cost.").[154] It is imperative that a remedial order of this Court include independent review and oversight of Defendants' business practices to identify and implement procedures and measures that will prevent and restrain Defendants from continuing to engage in fraud.

But Dr. Bazerman's testimony is not, as Defendants have suggested, solely a call for monitors. While the recognition that changes to the Defendants' businesses can be effectuated through the appointment of monitors was a part of Dr. Bazerman's testimony, Bazerman WD,

[154] Defendants' written policies are not necessarily what is done in practice. See, e.g., US FF § V.G(2) (citing Frederick Gulson's testimony in this case describing BATCo's written and unwritten document "retention" policies).

2:22-3:3, the Court recognized that Dr. Bazerman "testified to a lot more." Bazerman TT, 5/10/05, 20697:6-10. As noted above, Dr. Bazerman's testimony provides the underlying rationale for why it is important to conduct an independent and comprehensive review of Defendants' business practices, policies, and conduct. Moreover, based upon the equitable principles of RICO and the governing law, this Court has inherent authority to appoint officers, agents, or monitors to conduct such a review of Defendants' business practices.

b. Remedies that address corporate conduct comport with equitable principles and meet the remedial goals of RICO

Pursuant to 18 U.S.C. § 1964(a), this Court is authorized to enter appropriate remedial orders that "are forward looking, and calculated to prevent RICO violations in the future." United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995). The goal of civil RICO remedies is to separate criminal influences from organizations so that violations of the law do not occur in the future. Philip Morris USA, 396 F.3d at 1200. Ordering an independent and comprehensive review of Defendants' business practices and policies is a forward looking remedy, because it seeks to modify or eliminate those practices and policies that permit and encourage fraud, thus, preventing and restraining Defendants from using their business operations to perpetrate fraud. See US FF § V.G(3) (detailing ways in which remedial order of this Court addressing Defendants' business practices can prevent and restrain future fraud).

Addressing a defendant's business practices and policies is a traditional part of remedial schemes in civil RICO cases brought by the United States. Most often, these remedial schemes have been part of Consent Decrees.[155] However, in Local 30, United Slate, 871 F.2d 401, the

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[155] See, e.g., United States v. Mason Tenders District Council of Greater New York, No. 94-6487, 1994 WL 742637 (S.D.N.Y. 1994) (court authorized monitor to review proposed changes to the organization's constitution); United States v. Hanley, No. 90-5017, 1992 WL 684356 (D.N.J. 1992) (court-appointed monitor promulgated new election rules). While the

(continued...)

Third Circuit upheld a district court order addressing the business practices of a union. The order directed the union to devise a new grievance procedure and mandated audits of all financial matters. Local 30, United Slate, 686 F. Supp. at 1172. On appeal, defendants argued that the compelled changes to the union's procedures and the mandatory audit deprived the union membership of its right to govern itself, and therefore, the court's order was not narrowly targeted at preventing the proven harms and it failed to protect the rights of innocent persons, as required by 18 U.S.C. § 1964(a). The Third Circuit rejected this argument on the basis that the union treasury and other policies had been used to commit criminal violations in the past and the court's order was reasonably tailored to prevent those violations in the future. The Court reasoned that the audit was aimed at protecting the union treasury, and thus, the membership. In addition, the changes to the grievance procedures protected union members by removing the corruption that led to fear of reprisals against members in the past. Local 30, United Slate, 871 F.2d at 408.

Similarly, in the case sub judice, a remedial order addressing Defendants' business practices, policies, and conduct will be reasonably tailored to prevent future fraud in that the review of each Defendant's business operations will specifically target the practices and policies of that specific Defendant which have led to fraudulent conduct. In addition, such a remedial order protects "innocent persons," such as Defendants' employees. In fact, the United States' Proposed Final Judgment and Order outlines various means in which Defendants' business practices may be changed to prevent future fraudulent conduct, and a few of the recommended

[155](...continued)
litigated case is certainly distinguishable from relief in a consent order, these cases demonstrate the importance of addressing business practices as part of a comprehensive remedial scheme designed to prevent and restrain future violations of the RICO statute. See § III.C, supra.

strategies make specific provisions to protect Defendants' employees.[156]

The review of Defendants' corporate policies and practices will permit the Court to formulate an informed and individualized remedial plan that is no more intrusive than necessary to remedy future violations of RICO and no less pervasive than is necessary to formulate a meaningful set of mandated changes that supplements and insures that future fraudulent conduct is prevented and restrained. See Local 30, United Slate, 871 F.2d at 408; cf. United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 995 F.2d 375, 376-77 (2d Cir. 1993) (upholding scope of injunction curtailing defendants' First Amendment associational rights in civil RICO case where compelling evidence warranted "enjoining violators from activities that might lead to future violations."). Based on the pervasive nature of Defendants' fraud and the history of non-compliance with this Court's Orders, a remedial order that addresses the very practices and policies that lead to RICO violations is appropriate and necessary to prevent and restrain future violations. US FF §V.G(1) (citing Bazerman WD, 1:14-2:10; Bazerman TT, 5/4/05, 20322:18-20324:12).

Furthermore, a review of Defendants' business practices and policies is causally connected to Defendants' use of their business operations to perpetrate fraud. Cf. Brunswick Corp., v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (to recover for antitrust violation, plaintiffs must "prove more than injury causally linked to an illegal presence in the market . . . [they] must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). The remedy proposed by the United States is aimed at eliminating the policies and practices from

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[156] Such strategies include: (1) creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution; and (2) changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct. See United States' Proposed Final Judgment and Order, 32-33.

which Defendants' massive scheme to defraud flow.

c. Defendants' arguments opposing a comprehensive review of their business practices are unpersuasive

Defendants contend that there is no need for the Court to order changes to, or intrusive review of, their business practices, policies, and conduct, because there already exist various mechanisms that provide incentives for Defendants to act lawfully. These mechanisms, according to Defendants, include their boards of directors, institutional shareholders, regulatory agencies, watchdog groups, and media organizations. Fischel WD, 16:20-17:9, 20:19-23. In furtherance of this argument, Defendants rely upon the testimony of their expert, Daniel Fischel, a part-time law professor and highly paid litigation consultant. See US FF § V.G(2) (detailing Mr. Fischel's lucrative work as a paid expert witness). Defendants' argument, however, suffers from one fatal flaw – none of these mechanisms has prevented Defendants from engaging in a massive scheme to defraud that has spanned more than five decades.

Defendants maintain that their boards of directors and institutional shareholders have incentives to monitor Defendants' business practices and institute changes when appropriate. Without detailed analysis or comparison, Mr. Fischel pointed to instances where boards of directors have removed senior executives for misconduct as evidence that these Defendants' boards of directors would do the same on their own if such action became necessary. Fischel WD, 18:17-19:30. Mr. Fischel also cursorily opined that institutional shareholders will put pressure on Defendants to change their business practices if such practices are considered fraudulent. Id. at 16:20-17:3. Despite these assertions, Mr. Fischel failed to study the boards of directors and institutional shareholders of these Defendants to determine whether they have responded to allegations of Defendants' fraud and storied history of wrongdoing. Fischel TT, 5/27/05, 22188:24-22189:15, 22190:2-9.

The United States presented testimonial and documentary evidence demonstrating that regulatory agencies and watchdog groups have been ineffective in preventing Defendants' fraudulent conduct, because Defendants have fought these groups vigorously and evaded the rules and regulations these groups have sought to uphold. For example, Dr. David Kessler, former FDA Commissioner, testified about the obstructive tactics and "significant attack" Defendants employed during the FDA's investigation of the tobacco industry. Kessler WD, 65:20-66:2. Cheryl Healton, President and CEO of the American Legacy Foundation, testified about Defendants' numerous attempts to undermine Legacy's work in various ways, including threatening to terminate funding required under the MSA and publicly attacking Legacy's ad campaigns. Healton WD, 67:9-71:12. In light of these and similar practices, it is clear that these mechanisms are not sufficient to provide Defendants with incentives to act in accordance with the letter and spirit of the law and orders that govern them. Indeed, court-intervention that addresses Defendants' business practices is necessary to restrain Defendants from engaging in fraud.

Defendants also argue that there is no reason to believe they will not comply with this Court's Orders if basic injunctive relief is ordered in this case. Based on the history of these Defendants and the record in this case, Defendants' argument is disingenuous. Defendants have evaded, contravened, and subverted restrictions placed upon them, including orders of this Court, in countless ways with immeasurable consequences. See US FF §V.A(2)-(3) (explaining why basic injunctive relief is insufficient in light of Defendants' circumvention of the Advertising Code, Broadcast Ban, and MSA). Consequently, it is important for the Court to address the failures in Defendants' business practices, policies, and conduct that permit and encourage such flagrant disregard for the laws and rules that govern them.

Finally, Defendants assert that a remedial order resulting in changes to their business

practices will cause Defendants to suffer competitive disadvantages, decreased market share, and economic loss. Essentially, Defendants complain that changing their business operations will cause them to lose competitive position in the U.S. cigarette market "vis-a-vis non-defendant cigarette companies." Carlton WD, 37:14-23; Weil WD, 21:18-20. Defendants also fear a "significant decline in the share of cigarette sales." Carlton WD, 37:14-23. But Defendants cannot escape an effective and tailored remedial decree simply by asserting that the remedy will cause them economic hardship. In United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316 (1961), the Supreme Court held that complete divestiture of stock was an appropriate remedy in an anti-trust case, despite the defendant's argument that such a remedy would cause economic hardship. The Court's decision was based on evidence that partial divestiture of stock would not effectuate the remedial goals of the antitrust laws. The Court stated, "If the Court concludes that other measures will not be effective to redress a violation . . . the Government cannot be denied the . . . remedy because economic hardship, however severe, may result." 366 U.S. at 327. The Supreme Court's view has been followed in a civil RICO case upholding, on summary judgment, the United States' claim seeking divestiture under 18 U.S.C. § 1964(a). United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1446-48 (E.D.N.Y. 1988). On a more basic level, Defendants' hardship plea amounts to nothing more than the assertion that Defendants will lose future profits if forced to act lawfully.

7. The Court Should Prohibit Certain Specific Future Conduct

A comprehensive remedial order should also contain general and specific prohibitions, with court-appointed monitors charged with ensuring Defendants' compliance through the enforcement mechanisms of the United States' proposed remedies order. There is no dispute by Defendants that the Court, pursuant to 18 U.S.C. § 1964, may prohibit specified future conduct by injunctive decree if the Court finds RICO liability in this case. See, e.g., Defs. Rule 52(c)

Mem. at 14. The Court should do so, beginning with: (1) a general prohibition against any act of racketeering, as defined in 18 U.S.C. § 1961(1) relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States; (2) a prohibition against participating in the management and/or control of any of the affairs of CTR, TI or CIAR, or any successor entities; and (3) a prohibition against reconstituting the form or function of CTR, TI or CIAR. See United States' [Proposed] Final Judgment and Order, §§ V.1 and V.2. In addition, based on the evidence of Defendants' fraudulent scheme, the Court should specify the additional prohibitions set out below.

a. False statements about the health consequences of smoking

This case is a fraud case. It is a fraud case that involves false statements about the devastating consequences of cigarette smoking that have led to the death of millions of Americans, most of whom became addicted to smoking as teenagers. See generally Samet WD; Wyant WD. As detailed in the United States' Findings and summarized above, these statements have taken the form of, inter alia, flat denials of mainstream scientific conclusions, insistence that scientific issues remained open questions with calls for more research, and attacks against the Surgeon General and public health community. See US FF § III.A(1). Based on the evidence of Defendants' past and ongoing deception, the Court should prohibit any Defendant from making, or causing to be made in any way, any material false, misleading or deceptive statement or representation, or engaging in any public relations or marketing endeavor that misrepresents or suppresses information concerning cigarettes that is disseminated to the United States public.

In addition to the general prohibition, the Court should identify a standard by which to judge Defendants' public statements, for the existence of a standard will make the Court's injunctive decree more effective at preventing future fraudulent conduct by Defendants. The Court should specifically prohibit Defendants from making public statements or engaging in

public relations or marketing endeavors that distort or misrepresent any of the causal conclusions contained in any current or future Report of the Surgeon General on the Health Consequences of Smoking.[157] The process by which Surgeon General's Reports are prepared guarantees that they represent the state of scientific consensus at the time they are published.

The need for a standard to assist court-appointed officers in their monitoring efforts is demonstrated by the example provided in the form of the MSA. In the MSA, Defendants specifically agreed that they would not "make any material misrepresentation of fact regarding the health consequences of using any Tobacco Product." MSA, § III(r) at 36 (JD-045158) (A). But the existence of the provision, which does not contain any standard by which Defendants representations can be measured, has not stopped Defendants from denying the health effects of exposure to secondhand smoke, continuing to imply that low tar cigarettes provide health benefits compared to their higher tar counterparts, and questioning the conclusions of mainstream scientific publications like the National Cancer Institute's Monograph 13 and Surgeon General's Reports. Whether the continuation of these types of activities in the face of the MSA's prohibition on material representations is a result of the agreement's cumbersome enforcement mechanism, a shortage of resources amongst State Attorneys General,[158] or the absence of a defined standard for judging Defendants' actions, it is clear that a standard will improve the effectiveness of the Court's remedial order in this case. It will make effective work by court-appointed officers easier through all stages of the enforcement process: compliance monitoring, notices of violations and hearings to determine the propriety of monitor recommendations.

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[157] The standard proposed should not be the only standard by which Defendants' public representations are judged; the general prohibition should also be enforced by court-appointed officers.

[158] The United States' proposed remedies order does not create the enforcement mechanism and resource problems that have plagued the MSA.

Evidence also supports the appropriateness of the standard advocated by the United States. The Court heard detailed testimony about the process by which Surgeon General's Reports are prepared from Dr. David Burns, who described the extensive scientific review, expert authorship, comprehensive editing, exhaustive peer review, and, finally, HHS institutional review that insures the Reports represent an unbiased statement of scientific consensus at the time of publication. See Burns WD, 14:10-19, 15:3-16:11; US FF § III.A.(1)(i). Dr. Burns's testimony about the authority of the Reports was reinforced by Drs. Brandt, Samet, Benowitz, Henningfield, and Eriksen, and by Surgeon General Richard Carmona. The Court can and should find that the Reports of the Surgeon General represent the then-existing state of scientific consensus, can be expected to continue to do so in the future, and constitute an appropriate standard for prohibiting material misrepresentations in the future.

b. The use of brand descriptors for low tar cigarettes

Overwhelming trial evidence demonstrates that consumers are being misled by so-called brand descriptors such as "Light," "Mild," "Medium" and "Ultralight" used by Defendants today, because they create the false impression that these cigarettes deliver less tar and nicotine to smokers, and are thus less harmful. As detailed in the United States' Findings, US FF § III.D(3)(a), Defendants are well aware of the "inherent deception" in their use of descriptors and, in fact, intentionally use them to deceive consumers. Therefore, to prevent and restrain Defendants from defrauding the American public in the future, the Court must prohibit Defendants from using low tar descriptors.

As the National Cancer Institute concluded in Monograph 13, descriptors are inherently deceptive. US 58700 at 0611, 0646 (A). Similarly, the WHO Scientific Advisory Committee on Tobacco concluded that descriptors are inherently misleading, and recommended that "misleading health and exposure claims should be banned. . . . Banned terms should include

light, ultra-light, mild and low tar, and may be extended to other misleading terms." US 86658 at 0695 (A). And Dr. Burns explained, "the term 'lights' as a brand descriptor is misleading to consumers of cigarettes," and Defendants' documents "demonstrate that the **tobacco companies recognized that the smoking public was being misled by . . . terms such as low tar and light**." Burns WD, 55:7-16 (emphasis added); Burns TT, 2/16/05, 13652:18-21. As set out above in Section II.A.5.a.(5) and in the United States' Findings, Defendants' own documents, including consumer research, and testimony demonstrate that Defendants' both knew and intended to use brand descriptors to convey a false perception of reduced harm. See US FF § III.D(3)(a).

Defendants claim that prohibition of their deceptive use of descriptors "would improperly invade the primary jurisdiction of the FTC," JD FF, ch. 13 ¶ 599, but "[t]he FTC does not impose, regulate, or require [descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Henningfield WD, 56:8-11. Further, Defendants' claim is merely a re-argument of FTC preemption, which the Court has clearly rejected. See United States v. Philip Morris, Inc., 263 F. Supp. 2d 72, 74 (D.D.C. 2003).

Prohibition of Defendants' future use of deceptive descriptors is forward looking and narrowly targeted to prevent and restrain Defendants' future fraudulent conduct relating to the marketing of filtered and low tar cigarettes. Indeed, in order to prevent and restrain Defendants' future fraudulent marketing of filtered and low tar cigarettes, the Court must prohibit Defendants from using any descriptors indicating lower delivery – including, but not limited to, "light," "mild," "medium" and "ultralight" – which create the false impression that these cigarettes deliver less harmful constituents to smokers and are consequently less harmful.

c. Misleading and youth appealing marketing

Based on the evidence establishing that, as part of their fraudulent scheme, Defendants

sought to protect their ability to market to youth through the use of false and misleading statements about their marketing practices, the Court should specifically enjoin Defendants from utilizing youth appealing marketing. As set out above, youth appealing marketing has been a staple of Defendants' promotional practices for five decades, due to Defendants' recognition that capturing new teenagers was critical to their continued profitability. Moreover, Defendants' youth marketing efforts continue to be an integral part of the scheme to defraud. See Section II.A.5.a.(6), supra; US FF § III.E.

The Court should specifically prohibit misleading and youth appealing marketing as part of any remedial order. There is no question that if a remedial prohibition successfully causes Defendants to cease utilizing youth appealing marketing, the threat of future RICO violations related to Defendants' false statements about their marketing activities will be restrained. For this reason, the youth appealing marketing prohibition should be ordered to work in concert with youth smoking reduction targets and insure that Defendants are not able to successfully addict teenage smokers after the Court's remedial order is fully implemented. For the reasons set out at length in prior sections of this Post-Trial Brief, it is important that court-appointed officers have the ability to scrutinize the full panoply of Defendants' marketing tools – from direct mail to point-of-sale – in order to utilize the enforcement mechanism of the remedial order to curtail non-compliant conduct and impose commensurate penalties.[159] In order to further effectuate this prohibition, the Court should prohibit the following specific marketing practices.

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[159] The United States' proposed remedial order gives court-appointed officers flexibility to identify appropriate penalties for non-compliance with the Court's remedial order. This should include financial penalties or targeted action, such as requiring the offending Defendant to replace youth-appealing or misleading advertising or promotional material with black and white, factual information on replacement advertising for a specified period of time.

1) Price promotions

As discussed in Section D.3 above and set out in detail in the United States' Findings, evidence establishes that Defendants have knowingly used price promotions (as defined in the United States' June 27, 2005 remedial order) to make the most popular youth brands more appealing to teenagers. For this reason, the Court should prohibit the use of price promotions for the five leading youth brands, as measured annually by the National Survey on Drug Use and Health. Doing so will directly prevent Defendants from taking steps to appeal to teenage smokers, as enforced through the Court's remedial order.

2) "Kiddie packs"

A prohibition against the sale by Defendants of cigarette packs containing less than 20 cigarettes (known as "kiddie packs") is a necessary corollary to the ban on price promotions for the leading youth brands. Reductions in the number of cigarettes per pack lead to reductions in price and have a disparate impact on youth smoking due to youth price sensitivity. Defendants agreed to a ban on the sale of kiddie packs as part of the MSA, but only for three years, and the prohibition has expired. It should be extended by this Court in order to ensure that Defendants cannot utilize this avenue to circumvent a restriction on price promotions for leading youth brands.

3) Motor sports brand name sponsorships

One of Defendants' responses to the 1971 Broadcast Ban on television advertisements was to begin spending hundreds of millions of dollars in underwriting entertainment events with cigarette-brand sponsorships which attract large audiences in person and receive substantial television exposure, including highly desired youth viewers. To limit this avenue of youth marketing, the MSA restricted each Participating Manufacturer to one brand name sponsorship. MSA § III(c) at 19-22 (JD-045158) (A). Indeed, Philip Morris CEO Michael Szymanczyk

agreed at trial that the rationale for the MSA's restriction on brand name sponsorships was "to reduce the exposure of youth to the cigarette brand names and reduce the association of cigarettes with athletic events." Szymanczyk TT, 4/11/05, 18375:18-18376:9. As one example of such conduct, trial evidence demonstrated that Philip Morris and Altria have circumvented the MSA's prohibition by sponsoring the Formula 1 racing team Scuderia Ferrari Marlboro. US 93343 (A). This Marlboro racing team races two vehicles and has two drivers, and the Marlboro brand name and logo are prominently displayed on both race cars and the driver uniforms. US 93263 (A). The Philip Morris Formula 1 sponsorship impacts audiences and viewers in the United States, particularly when the races are broadcast in the United States and when photographs of the Marlboro vehicles are printed in American magazines and newspapers. Numerous media in the United States cover the Formula 1 Marlboro racing team and thus increase exposure of the Marlboro brand, directly contravening the MSA's salutary effort to reduce the exposure of teenagers to cigarette brand names and the association of cigarettes to glamorous athletic events like Formula I racing. See US FF § V.(2)(c)(ii).

Philip Morris defended its sponsorship by citing the control of the racing sponsorship by Altria and its subsidiary Philip Morris International. This defense to a marketing initiative that contributes to Philip Morris's effort to recruit teenage smokers underscores the need for this Court to enter a remedial order that addresses Defendants' ongoing and likely future conduct. Part of that remedial order should be a prohibition on motor sports brand name sponsorships that result in exposure, by any means, of a brand name sold in the United States. The restriction should apply to brand name sponsorships of events held in the United States and events held internationally, if the sponsorship results in exposure in the United States of a brand name sold in the United States.

4) Flavored cigarettes

During trial, the Court heard evidence about the efforts of Defendants RJR and B&W to promote flavored cigarettes such as RJR's Kauai Kolada and Twista Lime and B&W's Kool Smooth Fusion cigarettes, with flavors such as Caribbean Chill, Midnight Berry, Mocha Taboo and Mintrigue. Significantly, Defendants have long been aware of the attraction that flavored cigarettes pose to youth. For example, a September 1972 B&W Project Report from the firm Marketing Innovations, Inc. entitled "Youth Cigarette – New Concepts" suggested that the company develop "youth-oriented" cigarettes with new types of flavoring, such as Coca-Cola and Apple. The report suggested developing a "sweet flavor cigarette" because "[i]t's a well known fact that teenagers like sweet products." US 20291 (A). See also US FF § V.(4). And Defendants' research is borne out in the marketplace. Preliminary results from the American Legacy Foundation Media Tracking Survey administered in January 2005 indicate that teens who reported having seen an advertisement for flavored cigarettes were more than three times more likely to have tried the product than those who reported not having seen any ads. Healton WD, 66:15-67:8.

A prohibition against the manufacture and marketing of flavored cigarettes will prevent an effort by Defendants to appeal to teenagers. It will act to directly prevent and restrain one of the methods that Defendants' employ to advance the longtime, primary goal of the Enterprise – maximizing profits.

IV

COSTS

Early in these proceedings, the Court recognized that the taxation of costs would be resolved at the conclusion of this case. "Costs are accorded to prevailing litigants . . . under Rule

54(d)[160] of the Federal Rules of Civil Procedure." Moore v. National Ass'n of Secs. Dealers, Inc., 762 F.2d 1093, 1107 (D.C. Cir. 1985); Hoska v. United States Dept. of the Army, 694 F.2d 270, 272 (D.C. Cir. 1982). Local Civil Rule 54.1 states that "[c]osts shall be taxed as provided in Rule 54(d), Federal Rules of Civil Procedure," and specifically enumerates those costs that can be awarded to the prevailing party. LCvR 54.1(a) & (d).[161] Defendants have employed both questionable and vexatious litigation tactics throughout this case, including repeated efforts to re-litigate issues resolved by the Court and disregard of Court orders, resulting in increased costs after needlessly multiplying proceedings. An award of costs is particularly appropriate under these circumstances – the statutes, case law, federal and local rules so establish.

If any judgment is entered in its favor, the United States will timely serve and file a bill of costs in accordance with LCvR 54, enumerating its allowable costs.[162]

[160] Rule 54(d) of the Federal Rules of Civil Procedure states: "Except when express provisions therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." There is a presumption under Fed. R. Civ. P. 54(d) that the prevailing party will recover costs. Sun Ship Inc. v. Lehman, 655 F.2d 1311, 1314-1316 (D.C. Cir. 1981).

[161] LCvR 54 expands upon 28 U.S.C § 1920 which allows for the taxation of certain enumerated costs. Butera v. District of Columbia, 83 F. Supp 2d 25, 40 (D.D.C. 1999) rev'd on other grounds, 235 F. 3d 637 (D.C. Cir. 2001)

[162] The United States also reserves its right to seek reimbursement of its share of the special master's fees in this litigation pursuant to Rule 53 of the Federal Rules of Civil Procedure. Aird v. Ford Motor Co., 86 F.3d 216 (D.C. Cir. 1996) ("affirm[ing] the district courts' order assessing as costs the prevailing party's share of the special master's fees" and rejecting appellant's contention that special masters' fees do not qualify as costs because they are not specifically enumerated in 28 U.S.C. § 1920). When the Court appointed the Special Master in this case, each side was required to pay half of the Special Master's fees, but the Court indicated that "[f]inal allocation of these amounts shall be subject to taxation as costs at the conclusion of the case at the discretion of the Court." Order #41 at 3.

V

CONCLUSION

The evidentiary record established during this lengthy trial unequivocally demonstrates the liability of all Defendants under RICO. Defendants' unlawful conduct has transpired over a period of more than fifty years so far. The United States has established that the conduct that demonstrates liability will continue, with devastating consequences for the health of the American people in the absence of comprehensive relief. Those consequences of this future fraud will be seen in the form of disease and death, as more children become addicted to cigarettes as a result of Defendants' fraudulent actions. The serious consequences of Defendants' unlawful conduct underscore the need for a thorough remedial order that will effectively curtail the fraud that has so harmed the American public.

The United States respectfully requests that the Court find Defendants liable and render, immediately, a decision on liability and make liability findings, including credibility determinations, entering judgment in accordance with the United States' Proposed Final Judgment and Order. Furthermore, the United States requests an award of costs.

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