ARNOLD & PORTER LLP

Murray R. Garnick
Murray_Garnick@aporter.com
202.942.5716
202942.6999 Fax
555 Twelfth Street, NW
Washington, DC 20004-1206

August 10,2007

VIA HAND **DELIVERY**

Mark J. **Langer**
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
E. **Barrett** Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, **D.C.**20001

Re: ***United States*** *v.* Philip Morris, et. ***al,*** Case Nos. **06-5267, 06-5268, 06-5269,** 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103 (consolidated)

Dear Mr. Langer:

With this letter defendants-appellants are submitting an **original** and 7 copies of the Brief for Defendants-Appellants, which is joined by all defendants-appellants. Also enclosed are originals and 7 copies of the separate briefs of **Altria** Group, **Inc.,** and British American Tobacco (Investments). **These** briefs combined contain a total of 39,654 words, and therefore comply **with** this Court's May 22, **2007** Order. **Specifically,** the words have been allotted as follows:

- Brief for Defendants-Appellants 32,766 words
- Brief for **Altria** Group, Inc. 2,403 words
- Brief for British American Tobacco (Investments) Limited 4,485 words

Sincerely,

Murray R. Garnick

Cc: All Counsel
Enclosures

[ORAL ARGUMENT NOT YET SCHEDULED]

Case Nos. 06-5267, 06-5268, 06-5269, 06-5270,
06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103
(Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and
TOBACCO-FREE **KIDS** ACTION FUND, et *al.*,
Intervenors,
v.
PHILIP **MORRIS** USA **INC.,** (f/k/a Philip Morris, Inc.), et *al.*,
Defendants-Appellants.

Appeal from the Judgment of the United States District Court
for the District of Columbia

PROOF BRIEF FOR DEFENDANTS-APPELLANTS

Murray R. Garnick
David S. Eggert
Robert A. McCarter
ARNOLD & PORTER LLP
555 Twelfth Street, N.W..
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Attorneys for Defendant-Appellants Philip Morris USA Inc. and Altria Group, Inc.

Guy Miller Struve
Charles S. Duggan
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4192
Facsimile: (212) 450-3192

Attorneys for Defendant-Appellant Altria Group, Inc.

David M. Bernick
Stephen R. Patton
Renee D. Smith
KIRKLAND & ELLIS LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601
Telephone: (312) 861-2000
Facsimile: (312) 861-2200

Attorneys for Defendant-Appellant Brown & Williamson Holdings, Inc.

Robert F. McDermott, Jr.
Michael A. Carvin
Peter J. Biersteker
Geoffrey K. Beach
Noel J. Francisco
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Attorneys for Defendant-Appellant R. J. Reynolds Tobacco Company

David E. Mendelson
John K. Crisham
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Attorneys for Defendant-Appellant Brown & Williamson Holdings, Inc.

Michael B. Minton
Bruce D. Ryder
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693
Telephone: (314) 552-6000
Facsimile: (314) 552-7597

Attorneys for Defendant-Appellant Lorillard Tobacco Company

Bruce G. Sheffler
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Attorneys for Defendant-Appellant
British American Tobacco
(Investments) Limited

Joseph Kresse
COVINGTON AND BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 662-5036

Attorneys for Defendant-Appellant
The Tobacco Institute, Inc.

Deborah Israel
WOMBLE CARLYLE SANDRIDGE
& RICE PLLC
401 I St., N.W., Suite 700
Washington, D.C., 20005
Telephone: (202) 487-6900
Facsimile: (202) 261-0034

Attorneys for Defendant-Appellant
Council for Tobacco Research-USA,
Inc.

CERTIFICATE AS TO PARTIES, RULINGS. AND RELATED CASES

A. Parties, Intervenors, and Amici

1. District Court

The following is a list of parties, intervenors, and amici that appeared before the district court.

Parties: Plaintiff, the United States of America; defendants, Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp.,[1] Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research-U.S.A., Inc., The Tobacco Institute, Inc., and Liggett Group, Inc.

Intervenors: Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, National African American Tobacco Prevention Network, Elan Corporation, PLC, Glaxosmithkline Consumer Healthcare, L.P., Impax Laboratories, Inc., Pfizer, Inc., Pharmacia Corporation, Smithkline Beecham Corp.

Amici: Citizens' Commission to Protect the Truth, Regents of the University of California, Tobacco Control Legal Consortium, Essential Action, .

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[1] Effective July 30,2004, Brown & Williamson Tobacco Corporation's cigarette and tobacco business was merged with R.J. Reynolds Tobacco Company. Contemporaneously, Brown & Williamson Tobacco Corporation changed its name to Brown & Williamson Holdings, Inc., and ceased manufacturing, researching, selling, or marketing cigarettes.

City and County of San Francisco, Asian-Pacific Islander American Health Forum, San Francisco African American Tobacco Free Project, Black Network in Children's Emotional Health, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, District of Columbia.

2. Court of Appeals

Parties: Appellants1 cross appellees, Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc.; Appellee/cross appellant, United States of America;

Intervenors: 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.

Amici Granted Leave: Chamber of Commerce of the United States of America, Washington Legal Foundation, National Association of Manufacturers, and National Association of Convenience Stores.

B. Rulings Under Review

The rulings under review include: the Judgment below, Final Opinion, United States *v. Philip* Morris *Inc.*, *449* F. Supp. 2d 1 (D.D.C. 2001), and Order # 1015 ("Final Judgment and Remedial Order"), entered by Judge Kessler in this action on August 17,2006, as altered or amended on September 8,2006 and by the Memorandum Opinion and Order # 1021, entered in this action on September 20, 2006, and Memorandum Opinion and Order # 1028, entered in this action on March 16,2007, United ***States*** v. ***Philip*** Morris, 477 F. Supp. 2d 191 (D.D.C. 2007); the Memorandum Opinion and Order # 1028; and any and all antecedent and ancillary orders, including any and all interlocutory judgments, decrees, decisions, rulings, and opinions that merged into and became part of the Judgment, that shaped the Judgment, that are related to the Judgment, and upon which the Judgment is based.

C. Related Cases

The case under review was previously before this Court in the following appeals and/or petitions:

- USA, et al. v. Philip Morris Inc., et al.,
  Court of Appeals Docket No. 01-5244

  USA v. Philip Morris Inc., et al.,
  Court of Appeals Docket No. 02-5201

- USA v. British American Tobacco, et al.,
  Court of Appeals Docket No. 04-5207

- USA v. British American Tobacco, et al.,
  Court of Appeals Docket No. 04-5208

- USA v. Philip Morris USA, et al.,
  Court of Appeals Docket No. 04-5252

- USA v. Philip Morris USA, et al.,
  Court of Appeals Docket No. 04-5358

- USA v. Philip Morris USA, et al.,
  Court of Appeals Docket No. 05-5129

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1(a), defendants-appellantshereby make the following disclosures:

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc., is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

Altria Group, Inc. is a publicly held company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

Effective July 30,2004, a transaction was completed whereby R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business. Effective August 2,2004, Brown & Williamson Tobacco Corporation, a Delaware corporation, changed its name to Brown & Williamson Holdings, Inc. Brown & Williamson Holdings, Inc. is an

indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some publicly-held securities are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued publicly-owned bonds. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

BATCo discloses the following parent companies and publicly held companies that have a ten percent or greater ownership interest in BATCo:

- British American Tobacco p.l.c.,
- British American Tobacco (1998) Limited,
- B.A.T. Industries p.l.c.,
- British-American Tobacco (Holdings) Limited.

The Council for Tobacco Research-U.S.A., Inc. is a not-for-profit New York corporation that provided research funding to scientists at universities, hospitals

and other research institutions. Appellant CTR stopped funding research in 1998. It was dissolved under New York law in November 1998, and since that time has been winding up its affairs pursuant to a plan of dissolution that has been approved by a New York State court.

The Tobacco Institute, Inc. is a dissolved not-for-profit corporation under New York law. During its existence, The Tobacco Institute, Inc. did not issue stock and had no parent corporation. In addition, since its dissolution, The Tobacco Institute, Inc. has not issued stock and has had no parent corporation.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellants respectfully request oral argument.

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GLOSSARY

BATCo	British American Tobacco (Investments) Limited
BWH	Brown & Williamson Holdings
BWTC	Brown & Williamson Tobacco Corporation
CIAR	The Center for Indoor Air Research
CTR	Council for Tobacco Research
ETS	Environmental tobacco smoke (also known as second-hand smoke)
FDA	Food & Drug Administration
FTC	Federal Trade Commission
Labeling Act	Federal Cigarette Labeling & Advertising Act, 15 U.S.C. §§ 1331 etseq.
Lorillard	Lorillard Tobacco Company
MSA	Master Settlement Agreement
PMUSA	Philip Morris USA Inc.
RA	Racketeering Acts alleged by the government
RICO	Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961 ***et seq.***
RJR	R.J. Reynolds Tobacco Company
TI	Tobacco Institute
TIRC	Tobacco Industry Research Committee
USPFF	United States' Proposed Findings of Fact

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2201, over claims against all defendants except BATCo, see Brief for Defendant-Appellant-Cross-Appellee British American Tobacco (Investments) Limited. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a) over defendants' timely filed appeals.

PERTINENT STATUTES

Excerpts from RICO, 18 U.S.C. §§ 1961, 1962, and 1964; the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343; and the Labeling Act, 15 U.S.C. § 1334, are attached.

STATEMENT OF THE ISSUES

Defendants-appellantspresent four sets of issues for review. The first set raises four overarching legal issues:

1. Whether the district court erred by holding that, under the mail and wire fraud statutes, a corporate defendant can have specific intent to defraud even though no agent or employee of the corporation had such intent.

2. Whether the district court erred by ignoring the plain language of RICO in holding that associated-in-fact corporations may constitute an "enterprise" under 18 U.S.C. § 1961**(4).**

3. Whether the district court erred by ruling that there is a reasonable likelihood that each defendant will commit future RICO violations in light of, among other things, legal restrictions already imposed by settlements with the States barring such conduct.

4. Whether the district court erred by imposing remedies without specifically identifying which alleged schemes or racketeering acts violated RICO.

The second set of issues challenges the specific schemes alleged by the government:

1. Whether the district court erred by holding that defendants committed fraud in using low tar descriptors that were authorized by the FTC and protected by the First Amendment and in enjoining the use of low tar descriptors in foreign nations.

2. Whether the district court erred by finding that statements that were neither material nor intended to deprive anyone of money or property could constitute criminal mail or wire fraud.

3. Whether the district court erred by finding fraud and imposing remedies relating to ETS and addiction where defendants' statements on those issues were legitimate expressions of opinion.

4. Whether the district court's application of the mail and wire fraud statutes violated the First Amendment where statements were designed either to

petition government agencies or legislators for relief or to present the industry's views in ongoing public debates about tobacco.

The third set of issues relates to the district court's application of RICO:

1. Whether the district court erred by finding that defendants had the requisite purpose and structure to comprise a RICO enterprise and that defendants conducted the affairs of an enterprise through the alleged predicate acts.

2. Whether the district court erred by finding that defendants violated 18 U.S.C. § 1962(d) where its holding that defendants violated § 1962(c) must be reversed.

The final set of issues relates to the district court's remedies:

1. Whether the district court's order that defendants issue "corrective communications" exceeds the court's jurisdiction under 18 U.S.C. § 1964(a), and violates the Labeling Act, the First Amendment, and due process and whether other injunctive decrees violate due process.

2. Whether the district court's generalized injunctions against "false statements" and "acts of racketeering" are too vague to satisfy Federal Rule of Civil Procedure 65, the First Amendment, and due process.

3. Whether the district court erred in applying its injunctions to non-party subsidiary corporations contrary to Federal Rule of Civil Procedure 65.

STATEMENT OF THE CASE

A. The Filing Of This Lawsuit And Pre-Trial Proceedings

This action is the culmination of the federal government's decade-long efforts to impose sweeping regulation on the tobacco industry. The fundamental issue raised by this suit is whether, after repeatedly failing to achieve its goals through the regulatory and legislative processes, the government may exploit RICO's civil injunction provision, 18 U.S.C. § 1964(a), to achieve through litigation what it failed to achieve politically.

This lawsuit was filed the very day that the government closed a criminal RICO investigation of the cigarette manufacturers without bringing charges and only after (1) the FDA sought unsuccessfully in 1996 to assert regulatory authority over cigarettes, FDA v. Brown & *Williamson* Tobacco *Corp.*, 529 U.S. 120 (2000), and (2) Congress considered and rejected in 1998 detailed legislation that would have imposed many of the regulations and restrictions sought by the FDA (and by the government here).

Unable to achieve its regulatory goals through proper channels, the government filed this lawsuit, urging an unprecedented expansion of § 1964(a) to convert RICO into a blunt instrument to impose sweeping regulatory requirements upon a lawful industry. The government alleges that defendants -- virtually the entire domestic cigarette industry -- engaged in a five-decades-long RICO

"association-in-fact enterprise" both to deceive the public about (1) the health risks of smoking, and (2) the nature of defendants' own marketing practices. [DN_274_2].[2] The government further alleges that much of defendants' advertising, marketing, lobbying, and public relations activities over the past fifty years were "predicate acts" of mail and wire fraud. [DN_274_82-89]. Under the guise of "preventing and restraining" RICO violations pursuant to § 1964(a), the government sought extensive remedies, designed both to fill perceived gaps in legislation and regulation and to obtain disgorgement of "profits" in the amount of $280 billion. [DN_274_92]; [Op_13].

In United ***States v.*** Philip ***Morris*** *Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005), this Court held that § 1964(a) does not permit disgorgement and confers only limited jurisdiction on the district court to order forward-looking remedies designed to "prevent and restrain" FUCO violations. This Court's decision thus precluded any remedies in the absence of findings that (1) defendants violated RICO, (2) defendants would likely violate RICO in the future, and (3) the remedy would prevent or restrain those likely future RICO violations. Id.

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[2] The government also originally sought damages under the Medical Care Recovery Act, 42 U.S.C. § 2651(a), and the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2). [DN_274_49-73]. The district court dismissed those claims. See ***United States*** *v. Philip* Morris *Inc.*, 156 F. Supp. 2d 1, 7-8 (D.D.C. 2001); United ***States v.*** Philip ***Morris Inc.***, 116 F. Supp. 2d 131,144-46 (D.D.C. 2000).

B. The Trial

While defendants' appeal on disgorgement was pending, the district court proceeded to trial. Although § 1964(a) allows only forward-looking remedies to address likely future violations, the government's evidence focused overwhelmingly on conduct that occurred decades ago -- much of which concerned people no longer employed by the companies (or even alive), trade organizations that no longer exist, and scientific issues that defendants have not disputed for years.

We do not attempt to summarize the entire massive trial record here, most of which is irrelevant to the issues raised in this appeal. Specific facts are discussed as needed throughout the brief. We briefly review below the government's primary allegations.

The government argued that defendants constituted a RICO "association-in-fact" enterprise, existing over the course of nearly half a century to operate criminal racketeering schemes. The government alleged that defendants through this enterprise engaged in seven schemes of fraud. The government elaborated on each scheme in its opening statement:

- The Health Risks of Smoking and ETS. "[D]efendants have fraudulently denied that smoking and exposure to smoke causes cancer and other serious diseases in smokers and nonsmokers and have fraudulently maintained that whether smoking or exposure to

secondhand smoke causes disease is an open question." [9/21/04_Tr._42].

- Independent Research. "Defendants falsely stated that they would sponsor independent disinterested research into the health effects of smoking and communicate these results to the public." [9/21104-Tr .-431.

- Addiction. "[D]efendants have fraudulently denied that smoking is addictive and that nicotine is the addictive drug in cigarettes primarily responsible for that addiction." [9/21/04_Tr._43].

- Nicotine Manipulation. "Defendants have fraudulently ... denied that they manipulate nicotine." [9/21/04_Tr._43].

- Low Tar Cigarettes. "Defendants have fraudulently marketed filtered and light or low tar cigarettes as less hazardous than full flavored cigarettes, despite having substantial evidence that these light cigarettes are unlikely to be any less hazardous." [9/21/04_Tr._44].

- Youth Marketing. "Defendants have marketed cigarettes to young people, while fraudulently denying that they do." [9/21104–Tr._44].

  Suppression of Information. "[Dlefendants have suppressed evidence of their misconduct to avoid disclosure of information that could jeopardize their public relations positions and litigation defenses." [9/21/04_Tr._45].

The government claimed that defendants conducted the enterprise over the course of five decades and identified 148 discrete "Racketeering Acts" -- individual mailings or wirings alleged to violate the fraud statutes. [Op._App.III]; [DN_2697]; [DN_2698_1-2]. On the eve of trial, the government sought to add 650 Racketeering Acts, but the district court rejected the addition as

untimely. [DN_2698]. The government's claim of "racketeering activity," therefore, was limited to the original 148 alleged acts.[3]

After this Court issued its disgorgement decision during the trial, the district court criticized this Court's opinion,[4] but noted that this Court had delivered a "body blow" to the government's case. [DN_4906_2]. The court bifurcated the presentation of evidence relating to liability and remedies to provide the govemment with roughly two additional months in the middle of trial to conform its remedies scheme with the disgorgement decision. [DN_4906_5-6]. The court also permitted the government to amend its expert reports on remedies. [DN_4965].

After both sides presented their liability-related evidence, the remedies phase of the trial commenced on May 2,2005. Yet, it was only *after* the trial ended (including the remedies phase) that the government produced the "final" list of remedies that it was requesting. Defendants objected to the government's

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[3] Attached as Exhibit I, entitled "Disposition of Evidence Regarding Alleged RICO Predicate Acts of Mail and Wire Fraud," is a chart that lists the 148 alleged RICO predicate acts.

[4] The court stated that it found itself "in the peculiar and extremely uncomfortable position of interpreting the scope of an appellate decision which, in the words of Judge Tatel's dissent, 'ignores controlling Supreme Court precedent, disregards Congress's plain language, and creates a Circuit split -- all in deciding an issue not properly before [the appellate court].'" [DN_4906_4].

proposed remedies on a variety of grounds, including the lack of a hearing, and submitted an offer of proof outlining the evidence they would have offered if the government had disclosed those remedies before the close of evidence. [DN_5657]. However, the district court held no further hearing on the propriety or feasibility of the government's belatedly requested remedies.

C. The District Court's Judgment

Fifteen months after the trial ended, the district court issued a 1,653-page opinion ruling that defendants had violated 18 U.S.C. § 1962(c) and (d). The great majority of the opinion addressed conduct from decades ago, and the decision reproduced large sections of the government's proposed findings verbatim, complete with the government's typographical errors.' Indeed, over 80% of the court's findings were simply copied from the government's proposed findings; in the "enterprise" section, 90% of the court's findings were taken verbatim from the government's proposals.[6]

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[5] *Compare, e.g.*, [Op_1301(¶ 3542)], with [USPFF_493(¶ 732)]; [Op._1304(¶ 3552)], with [USPFF_497(¶ 747)].

[6] To analyze the district court's opinion in comparison to the proposed findings of fact submitted by the government, defendants utilized a computer program known as "WCopyfind," which is described and can be downloaded at http://plagiarism.phy.virginia.edu/Wsoftware.htm. This program is designed to "find documents that share large amounts of text," Upon request, defendants will provide the back-up data applying this software.

The district court's word-for-word reproduction of the government's proposed findings led to serious deficiencies that the court itself acknowledged. For example, the court warned that, on "occasions, some individual factual findings may appear unclear or inconsistent with other factual findings. In those instances, the Conclusion to that section will contain the Court's final Findings, and its reasons for reaching them." [Op. 6]. Remarkably, the court also warned in its Findings of Fact that its use of the word "enterprise" "d[id] not imply that Defendants' activities meet the statutory definition contained in 18 U.S.C. § 1961(4)." [Op. 15 n.8]. Yet, in its Conclusions of Law, the court supported its holding with respect to the "enterprise" requirement only by citing broad sections of those very findings of fact. [Op. 1530-36].

The district court found that defendants had engaged in nearly all of the schemes alleged by the government.[7] [Op. 1501-02]. However, though the court stated that unspecified statements by defendants were "false" or "fraudulent," it did not address whether any of the 148 specific predicate racketeering acts alleged by the government violated the fraud statutes. Nor did the court find that any particular scheme alleged by the government violated RICO. Rather, the court

[7] The court found that the government had failed to prove its claim relating to the alleged failure to research and develop less hazardous products -- a subset of the alleged scheme concerning independent research. [Op. 655-740].

merely held that the individual schemes "must be viewed in the context of the entire scheme to defraud" and that the court need only find "that the defendant devised a scheme intended to defraud which included one or more of the individual component schemes alleged." [Op._1502]. In other words, the court suggested that it had found that at least one of the alleged "schemes" constituted "racketeering activity," but did not anywhere identify ***which*** so qualified or ***which*** of the 148 alleged racketeering acts were the basis for liability. Id. The court also did not identify even a single employee of defendants who had the specific intent to defiaud required for mail and wire fraud, instead inferring specific intent based on "the company's collective knowledge." [Op._1580].

The district court accepted the government's allegation of an enterprise, "comprised of a group of business entities and individuals associated-in-fact, including Defendants to this action." [Op._1528]. The court found that the enterprise has operated continuously since 1953, when its members agreed to issue an advertisement acknowledging scientific studies linking smoking to lung cancer and promising to fund additional research on the issue. [Op._24-26, 1534-35]. The court found that "the Enterprise created and used formal and informal entities, many with overlapping participants and purposes to serve [its] central mission." [Op._1532]. The court did not identify a "core of constant personnel" that formed

the enterprise and instead referred to the "organization of the Enterprise" as a n ' "amoeba" that "changed its shape to fit its current needs." [Op._1532].

The district court also concluded that it could infer from defendants' "past conduct alone" that they were likely to violate RICO in the future. [Op._1602]. Notwithstanding the government's burden of proof on this issue, the court disregarded consent judgments already imposing extensive injunctions and other prohibitions on defendants on the ground that they did not make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." [Op._1609 n.46] (emphasis added). The court concluded that the mere possibility that defendants might have "temptations" or "opportunities" to resurrect the enterprise or "take similar unlawful actions in order to maximize their revenues," [Op._1602], sufficed to impose injunctive relief, even though the court failed to find any joint activity (let alone any RICO enterprise) for the past eight years.

The district court then imposed broad remedies. The court ordered defendants to remove "light" and "low tar" descriptors (that are used to refer to cigarettes that measure lower in tar and nicotine according the FTC's standardized methodology) from cigarette brand names and packages. [Order–3-41, The court ordered "corrective" statements regarding "(a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any

significant health benefit from smoking [low-tar cigarettes]; (d) Defendants' manipulation of cigarette design ... ; and (e) the adverse health effects of exposure to secondhand smoke." [Order_4]. The court ordered that these statements be published in newspapers and on television, and placed on cigarette packages and point-of-sale advertising in hundreds of thousands of retail outlets. [Order–5-91.

The district court also permanently enjoined defendants from:

- "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," [Order_2] and
- "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 is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." [Order–31.

By separate post-judgment motion, defendants requested clarification of the scope of the general injunctive relief and asked the district court to clarify that its remedies did not apply to conduct (including by non-party subsidiaries) occurring wholly in foreign countries. [DN_5743]. Seven months later, the court held that it did intend to ban defendants from using low tar descriptors even in foreign countries, irrespective of those countries' own policies and regulations, but refused to clarify the specific meaning of its general injunctions. [DN_5800]. The court ruled that it needed to leave those injunctions open-ended because "it would be

impossible to foresee what the ingenuity and creativity of Defendants' cadres of sophisticated lawyers could 'think of next.'" [DN_5800_4].

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal asks whether RICO provides a vehicle for the judiciary to substitute its policy judgments for those of Congress and the FTC by imposing broad new regulations on the sale and marketing of cigarettes, masked in the form of "injunctions" to prevent future RICO violations. Such an unprecedented and radically expansive use of RICO is precisely what a growing number of courts have described as "something quite different from the conceptions of its enactors, warranting concerns over an unbridled reading of the statute." *Scheidler* v. *National Organization For Women, Inc.*, 537 *U.S.* 393,421 (2003).[8]

The district court was able to convert RICO into a vehicle for judicial regulation only by, among other things: (1) eliminating the requirement of proving specific intent to defraud under the fraud statutes, (2) declaring that the major corporate competitors in a legal industry could be an "enterprise," (3) inferring a likelihood of future RICO violations in the face of existing injunctions and related

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[8] *See also Sedima, S.P.R.L.v. Imrex Co.,* 473 *U.S.* 479,500 (1985) (same). At least one judge in this Court has also recognized the dangers from an overly broad interpretation of RICO. See, *e.g.*, Sentelle, David, ***Civil RICO:*** The ***Judges' Perspective and Some Notes on Practice for North Carolina Lawyers,*** 12 Campbell Law Rev. 145 (Spring, 1990).

prohibitions enforceable by the Attorneys General of 50 States – prohibitions that already bar any conduct that could violate RICO, (4) ignoring the FTC's policy of requiring manufacturers to use the FTC's own machine method to measure and report tar and nicotine yields and the FTC's approval of the use of the descriptors "lights" and "low tar" if substantiated by that test method, and (5) holding that defendants' statements amounted to criminal fraud even though they were not designed to deprive consumers of money or property and were not material to consumers' purchasing decisions. These fundamental legal errors -- and others as set forth below -- distorted RICO beyond anything contemplated by Congress and require reversal of the judgment.

First, although the alleged "predicate acts" underlying the government's RICO claim were all violations of the mail and wire fkaud statutes, the district court did not require any showing of "fraud" at all. The crux of any fraud claim is scienter. To establish that a corporate defendant has a specific intent to defraud, the government must prove that some agent or employee of the defendant actually acted with a specific intent to defraud. Saba v. *Compagnie* Nationale Air France, 78 F.3d 664,670 n.6 (D.C. Cir. 1996). The court nullified this requirement by holding defendants liable without finding that even a single person made any statement he or she believed to be false. Instead, at the government's express request, the court cobbled together the allegedly conflicting beliefs of different

employees of the same corporation at different times to create a fictional "collective corporate intent" to commit fraud -- an intent that was not shown to have existed in any real person.

Second, the district court converted the leading manufacturers in the United States cigarette industry into a RICO "enterprise" by adopting a type of "association in fact" never contemplated by Congress. RICO defines an association-in-fact enterprise as "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). An industry comprised of corporations cannot constitute a "union or group of individuals associated in fact," because corporations are not "individuals" within the meaning of RICO. The court was also unable to explain or establish how these competing corporations formed a distinct "enterprise[yy] with a separate, continuous "organization" and "common purpose" -- as required by RICO. The alleged "common purpose" was nothing more than to "maximize profits for the tobacco industry" -- a goal no different from the individual objective of each defendant (or any for-profit corporation for that matter). If there is to be any limitation at all on the application of RICO, parallel conduct and the existence of a profit motive cannot possibly be sufficient to give rise to a RICO enterprise.

Third, the district court only has limited jurisdiction under § 1964(a) to impose injunctions designed to "prevent and restrain" reasonably likely future

RICO violations. *See* 18 U.S.C. § 1964(a). Thus, even assuming that there used *to be* a RICO enterprise -- and there was not -- the undisputed fact is that all of the lobbying and trade associations cited by the court as evidence of such an enterprise were disbanded at least eight years ago and no similar organization can be reconstituted in light of injunctions and related prohibitions that are enforceable in every state under the landmark **MSA** and other agreements. Furthermore, the **MSA** and related agreements impose a broad array of additional restrictions barring fraudulent conduct, and neither the government nor the court explained how it is reasonably likely that defendants could violate RICO in the future in light of those restrictions. Because the government did not even try to satisfy its burden of proof on this issue, no § 1964(a) remedy is permissible. *See, e.g.*, *Comfort Lake Ass'n v. Dresel* Contracting, *Inc.*, 138 F.3d 351 (8th Cir. 1998). In addition, defendants long ago abandoned the positions that the government contended were fraudulent, and their public positions simply cannot be undone. Indeed, one defendant -- BWTC -- has since become the passive holding company, BWH. Accordingly, there is no ongoing fraudulent activity -- and no likely RICO violation -- to enjoin.

Further, even assuming that a future RICO enterprise could somehow exist in the face of the MSA injunctions and the government's failure to prove a likelihood of future RICO violations, all the remedies entered below are still

facially improper because the court's 1,653-page opinion never identifies which of the various alleged schemes or racketeering acts actually amounted to a violation of the mail and wire fraud statutes or RICO. Without the identification of any past or current FUCO violation, a court cannot determine either whether there is a "causal connection between the conduct enjoined or mandated and the violation found," United States v. *Microsoft*, 253 F.3d 34, 104-05 (D.C. Cir. 2001), or whether any ordered relief is properly tailored to prevent and restrain a future FUCO violation.

Fourth, in its disregard of the deference owed to the policy-making authority of other branches of government, the district court found that defendants' use of the descriptors "light" or "low tar" to refer to certain cigarettes' tar and nicotine yields under the FTC's mandated measurement methodology was fraudulent even though the descriptors have been expressly approved by the FTC and, indeed, even though the FTC determined that the yield measurements were so important to consumers that it required this information in all product advertising. By penalizing FTC-approved conduct, the court, in violation of well-established law, used a general statute to trample the specific policy and scientific judgments of an expert independent agency.

More generally, pursuant to the "specific intent" requirements described above and well-established "materiality" requirements, Congress carefully limited

the reach of the fraud statutes to instances where defendants' alleged fraudulent statements were made with the purpose and effect of depriving consumers of money. Yet, the district court dramatically expanded these statutes by interpreting them as prohibiting the industry's statements made, not to induce consumers to purchase, but in response to various public and regulatory controversies surrounding the industry. Under the court's analysis, an industry's responses to private critics or proposed government regulation, even on matters of ongoing scientific debate (such as the health effects of ETS) or matters that would not seem to affect consumers' purchasing decisions (such as denials of marketing to youth), may be subject to criminal sanctions without any evidence that the challenged statements were made to deceive consumers or were relied upon by consumers. It is clear that Congress did not enact, and that the First Amendment would not permit Congress to enact, a law that so criminalized one side of an ongoing legislative and public debate because the industry's opinions differed from the government or "consensus" view.

Finally, in addition to the flaws described above, the district court's remedies were improper for a number of reasons. The court ordered "corrective" communications that exceed its remedial powers under § 1964(a), conflict with *Microsoft*'s holding that a defendant has a due process right to be heard on potential remedies before they are imposed, and violate the First Amendment, the

Labeling Act, and due process. The court also erred in entering vague injunctions that provide no guidance other than telling defendants not to commit racketeering or engage in misrepresentations. The court then compounded these errors by applying its remedial order to non-party subsidiaries of defendants, violating Fed. R. Civ. P. 65(d) and due process.

Reversal is necessary because this case presents an extreme example of judicial overreaching that cannot be squared with the record, precedent, or the plain language of the relevant statutes.

STANDARD OF REVIEW

This Court reviews de *novo* the district court's rulings on questions of law, *Eldred v.* Reno, 239 F.3d 372,374 (D.C. Cir. 2001), on the likelihood of future violations, *SEC v.* Bilzerian, 29 F.3d 689,695 (D.C. Cir. 1994), and on its failure to provide an evidentiary hearing on disputed facts relating to the government's requested remedies, *Microsoft,* 253 F.3d at 101-03. To the extent not predicated on legal error, the district court's imposition of remedies is reviewed for abuse of discretion. Id. at 106.

This Court normally reviews factual findings only for clear error, but many of the findings here involve constitutionally protected statements on important public controversies or proposed regulation that must be reviewed de novo. In *Bose Corp.* v. Consumer's Union of United States, 466 U.S. 485 (1984), the

Supreme Court stated: "In cases **raising** First Amendment issues, we have repeatedly held that the appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 499 (citations omitted). In such cases, the "clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied," and "[a]ppellate judges ... must exercise independent judgment." *Id.;* see also ***Lee*** *v.* Dep't of Justice, 413 F.3d 53,159 (D.C. Cir. 2005); United States v. *Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); United States v. *Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001); McCoy v. Stewart, 282 F.3d 626,629 (9th Cir. 2001).[9]

Moreover, to the extent that Rule 52's "clearly erroneous" standard applies, this Court should review the judicial findings "with particular, even painstaking, care," because the district court's findings were overwhelmingly adopted verbatim

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[9] In FTC v. Brown & Williamson Tobacco *Corp.*, 778 F.2d 35 (D.C. Cir. 1985), this Court stated that it was "reluctant ... to extend Bose" to the FTC "false advertising" claim brought there because "Bose itself suggests that commercial speech might not merit the same approach as set out therein for libel cases." Id. at 41. That decision is inapposite here because this is a civil fraud case, not a FTC false advertising case, and the Bose Court expressly stated that fraud claims have a direct "kinship" to the type of defamation claim at issue in Bose, 466 U.S. at 502. See *also Madigan* v. Telemarketing Associates, 534 U.S. 600, 621 (2003). Moreover, the vast majority of the speech at issue here is not commercial speech like advertising, but involves statements on important public controversies and/or proposed legislation or regulation. See *infra* at IX.

from the government's proposals. *S. Pac. Commc'ns v. AT&T*, 740 F.2d 980, 983-84 (D.C. Cir. 1984); see also *Valentino v.* United States Postal *Serv.*, 674 F.2d 56, 60-61 & n.2 (D.C. Cir 1982). Finally, the government must prove all the elements of fraud by clear and convincing evidence. *Armstrong v.* Accrediting Council Con. Educ. & Training, Inc., 961 F. Supp. 305,309 (D.D.C. 1997); see also Shepherd *v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995) ("proof of civil fraud in general ... requires clear and convincing evidence").

ARGUMENT

PART ONE: OVERARCHING LEGAL ERRORS

To establish a RICO violation, the government was required to prove that (1) defendants were either employed by or associated with an "enterprise"; (2) defendants participated in the "conduct of such enterprise's affairs"; and (3) defendants each did so through a "pattern of racketeering activity" -- *i.*e., through a pattern including at least two acts of "racketeering" (or two "predicate acts"), the last of which occurred within ten years of a prior racketeering act. 18 U.S.C §§ 1962(c), 1961(5).

This Court need not delve into the district court's lengthy fact-finding because of four straightforward legal errors with respect to these requirements, each of which warrants reversal of the judgment. First, the district court's finding that defendants committed mail and wire fraud is predicated on an erroneous

"collective intent" standard that has been rejected by this Court as well as every appellate court that has addressed it. Second, the court erroneously concluded that a corporation can be held liable as part of a RICO "association-in-fact" enterprise despite the plain language of the statute. *Third*, in concluding that defendants were likely to commit future RICO violations -- a prerequisite to the injunctive relief here -- the court applied an erroneous legal standard and disregarded the intervening injunctions already in place. Finally, the court's remedies are not tailored to any identified RICO violation.

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING SPECIFIC INTENT TO DEFRAUD

The only "racketeering activity" alleged by the government were violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. [DN_5606_4]. As the district court recognized, an act of mail or wire fraud requires proof of specific intent to defraud. [Op._1570]; see also United States v. Winstead, 74 F.3d 1313, 1317 (D.C. Cir. 1996); United States *v.* Lemire, 720 F.2d 1327, 1334-35 (D.C. Cir. 1983). Specific intent requires the government to show that the defendant "knowingly does an act which the law forbids, intending with bad purpose, either to disobey or disregard the law." United States v. Rhone, 864 F.2d 832,834 (D.C. Cir. 1989) (quoting District of Columbia Bar Ass'n Criminal Jury Instructions, No. 3.01, at 115 (3d ed. 1978)). Good faith negates any specific

intent to defraud. See, *e.g.*, United States *v.* Young, 470 U.S. 1, 32 (1985) (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part and dissenting in part); S. Atl. *Ltd.* P'ship of Tenn., L P *v.* Riese, 284 F.3d 518, 531 (4th Cir. 2002). Therefore, the government must prove "a plan to obtain money by making knowingly false, material statements with the intent to defraud." United States *v.* King, 257 F.3d 1013, 1021 (9th Cir. 2001); see also *Williams v. Aztar Ind.* Gaming *Corp.*, 351 F.3d 294,299 (7th Cir. 2003); United States *v.* Mann, 884 F.2d 532,536 (10th Cir. 1989); *cf.* Day *v. Avery*, 548 F.2d 1018, 1025 (D.C. Cir. 1976) ("conscious misrepresentation of a material fact" required for common law fraud).

The government did not even attempt to prove that any agent or employee of defendants had such intent. Instead, the government took the tactical position that the speaker's intent was "immaterial" because specific intent could be proven through defendants' "collective knowledge":

> [O]ur proof will not focus on whether, if we are looking at a particular statement which we are alleging to be falsely and knowingly made, we are not going to focus on evidence that that particular [corporate] representative knew or believed the statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives.

[9/21/04_Tr._39].

The district court adopted the government's approach, concluding that each defendant acted with specific intent based on the erroneous belief that "specific intent may be established by the collective knowledge of each defendant and of the enterprise as a whole." [Op._1577]. Indeed, at times the court used the "knowledge" of other employees long after the challenged statement was made.[10] The court's specific intent conclusion is error, and the government's failure of proof under the correct standard requires the entry of judgment for defendants.

Where, as here, the defendants are corporations, this Court and others have consistently held that the required ***mens rea*** must reside in a specific corporate employee:

> Within either corporation, of course, the negligent acts of employees can be fairly imputed to the corporation. Individual acts of negligence on the part of employees -- without more -- cannot, however, be combined to create a wrongful corporate intent. In ***United States*** v. ***Bank of New England,*** 821 F.2d 844 (1st Cir.), ***cert. denied,*** 484 ***U.S.*** 943 [] (1987), for example, 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.***

[10] For example, the only evidence cited by the court that a 1975 "Quit or smoke True" advertisement (RA 37) was fraudulent was a statement by an employee 26 years later. [Op._793].

Saba v. Compagnie Nationale Air France, 78 F.3d 664,670 n.6 (D.C. Cir. 1996) (emphasis added).

Other circuit courts agree that, to establish a corporation's specific intent, it is "appropriate to look to the state of mind of the individual corporate official or officials who make or issue the [allegedly fraudulent] statement ... rather than generally to the collective knowledge of all the corporation's officers and employees." *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.,* 365 F.3d 353, 366-67 (5th Cir. 2004); *see also Dana Corp. v. Blue Cross & Blue Shield Mut.,* 900 F.2d 882,886 n.2 (6th Cir. 1990); *Nordstrom, Inc. v. Chubb & Son, Inc.,* 54 F.3d 1424, 1435-36 (9th Cir. 1995); *Woodmont, Inc. v. Daniels,* 274 F.2d 132, 137 (10th Cir. 1959).[11] *Saba* is also consistent with the common-law rule that the state of mind necessary for liability "must actually exist in the individual making (or being a cause of the making of) the misrepresentation, and may not simply be imputed to that individual on general principles of agency." *Southland,* 365 F.3d at 366.[12]

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[11] *See also AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC,* 2006 WL 1206333, *3 (S.D.N.Y. May 2,2006); *In re Apple Computer, Inc., Sec. Litig.,* 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002); *Lind v. Jones Lang LaSalle Ams. Inc.,* 135 F. Supp. 2d 616,622 n.6 (E.D. Pa. 2001); *Cutter v. E.I. du Pont de Nemours,* 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.,* 642 F. Supp. 781,803 (E.D. La. 1986).

[12] *See also In re Alpharma Inc. Sec. Litig.,* 372 F.3d 137, 149-53 (3d Cir. 2004); *Kushner v. Beverly Enters., Inc.,* 317 F.3d 820,827-30 (8th Cir. 2003).

A few cases have suggested that, when corporate ***Knowledge*** is at issue, it can be shown through the cumulative knowledge of the corporation's employees. ***See, e.g., United States v. Bank of New England,*** 821 F.2d 844,856 (1st Cir. 1987) (cited by the district court, ***see*** [Op._15751). Even assuming those decisions are correct, a fraudulent ***intent*** cannot be "created" or "inferred" where none in fact exists merely by combining the knowledge of different employees; at least one employee must be shown to have acted with the specific intent to defraud. ***Saba,*** 78 F.3d at 670 n.6. Indeed, ***Bank of*** New ***England*** itself recognized that corporate intent could be found only if a ***specific employee*** had the requisite intent: "[t]he bank is deemed to have acted willfully ***if one of its employees in the scope of his employment acted willfully."*** 821 F.2d at 855 (emphasis added).[13]

It is especially inappropriate to relax the "specific intent" requirement under criminal statutes such as mail and wire fraud or RICO. "RICO, because it has criminal as well as civil applications, must possess the degree of certainty required for criminal laws." ***Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local***

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[13] ***See also Woodmont,*** 274 F.2d at 137 ("while in some cases, a corporation may be held constructively responsible for the composite ***knowledge*** of all of its agents ... we are unwilling to apply the rule to fix liability where, as here, ***intent*** is an essential ingredient of tort liability.") (emphases added); ***First Equity Corp. v. Standard & Poor's Corp.,*** 690 F. Supp. 256,260 (S.D.N.Y. 1988) (same), *aff'd*, 869 F.2d 175 (2d Cir. 1989); ***United States v. LBS Bank-N.Y., Inc.,*** 757 F. Supp. 496,501 n.7 (E.D. Pa. 1990) (same).

Union 639,913 F.2d 948,956 (D.C. Cir. 1990) (en banc), *overruled* on other grounds, Reves v. *Ernst & Young*, 507 U.S. 170 (1993). The rule of lenity requires that the intent requirement applies "only to conduct clearly covered." United States v. *Lanier*, 520 U.S. 259,266 (1997).

Here, the district court acknowledged that "the courts, including our Circuit, have uniformly rejected the theory of collective intent that the Government advocates." [Op._1579]. Nonetheless, it erroneously concluded that "a company's fraudulent intent may be inferred from all of the circumstantial evidence including *the* company*'s* collective knowledge." [Op._1580] (emphasis added). The court expressly held that it could infer corporate "intent" from collective knowledge "even if it is impossible to determine the state of mind of the individual agent or officer at the time." Id. Indeed, the court went even further and found intent based on the "collective knowledge" of the entire "enterprise," by imputing the knowledge of an employee of one defendant to the employee of another defendant. [Op._1577-78]. However, there is simply no difference between the court's approach of "inferring" fraudulent intent from "collective knowledge" and the theory of collective intent repeatedly rejected by this Court and others.

Because the government made the tactical decision not to pursue proof of any individual corporate employee's specific intent, the district court did not identify any agent ox employee of any defendant who acted with specific intent.

Surely a few such specific examples could have been readily established if defendants truly had embarked on a 50-year-long pattern of "consciously deceiving the American public," particularly since the alleged "authors of the fraudulent statements" were "high level" executives who "would reasonably be expected to have knowledge of the companies' internal" contradictory statements that the executives allegedly believed. [Op. 1581-82]. Lacking such proof, the court instead pointed to, for example, TI's statements that there was an "'open question' regarding whether smoking or nicotine is addictive." [Op. 1581]. But the only thing that made defendants' executives approval of these TI statements fraudulent, according to the court, was that "their companies had [collective] knowledge both that smoking and nicotine are addictive." Id. (emphasis added). This is just a restatement of the flawed "collective intent" standard.

The district court's rule also conflicts with basic principles of respondeat superior.[14] Under that doctrine, if all elements of the crime or tort are not proven as to an employee, nothing can be attributed to the principal. Jordan v. Medley, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.) ("[V]icarious liability of the principal can hardly be sustained if the agent was not properly found to have

[14] It is an open question as to whether the doctrine of respondeat superior even applies to RICO. *Cedric Kushner* Promotions, *Ltd. v.* King, 533 U.S. 158, 165-66 (2001) (reserving issue of whether *respondeat* superior applies to RICO).

committed the tort."). Here, the court's approach to "specific intent" violated the ***respondeat superior*** doctrine by attributing intent to the corporation not based on a single employee's intent but by (1) aggregating all the knowledge of all employees of all the alleged participants in the enterprise and then (2) inferring from this fictitious collective knowledge a fictitious "intent." That is, the court imputed the knowledge or beliefs of one employee to another ***employee*** -- the public speaker -- to manufacture the proscribed intent. It is grossly improper, and a violation of due process and the First Amendment, to attribute to a public speaker the inconsistent views of another cherry-picked employee in order to create a fictional proscribed intent for which the corporation is liable. ***See infra*** at 113-14.

The district court stated that its "collective intent" standard was necessary to prevent a corporate defendant from "avoid[ing] liability by simply dividing up duties to ensure that fraudulent statements were only made by ... uninformed employees." [Op. 1580]. This concern is unfounded; specific intent can be established by showing that one individual knowingly or through reckless disregard caused another to make a misrepresentation. See *Southland*, 365 F.3d at

366 n.8. Thus, if someone at a corporation manufactured willful blindness in this way, it would satisfy specific intent."

Nor is there any merit to the district court's fear that following the orthodox rule "would create an insurmountable burden for a plaintiff in corporate mail and wire fraud cases." [Op._1579-80]. Plaintiffs have long been required to prove corporate liability by showing that a specific employee or agent acted with fraudulent intent, yet no court has suggested that this requirement created an "insurmountable burden." The fact that the government alleged the existence of a five-decade, ongoing criminal enterprise wholly unprecedented under RICO certainly does not relieve it of the evidentiary requirements imposed on those seeking to establish a discrete corporate fraud.

The district court's rule would, conversely, eviscerate the specific intent requirement for corporate defendants. These defendants, like many corporations, have tens of thousands of employees with differing knowledge and differing opinions. A plaintiff will almost always be able to splice together statements by

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[15] The court also found a "reckless disregard for the truth of [defendants'] public statements," but that finding was "evidence[d]" *only* by defendants' "statements" themselves, which the court conclusorily asserted were inconsistent with the "collective knowledge" of the defendant corporations. See, *e.g.*, [Op._1582-83]. This, of course, simply assumes the conclusion that defendants' spokespersons knew of, agreed with, and disregarded the allegedly inconsistent statements and is just another way of stating the legally erroneous "collective corporate intent" standard.

company personnel to create a conflict between the internal statements of one employee and the public statements of another, from which a court could infer a "collective intent" to defraud. But as the Seventh Circuit recently recognized, "that one or more subordinates reached one or another conclusion does not demonstrate that '[a corporation] thought' anything in particular." *R.J.* Reynolds Tobacco *Co.* v. Cigarettes Cheaper!, 462 F.3d 690,701 (7th Cir. 2006).

Because there is no finding or proof that any individual acted with specific intent to defraud, the district court had no basis to impute any "indictable" acts of mail or wire fraud to any defendant to satisfy the requirements under § 1962(c).

II. DEFENDANTS CANNOT BE PART OF AN ASSOCIATION-IN-FACT RICO ENTERPRISE

The judgment also should be reversed because the district court erred in ruling that defendant-corporations could constitute an "associated-in-fact enterprise." [Op. 1528-30]. FUCO provides that an "'[e]nterprise' includes [1] any individual, partnership, corporation, association, or other legal entity, and [2] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The court concluded that the enterprise requirement was met here because defendants constituted an association-in-fact enterprise under the second clause of § 1961(4). This holding misreads the statute: because defendants

are all corporations, they cannot comprise a "union or group of individuals associated in fact."

This conclusion is compelled by comparing the plain language of the two clauses of § 1961(4). The first clause separately lists "any individual, partnership, corporation, or other legal entity." Because "corporation" is listed separately from "individual," a corporation cannot be an "individual" under the statute. As a result, the second clause's reference to a "group of individuals associated in fact" -- without any reference to corporations -- cannot logically encompass "corporations."[16] Indeed, for this reason, in a case recently argued before the Supreme Court, the government conceded that a corporation is not an "individual" within the meaning of § 1961(4). See Brief for the United States as Amicus Curiae Supporting Respondents at 6, *Mohawk Indus.*, Inc. *v.* Williams, 126 S. Ct. 2016 (2006). And while the Court in that case ultimately declined to address the issue, at oral argument a majority of justices expressed skepticism that a RICO "enterprise" could include an association-in-fact of corporations, and no justice expressed a contrary view. See Transcript of Oral Argument, Mohawk Indus., Inc. *v. Williams*, 126 S. Ct. 2016, 28-54 (Apr. 26, 2006) ["Oral Argument Transcript"].

[16] See also In re North, 12 F.3d 252, 254 (D.C. Cir. 1994) ("In common usage, 'individual' describes a natural person.") (citing dictionary definitions); Dictionary Act, 1 U.S.C. § 1 (distinguishing between "individuals" and "corporations"); 18 U.S.C. § 1961(3) (distinguishing between "individuals" and "entities").

Instead, the government argued in ***Mohawk*** that an association-in-fact of corporations can be a RICO "enterprise" because the statutory enumeration in § 1961(4) begins with the word "includes" and therefore is not exhaustive. This too is wrong.

First, it is clear that here Congress, as it often does, used the term "includes" to introduce an exhaustive statutory definition. See, *e.g.*, Helvering v. Morgan's, Inc., 293 U.S. 121, 125-26 (1934) (the term "includes" introduced an exhaustive, not illustrative, statutory definition). That it did so is confirmed by the catch-all phrase "or other legal entity" in the first clause of § 1961(4). This phrase captures all the legal entities that are not "individual[s], partnership[s] [or] corporation[s]" and therefore makes the list in the first clause exhaustive. It would be redundant to use the word "includes" illustratively to capture all entities not specifically enumerated, when the catch-all "or any other legal entity" does just that. And because the word "includes" is exhaustive with respect to the first clause, it is obviously exhaustive for the second clause as well, as the same word in one sentence cannot have different meanings.

Second, identical words used in different parts of the same statute are presumed to have the same meaning. *IBP,* Inc. v. *Alvarez*, 546 U.S. 21, 29 (2005). Here, Congress used the words "includes" or "including" five other times in the RICO statute, and all of these uses confirm that the word "includes" is meant to

introduce an exhaustive listing. For example, three other subsections of § 1961 use. "includes" to introduce a statutory enumeration, and in each one, "it is unquestionable" that the term "includes" introduces an exhaustive list. ***See*** 18 U.S.C. §§ 1961(3); Oral Argument Transcript at 48 (Scalia, J.) (noting that the government "did not refute [this] point"). And finally, in the one place where the word "including" is used to introduce a non-exhaustive list, it is followed by the phrase "*but* not limited *to.*" 18 U.S.C. § 1964(a) (emphasis added).

Third, a contrary understanding of the term "includes" would strip Congress's careful statutory definition of meaning. If "includes" encompasses anything a court could arguably regard as an "enterprise," then Congress' definition would be essentially pointless -- something that Congress cannot be presumed to have done, particularly in a criminal statute and with respect to an unfamiliar concept like "enterprise."

Fourth, any ambiguity in the scope of § 1961(4) must be resolved in favor of defendants under the rule of lenity, ***see*** supra at 28, since § 1961(4)'s use of "includes" is "at least ambiguous." Oral Argument Transcript at 47 (Scalia, J.).

Finally, Congress's exclusion of a "group of corporations" from the definition of an association-in-fact "enterprise" is fully consistent with the purposes of RICO. As Justice Alito has explained, RICO had "two aims": "to make it unlawful for individuals to function as members of organized criminal

groups" and "to stop organized crime's infiltration of *legitimate businesses*." Samuel Alito, Jr., Racketeering Made *Simple(r)*, in *The RICO* Racket 1, 3-4 (G. McDowell ed., 1989) (emphases added). The plain language construction of section 1961(4) furthers these purposes. The first clause defines an "enterprise" to include any "individual, partnership, corporation, association, or other legal entity." It thus prohibits organized crime from infiltrating these legitimate businesses or from starting apparently legitimate businesses to mask criminal activity. And the second recognizes that organized crime also acts through loose associations of individuals rather than the corporate form. It thus captures a "union or group of individuals associated in fact" -- although not a legal entity.

Nothing in RICO's text, legislative history, or purposes, however, suggests that Congress was concerned about confederations of corporations banding together into a RICO "enterprise." To the contrary, Congress "had no reason whatsoever [for criminalizing] associations ... of corporations with each other" and thus "RICO-iz[ing] ... vast amounts of ordinary commercial activity." Oral Argument Transcript at 44 (Breyer, J.). In other words, "Congress did not enact FUCO because it was concerned that criminal conspiracy law applied to corporations ... The whole point is that [Congress] had something significantly different in mind." Id. at 36 (Roberts, C.J.).

The only case cited by the district court for the proposition that corporations could comprise an association-in-fact enterprise was United States *v.* Perholtz, 842 F.2d 343,357 (D.C. Cir. 1988), but that case is both based on a rationale that has since been rejected by the Supreme Court and distinguishable. In Perholtz, two individuals -- not corporations -- were convicted of criminal RICO charges based on fraudulent bidding on government contracts. See id. at 346. The indictment, however, charged that the enterprise consisted of '"a group of individuals, partnerships, and corporations associated in fact.'" Id. at 351 n.12,352. Because "none of the appellants objected at trial to the wording of the indictment, [the Court] review[ed] [this] claim under the plain-error standard" and affirmed the convictions. Id. at 352. In so holding, it stated "that individuals, corporations, and other entities may constitute an association-in-fact." Id. at 353.[17]

The Perholtz Court justified this interpretation of § 1961(4) because it feared that a contrary rule "would lead to the bizarre result that only criminals who failed to form corporate shells … could be reached by RICO." Id. The court was concerned that a criminal defendant conducting the affairs of an "enterprise" that

[17] Other circuits have reached similar conclusions. See, *e.g.*, United States *v.* London, 66 F.3d 1227, 1243 (1st Cir. 1995); United States *v.* Huber, 603 F.2d 387, 394 (2d Cir. 1979). None of these decisions, however, contains any extended analysis of the issue, as the government conceded in Mohawk. See Oral Argument Transcript at 50-51 ("I would agree with [opposing counsel] that the analysis [of these cases] doesn't tend to be lengthy[.]").

was his own closely held corporation, would be so closely tied to the enterprise that he would escape RICO liability. ***Id.*** at 353. But this understanding of RICO -- that criminals could avoid liability by **forming** corporations -- was recently repudiated in ***Cedric Kushner Promotions, Ltd.*** v. ***King,*** 533 U.S. 158, 165-66 (2001). There, the Supreme Court held that the president and sole shareholder of the alleged corporation-enterprise can be held liable under RICO because he is "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." Id. at 163. Thus, ***Cedric Kushner*** eliminated the rationale for the ***Perholtz*** ruling since ***a*** criminal acting through a corporate shell ***would*** be sufficiently distinct from the enterprise to be subject to prosecution. Consequently, ***Perholtz*** is no longer binding on this Court. ***See Tri-State*** *Dev., Ltd.* v. ***Johnston,*** 160 F.3d 528, 532 n.5 (9th Cir. 1998).

At the very least, this Court should limit ***Perholtz*** to its facts and not extend it beyond "its actual holding." ***United States v. Kemp***, 12 F.3d 1140, 1142 (D.C. Cir. 1994); ***see also Gersman v. Group Health Ass'n,*** *Inc.*, 975 F.2d 886,897 (D.C. Cir. 1992). Because the only defendants charged in ***Perholtz*** were natural persons, ***Perholtz*** at most held that natural persons who form an association-in-fact enterprise cannot escape liability merely because they added corporate entities to their association. Here, however, ***all*** defendants are corporations and are not covered by this holding.

In short, judgment should be entered for defendants because the corporations here cannot comprise an association-in-fact enterprise.

III. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD TO HOLD THAT DEFENDANTS WERE LIKELY TO COMMIT FUTURE RICO VIOLATIONS

In this civil action for an injunction, the district court has jurisdiction only to "prevent and restrain" future RICO violations. 18 U.S.C. § 1964(a). Consequently, the government was required to prove that defendants are likely to engage in "RICO violations ... ***in the future.*** *" **United States v. Philip** Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (emphasis in original). Here, the court's conclusion that defendants are likely to commit future RICO violations was premised on a flawed legal standard, which allowed it to disregard the array of injunctions and other prohibitions against future violations imposed by the ***MSA*** -- a "landmark agreement" entered between defendants and the States to settle lawsuits brought against the tobacco industry. *Lorillard **Tobacco Co.** v. Reilly*, *533* U.S. 525,533 (2001). At a minimum, as a result of the ***MSA,*** the government was required to demonstrate exactly how future violations can be likely in the face of these existing injunctions -- which it plainly did not do.

A. The District Court Applied The Wrong Legal Standard

To obtain injunctive relief, the government must prove that "a reasonable likelihood of future violations exist[s]." ***SEC v. First City Fin.** Corp., **Ltd., 890***

F.2d 1215,1229 (D.C. Cir. 1989); see also SEC *v.* Commonwealth Chem. *Sec.*, *Inc.*, 574 F.2d 90, 100 (2d Cir. 1978) (Friendly, J.). "No single factor is determinative; instead, the district court should determine the propensity for future violations based on the totality of the circumstances." First *City*, 890 F.2d at 1228. However, "[t]o obtain injunctive relief," the government "needs to go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." SEC *v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978); see also Commonwealth *Chem.*, 574 F.2d at 100 (same); *SEC v. Kenton* Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (same).

Here, the district court applied an erroneous legal standard in holding that "the requisite 'reasonable likelihood' of future violations may be established by inferences drawn from past conduct alone." [Op._1602]. It then held that, once those past violations are established, the burden shifts to the "defendant seeking to escape a permanent injunction" to "demonstrat[e] that 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" [Op._1609 n.46] (emphasis added). The court deemed the MSA relevant only if defendants could prove that it made it "absolutely clear" that future violations were impossible.

This standard is doubly flawed. First, case law makes clear that, where an existing consent decree already proscribes future violations, a court cannot rely on "inferences drawn from past conduct alone," [Op. 1601], since the existing decree imposes a legal barrier to the repetition of such conduct in the future. Section 1964(a) and the law generally presume that an existing decree or injunction will alter future behavior -- not, as the district court presumed, that past misconduct will be repeated in defiance of an existing and enforceable injunction. *See* Philip Morris, 396 F.3d at 1198; see also id. at 1204-05 (Williams, J., concurring) (injunctions plus contempt penalties "materially alter [a defendant's] readiness to persist in violations").

For example, in Comfort *Lake Ass'n, Inc., v. Dresel* Contracting, Inc., 138 F.3d 351 (8th Cir. 1998), a citizen's association sued to enjoin alleged lake pollution. A state government agency subsequently commenced enforcement actions against the same defendants, resulting in a stipulation agreement and the termination of a permit that resolved the alleged Clean Water Act violations and prevented future ones. The Eighth Circuit held that the existence of this separate relief meant that the plaintiff could not rest on allegations of past misconduct alone, but rather had to demonstrate how future violations were likely notwithstanding the intervening relief:

> In these circumstances, we agree with the Second Circuit that the claim for injunctive relief is moot unless Comfort Lakes proves "there is a realistic prospect that the violations alleged in [its] complaint will continue notwithstanding" the permit termination and Stipulation Agreement. ***Atl. States Legal Found., Inc. v. Eastman Kodak Co.,*** 933 F.2d 124, 127 (2d Cir. 1991).

Comfort Lake, 138 F.3d at 355; ***see also United States v. Jones,*** 136 F.3d 342,348 (4th Cir. 1998); ***Ellis*** v. *Gallatin* ***Steel Co.,*** 390 F.3d 461,475-76 (6th Cir. 2004); *Duboise v. U.S. Dep't of Agric.*, 20 F. Supp. 2d 263,269 (D.N.H. 1998). These cases reflect the common sense "fact ... that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." ***Hawaii v. Standard Oil Co. of*** *California,* 405 U.S. 25I, 261 (1972).

Second, the intervening ***MSA*** injunctions and other prohibitions also render erroneous the district court's decision to shift the burden to defendants to prove that RICO violations will not occur in the future -- and then to impose on defendants the requirement that they satisfy this burden under the "absolutely clear" test. As the two cases the court cited for that test show [Op._1609 n.46], that test applies only to mootness claims based on a defendant's voluntary and non-binding cessation of the allegedly illegal conduct. ***See United*** *States* ***v. Concentrated Phosphate Export Ass'n,*** *Inc.*, 393 ***U.S.*** 199,203 (1968); ***United***

States v. W.T. Grant *Co.*, 345 U.S. 629,632 (1953).[18] The obvious purpose of this test is "to prevent defendants from defeating a plaintiff's efforts to have its claims adjudicated simply by stopping their challenged actions, and then resuming their 'old ways' once the case [becomes] moot." Boston Teachers Union *v.* Edgar, 787 F.2d 12, 16 (1st Cir. 1986). But, as Comfort *Lake* explains, this test has no application,where, as here, a defendant's future conduct is already governed by legally binding relief:

> [The plaintiff] argues that [defendants] must prove it is "absolutely *clear* that the allegedly wrongful behavior could not reasonably be expected to recur." But that is the test when a defendant claims that its voluntary action has mooted a controversy ... There was nothing voluntary about [defendants'] compliance activities in this case.

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[18] W.T. Grant ***Co.*** itself establishes that there is a basic difference in the tests for determining whether defendant's voluntary cessation renders the case moot and whether a plaintiff is entitled to injunctive relief The Court held that the case was not moot because a defendant's "protestations of repentance and reform, especially when abandonment seems timed to anticipate a suit," do "not suffice to make a case moot." 345 U.S. at 632-33 & n.5. At the same time, however, the Court rejected the claim for injunctive relief because the plaintiff had not demonstrated the likelihood of future violations. ***See*** id.

138 F.3d at 355 (emphasis in the original).[19] Because defendants' future conduct is governed by the MSA, the same is true here.[20]

More generally, the district court also erred in holding that "the requisite 'reasonable likelihood' of future violations may be established solely by inferences drawn from past conduct alone" without regard for current conditions. [Op._1602]. The court's holding contradicts the established rule that "[t]o obtain injunctive relief," even in cases where there is no extant decree, the government "needs to go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." Blatt, 583 F.2d at 1334; see also Commonwealth *Chem.*, 574 F.2d at 100. Likewise, it is "[t]he *moving party* [who] must satisfy the court that relief is needed," *W.T.* Grant Co., 345 U.S. at 633 (emphasis added), not, as the district court believed, the defendant (much less with "absolute clarity").

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[19] The cases cited by the court for the contrary conclusion, see [Op._1601-21 (cross-referencing United States v. Philip Morris, 316 F. Supp. 2d 6, 11 n.3), merely acknowledge that, absent a consent decree like the MSA, a defendant's past violations are relevant to determining the likelihood of future violations under the totality of the circumstances. See, *e.g.*, United States v. Local 30,871 F.2d 401, 409 (3d Cir. 1989); First *City*, 890 F.2d at 1228-29; *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994); *SEC* v. *Gruenberg*, 989 F.2d 977,978 (8th Cir. 1993).

[20] Because the "absolutely clear" test only applies when mootness stems from voluntary cessation, it would not apply to BWH's claim of mootness, which is predicated on the fact that BWH is incapable of future violations due to its post-merger status as a passive holding company. See infra at II.B.3.

As demonstrated immediately below, under the appropriate legal standard, the government did not establish the required likelihood of future violations.

B. The Government Failed To Demonstrate A Likelihood Of Future Violations

1. The Government Failed To Demonstrate How Future RICO Violations Are Likely Notwithstanding The MSA

In November 1998, defendants RJR, PMUSA, Lorillard, and BWTC entered into the MSA with the States to settle numerous lawsuits.[21] Defendants agreed to a variety of marketing restrictions and other obligations, and to pay billions of dollars to the Settling States. [US_12391_18-48, 55-57]. The MSA is enforced through judicially enforceable consent decrees and related agreements entered in every state.

The government failed to satisfy its burden of showing how a reasonable likelihood of future RICO violations persists in the face of the MSA. Specifically, the government failed to prove that (1) there was an ongoing or likely future "enterprise," or (2) defendants would likely conduct the affairs of that enterprise through a "pattern of racketeering activity." Judgment should therefore be entered for defendants.

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[21] The MSA was entered into with 46 states, the District of Columbia, Puerto Rico, and four U.S. territories. Defendants had previously entered into separate but similar agreements with the four other states.

a. The MSA Prohibits A RICO "Enterprise"

Defendants cannot be reasonably likely to commit future RICO violations without a future RICO enterprise. In enacting RICO, Congress did not seek "to outlaw the commission of the predicate acts. It sought rather to outlaw the commission of predicate acts only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] ... in the conduct of [the] *enterprise's* affairs.'" Yellow Bus Lines, 913 F.3d at 954-55 (emphases added). Furthermore, this enterprise needs to be more than a mere loose association of individuals who purportedly committed or agreed to commit "predicate acts." Instead, the enterprise needs to have a defined "organization" or "structure," an element that this Court has emphasized "is the most difficult to show." *Perholtz*, 842 F.2d at 362; see also United States *v.* Richardson, 167 F.3d 621,636 (D.C. Cir. 1999).

Here, the MSA's wide-ranging bans on joint activity by defendants made it incumbent upon the government to demonstrate exactly how such a requisite future RICO enterprise -- and hence future RICO violations -- could exist in spite of those bans. The government and district court completely failed to do so.

To the contrary, the district court found that "in terms of formal organization," the purported "enterprise" operated through TIRC, which later

became CTR and TI. [Op._1532-33].[22] The court further ruled that various committees and subcommittees of these organizations provided "structures of varying degrees of formality" through which the "[e]nterprise [] respond[ed] as new threats to the industry arose." [Op._1533-34].

But as the district court also recognized, because of the MSA, these organizations ***no*** longer exist: "TIRC/CTR, which was created in 1954, ***existed until*** 1998, and the Tobacco Institute, which was created in 1958, ***existed*** through 2000" [Op._1535] (emphases added). They were dissolved pursuant to the MSA. [US_12391_32-35]. The same is true of *all* the other entities that the district court pointed to as support for its "enterprise" ruling. CIAR was disbanded in 1999 pursuant to the MSA. [US_12391_33]. The so-called "committee of Counsel," the College of Tobacco Knowledge, the Research Liaison Committee, and the ETS Advisory Committee were all part of TI, now dissolved. [Op._94, 151, 168-69, 1535]. Indeed, the College of Tobacco Knowledge has not existed since the 1980s, and the Research Liaison Committee disbanded in 1978. [Op._103]. The Industry Technical Committee has not existed since the 1970s. [Op._154-57]. It is not surprising, therefore, that neither the government nor the district court identified

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[22] TI was an industry-funded organization engaging in public relations and lobbying. [Op._66-67]. CTR was an industry-funded organization that funded scientific research. [Op._29].

any alleged joint activity by defendants since the MSA was entered into in 1998 -- let alone joint activity amounting to a formal, structured "enterprise."

The district court stated that these organizations and the enterprise "can be readily re-activated." [Op. 1534, 1602]. But neither it nor the government offered any evidence for this *ipse dixit* assertion. The express terms of the MSA preclude defen ants from "reconstitut[ing] CTR or its function in any form" and from participating in any tobacco-related trade associations that "act in any manner contrary to" the provisions of the MSA, including the MSA's provisions forbidding any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product." [US. 12391. 36]. The MSA also contains detailed procedural checks to ensure that any future tobacco-related trade association will operate independently of defendants. [US. 12391. 34]. Finally, the MSA expressly enjoins defendants from joint activity that in any way has the "purpose or effect" of limiting the production or distribution of information to the public about the health hazards of smoking or of limiting or suppressing research into smoking and health. [US. 12391. 35-36].

The district court nonetheless found that defendants might have unspecified "temptations" and "opportunities" to re-form the defunct alleged enterprise.[23] [Op._1534]. But nowhere did the court explain *how* it is reasonably likely that defendants could re-form the enterprise in the face of the MSA's prohibitions.

b. The MSA Prohibits Defendants From Committing Predicate Acts

The MSA also imposes scores of injunctions and related prohibitions that bar any continuation or repetition of the core wrongdoing alleged by the government and found by the district court. For example, the MSA:

- Enjoins material misrepresentations of fact regarding the health consequences of smoking, [US_12391_36];
- Enjoins targeting youth in the advertising, promotion, or marketing of tobacco products, [US_12391_18-19];
- Bans the use of cartoon characters in the advertising, promotion, packaging, or labeling of tobacco products, [US_12391_19];
- Bans billboards and virtually all other outdoor advertising of tobacco products, [US_12391_22-23];
- Bans apparel or other merchandise bearing a tobacco brand name (*e.g.*, caps, jackets or bags with a tobacco brand name), [US_12391_25-26]; and

[23] The only specific "example" offered by the district court of these supposed "opportunities" is that "Philip Morris currently has PMERP (Philip Morris External Research Program)." However, the PMERP, as its name conveys, is administered by PMUSA and no other defendant. [Op._1534,16021.

- Sharply restricts tobacco brand-name sponsorships of events or teams both in number and in type, with a flat ban on sponsorship of athletic events in the major sports, [US_12391_19-21].[24]

As even the district court acknowledged, "the MSA has made significant strides towards preventing Defendants' [allegedly] fraudulent activities." [Op._1619].

Yet, the district court offered no explanation of how the "fraudulent sub-schemes" could possibly continue into the future consistent with the **MSA.** For example:

- The court found that defendants misrepresented the health effects of smoking and by making false statements about addiction, nicotine manipulation, and low tar products. [Op._1500-02]. But the **MSA** enjoins the signatories from making misrepresentations regarding the health consequences of using any tobacco product, including statements with regard to tobacco additives, filters, paper or other ingredients. **[US_12391_36].**

- The court found that defendants agreed to suppress smoking and health research into smoking and health. [Op._1500-02]. But the MSA enjoins the signatories from agreeing to limit or suppress research into smoking and health. [US_12391_35-36].

- The court found that defendants marketed to youth, [Op._1500-02], and designed advertisements that "appeal to and target youth," [Op._1519]. But the **MSA** prohibits the signatories from taking any action, directly or indirectly, to target youth in the advertising, promotion, or marketing of tobacco products, or taking any action, the primary purpose of which is to initiate, maintain, or increase the incidence of youth smoking. **[US–1 2391_18-19].**

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[24] Notably, the MSA did not ban the use of any low tar descriptors, such as "lights." As discussed below, because the FTC has authorized the use of such descriptors, they cannot form the basis of a RICO violation. See *infra* at V.

The district court nonetheless disregarded the MSA because it doubted the States' ability to enforce these injunctions. [Op._1610]. But the "facts" relied upon by the court relating to the States' ability or willingness to enforce the MSA are nowhere to be found -- either in the opinion or in the record. For example, the district court cited nothing for its repeated assertions that the States have devoted "limited resources" to MSA enforcement. [Op._1488, 1492]. This assertion is belied by the court's own finding that that the States have instituted numerous enforcement measures against defendants. [Op._1619-10].

The district court also asserted that "Defendants have not fully complied with the letter or spirit of the MSA." [Op._1609]. But leaving aside that the court failed to cite even a single violation of the MSA that was not dealt with by the States, failure to comply with all the details or the "spirit" of the MSA does not even begin to approach a *RICO* violation. Indeed, the six examples cited by the court as violations of the "letter or spirit" of the MSA confirm beyond doubt that the States are vigorously enforcing it. Of the six:

One example simply noted that Lorillard had not changed its "Pleasure" advertising campaign. [Op._1609]. But the MSA did not require it to do so. Nor does this advertising violate RICO.

- Another noted that PMUSA and Altna's international subsidiary each sponsor motor sports teams when the MSA limits each signatory to one sports sponsorship. But the court never states that this violates the MSA, because it plainly does not. [Op._1610]. And the court does

not even begin to explain how sponsorship of a motor sports team by an Altria subsidiary violates RICO.

- One charged that "[e]ven 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, under the name of the Philip Morris External Research Program." [Op._1610]. But nothing in the MSA barred PMUSA ***individually*** from operating a research program and, indeed, PMUSA would be criticized if it were ***not*** undertaking. research. Nor does such individual activity in any way suggest that PMUSA will engage in RICO violations.

- A fourth accused defendants of "increas[ing] price promotions" -- i.e., reducing prices -- noting that "youth are particularly vulnerable to" price reductions. Id. But it is absurd to charge that defendants' competitive price reductions violated FUCO (or even the MSA or its "spirit") merely because youth -- like all rational consumers -- prefer lower prices.

This leaves just two other purported instances of failure to "compl[y] with the letter or spirit of the MSA." [Op._1609]. As the district court itself acknowledges, in one, the State brought an enforcement action to end the conduct, ***see People ex rel. v. Lockyer v. R.J. Reynolds Tobacco Co.***, 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004) (alleged youth targeting), and, in the other, PMUSA voluntarily ended the conduct after a State Attorney General protested. [Op._1609-10] (limiting sponsorship of a single motor sports team to only one auto racing league per year). In other words, in the only instances arguably worthy of the States' attention, the States did, in fact, successfully protest the conduct at

issue.[25] Indeed, the fact that the court was able to point to only two such instances in the eight years of the MSA's enforcement -- each of which was resolved to the satisfaction of the States -- establishes the efficacy of the MSA.[26] These instances, moreover, were actions by individual companies, not any "enterprise" governed by RICO.

In short, far from demonstrating that the MSA is ineffective, the evidence relied upon by the district court confirms that the government failed to discharge its burden of showing a likelihood of future RICO violations in the face of the MSA.

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[25] The court also asserted that "[t]he states' Attorneys General have complained to Philip Morris that more than forty types of activities violate the MSA." [Op._1489]. But the testimony relied on by the court was not testimony at all, but a cross-examination ***question.*** The actual testimony simply points out informal inquiries made by the Attorneys General -- each of which was resolved to the States' satisfaction. See [JD_041836_ 26-28].

[26] The court also held that the MSA could not prevent future violations, because defendants Altria (a holding company that owns PMUSA and other companies) and BATCo were not subject to the provisions of the MSA. [Op._1612]. However, Altria does not manufacture, sell, market, or advertise cigarettes, ***see,*** *e.g.*, [1/26/05_Tr._11184-85,111891; [Szymanczyk_WD 13]; and BATCo does not manufacture, sell, market, or advertise cigarettes in the United States, ***see,*** *e.g.*, [JD_013318 850275059]; [JD_013295_003]; [Op._1613 n.47]. Moreover, the MSA's elimination of any potential "enterprise" structure makes RICO violations by any defendant unlikely, regardless of whether that defendant is a party to the MSA.

2. Defendants' Current Public Positions Preclude Future RICO Violations

Apart from the MSA, defendants years ago radically transformed their business practices and public positions on issues relating to smoking and health. Defendants' revised public positions with respect to causation, addiction, and low tar simply cannot be undone.[27]

a. Defendants Have Admitted For Years That Smoking Causes Lung Cancer

The principal fraud found by the district court was defendants' denial of a causal link between smoking and disease. [Op. 1501]. However, as the government's experts conceded, defendants have publicly admitted fox years that smoking causes disease. See, *e.g.*, [10/14/04 Tr. 2513] (by 1999, defendants had made "direct and explicit admission[s] that cigarette[] smoking caused disease"). PMUSA states on its website that it "agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers." [JD 053199]. RJR states that "smoking, in combination with other factors, causes diseases in some individuals." [JD_068012]. Lorillard has likewise "stated publicly that we agree with and accept

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[27] With respect to the remaining alleged schemes (ETS, nicotine manipulation, youth marketing, and suppression), the district court erred in finding any RICO violation, as discussed *infra* at VI, VII, and VIII.

the Surgeon General's and other public health authorities' views, which includes any disease," [10/13/04 Tr. 2303], and its website encourages the public to rely on public health authorities fox information about the hazards of smoking. [Orlowsky WD 90-92].

The district court nonetheless concluded that defendants were likely to revert to past denials of adverse health effects because defendants' concessions were "half-hearted," faulting RJR for stating that smoking causes disease "in combination with other factors," and Lorillard for similarly stating that smoking is a "risk factor" for disease. [Op. 1604-05]. Of course, both statements are accurate. Moreover, this semantic quibbling does not even remotely demonstrate that defendants are likely to deny in the future that smoking causes disease. In any event, it is impossible to understand how defendants could reverse positions on this issue in a way that would be fraudulent, because no rational consumer would believe them (particularly after four decades of mandated health warnings). See *infra* at VI (statement must be material to be fraudulent).

b. Defendants Have Admitted For Years That Smoking Is Addictive

The same is true of the district court's finding that defendants are reasonably likely to deny that smoking is "addictive." Although defendants dispute the court's

conclusion that defendants' past statements were fraudulent, *see infra* at VIII, all' defendants now agree that smoking is addictive.

PMUSA, for example, has publicly admitted the addictiveness of smoking for years:

> Philip Morris USA agrees with the overwhelming medical and scientific consensus that cigarette smoking is addictive. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so.

[JD_053199]. Other defendants have done the same. [Op._455-56] (RJR acknowledged that "'[m]any people believe that smoking is addictive, and as that term is commonly used today, it is'"); [Op._460-61] (BWTC posted a document on its website that stated, '"by some definitions, including that of the Surgeon General in 1988, cigarette smoking would be classified as addictive'"). And, although the court criticized the content of a 2003 press release regarding a litigation verdict that Lorillard posted on its website, [Op._1605] (stating that "willpower is the only smoking cessation aid that always works"), the fact of the matter is that, since May 2000, Lorillard has also agreed that cigarette smoking is addictive. [Orlowsky_WD].

The district court acknowledged these statements, but criticized defendants for not "publicly inform[ing] consumers that ***nicotine*** is addictive, much less that smoking is a ***nicotine-driven*** addiction." [Op._1607] (emphases added). But the

important thing for smokers to know is that ***smoking*** is addictive; Certainly, this "omission" does not constitute *fraud*, much less a RICO violation. [Op._1618].[28]

c. Defendants Have Disclosed To Consumers That Low Tar Cigarettes May Not Be Safer

The district court also found that defendants' statements about low tar cigarettes were fraudulent because defendants did not inform low tar cigarette smokers that they may "compensate" -- *i.e.,* change the way that they smoke in order to obtain more nicotine -- and thus may get the same amount of tar and nicotine from low tar cigarettes as they would from a higher tar cigarette. [Op._864-77, 1514-16]. Again, defendants vigorously dispute that they have ever misled consumers on this issue (see *infra* at V), but, in any event, the record is clear that defendants today provide consumers with precisely the information that the court found previously lacking. ***See*** [Op._915-16, 929-30].

For example, in a November 2002 package "onsert" (a brochure enclosed in the cellophane wrapping) that PMUSA included with approximately 130 million packages of non-full flavor (light, ultralight, low tar, and medium tar) cigarettes, PMUSA told consumers that "the tar and nicotine yield numbers are not meant to

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[28] Denise Keane, the General Counsel of PMUSA, did ***not*** testify -- as the court reported -- that "it is material for people to know that Philip Morris agrees that the nicotine delivered in cigarette smoke is addictive." [Op._1607]. Instead, she testified only that "the fact that ***smoking*** is addictive" is material to consumers. [1/18/05_Tr._10458] (emphasis added).

communicate the amount of tar or nicotine actually inhaled by any smoker, as individuals do not smoke like the machine used in the government test method." [JD_041096]. PMUSA further advised:

> The amount of tar and nicotine you inhale will be higher than the stated tar and nicotine yield numbers if, for example, you block ventilation holes, inhale more deeply, take more puffs or smoke more cigarettes. Similarly, if you smoke brands with descriptors such as "Ultra Light," "Light," "Medium," or "Mild," you may not inhale less tar and nicotine than you would from other brands. It depends on how you smoke.

Id. In the fourth quarters of 2003 and 2004, PMUSA again enclosed similar onserts in more than 100 million packages of cigarettes. [Szymanczyk_WD_97]; [Keane_WD_60-61]; [JD_041096]; [JD_052910]; [JD_ 550421. PMUSA also has disclosed the onsert and additional information about low tar cigarettes and compensation on its publicly accessible website since October 1999. [JD_053199]; [Szymanczyk_WD_74-76].

Other defendants have provided similar information to consumers. RJR has informed consumers that "there is no such thing as a safe cigarette" and that the use of descriptors does not mean that a cigarette is safer. [Beasley_WD_71]; [JD_068012]. RJR also has publicly described compensation and communicated the findings of the National Cancer Institute's Monograph 13, to which it directed consumers via a link on its website. ***See*** RJ Reynolds Tobacco Company, Smoking

and Health, Guiding Principles and Beliefs, http://www.rjrt.com/smoking/summaryCover.asp. Likewise, Lorillard has advised consumers that "all cigarettes are dangerous" and has stated that low tar cigarettes do not present a clear reduction in risk. [Orlowsky_WD_93-94, 109]. In short, there simply is no basis for finding that defendants are engaged in current, or likely to commit future, RICO violations relating to low tar cigarettes.

3. BWH's Reconstituted Status And TI/CTR's Dissolution Preclude Future RICO Violations And Render This Case Moot As To These Entities

The district court also erred in finding that BWH is likely to commit future RICO violations because, after the amended complaint was filed, BWTC was reconstituted as a passive holding company. On July 30,2004, the entirety of BWTC's domestic tobacco operations, assets, and liabilities were merged with Reynolds Tobacco. ***See*** [US_89456_53-55]; [JD _013296_310-73]; [JD_ 013295_3]. BWH owns no facilities, manufactures no tobacco or tobacco products, and engages in no advertising or selling of tobacco products at all. ***See*** [JD_013295_146-220]. Further, it has withdrawn from all domestic and international trade organizations and no longer maintains a website. ***See, e.g.***, [1/7/04_Tr._9318]; [Ivey_WD_1]; [1/24/05_Tr._ 10818-19]; [Beasley_WD_66-67]; [11/16/04_Tr._6078-79]. As a result of the merger, "the challenged conduct [has] cease[d] such that 'there is no reasonable expectation that the wrong will be

repeated,' [and thus] it becomes impossible for the court to grant 'any effectual' relief whatever' to [the] prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277,287 (2000).

In reaching the conclusion that the prescribed remedies were necessary to prevent and restrain future RICO violations, the district court failed to make any findings, nor was any evidence presented, that the post-merger BWH, as reconstituted, manufactures, sells, or markets tobacco products. Such a finding, supported by evidence, is a prerequisite to establishing a reasonable likelihood of future RICO violations. Accordingly, BWH's fundamental reconstitution and corresponding complete withdrawal from any tobacco operations -- combined with the court's failure to make *any findings* to the contrary -- compels the conclusion that there is no reasonable likelihood that BWH will commit any future violations of RICO.

This reconstituted status also renders the government's case against BWH moot -- depriving the district court of Article 111 jurisdiction. ***See Lewis v. Continental Bank Corp.***, 494 U.S. 472,477-78 (1990); ***Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.***, 528 ***U.S.*** 167, 189-91 (2000); ***Deakens v. Monaghan,*** 484 ***U.S.*** 193, 199 (1988); ***Wyoming Outdoor Council v. United States Forest Sew.,*** 165 F.3d 43, 47 (D.C. Cir. 1999). Where, as here, a defendant is a reconstituted entity that has completely withdrawn from, and shows absolutely no

propensity to return to, the challenged conduct, a court lacks subject-matter jurisdiction to enjoin that defendant. ***County of Los Angeles v. Davis,* 440 U.S.** 625, 632-34 (1979).

These principles also require reversal as to CTR and TI. The district court recognized that no relief could be awarded against these entities because there was no likelihood that they would violate RICO in the future. [Op._1614-19]. More fundamentally, however, because CTR and TI no longer exist, the entire case against these entities should be dismissed as moot.

IV. BECAUSE THE DISTRICT COURT FAILED TO IDENTIFY THE RICO VIOLATIONS, ITS REMEDIES WERE NOT PROPERLY TAILORED TO PREVENT AND RESTRAIN FUTURE VIOLATIONS

Nowhere in its 1,653-page opinion did the district court ever identify which alleged racketeering acts -- or even which fraudulent "schemes" -- supposedly formed the "pattern of racketeering" Rather, the court stated only that "defendant[s] devised a scheme intended to defraud which included ***one or more*** of the individual component schemes alleged," [Op._1502] (emphasis added), without identifying which scheme or schemes so qualified. The legal requirement that the court identify which alleged racketeering acts actually constituted RICO racketeering is not a mere technicality. Without the identification of any past or current RICO violations, this Court obviously cannot determine whether any defendant's conduct constituted a "pattern of racketeering activity" or whether the

ordered relief is properly tailored to "prevent and restrain" a future RICO violation. See United States *v.* Philip Morris USA, Inc., 396 F.3d 1190, 1198 (D.C. Cir. 2005). If, for example, the only "scheme" found to violate RICO related to long-ceased denials that smoking causes disease, this would not support a *prospective* injunction against such ancient denials, much less injunctions relating to the other alleged frauds.

This omission is dispositive because, as this Court explained in *Microsoft*, a remedial order may stand only where there is a "causal connection between the conduct enjoined or mandated and the violation found." 253 F.3d at 105 (emphasis added); see also Dayton Bd. of Educ. *v.* Brinkman, 433 U.S. 406,420 (1977) ("the scope of the remedy" must be "tailored" to the "violation found); *Milliken* v. Bradley, 418 U.S. 717,738 (1974).

The need for a clear articulation of which alleged schemes and predicate acts were found to violate RICO is underscored by several deficiencies in the district court's findings and conclusions. First, every one of the five alleged predicate acts relating to nicotine manipulation (RA 109-113), came from testimony before Congress, see [Op. 1513 n.15]; [Op. App.III.25], which, as the court expressly found, is protected speech under the *Noerr-Pennington* doctrine, [Op. 1564]; *see* also infra at IX(A). (As noted, the 148 alleged predicate acts are the only potential grounds for RICO liability here. *See* supra at 7.)

Second, the government alleged just one ETS-related predicate act, (RA 42) -- a 1977 statement that "[t]obacco smoke does not harm nonsmokers." [Op._App.III._10]. The district court did not (and could not) find that statement to be an act of racketeering because, as explained below, the court itself ruled that statements denying ETS's health effects only became fraudulent when a scientific consensus emerged in 1986, nine years later. ***See infra*** at 102-03; ***see also*** [Op._1232, 1406].

Third, only four of the nineteen alleged predicate acts under the "addiction" scheme took place after December of 1988, the date on which -- according to the district court -- denials of "addiction" became fraudulent because the Surgeon General determined then for the first time that smoking was "addictive." ***See*** [Op._341-45, 1508 n.12]; ***see also infra*** at 106-07. Two of these statements were made during testimony before Congress (RA 109, 110), and one was a letter from one of the defendants regarding the same congressional testimony (RA 114), [Op._App.III._25]; these three statements, thus, are protected under *Noerr-Pennington.* The fourth statement (RA 116), which appeared on one defendant's website, acknowledges that smoking is addictive, but further opines that the key issue is whether "consumers are aware that smoking may be difficult to quit (which they are) and whether there is anything in cigarette smoke that impairs smokers from reaching and implementing a decision to quit (which ***we believe*** there is

not)." [Op._App.III._26] (emphasis added). That opinion is neither material nor a RICO violation.

Fourth, of defendants' eight allegedly fraudulent statements regarding the relative health benefits of low tar cigarettes (RA 36, 37, 39, 47, 48, 53, 119, 124), the most recent was made 25 years ago. [Op._1515 n.16]; [Op._App.III._9-13, 27-28]. A statement must be fraudulent when made; yet, at the time all of these statements were made -- indeed, until the publication of the National Cancer Institute's Monograph 13 in 2001 -- the public health community was generally of the view that low tar cigarettes were less hazardous than regular cigarettes. ***See infra*** at 67-72; [2/15/05_Tr._13373-74] (prior to the publication of Monograph I3 the consensus was that smokers of low tar and nicotine cigarettes faced lower risk of disease); [US_58700_65] ("'Prior reviews (U.S. DHHS, 1981; NCI, 1996) of changes in disease risk with switching from unfiltered or higher yield to filtered or lower yield cigarettes concluded that switching probably reduced lung cancer risk somewhat ....''). There is no factual or legal basis for concluding that these statements were fraudulent.

Ultimately, the district court justified its failure to specify which acts or schemes constituted fi-aud by citing cases upholding criminal sentences if at least one of the alleged schemes satisfied the elements of mail or wire fraud. ***See*** [Op._1502]. But those criminal cases are inapposite because the remedy --

imprisonment -- would have been the same regardless of the number of schemes.[29] In a civil case, by contrast, any remedy must be linked to the violation. Where, as here, the court failed to identify the conduct at issue that actually violated RICO -- or would do so in the future -- the remedies cannot be upheld because there is no basis for concluding that they would prevent or restrain a *RICO* violation. *Microsoft*, 253 F.3d at 104-05.

PART TWO: ERRORS WITH RESPECT TO SPECIFIC SCHEMES

The district court committed numerous errors with respect to its conclusion that defendants engaged in fraudulent activity. First, any conclusion that defendants committed fraud by marketing and selling light and low tar cigarettes cannot stand because, among other reasons, that very conduct was approved by the FTC. Second, with respect to the remaining schemes, there was no evidence that defendants' statements were material or intended to deprive persons of money or property, as the mail and wire fraud statutes require. Third, with respect to the alleged ETS scheme, the court erred in finding that good faith and scientifically supported statements about the health effects of ETS amounted to criminal fraud. Fourth, with respect to the alleged addiction scheme, the court likewise erred in

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[29] In criminal cases where the length of the sentence would differ depending on which particular RICO violation occurred, courts do insist on "specific findings" identifying which "underlying offense" supports the sentence. *See* United States v. *Tocco*, 200 F.3d 401,428-31 (6th Cir. 2000).

converting a semantic debate over whether cigarettes are better described as "addictive" or "dependence-producing" into criminal fraud. *Finally,* even if the fraud statutes themselves did not foreclose the court's conclusions, the First Amendment would.

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING FRAUD RELATING TO LOW TAR CIGARETTES

The district court committed legal error with respect to the specific alleged "scheme" of fraud relating to defendants' use of descriptors such as "low tar," "light," or "ultra light" to refer to reduced-yield cigarettes (as measured by the FTC Method) compared to full-flavor cigarettes. As the Fifth Circuit recently held, "the use of FTC-approved descriptors cannot constitute fraud" because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement." Brown v. *Brown & Williamson* Tobacco *Corp.*, 479 F.3d 383,392 (5th Cir. 2007). The district court's judgment with respect to low tar cigarettes is thus legally erroneous because it (1) improperly uses a general statutory standard to override the FTC's specific authorization of the descriptors as part of an integrated regulatory program, (2) ignores the well-established principle that government-approved conduct cannot be the target of government prosecution,

(3) improperly finds the descriptors fraudulent, (4) violates the First Amendment, and (5) applies to the sale of cigarettes wholly outside of the United States.

A. The FTC's Regulatory Policies

1. The FTC's Three-Pronged Regulatory Program

The FTC has the authority to protect consumers fiom "unfair or deceptive practices," see Pub. L. No. 75-447, 52 Stat. 111 (1938) and has exercised this power with respect to cigarette advertising since the 1940s. Congress confirmed this regulatory power in the Labeling Act. There, Congress mandated specific health warnings on all cigarette advertising and packaging. 15 U.S.C. § 1332. As the Supreme Court has recognized, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising" beyond these warnings, "it vested that authority in the FTC." *Reilly*, 533 U.S. at 548 (emphasis added).

As the district court found, the FTC has focused much attention on low tar cigarettes over the last half century. [Op. 742-46]. In response to pressure from the public health community, the FTC adopted two policy "goals" in this area: (1) to "provide consumers with an incentive to smoke the lower tar/nicotine cigarettes rather than the higher tar/conventional cigarettes;" and (2) to "give manufacturers a competitive incentive to produce cigarettes with low levels of tar and nicotine." [Op. 748]. Consistent with these "goals," the FTC developed a

three-pronged regulatory program concerning the measurement, disclosure, and' marketing of tar and nicotine yields.

First, the FTC developed a standardized test methodology for measuring tar and nicotine yields, now known as the "FTC Method." [Op._746-47]. In 1966, the FTC notified defendants that "they would be permitted to advertise tar and nicotine yields" based on FTC Method measurements. [Op._747]. In 1967, the FTC began testing cigarettes under the FTC Method in its own laboratories and periodically published the results. [Op._749].[30]

The FTC concluded that the FTC Method provided a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." [JD_061264 1-2]. The FTC also concluded that the "public interest requires that all test results presented to the public be based on a uniform method" because "[u]se of more than one testing method ... would only serve to confuse or mislead the public." [JD_ 004348_2]. As a result, the FTC advised that "statements or representations" of tar and nicotine yields "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public."

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[30] In 1987, the FTC delegated testing responsibility to the Tobacco Industry Testing Lab, which has since conducted the testing under FTC supervision. [US_51957_73.

[JD_001493_3]. Indeed, in 1978, the FTC rejected a request to use a method other than the FTC Method, even if the method would produce higher yields:

> In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated. ... Therefore, in the Commission's opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number.

In re *Lorillard*, 92 F.T.C. 1035, 1035 (1978).

Second, in 1970, to encourage "greater interest in obtaining a low tar and nicotine cigarette" and to facilitate "competition among the cigarette companies to meet that interest," the FTC compelled the tobacco industry to include FTC Method results in all advertising. [JD_000444_15]. The FTC initially sought to implement this requirement through a Trade Regulation Rule, but allowed the manufacturers to submit instead a proposal that was published in the Federal Register and subject to notice and comment. [Op._749]. The FTC rejected the manufacturers' initial proposal, but adopted a revised version of the proposal "as a substitute for its proposed trade regulation." [Op._749-50].

Third, the FTC mandated that any statement regarding tar and nicotine yields -- including descriptors -- must be substantiated by FTC Method results. In 1967, the FTC announced its "enforcement policy" with respect to "representations

relating to tar, and nicotine content of cigarettes," indicating that it would "not challenge" representations substantiated by the FTC Method results. [JD_001493_3]. The FTC repeated this statement in its Annual Report to Congress. [US_64287_18].

Consistent with this policy, the FTC entered into a consent decree in 1971 with American Brands, in which the FTC announced that it would permit the use of shorthand descriptors such as "low," "lower," "reduced" or "like qualifying terms," so long as the statement was substantiated by FTC Method results. [JD_003674_2-31. The FTC reaffirmed this position in a more recent consent decree that explicitly provided that statements in advertisements communicating FTC Method results "with or without an express or implied representation that [the] brand is 'low,' 'lower,' or 'lowest,' in tar and/or nicotine" would be permissible. In ***re Am.*** Tobacco Co., 119 F.T.C. 3, 11 (1995).

2. The FTC's Awareness Of The Limitations Of The FTC Method

From the beginning of its program, the FTC knew that its standardized test method could not accurately predict how much tar and nicotine any particular smoker would intake. [Op._750-52]. As the district court found, defendants repeatedly told the FTC that its testing method "would not measure the tar or nicotine that a human being would ingest from smoking any particular cigarette"

because '"[n]o two human smokers smoke in the same way.'" [Op._751]. As the court acknowledged, "[t]he FTC's press release announcing its decision ***clearly described the limitations of the standardized test method it was adopting.***" [Op._751-52] (emphasis added).

Furthermore, the FTC repeatedly investigated charges that its method was misleading because it could not account for "compensation," the tendency of some smokers to change the way that they smoke to obtain more nicotine from low tar cigarettes -- for example, "by taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes." [Op._741,786-818]. On each occasion, however, the FTC decided to retain its method. In 1977, for example, the FTC investigated claims that its measurements were misleading because some smokers might cover ventilation holes that are used on many low tar cigarettes. See 42 Fed. Reg. 21,155 (April 25, 1977); 43 Fed. Reg. 11,856 (March 22, 1978). The FTC recognized that smokers may "compensate" by covering ventilation holes and thereby increase the amount of tar inhaled, but nonetheless decided to retain its method. ***Id.; see also*** [US_51957_3-4].

In 1981, the FTC began investigating whether a unique filter design used in BWTC's Barclay cigarettes was producing misleadingly low numbers in the FTC Method's machine. [US_51957_5]. Throughout the investigation and in

subsequent litigation, BWTC argued that, because of compensation, the FTC Method was flawed and deceptive. [US–51957_4-71; 48 Fed. Reg. 15,953 (April 13, 1983); 49 Fed. Reg. 23,121 (June 4, 1984). In response, the FTC undertook a broad-based study of low tar cigarettes and compensation, consulted with experts in smoking and health -- including experts that testified for the government here -- and considered other testing methods. In the end, it decided not to change its method. [US_ 51957_4-71.

In declining to change its program, the FTC relied on epidemiological studies showing that people who smoked cigarettes that measured lower in tar under the FTC Method were less likely to get certain smoking-related diseases than people who smoked higher yielding cigarettes. [JD_63324]; [US_ 58700_82] (collecting and summarizing.studies); [9/29/04_Tr._1146]; [US_ 51957_7]. As the government's own witnesses have acknowledged, because these studies compared the risks incurred by actual smokers, grouped according to FTC Method yields, they inherently accounted for any tendency to compensate by smoking individual cigarettes more intensively. [9/29/04_Tr._1161-62, 1176, 1178].

The public health view that low tar cigarettes were safer continued at least until 2001, when the National Cancer Institute published Monograph 13. [US_58700_81-82]. After a new review of the available epidemiological literature, Monograph 13 concluded that there was "no convincing evidence that

changes in cigarette design between 1950 and the mid-1980s have resulted in an important decrease in the disease burden caused by cigarette use either for smokers as a group or for the whole population." [US_58700_146]. Nonetheless, even in light of Monograph 13, the FTC has adhered to its low tar cigarette policy and has not revoked its authorization of defendants' marketing of low tar cigarettes. See [Langenfeld_WD_92, 128-29].[31]

B. The Judgment Conflicts With The FTC's Specific Regulatory Policies And Must Be Reversed

The district court's conclusion that low tar descriptors are fraudulent, its ban on those descriptors, and its required corrective communications, are impermissible because they inescapably conflict with the FTC's policies described above. See *Brown*, 479 F.3d at 392. As a matter of law, defendants' conduct could not violate RICO because it was subject to and authorized by the FTC's regulatory regime.

It is axiomatic that, where an agency has taken specific action pursuant to its statutory authority, a court should not upset this regime by applying a general statute. Rather, any conflict between a general statute and specific regulatory

[31] The district court acknowledged that many studies continue to suggest that low tar cigarettes are safer and the government's expert, Dr. Burns, conceded that his personal beliefs about "low tar" cigarettes do not represent the scientific consensus, even today. See, *e.g.*, [Op._761-62,7641; [2/15/05_Tr._13392-93].

action must be resolved in favor of the regulatory action, unless Congress has demonstrated a contrary intent. See, *e.g.*, Hughes Tool Co. *v.* Trans *World* Airlines, *Inc.*, 409 U.S. 363,387 (1973); Middlesex *County Sewage* Auth. *v.* Nut'l Sea Clammers Ass'*n*, 453 U.S. 1, 20 (1981). This doctrine also follows from separation of powers and administrative law principles, which require the district court to defer to the agency's expertise. See Chevron *U.S.A.*, Inc. *v.* Natural Res. Defense Council, *Inc.*, 467 U.S. 837,844 (1984); *Pawley v. BethEnergy* Mines, Inc., 501 U.S. 680,696 (1991); Troy *Corp. v.* Browner, 120 F.3d 277,283 (D.C. Cir. 1997).

For instance, in Pan American World Airways, *Inc. v.* United States, 371 U.S. 296 (1963), the Supreme Court rejected the government's Sherman Act challenge to conduct that was already governed by a regulatory scheme administered by the Civil Aeronautics Board. The Court reasoned that "[i]t would be strange, indeed, if [conduct] that met the requirements of the [specific Civil Aeronautics Act] would be held to be antitrust violations." Id. at 309; see also id. at 305. That being so, "if the courts were to intrude independently with their conception of the antitrust laws, two regimes might collide." Id. at 310

Similarly, in Credit *Suisse* Securities (USA) LLC *v.* Billing, 127 S. Ct. 2383 (2007), the Supreme Court recently held that the antitrust laws could not be used to challenge certain underwriting practices subject to SEC regulation where there was

(1) "the existence of regulatory authority," (2) "exercise [of] that authority," and (3) "a resulting risk" of "conflicting guidance, requirements, duties, privileges, or standards of conduct." Id. at 2392. This was true even though the "SEC has disapproved ... the conduct that the antitrust complaints attack," because there was "a serious line-drawing problem" differentiating the permitted or precluded conduct and it would thus "prove difficult for ... many different courts to reach consistent results." Id. at 2394-95 (emphasis in original). Afortiori, as the United States itself acknowledged, approval of conduct by the specific regulatory agency immunizes it from attack under a general statute. See Br. of United States as Amicus Curiae, Credit Suisse Securities (USA) LLC *v.* Billing, 2007 WL 173649, at *12-13 (Jan. 22,2007); see also *Haddad* v. Crosby Corp., 533 F.2d 1247,1249 (D.C. Cir. 1976).

Consistent with these principles, this Court and others have held that RICO does not apply where the challenged conduct was specifically regulated by a federal agency acting within its authority. In *Danielsen v. Burnside-Ott* Aviation Training Center, *Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), this Court held that RICO could not be used to challenge conduct specifically regulated under the Service Contract Act ("SCA"). The Court therefore dismissed a RICO action challenging allegedly fraudulent wage classifications by government contractors because the SCA vested the Secretary of Labor with the authority to make decisions regarding

applicable wage rates and these specific regulatory provisions supplied the relevant standards and enforcement mechanisms. ***See*** id. at 1228-29. Since the SCA's comprehensive scheme foreclosed an implied cause of action under the SCA itself, it also foreclosed a RICO action because "fram[ing] the action ... in terms of RICO adds nothing." ***Id.*** at 1228.

Tamburello v. Comm-Tract Corp., 67 F.3d 973 (1st Cir. 1995), is to like effect. There, the First Circuit held that an employee could not maintain a RICO action to challenge conduct specifically governed by the National Labor Relations Act ("NLRA"). Despite the fact that the "[p]laintiff's allegations arguably establish[ed] violations of both RICO and the NLRA," the court held that RICO could not be applied in a manner that would interfere with the enforcement mechanisms established under the NLRA. *Id.* at 978; ***see also Brennan v. Chestnut,*** 973 F.2d 644,647 (8th Cir. 1992) (rejecting attempt to use RICO in a claim "involv[ing] conduct protected and prohibited by the NLRA"); ***Bridges v. Blue Cross & Blue Shield Ass'n***, 935 F. Supp. 37, 41 (D.D.C. 1996) (applying ***Danielsen*** to hold that the Federal Employees Health Benefits Act "leaves no room for a remedy under RICO).

Finally, in Sun ***City Taxpayers' Association v. Citizens Utilities Co.***, 45 F.3d 58, 61-62 (2d Cir. 1995), the Second Circuit held that the filed-rate doctrine, which recognizes the authority of regulatory commissions to consider and set utility rates,

required dismissal of a RICO action alleging fraud during the rate-setting process. As the court explained, any rate that is "approved by the governing regulatory agency" is "per se reasonable" and cannot form the basis of a RICO action. *Id.* at 62; see also Wegoland, *Ltd. v. NYNEX Corp.*, 27 F.3d 17, 22 (2d Cir. 1994) (same).

In a similar context, numerous courts have dismissed state consumer protection claims challenging the use of low tar descriptors because the FTC has authorized them. See Price v. Philip Morris, 848 N.E.2d 1, 50 (Ill. 2005) (FTC "specifically authorized" use of low tar descriptors), cert. denied, 127 S. Ct. *685* (2006); Flanagan v. *Altria* Group, *Inc.*, No. 05-71697,2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25,2005) (use of descriptors was "specifically authorized" by the FTC). And, in recently holding that the Labeling Act preempts similar state-law claims of light-cigarette fraud, the Fifth Circuit emphasized the FTC's approval of low tar descriptors, explaining:

> *[T]he* use of FTC-approved descriptors cannot constitute *fraud*. Cigarettes labeled as "light" and "low tar" do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, the Manufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method. The terms "light" and "lowered tar and nicotine" cannot, therefore, be inherently deceptive or untrue.

Brown, 479 F.3d at 392 (emphasis added); *see* also *Watson* v. Philip Morris *Cos.*, 420 F.3d 852,862 (8th Cir. 2005) (recognizing that the FTC has determined that the use of a "low tar descriptor in conjunction with its cigarettes' FTC rating" is "not ... deceptive") (emphasis in original), *rev'd* on other grounds, 127 S. Ct. 2301 (2007); Clinton *v.* Brown & Williamson Holdings, -- F. Supp. 2d --, 2007 WL 2181896, at *11 (S.D.N.Y., July 24,2007) ("there is no dispute that the FTC has declined to disallow [the] terms ['light' or 'lowered in nicotine and tar'] in response to several invitations to do so") (emphasis in original).

The conflict between the district court's order and the FTC's regulatory policies goes beyond the mere authorization of descriptors; it constitutes a full-scale assault on the FTC's policies in two fundamental respects. First, the court held that defendants' use of descriptors based on the FTC method was fraudulent. However, the FTC warned the industry that it would be deceptive to publish the results of any other testing method. In re *Lorillard*, 92 F.T.C. 1035. Thus, the very action that the court held to be deceptive -- basing descriptors on the FTC Method -- was the very action the FTC requires so that the use of descriptors would not be deceptive. As the Fifth Circuit recognized, such a claim threatens the very existence of the FTC's regulatory program: "To hold that the Manufacturers' use of the FTC-approved terms relating to the FTC-approved measurement system constitutes affirmative misstatement ... would directly undermine the entire

purpose of the standardized federal labeling system." Brown, 479 F.3d at 392 (emphasis added).

Second, the district court's judgment is a direct attack on the FTC's requirement to disclose in all cigarette advertisements the tar yield information that is being characterized by the descriptors. The tar and nicotine figures serve precisely the same purpose as the descriptors -- *i.e.*, to facilitate "mak[ing] comparative assessments" based on the tar and nicotine yields produced by the FTC Method. Brown & Williamson, 778 F.2d at 39, 41. The accurate descriptors can be false or misleading only if the tar yields produced by the FTC Method are themselves false or misleading. Yet the court did not prohibit the disclosure of the tar yields that the FTC requires, presumably because it recognized the absurdity of deeming a goverqment-compelled disclosure "fraudulent." Since the disclosure of FTC Method results is not and cannot be fraud, the description of those results likewise cannot be fraud.[32]

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[32] The FTC itself indicated that lawsuits like this one would disrupt its low tar policies when, in 1988, it opposed proposed legislation that would have repealed the Labeling Act's preemption provision and exposed tobacco companies to liability for advertising and promoting low tar cigarettes. [JD_004410_8]; [JD_001992]. The FTC warned that it could generate "significantly inconsistent" obligations on the cigarette companies and subject cigarette advertisers to an "irreconcilable conflict."? See [JD_004410_8]; [JD_001992].

The district court summarily brushed these conflicts aside by stating, in a footnote, that the "the FTC does not impose, regulate, or require" low tar descriptors. [Op. 1631 n.52]. As a threshold matter, the question is not whether the FTC "require[d]" descriptors. As discussed above, a general statute such as RICO may not be used to impose liability for conduct that was approved by an expert federal agency. See supra at 73-75.

Beyond that, the district court's assertion that the FTC never "regulate[d]" descriptors is wrong. The statement appears to be based on the fact that the FTC never issued a formal Trade Regulation Rule addressing the use of descriptors. But the critical issue is the substance -- not the form -- of agency action. Like all agencies, the FTC often acts and sets regulatory policies through a variety of regulatory tools other than formal rulemaking.[33] Indeed, numerous courts have held that agency actions other than rulemaking can even preempt claims."

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[33] See, *e.g.*, *Holloway v.* Bristol-Myers *Corp.*, 485 F.2d 986, 997-99 (D.C. Cir. 1973) (explaining FTC's long history of using informal means to secure adherence to its policies); see also Price v. Philip Morris, *Inc.*, 848 N.E.2d 1, 49-50 (Ill. 2005); Testimony of FTC Chairman Oliver in Hearing Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the H. Comm. on Energy and Commerce, 100th Cong. at 17-19 (1987); [DN 3312 1 212-13] (rulemaking is "only one means by which the FTC can obtain industry-wide compliance").

[34] See, *e.g.*, Gen. Motors *Corp.* v. Abrams, 897 F.2d 34, 39 (2d Cir. 1990) (rejecting the argument that an FTC consent decree cannot preempt state law as "an exaltation of form over substance") (citations omitted and emphasis added); *cf.*

In short, the district court's ruling that accurate descriptions of tar and nicotine yields produced by the FTC Method constitute misleading health information is irreconcilable with the FTC's considered judgment that the FTC Method produces meaningful health information that should be provided to consumers. The court's ban on descriptors would unavoidably frustrate the FTC's regulatory objectives and create precisely the "collid[ing]" regulatory "regimes" that ***Pan American*** and similar cases sought to avoid. ***Pan Am.***, 371 U.S. at 310.

C. The FTC's Authorization of Descriptors Defeats Specific Intent To Defraud

The FTC's authorization of descriptors also defeats as a matter of law any showing that defendants acted with "specific intent" to defraud. Courts have consistently rejected prosecutions targeting conduct approved by the government because to do otherwise would "sanction an indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State clearly had told him was available to him." ***Raley v. Ohio,*** 360 U.S. 423,439 (1959); ***see also Cox v. Louisiana,*** 379 U.S. 559,571-72 (1965).

For example, in ***United States v. Levin,*** 973 F.2d 463 (6th Cir. 1992), the Sixth Circuit refused to allow a mail fraud claim because employees at HHS had

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Price, 848 N.E.2d at 46 (concluding that FTC may authorize conduct through informal regulatory means).

approved the challenged activities. The court held that, given such approval, the government was legally "incapable of proving beyond a reasonable doubt the intent required to convict" and the prosecution violated "fundamental notions of fairness embodied in the Due Process clause." Id. at 468-69; ***see also, e.g., United States v. Laub,*** 385 U.S. 475,487 (1967) ("Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach."). Applying similar principles, this Court has held that approval expressed in an advisory opinion issued by a Congressional ethics committee could provide a good faith defense as a matter of law to a false statements charge pursuant to 18 U.S.C. § 1001: since "good faith reliance upon advice of counsel would establish a defense against § 1001 ***... reliance upon a specifically authorized pronouncement of one of the designated committees would. a fortiori do so." United States v. Hansen,*** 772 F.2d 940,947 (D.C. Cir. 1985) (emphasis added).

As this line of authority makes clear, there can be no specific intent here because the very action challenged as fraudulent was approved by the FTC.

D. The Descriptors Were Not Fraudulent

The district court's judgment with respect to the alleged low tar scheme must also be reversed because the descriptors were not "fraudulent" as a matter of law. Under the mail and wire fraud statutes, the government "bears the burden to

negate any reasonable interpretations that would make a defendant's statement factually correct." United States v. Migliaccio, 34 F.3d 1517, 1525 (10th Cir. 1994). In other words, the government must affirmatively disprove "any reasonable interpretation of an ambiguous statement" under which it would not be fraudulent. United States *v.* Race, 632 F.2d 1114, 1120 (4th Cir. 1980); see also United States *v.* Diogo, 320 F.2d 898,905-07 (2d Cir. 1963) ("it is incumbent upon the Government to negative any reasonable interpretation that would make the defendant's statement factually correct"). In United States v. Dale, 991 F.2d 819 (D.C. Cir. 1993), this Court cited these cases favorably and found a violation of 18 U.S.C. § 1001 only "because [defendant's] statements were not literally true under a reasonable interpretation of the [statements]." Id. at 832-33 & n.22.

Here, the government did not even attempt to satisfy this standard (nor could it). Indeed, the descriptors are literally true -- "[t]here is ... no dispute that the allegedly misleading terms ['light' and 'lowered in nicotine and tar'] accurately describe the results of the FTC testing method." Clinton, 2007 WL 2181896 at *11. Notably, the government did not, and could not, even allege that defendants ever expressly stated that light cigarettes are safer -- at most, the allegation was that the use of the descriptors "implied a health benefit." [Op. 878] (emphasis added).

Moreover, under the government's theory, light cigarettes are as unhealthy as regular cigarettes only when smoked in a manner or in numbers sufficient to produce "complete compensation." See, *e.g.*, [Op._755] ("Because compensation is essentially complete, low tar cigarette smokers inhale essentially the same amount of nicotine and tar as they would from full flavor cigarettes, thereby eliminating any purported health benefit from low tar cigarettes."); see *also* [Op._755-56]. This is because, as the government acknowledged and the district court found, there is a "dose-response" relationship between smoking and disease; the less tar and nicotine to which smokers are exposed, the lower the associated lung cancer risk. [Op._753]; [11/1/04_Tr._4521]; [Townsend_WD_80].

Consequently, the descriptors can be deemed "false" only if one interprets those literally true statements as implying that light cigarettes are always healthier, even for smokers who compensate completely (by, for instance, smoking more cigarettes). But defendants never said anything remotely like that, and there is not a scintilla of evidence that consumers understood the descriptors to imply that light cigarettes would always be safer, regardless of how the cigarettes are smoked or how many cigarettes are smoked. Far from the only "reasonable" interpretation, such an interpretation would not be "reasonable" at all; it would defy common sense.

Beverage companies would not be making an implicitly false statement -- or deceiving consumers -- if the companies described their products as "low cal" or "low caffeine" even if consumers generally increased their consumption to "compensate" for lower levels of the sugar and caffeine they crave. The same is true here. For example, if an individual compensates by smoking more light cigarettes, such an individual cannot reasonably expect to obtain the same benefits that he or she would have otherwise obtained by not smoking more. In short, the government has ascribed to a literally true statement a meaning that is completely counter-intuitive and unsupported by the evidence -- and thus has not come close to negating "any reasonable interpretation that would make the defendant's statement factually correct."[35] Indeed, the descriptors can hardly be deemed unequivocally false when the Fifth Circuit recently declared that they "cannot constitute fraud." Brown, 479 F.3d at 392.

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[35] Even under the less onerous provisions of the civil FTC Act, where, as here, the challenged statements are "literally true," there must be "evidence of substance," usually consumer survey evidence, about what "the person to whom the advertisement is addressed find[s] to be the message." Brown & Williamson, 778 F.2d at 40 (internal quotation marks omitted). Here, there is no evidence that anyone interpreted descriptors to convey the message that light cigarettes will always be safer even if they are smoked in a way that produces the same amount of tar and nicotine as full flavor cigarettes.

E. The District Court's Liability Findings And Injunction With Respect To "Low Tar" Descriptors Violate The First Amendment

The district court's judgment with respect to low tar descriptors also violates the First Amendment. Under ***Central Hudson Gas & Electric Corp. v. Public Sew. Comm'n.***, 447 U.S. 557 (1980), the "entire regulatory scheme" governing a commercial speech restriction must be evaluated to determine (1) "whether the State's interests in proscribing [the speech] are substantial," (2) "whether the challenged regulation advances these interests in a direct and material way," and *(3)* "whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v.* Fane, 507 U.S. 761, 767 (1993) (setting forth ***Central Hudson*** test); ***see also Greater New Orleans*** Broadcasting ***Ass'n, Inc. v.*** *U.S.*, 527 U.S. 173,183 (1999). The government bears the burden both of identifying a substantial interest and justifying the challenged restriction. *Id.*[36]

1. The government cannot demonstrate a "substantial interest" in banning descriptors because there has been no governmental policy decision that

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[36] Although "inherently misleading" commercial speech is not entitled to protection, the descriptors obviously cannot be "inherently misleading." As noted, the descriptors are true under a reasonable interpretation of them and the FTC determined that such statements are not deceptive. As the Fifth Circuit held, "the terms 'light' and 'lower tar and nicotine' cannot ... be inherently deceptive or untrue." ***Brown,*** 479 F.3d at 392.

the descriptors are misleading or otherwise harmful. See supra at 70-73. Indeed, as noted, the FTC approved the descriptors as used by defendants because they are based on the FTC's own test methodology. See supra at 67-70.

Nor can the district court or Department of Justice claim authority or expertise to determine whether descriptors should be banned. The judiciary has no authority to impose its own speech restriction in the face of a policy judgment by the expert agency authorizing use of the challenged speech. See Turner Broad. Sys., Inc. *v.* FCC, 520 U.S. 180, 195-96 (1997) (it is "beyond the competence of the Court of Appeals itself to assess the relative risks and benefits" of the speech-restricting policy). The same is true of the Department of Justice, particularly because the FTC -- the agency vested by Congress in the Labeling Act with tobacco-consumer regulatory authority -- is an independent agency, not subject to the policy supervision of the President. Humphrey's Executor v. United States, 295 U.S. 602,625 (1935). Thus, allowing the Department of Justice to establish governmental policy on descriptors would undermine Congress' decision to vest such important public interest determinations in an agency free from executive influence.

No court has ever upheld a restriction on commercial speech where the legislature or regulatory agency has authorized (let alone encouraged) such speech as in the public interest. Indeed, with respect to commercial speech that

encourages harmful activity such as gambling or drinking, the Supreme Court has frequently held that a regulatory or legislative decision partially to permit the allegedly "harmful" speech by some speakers or in certain media directly undermines any assertion that the government's interest was "substantial" or that it was "directly advanced" by the challenged restriction. Greater New Orleans Broad. Ass'n, 527 U.S. at 193-94; *Rubin v. Coors* Brewing *Co.*, 514 U.S. 476,488 (1995). Similarly, this Court partially struck down an otherwise constitutional ban on indecent speech before midnight because the regulatory scheme permitted such speech on some public stations after 10 p.m. See Action for Children's Television *v.* FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc). If this is the effect of partial permission to use the challenged speech, it inexorably follows that a legislative and regulatory decision completely to permit the use of descriptors totally undermines any assertion that the district court's prohibition advances a substantial governmental interest, much less does so materially or narrowly.

2. The government also cannot prove that the district court's ban on descriptors would "directly and materially" eliminate the alleged "harm" because defendants still would be required to disclose the FTC tar ratings in advertisements. In *Rubin*, the Supreme Court found that a ban on disclosing the alcohol content on beer labels could not "materially advance" the substantial interest in preventing consumers from buying beer on the basis of alcohol content

precisely because the federal government sometimes permitted such information in advertising. See 514 U.S. at 488. Afortiori, the court's limited ban on "descriptors" cannot materially advance its goal of denying consumers information about low tar cigarettes when the basis for the descriptors -- the FTC Method results -- must be included in all cigarette advertisements.

3. The district court's ban is also plainly "more extensive than is necessary" to serve any interest in avoiding consumer confusion. In addition to the fact that any restriction beyond that imposed by Congress or the FTC is overbroad as a matter of law, there is a less restrictive alternative that advances any conceivable governmental interest: requiring defendants to make additional disclaimers in their advertising. This very issue is currently pending before the FTC. See [US_458231 Indeed, the court's speech ban is based on nothing more than its facially impermissible assumption "that the public is better kept in ignorance than trusted with correct but incomplete information." *Pearson v. Shalala*, 164 F.3d 650,657 (D.C. Cir. 1999) (quoting Bates *v.* State Bar *of Ariz.*, 433 U.S. 350,374-75 (1977)); see also Bates, 433 U.S. at 375 ("we view as dubious any justification that is based on the benefits of public ignorance"); 44 Liquormart, Inc. *v. Rhode* Island, 517 U.S. 484,503 (1996) (plurality) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). In

Pearson, this Court rejected as "almost frivolous" the government's "paternalistic" contention that explicit "health claims lacking 'significant scientific agreement' are inherently misleading because they have such an awesome impact on consumers ... " 164 F.3d at 655.

In light of the strong presumption in favor of correcting, rather than banning, potentially "misleading" speech, the Supreme Court has "repeatedly point[ed] to disclaimers as constitutionally preferable to outright suppression." *Pearson*, 164 F.3d at 657 (internal quotation marks and citations omitted); see also Bates, 433 U.S. at 375 ("the preferred remedy is more disclosure, rather than less"); Peel v. Attorney Registration And Disciplinary *Com*'n, 496 U.S. 91, 109 (1990) (discussing "presumption favoring disclosure over concealment"). Here, any perceived consumer confusion would necessarily be more than eliminated by disclaimers disavowing any health benefits (like those communicated by defendants after Monograph 13). *Pearson*, 164 F.3d at 657.

For these reasons, the district court's judgment with respect to descriptors cannot survive Central Hudson.

F. The District Court Erred In Enjoining Defendants From Using "Low Tar" And Other Descriptors In Foreign Nations

The district court's ban on using low tar descriptors is not limited to sales in the United States. Rather, in section III(A)(4) of its Order, the court extended the

ban to cigarettes sold anywhere in the world. [DN_5800_6-71. Thus, the court purported to determine how cigarettes could be marketed in Germany, Argentina, China, and scores of other countries around the world, irrespective of each country's own domestic policies. The court attempted to justify this breathtaking assertion of global judicial power by invoking the "effects" test. [DN_5800_6-7].[37]

The district court's reasoning does not withstand scrutiny. Under § 1964(a), the use of descriptors in foreign countries cannot be enjoined unless such an injunction would "prevent and restrain" a future RICO violation. However, the sale of cigarettes wholly outside the United States cannot violate RICO. Federal statutes are presumed not to apply extraterritorially unless Congress expresses a contrary intent, see, *e.g.*, EEOC ***v. Arabian Am. Oil Co.***, 499 U.S. 244,248 (1991), and Congress has expressed no such intent here. See ***North South*** Fin. *Corp.* ***v.*** *Al-Turki*, ***100*** F.3d 1046, 1051 (2d Cir. 1996) ("The RICO statute is silent as to any extraterritorial application.").

To be sure, some courts have applied the "effects test" to RICO, under which a statue can apply extraterritorially to conduct abroad provided that conduct has a "substantial effect" in the United States. See, *e.g.*, *Alfadda* ***v.*** *Fenn*, 935 F.2d

[37] This is the only provision of the final judgment that purports to have extraterritorial application with respect to defendants other than BATCo.

475,479 (2d Cir. 1991). However, nothing in RICO or its legislative history reflects a congressional intent to reach conduct that occurs outside of the United States. See Jose *v. M/V Fir* Grove, 801 F. Supp. 349,357 (D. Or. 1991) (rejecting effects test as contrary to congressional intent). However, even assuming -- which this Court has never held -- that the "effects" test applies, the worldwide ban on descriptors would fail that test, The "effects" test requires a showing of "substantial effects within the United States" as "a direct and foreseeable result of the conduct outside the territory of the United States." *Consol. Gold* Fields PLC *v. Minorco, S.A.,* 871 F.2d 252,261-62 (2d Cir. 1989). The "effects" test is not satisfied by transactions that "have only remote and indirect effects in the United States." *Id.* at 262. Here, the government offered absolutely no evidence that the use of descriptors in other countries would have any impact on the United States -- much less the direct, foreseeable, and substantial effect required by the "effects" test -- and the district court failed to make any such finding.

Furthermore, the ban on the use of descriptors in foreign markets would also impermissibly intrude on the sovereignty of foreign nations. The district court declared that there was "no justification, either legal or ethical," for permitting anywhere in the world the use of descriptors the court had prohibited in the United States. [DN_5800_8]. The court, however, should not be allowed to arrogate to itself the power to decide the domestic policies of foreign States, especially when

the court itself acknowledged that studies continue to suggest that low tar cigarettes are safer. See, *e.g.*, [Op._761-62,7641. The court's legal and moral convictions do not empower it to legislate for the rest of the world. See, *e.g.*, *Microsoft* Corp. *v.* AT&T *Corp.*, 127 S. Ct. 1746, 1758 (2007) ("Foreign conduct is [generally] the domain of foreign law [which] may embody different policy judgments ...") (citation and internal quotations omitted); F. Hornan-La *Roche* Ltd. *v. Empagran* S.A., 542 U.S. 155, 165 (2004) ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"); *N.* S. Fin. *Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).

VI. THE DISTRICT COURT ERRED BECAUSE THE ALLEGED FRAUDULENT STATEMENTS WERE NEITHER MATERIAL NOR INTENDED TO DEPRIVE ANYONE OF MONEY OR PROPERTY

The district court also committed reversible error with respect to the alleged schemes other than low tar (which fails for the reasons stated in Section V) because it failed to apply two essential prerequisites to any violation of the fraud statutes: that the defendant must have intended to deprive someone of "money or property" and that the alleged fraudulent statement must have been "material."

To show a violation of the mail and wire fraud statutes, the government had to prove that defendants' statements were designed fraudulently to deprive tobacco consumers of their money. See *McNally* v. United States, 483 U.S. 350, 360 (1987). Even knowingly false statements (and these were not) designed to mislead the government or to deceive the public to secure support for forestalling anti-tobacco regulation are not actionable under the mail and wire fraud statutes. See Cleveland *v.* United States, 531 U.S. 12, 19 (2000); see also Reynolds v. East Dyer Dev. Co., 882 F.2d 1249 (7th Cir. 1989).

Moreover, a fraudulent statement not only must be made with the intent to deceive, but must be "material" -- *i.e.*, "of importance to a reasonable person in making a decision about a particular matter or transaction." United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996); see also Neder v. United States, 527 U.S. 1, 25. The reasonable person for these purposes is presumed to be a person of "ordinary prudence and comprehension." Corley *v.* Rosewood Care Center, *Inc.* of Peoria, 388 F.3d 990, 1009 (7th Cir. 2004).

The district court did not address materiality in connection with any specific scheme (other than low tar cigarettes, discussed supra at V), or with respect to any of the alleged predicate acts, but made two general observations about it. First, the court said that the question of materiality "answers itself' because defendants annually spent "millions upon millions of dollars in advertising." [Op._1585].

But, theproduct advertising that defendants spent millions on is not the source of the alleged misrepresentations. Rather, the alleged public falsehoods were largely contained in representations to government agencies or the general public that focused on issues such as ETS or addiction. Moreover, a large majority (about 79%) of the statements cited in the district court's opinion were internal communications, which were never made available to the public and thus could not have been intended or likely to defraud consumers. See *infra* at 112 n.43.[38]

Second, the district court assumed materiality based on the unsupported and counter-intuitive contention that, "for much of the period," defendants, rather than the "public health community," were "the primary source of information regarding cigarette smoking and tobacco addiction" and it was therefore "reasonable ... for consumers to believe that the Defendants' statements accurately reflected the current knowledge about the dangers of smoking." [Op._1584]. The court's only support for this assertion is the part of its opinion describing the public health community's struggle to determine the essentially semantic issue of whether smoking should be described as an "addiction" prior to 1988. See [Op._336-46, 1584]. But if consumers relied on tobacco companies' view of addiction during

[38] Approximately 751 of the *822* documents the district court cited on addiction (91%) were internal communications, [Op._332-514], as were 522 of the 610 (86%) ETS documents, [Op._1210-1407].

the "period" prior to 1988, there would be no fraudulent misrepresentation because, according to the court, those pre-1988 statements comported with the views of the public health community and only became fraudulent in that year. See *infra* at 106-07. And, after 1988, when the Surgeon General and public health community repeatedly told the public that smoking is addictive, there is no evidence or finding to support the implausible notion that consumers would look to the financially motivated views of defendants, rather than the "consensus" of the public health community.

Finally, the complete absence of evidence that any consumer anywhere actually took defendants' statements into account in deciding whether to purchase cigarettes wholly belies the notion that a "reasonable person" would think these statements important. Even though the government need not prove actual reliance to establish a violation of the fraud statutes since they reach "*schemes* to defraud," not just completed frauds, the absence of evidence of actual consumers' views here is virtually dispositive, particularly given that the alleged fraud occurred over decades during which millions of cigarette purchasers received mandated health warnings.

A more detailed review of the specific fraudulent "misrepresentations" further reveals the deficiencies in the district court's analysis.

A. Youth Marketing

The government alleged -- and the district court found -- that defendants committed fraud not by targeting youth with cigarette advertising (which is not a RICO violation), but rather by denying that they targeted youth with their advertising. But defendants' statements denying youth marketing cannot constitute indictable mail or wire fraud crimes because they were neither material nor intended to deprive smokers of money or property.

First, the district court never found that defendants' statements denying youth marketing were material. This omission is hardly surprising. Neither logic nor evidence supports the bizarre notion that any person, young or old, would have stopped or refrained from smoking if defendants "admitted" that they marketed to youth. See In re Tobacco Cases *II*, 20 Cal. Rptr. 3d 693,714 n.21 (Cal. Ct. App. 2004) (dismissing similar claims of fraud in denying youth marketing on materiality grounds; it was "implausible that" such statements "factored into [plaintiffs'] decision to smoke"), *aff'd*, -- Cal. Rptr. --, 2007 WL 2199006 (Cal. Aug. 2,2007).

Second, there is no evidence or finding that defendants' denials were intended to deprive consumers of money or property. Indeed, the district court found, and the government's own witness conceded, that defendants' statements

were motivated by a desire to "avoid regulation by the FTC." [Op._1174]; [12/15/04_Tr._8608-11].

B. Nicotine Manipulation

Defendants' denials concerning nicotine manipulation were not "material" to a reasonable consumer's purchasing decisions for the simple reason that there is no evidence that tobacco consumption would be different if defendants (contrary to the evidence and their own beliefs) admitted that they deliberately increased or manipulated the levels of nicotine.

In any event, the denials were true. Defendants, when denying nicotine manipulation, were denying allegations that they ***spiked or increased*** nicotine levels. [Op._639,646-47,649-521. The district court, however, found defendants' denials false only by defining "nicotine manipulation" so broadly as to include design changes that ***reduced*** nicotine levels. [Op._567-69]. But defendants never denied ***reducing*** nicotine levels, and the court never found to the contrary.[39]

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[39] Moreover, defendants were correct in denying that the use of ammonia during their manufacturing processes raises the pH level of nicotine or its rate of absorption into the blood. The government's experts uniformly testified that there was insufficient evidence to conclude that defendants' use of ammonia caused an increase in the pH level of nicotine or had any effect on the rate of nicotine absorption into the bloodstream or brain. [11/29/04_Tr._7156-58,71641; [11/2/04-_Tr._4792-93]; [11/29/04_ Tr._7165-66]; [11/2/04_Tr._4804-08, 4810-12]; [10/7/2004_Tr._2017-18].

C. The Health Effects Of Smoking

The "adverse health consequences of tobacco [are] well known." Brown & Williamson Tobacco *Corp.*, 529 U.S. at 138. Indeed, Congress' explicit warnings concerning these negative health effects have been prominently displayed on every cigarette package since January 1, 1966. Thus, "[n]o jury could find that a reasonable [person] would be misled by [a] statement ... when the truth was under his nose in black and white (many times over)." *Assocs.* in Adolescent Psychiatry, *S.C. v.* Home Life Ins. Co., 941 F.2d 561,570 (7th Cir. 1991); see also, *e.g.*, *Blount Fin.* Sews., *Inc. v.* Walter E. *Heller* & Co., 819 F.2d 151, 153 (6th Cir. 1987); United States *v.* Brown, 79 F.3d 1550, 1559 (11th Cir. 1996).

Here, the district court found only that, "in the early days," smokers "did not want to believe ... that smoking was disastrous for their health." [Op._1584-86]. Of course, many courts have dated common knowledge of the health risks and addictiveness of smoking to the 1950s or even earlier. See, *e.g.*, *Insolia v.* Philip Morris Inc., 128 F. Supp. 2d 1220, 1221 (W.D. Wis. 2000); Estate of White v. *R.J.* Reynolds Tobacco Co., 109 F. Supp. 2d 424,433 (D. Md. 2000). Certainly, by the mid-1970s, the public was aware of smoking's adverse health consequences and thus any inconsistent assertion by defendants could not be material to a reasonable

person. [JD_002701_000092].[40] At a minimum, smoking's adverse health consequences have been universally recognized for at least the last ten years, and defendants have not denied those consequences during that same time period. There is, therefore, no basis for prospective relief. See ***supra*** at 54-55.

D. ETS, Addiction, And Suppression

Finally, the government did not establish, nor did the district court find, that defendants' statements about the health effects of ETS and addiction, or their alleged suppression of research, were material or intended to deprive consumers of money. As to ETS, only one act was charged (RA 42). [Op._App.III_10]. It concerns a 1977 statement and is not even mentioned in the district court's findings or conclusions regarding ETS. The evidence concerning statements not charged as predicate acts suggests at most that defendants' statements were designed to ward off government regulation, such as prohibiting smoking in restaurants, not to induce individuals to purchase cigarettes. The same is true regarding the alleged suppression of documents. ***See*** [Op._1407-08] (suppression to "protect their public positions ... avoid or limit liability ... in litigation, and prevent regulatory limitations"). As to addiction, there is simply no basis to conclude that the semantic debate over whether cigarette smoking causes "addiction" or

[40] ***See*** also [9/28/04_Tr._850]; [JD_012297]; [JD_063736_3]; [JD_002698_24-25]; [JD_080031].

"dependence," see infra at 106-07, would be material to a reasonable person since' both clearly convey the same important information to consumers -- that smoking can be difficult to quit.

VII. THE DISTRICT COURT ERRED IN FINDING FRAUD RELATING TO ENVIRONMENTAL TOBACCO SMOKE

The district court concluded that, when defendants asserted that the available scientific evidence has not established that ETS causes disease, they violated criminal fraud statutes because this view was contrary to a scientific "consensus" that developed in 1986. See, *e.g.*, [Op._1525-26].

However, good faith is a complete defense to allegations of mail fraud. United States *v.* Young, 470 U.S. at 31-32. Relatedly, a "statement of opinion cannot constitute fraud, except in unusual circumstances." de *Magno v.* United States, 636 F.2d 714,720 n.9 (D.C. Cir. 1980); see also United States *v.* Amlani, 111 F.3d 705, 717-18 (9th Cir. 1997) (misrepresentation cannot be based on expression of opinion); *Migliaccio*, 34 F.3d at 1524 ("inaccurate, incorrect or wrong" opinions not actionable).

These principles apply with particular force with respect to an ongoing scientific debate about the health effects of products. Courts have repeatedly ruled that "taking one side of a medical or scientific dispute is [not] 'fraud.'" Luckey *v.* *Baxter Healthcare Corp.*, 183 F.3d 730,733 (7th Cir. 1999); Singer *v.* Am.

Psychological Ass'n, 1993 WL 307782, at *11 (S.D.N.Y. Aug. 9, 1993) (when parties are "engaged in heated debate as to the scientific validity of [a] theory ... [expressing] their views to others over the telephone and through the mails ... does not transform those acts into fraud constituting a RICO conspiracy"); *Senart* v. *Mobay* Chem. *Corp.*, 597 F. Supp. 502,506 (D. Minn. 1984) ("taking a particular view in a scientific debate" is protected by the First Amendment).

Thus, a defendant's views on a complex scientific debate about its products will rarely, if ever, be deemed "false," at least unless it is clear that the defendant did not subjectively believe the assertion or that it is entirely devoid of legitimate support. See *Ollman* v. Evans, 750 F.2d 970,975-76 (D.C. Cir. 1984) (en banc) ("There is no such thing as a 'false' opinion."). Any other rule would severely restrict valuable contributions to the marketplace of ideas by criminalizing any input from commercial entities that runs counter to the majority or "consensus" view. Such a result is foreclosed by both the rule of lenity, supra at 28, and, given the obvious First Amendment implications, the doctrine of constitutional doubt. See Pennsylvania *Dep't of Corr. v. Yeskey*, 524 U.S. 206,212 (1998).

Here, there was a legitimate basis for defendants' views that the link between ETS and disease had not been definitively established.

1. As an initial matter, it is undisputed that, before 1986, defendants' statements were not contrary to any "consensus," even under the district court's

view of the facts. Before 1986, the Surgeon General, whose reports the court found to "represent the scientific consensus on smoking and health topics," [Op._1232], had not concluded that ETS exposure causes disease, [Op._1215-30, 1406]. Indeed, in late 1984, one of the government's ETS experts found that there was a "paucity of data" linking ETS to lung cancer in non-smokers that "contrast[ed] sharply with the literature cited in the 1964 Surgeon General's Report which characterized active cigarette smoking as a cause of lung cancer." [JD_067821_236]. In January 1986, Surgeon General Koop wrote that "the ... statement that the 'currently available data do not support a conclusion that exposure to [ETS] represents a health hazard' is supportable, given the existing evidence." [JD_023486_2]. Thus, according to the court's own findings, defendants' pre-1986 statements accurately reflected the state of the scientific evidence at the time.

Nor was there any basis for concluding that any defendant uniquely possessed relevant scientificevidence that was unavailable to the scientific community. Although the district court referred to defendants' supposed "internal acknowledgment of the hazards of secondhand smoke," [Op._15231, the only type of "acknowledgment" identified was that ETS contains substances that could be carcinogenic or toxic and that a few published studies had found a weak statistical correlation between spousal smoking and lung cancer. [Op._1239-58]. The

Surgeon General and public health scientists were well aware of these facts, see, *e.g.*, [Op._1215-30], but also had not concluded that ETS exposure causes disease. [Op._1406].

2. The district court also had no grounds to conclude that defendants' post-1986 ETS statements either lacked a legitimate basis or did not reflect the true beliefs of the persons who made the statements. Indeed, in **1998,** a federal district court found that the **EPA,** using methodologies similar to that employed by the Surgeon General and government expert. here, did not have "sufficient evidence to conclude ETS causes cancer in humans" because there was a "significant number of studies and data which demonstrated no association between ETS and cancer" and because the "**EPA** did not demonstrate a statistically significant association between ETS and lung cancer." Flue-Cured Tobacco *Coop.*.Stabilization *Corp.* v. EPA, 4 F. Supp. 2d 435,438,463 (M.D.N.C. 1998), ***vacated*** on other grounds, 313 F.3d 852 (4th Cir. 2002). Standing alone, this 1998 finding by a federal court demonstrates that defendants' expression of similar opinions was not fraud.

Moreover, notwithstanding the alleged "consensus," independent scientists shared defendants' judgment about ETS and disease causation after 1986. [9/29/04_Tr._1104, 1142]. For example, scientists continued to question the Surgeon General's conclusion because of the "limits of its methodology," "substantial gaps in the available data," and "substantial differences in opinion on

how to interpret the data." ***See*** [JD_002889]; [JD_002890]; [JD_042153_164] (recognizing that there "are still uncertainties associated with the assessment of ETS"). Likewise, in 2003, the editor of the ***British Medical Journal*** stated that "[w]e must be interested in whether passive smoking kills, and the question has not been definitively answered. It's a hard question, and our methods are inadequate." [JD_024502_505]. The district court provided no explanation of how defendants' opinions could have lacked a legitimate scientific basis in light of similar post-1986 statements by non-industry scientists.

3. Nor was there any evidence that defendants ***believed*** that ETS had been shown to cause serious disease in otherwise healthy adult non-smokers. All of defendants' current and former employees and consultants consistently testified that they believed that ETS had not been shown to cause chronic disease in healthy adult non-smokers. ***See*** [11101/04_Tr._4440]; [10/26/04_Tr._3892]; [Ogden_WD_41-42]; [1/26/05 Tr._11266-11272]. The existence of two industry-sponsored studies by outside scientists finding a correlation between ETS exposure and disease, [Op._1257-58], does not constitute evidence of ***defendants'*** beliefs. At most, these studies are consistent with the conclusion that by the 1990's many outside scientist. thought that ETS causation had been established -- a point no one denies. They do not suggest that the minority view is "false," much less that it was not believed by defendants or devoid of a legitimate basis.

VIII. THE DISTRICT COURT ERRED IN FINDING FRAUD RELATING TO ADDICTION

The district court's ruling regarding "addiction" transforms a semantic debate into a criminal fraud case. Unquestionably, smoking is difficult to quit. The question here, however, is which label to affix to this difficulty -- "addiction" or "dependence." Defendants did not commit a RICO violation by arguing against the use of the word "addiction."

Fraud requires a misstatement of fact. A "fact" is something that is "objectively capable of proof or disproof." Ollman, 750 F.2d at 982. A statement is factually "false," therefore, only if it avers or clearly implies an event or characteristic that is disproved through objective evidence. Id. at 981. Thus, statements concerning or using "indefinite terms," id., almost inherently cannot be "false" because, by definition, they are vague and imprecise. See *id.* at 979-80. More specifically, as noted, a "facial[ly] ambigu[ous]" term cannot be fraudulent unless the government affirmatively disproves "any reasonable interpretation of [the] ambiguous statement" under which it would not be fraudulent. Anderson, 879 F.2d at 376 (emphasis added); see supra at V(D).

Here, as the district court acknowledged, "[t]he scientific and medical community has struggled with the choice of the proper nomenclature to describe the human affinity for nicotine and has moved from 'habituation' to 'dependence'

to 'addiction.'" [Op._349-50]. In 1964, the Surgeon General, applying accepted scientific definitions, determined that smoking was not addictive, but was a habit. [Op._338]. It was not until 1988 that the Surgeon General said that smoking was "addictive" -- indeed, that smoking met "the same criteria for addiction that apply to heroin, morphine, and cocaine" -- and, even then, he was able to do so only by significantly redefining the criteria for determining addiction. [Op._341-42] (new criteria used in 1988); [Op._343-44] (intoxication, withdrawal, tolerance eliminated); see also [11/12/04_Tr._4641-44] (describing same). Government experts involved in the decision to change the definition conceded that the label "addictive" was "pejorative," a "loaded term," and had "antisocial connotations." [11/2/04_Tr._4636]; [JD_04596_38S].

More importantly, an ambiguous term cannot cause consumer deception unless it is actually contrary to consumers' understanding of that term -- regardless of the technical definition given by the scientific community. As the government's expert wrote in connection with the 1988 Surgeon General's report, "highly technical terms" are not always accurately communicated to, or interpreted by, the "public." [JD_004593_2027]. And here there is no evidence that the public's understanding of the term "addiction" would be the same as the Surgeon General or would encompass cigarette smoking -- *i.e.*, that the public would call a dependent smoker a "drug addict." Indeed, that the Surgeon General altered the

definition of addiction in 1988 to encompass tobacco products confirms that the term is inherently ambiguous and its application to cigarettes was novel and controversial. See [11/23/04_Tr._6952]; [11/29/04_Tr._7091-92].

Thus, the government did not prove through clear and convincing evidence that defendants committed criminal fraud at the time they took issue with the characterization of cigarettes as "addictive."

IX. THE DISTRICT COURT'S APPLICATION OF THE *FRAUDSTATUTES VIOLATES THE FIRST AMENDMENT

A substantial majority of defendants' allegedly fraudulent statements were either designed to persuade government agencies or legislators to reject more severe regulation of tobacco products or to present the industry's views in the ongoing public debates about tobacco. (After all, speech directed at consumers to induce a commercial transaction would not focus on, for example, denying that the adverse health effects of ETS have been firmly established or debating whether tobacco produces "dependence" or "addiction" -- these are plainly statements designed for the regulatory or public policy context.) Statements to reject more severe regulation enjoy immunity from statutory penalties under *Noerr-Pennington* even if they are deemed false or misleading. And statements presenting views in ongoing public debates may not, as the United States itself has recognized, be penalized unless it is demonstrated that the speaker knew, or must have known,

that the speech constituted a false statement of fact ***and*** that the statement was actually material to consumers. ***See*** Brief for the United States as ***Amicus Curiae*** Supporting Petitioners at 17-19, ***Nike, Inc. v. Kasky***, 539 ***U.S.*** 654 (2003) ("U.S. ***Nike*** Brief"). Because the judgment rests on statements protected by the First Amendment, it must be reversed in its entirety.[41]

A. Many Of The Alleged 148 Racketeering Acts Are Protected By The *Noerr-Pennington* Doctrine

Since "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," the ***Noerr-Pennington*** doctrine immunizes speech that "attempt[s] to persuade the legislature or the executive to take particular action," ***Eastern*** R.R. ***Presidents Conference v. Noerr Motor Freight, Inc.***, 365 U.S. 127, 136 (1961), or otherwise "genuinely seeks to achieve [a] governmental result." ***Allied Tube & Conduit Corp. v. Indian Head, Inc.***, 486 U.S. 492, 507 n.10 (1988); ***see also United Mine Workers of America*** v. *Pennington*, 381 ***U.S.*** 657,669 (1965).

The doctrine protects not only speech made directly to the government, but also speech that is "incidental to a valid effort to influence governmental action," including, for example, a "publicity campaign directed at the general public,

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[41] This section addresses the First Amendment with respect to all of the alleged schemes except for low tar, which is discussed ***supra*** at V(F).

seeking legislation or executive action." Allied ***Tube,*** 486 ***U.S.*** at 499; ***see*** id, at 503; ***Sosa v.*** *DIRECTV, Inc.*, 437 F.3d 923,934 (9th Cir. 2006). Accordingly, the ***Noerr-Pennington*** doctrine protects speech that "advocate[s] ... causes and points of view respecting [the] resolution of ... business and economic interests." ***California Motor*** *Transp.* ***Co. v.*** *Trucking* ***Unlimited,*** 404 ***U.S.*** 508,511 (1972).[42]

The Supreme Court has also made clear that ***Noerr-Pennington*** immunizes even false statements from statutory sanction. ***See,*** *e.g.*, ***Allied Tube,*** 486 U.S. at 499-500; ***Boone v. Redevelopment Agency of San Jose,*** 841 F.2d 886,896 (9th Cir. 1988); *Davric* ***Maine Corp. v. Rancourt,*** 216 F.3d 143, 147 (1st Cir. 2000). In *Noerr* itself, the defendant allegedly engaged in activities that fell "fa.short of the ethical standards generally approved in this country," including planting misleading newspaper and magazine articles, generating biased research results that falsely appeared to emanate from independent sources, and grossly distorting empirical data in order to slant the conclusions in favor of the railroads. 365 U.S. at 139; ***see also Eastern R.R. Presidents*** *Conf.* ***v.*** *Noerr* ***Motor Freight,*** *Inc.*, 155 *F.*

[42] ***Noerr-Pennington*** immunity extends to a variety,of statutory and common law actions in addition to the antitrust laws, including RICO, which was modeled after the antitrust laws. ***See International Brotherhood of Teamsters v. Philip Morris, Inc.,*** 196 F.3d 818,826 (7th Cir. 1999); ***Sosa,*** 437 F.3d at 931; ***Sedima, S.P.R.L.v.*** *Imrex Co.*, 473 ***U.S.*** 479,489 (1985).

Supp. 768, 774-816 (E.D. Pa. 1957) (exhaustively detailing the alleged activities), rev'd on other grounds, 365 U.S. 127 (1961).

The district court paid lip service to Noerr-Pennington but decreed, without explanation or citation, that the doctrine applied only to six communications "made directly to legislative bodies" -- *i.e.*, the "testimony" of five of defendants' CEO's "before the Waxman Subcommittee" in the House and a "letter from Philip Morris to Rep. Waxman" concerning that testimony. [Op._1562-64]. Limiting *Noerr-Pennington* immunity to only direct statements before Congress is plainly wrong. As noted, the Supreme Court has made clear that the doctrine extends to speech that is "incidental to a valid effort to influence governmental action," including a "publicity campaign directed at the general public, seeking legislation or executive action," and *Noerr* itself involved precisely such a publicity campaign. *Allied* Tube, 486 U.S. at 499.

Here, defendants' statements concerning ETS, addictiveness, nicotine manipulation, and youth marketing were designed to respond to potential regulatory and legislative initiatives by legislators, the Clinton Administration, the FDA and similar agencies, as well as the torrent of regulatory and litigation initiatives by state and municipal governments. For example, under a proper interpretation of Noerr-Pennington, almost 60% of the public communications cited by the district court in its findings of fact regarding the addiction and

manipulation sub-schemes were petitioning or incidental to a petitioning campaign. [Op._332-6551. Regarding ETS, it was just over 30%. [Op._1210-1407].[43] If *Noerr-Pennington* stands for anything, it is that an industry cannot be denied its right to participate in this type of "political arena" debate in order to influence legislation or regulation "in the very instances in which that right may be of most importance to them." *Noerr*, 365 U.S. at 139.

The district court's judgment appears predicated on statements that are protected under *Noerr-Pennington* (it is impossible to know for sure because the court failed to identify which schemes or racketeering acts formed the basis of liability, see supra at IV). This error requires that the judgment be reversed.

B. The District Court's Judgment Impermissibly Infringes Free Speech

It is a bedrock free speech principle that the government "may [not] impair the effective exercise of the right to discuss freely industrial relations which are

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[43] These statements include testimony concerning pending or anticipated legislation, regulation, governmental reports, or public commentary regarding the same. The district court cited a total of approximately 3,511 statements by defendants in the discussion of the alleged RICO sub-schemes. The vast majority -- roughly 2,777 -- were purely internal communications and hence not made to the public at all. Of the remaining 734, approximately 156 were protected by *Noerr-Pennington*; approximately 26 were public opinion advertisements; approximately 373 were commentaries on public issues (*e.g.*, a statement made by a defendant to a public audience in a press release, letter to a consumer, annual report, newsletter, website, or quoted in a publication); and only about 179 were brand advertisements. [Op._219-1478].

matters of public concern." *Thornhill* v. *Alabama*, 310 U.S. 88,104 (1940). As the Supreme Court has frequently noted, "erroneous statements of fact" are "inevitable in free debate." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1973); see also Time, *Inc. v.* Hill, 385 U.S. 374,389-90 (1967) (same). Consequently, "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech." *Gertz*, 418 U.S. at 340. Therefore, in light of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," the Supreme Court, in the libel context and elsewhere, has "require[d] that we protect some falsehoods" to ensure the "breathing space" demanded by the First Amendment. *New* York Times *Co.* v. Sullivan, 376 U.S. 254,270 (1964); Gertz, 418 U.S. at 341-42.

The district court's judgment violated these necessary speech protections both through (1) its substitution of its fictional "collective company intent" doctrine for the "specific intent" requirement and (2) its unsupported presumption that the speech at issue was material to consumers. These errors applied to all of the alleged schemes other than low tar (addressed supra at V) and therefore require reversal of the judgment.

First, with respect to defendants' non-commercial speech, even if the district court's "collective intent" holdings somehow complied with statutory

requirements, those holdings would still run afoul of the First Amendment, which does not permit eliminating the scienter requirement. For example, although the New York Times and Time magazine were ultimately responsible for their reporters' falsehoods under respondeat superior principles, a court could not find that a libelous or "false light" statement was deliberately or recklessly false unless the persons actually involved in preparing the challenged article knew the facts were false or recklessly disregarded their falsity. See New York Times Co., 376 U.S. at 287 ("The mere presence of stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement."). But the district court's "collective corporate intent" doctrine does worse than that by attributing to the defendants' speakers not only the beliefs of other employees at their corporation, but also the beliefs of those at competing corporations. See, *e.g.*, *Bose Corp* v. Consumers Union, 466 U.S. 485,505 (1984) (comparing libel to fraud cases for purposes of scienter requirement under First Amendment); In re Grand Jury Matter, 764 F.2d 983,987-88 (3d Cir. 1985) (explaining that in both libel and fraud, ban is permitted because of scienter requirement).

Second, and equally important, the district court's expansive definition of what is "material" greatly chills protected speech on matters of public interest. As

noted, the court essentially presumed materiality. Indeed, the court expressly held that defendants' representations were "material" even if a "reasonable person" would ***not*** regard them as important in determining whether to purchase tobacco. [Op._1583-87].

Based on this reasoning, defendants' views on a host of matters such as youth marketing and nicotine manipulation were deemed to influence consumers' purchasing decisions, even though there was no evidence that any consumer was actually influenced by those statements or that the purpose of those statements was to induce purchases, as opposed to responding to concerted attacks in the political or regulatory arena. Under this dangerous doctrine, any time an industry speaks in the political arena about the effects of its products on health or the environment, it can be charged under RICO or the fraud statutes even though there is no showing either that the challenged speech was intended to induce a commercial transaction or that anyone took such speech into account in making their purchasing decisions. For example, executives from transportation or energy companies could be imprisoned if they opined in good faith that the link between carbon dioxide and global warming has not been established, because such views would purportedly be "material" under the fraud statutes and would be inconsistent with the "consensus" position articulated by 2,500 international scientists in a recent United

Nations report. ***See*** Elisabeth Rosenthal & Andrew C. Revkin, Science ***Panel Calls Global Warming "Unequivocal," N.Y.TIMES,*** Feb. 3,2007, at A1.

The United States itself has correctly acknowledged that a far less draconian California consumer protection law prohibiting "false and misleading" statements by a company "about its own products or its own operations" violated the First Amendment, ***regardless*** of whether those statements constituted "commercial" or "non-commercial" speech. U.S. Nike Brief at 28-29. The government argued that the consumer fraud statute impermissibly chilled speech about commercial products because liability could be imposed without a showing of actual and detrimental consumer reliance on the false statements: the "traditional principles that govern judicial actions for commercial misrepresentations have ***always*** required a substantial link between the challenged statements and the ***resulting injury*** ... [to] eliminate the prospect that ... a misrepresentation respecting a commercial product or transactions might chill protected speech." U.S. ***Nike*** Brief at ***9***-10 (emphases added).

The government correctly observed that a "traditional suit for misrepresentation is directed at what is essentially conduct -- the inducement and execution of a purchase or sale -- rather than the content of the speech itself," thus posing a "diminished risk of chilling protected expression." Id. In contrast, general statutes allowing actions against misrepresentation "based on no more than

a threshold showing of materiality ... unacceptably chill[] speech, particularly unpopular speech that is likely to become the target of such lawsuits." *Id.* at 23; see also *Gertz*, 418 U.S. at 349 (since recovery was allowed "without evidence of actual loss" a higher showing of scienter was required); *Madigan*, 538 U.S. at 620 (upholding a fraud prosecution against First Amendment challenge in part because liability attached only if a "knowingly false" representation was made "with the intent to mislead the listener, and succeeded in doing so") (emphasis added)).

To be sure, the Solicitor General argued in Nike that, while the First Amendment prohibited statutes allowing suits by private litigants absent reliance and actual injury, such statutes would be permissible where the government has the "exclusive authority to prosecute" because "institutional constraints" insure that public enforcement will be neutral and not chill unpopular speech. U.S. Nike Brief at 22-23 (emphasis added): Putting this erroneous distinction aside,[44] it is true that the focus of government-filed suits often is to prevent deceptive and fraudulent practices and therefore a strict showing of reliance would be impractical; nonetheless, as the Solicitor General pointed out, even in such cases, the

[44] There is nothing to the government's contention that the First Amendment is somehow more threatened by private rights of action than government prosecutions. To the contrary, the "government's direct enforcement of its own laws" was the most basic concern "of the First Amendment, which by its terms applies only to governmental action." Philadelphia Newspapers *Inc. v. Hepps*, 475 U.S. 767,777 (1986).

government must demonstrate that the challenged claims are "important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Id.* at 16 (quotations omitted). Where, as here, the alleged fraud was ongoing for decades, and tobacco's dangers have also been a matter of mandated warnings and overwhelming public awareness for decades, the complete absence of any evidence of consumer reliance defeats any potential showing that the statements here were material. This is particularly true because the FTC -- the agency charged with protecting tobacco consumers against deceptive practices -- never found or alleged that any of the statements condemned by the district court misled consumers. Thus, under the government's own analysis in Nike, the judgment violates the First Amendment because it penalizes and prospectively prohibits speech about a commercial product without any showing that the speech made any difference, or even was likely to make a difference, to consumer choice.

As the government explained in *Nike*, these First Amendment protections apply to both "commercial" and "non-commercial" speech. Id. at 14. In any event, the vast majority of statements found to be false here are more than mere "commercial" speech, the test for which is whether the statement "does no more than propose a commercial transaction." Bolger v. *Young Drug* Products *Corp.*, 463 U.S. 60, 66 (1983); see *also Board of Trustees v. Fox*, 492 *U.S.* 469,473-74

(1989) (reaffirming that the test is "whether it proposes a commercial transaction"); Kansas *v.* United States, 16 F.3d 436,442 (D.C. Cir. 1994) (commercial speech is "speech which does no more than propose a commercial transaction") (quotations omitted). Here, the vast majority of the speech at issue -- for example, the press releases relied upon by the district court -- did not propose a commercial transaction or even focus on specific cigarette brands. See *supra* at 56, IX. Rather, most of the speech was directed at the public and lawmakers, and did not request consumers to purchase cigarettes. Central Hudson, 447 U.S. at *561*.[45]

PART THREE: ERRORS RELATING TO THE APPLICATION OF RICO

The district court erred in applying the specific strictures of RICO. Specifically, the district court failed to make the findings necessary to support the existence of a structured RICO "enterprise" or that defendants conducted the affairs of any enterprise through the alleged racketeering acts. The court also erred in holding that defendants conspired to violate RICO under 18 U.S.C. § 1962(d),

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[45] At a minimum, the noncommercial speech here is "inextricably intertwined" with commercial speech and, as the United States recently acknowledged, the Supreme Court has held "that the exacting First Amendment standards applicable to noncommercial speech apply as well to ... limitations on commercial speech" when the two forms of speech are so "intertwined." Brief of United States as Amicus Curiae Supporting Vacatur at 14, Credit *Suisse Secs. v.* Billing, 127 S.Ct. 2383 (quoting Riley *v.* Nat'I Fed'n of Blind, 487 U.S. 781,796 (1988)).

and thus the portion of the judgment relating to that section also should be reversed.

X. THE DISTRICT COURT ERRED IN FINDING A RICO "ENTERPRISE" AND THAT DEFENDANTS CONDUCTED ITS AFFAIRS THROUGH THE ALLEGED RACKETEERING ACTS

To impose liability under § 1962(c), a person must associate with an "enterprise" and operate or manage its affairs through a pattern of racketeering activity. See Reves, 507 U.S. at 185. "[T]he enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity." United States *v.* Richardson, 167 F.3d 621,625 (D.C. Cir. 1999). The "enterprise's" "central role ... under RICO cannot be overstated." United *v. DeFries*, 129 F.3d 1293, 1310 (D.C. Cir. 1997). "[W]hen [as here] the prosecution is based on an illegitimate association in fact, the proof must establish [it]." *United* States *v.* Neapolitan, 791 F.2d 489,499 (7th Cir. 1986). This element, moreover, is the "most difficult to show" because of the "proper attention [that must be] given to the organization and continuity requirement.." *Perholtz*, 842 F.2d at 362-63.

Here, the district court never identified the RICO "enterprise." Although the district court used the term "enterprise" fifty-three times in its findings of fact, it expressly stated that "these Findings [do] not imply that Defendants' activities meet the statutory definition" of that term. [Op. 15 n.9]. And in its conclusions of law, the district court's constantly shifting definition of the "enterprise"

encompassed no less than the entirety of the tobacco industry and thus the actions of every one of the tens of thousands of employees in that industry. The court, for example, at times characterized the enterprise as "individual Defendants working together ... through TIRC/CTR, the Tobacco Institute, and an array of other overlapping entities." [Op._1536]. At other times, however, the court called it "a group of business entities and individuals associated-in-fact, including Defendants to this action, their agents and employees, and other organizations and individuals." [Op._1528]. But the court's most telling characterization of the "enterprise" is that it is "[l]ike an amoeba" that constantly "changed its shape to fit its current needs." [Op._1532]. This amorphous concept of "enterprise" essentially eliminates the requirement of a separate "enterprise." Because no distinction was made between defendants and the "enterprise," the court erroneously treated any purported act by any defendant as furthering the enterprise's affairs. This approach cannot be squared with the requirements for proving a RICO "enterprise."[46]

Indeed, here, the district court defined the enterprise entirely in terms of an asserted "overarching scheme to defraud existing and potential smokers." [Op._1501]. By doing so, it effectively eliminated the requirement that the

[46] To the extent the "enterprise" here is deemed to be TI and CTR, they no longer exist, so there is no basis for the court's injunctive relief. See supra at 61.

government prove the existence of an "entity separate and apart from the pattern of [racketeering] activity in which it engages." United States *v.* Turkette, 452 U.S. 576, 583 (1981) (emphasis added). By collapsing the concept of "enterprise" with the concept of the alleged joint "scheme" to engage in various frauds, the,district court effectively reduced RICO to a civil enforcement mechanism for an alleged mail and wire fraud conspiracy simpliciter. But an enterprise requires."some structure, to distinguish [it] from a mere conspiracy." Richardson, 167 F.3d 621 at 625. [47]

A review of the basic elements of a RICO "enterprise" demonstrates the serious flaws in the district court's analysis.

First, the district court defined the enterprise's "common purpose" at such a level of generality as to render it meaningless. "Requiring that members of an enterprise have a 'common purpose' limits the potentially boundless scope of the word 'enterprise'; it distinguishes culpable, from non-culpable, associations."

[47] The district court erroneously believed that Perholtz supports this amorphous conception of "enterprise."[Op._1529-30]. Perholtz merely holds that the evidence used to prove the "enterprise" requirement may overlap "with the proof of the pattern." 842 F.2d at 362-63. To the extent that Perholtz were to be read as supporting the district court's extraordinarily flexible concept of "enterprise," defendants respectfully submit that the Eighth Circuit's stricter definition of "enterprise" is the correct one. See *Asa-Brandt, Inc. v. ADM Investor* Sews., *Inc.*, 344 F.3d 738,752 (8th Cir. 2003); *cf.* Odom *v. Microsoft Corp.*, 486 F.3d 541, 549-51 (9th Cir. 2007) (en banc) (noting that there is at least a 4-4 circuit split on this issue).

Ryan *v.* Clemente, 901 F.2d 177, 180 (1st Cir. 1990) (Breyer, J.); see also First Capital Asset Mgmt. Inc. v. Satinwood Inc., 385 F.3d 159, 174 (2d Cir. 2004) (RICO "requires that a nexus exist between the enterprise and the racketeering activity .... [T]he individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes."). The Supreme Court has thus repeatedly "said that [RICO] liability 'depends on showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs.'" *Cedric Kushner*, 533 U.S. at 163 (quoting Reves, 507 U.S. at 185) (emphasis in original); see also Yellow Bus Lines, 913 F.2d at 954 (RICO sought "to outlaw the commission of the predicate acts only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] in the conduct of [the] enterprise's affairs.'") (emphasis added).

Here, however, the district court found a "common purpose" in defendants' overarching goal to "maximize the profits of the cigarette company Defendants" and the fact that defendants engaged in similar conduct (*e.g.*, all sold "light" cigarettes) [Op. 1530-31]. But because "[a]ll for-profit corporations ... have a motive to ... increase profits," this fact cannot possibly "exclude independent behavior." In re Managed Care Litig., 430 F. Supp. 2d 1336, 1354-55 (S.D. Fla. 2006). Similarly, mere parallel conduct cannot establish an "enterprise" where, as here, such conduct is "in line with a wide swath of rational and competitive

business strategy unilaterally prompted by common perceptions of the market." See Bell Atlantic *Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007); see also, *e.g.*, *Begala v.* PNC Bank, Ohio, *N.A.*, 214 F.3d 776, 781-82 (6th Cir. 2000); *Libertad v.* Welch, 53 F.3d 428,443 (1st Cir. 1995); United States v. *Bledsoe*, 674 F.2d 647, 666-67 (8th Cir. 1982); *In* re Managed Care Litig., 430 F.Supp. 2d at 1345. No one, for example, contends that Coke and Pepsi market similar diet colas through a joint "enterprise." In other words, since each defendant corporation seeks to maximize its own profits, behavior designed to "maximize profits for the tobacco industry" is not a reasonable ground for distinguishing between actions done on behalf of the "enterprise's affairs" and those furthering their "own affairs." Cedric *Kushner,* 533 U.S. at 163 (emphasis in original). Indeed, under the court's rationale, any industry could be found to be a RICO "enterprise" since the participants in every industry aim to maximize their profits and engage in parallel business conduct.

Second, to show the requisite "continuity" and "organization," "there [must] be a certain core of constant personnel" demonstrating that the "'associates are bound together ... [in] a continuing unit.'" United States *v. Hoyle*, 122 F.3d 48, 51 (D.C. Cir. 1997) (quoting *Perholtz*, 842 F.2d at 362). This is necessary to determine whether "a nexus exist[s] between the enterprise and the racketeering activity." First *Capital* Asset *Mgmt.*,385 F.3d at 174; see also Bachman v. Bear,

Stearns, & Co., 178 F.3d 930,932 (7th Cir. 1999) (Posner, C.J.). A corporation is an inanimate object that cannot itself decide to commit crimes, divide responsibilities, or establish a chain of command; it can do such things only through its agents and employees. See United States v. White, 116 F.3d 903,925 (D.C. Cir. 1997); United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994). A corporation's employees, however, obviously undertake many activities that are for the sole benefit of the corporation, not some joint "enterprise" comprised of the corporation and its competitors. Thus, absent identification of the individuals who either committed the predicate acts or managed the "enterprise," it is, again, impossible to discern whether the alleged frauds were undertaken in "the conduct of the 'enterprise's affairs, not just [each corporate-defendant's] own affairs." *Cedric Kushner*, 533 U.S. at 163 (emphasis in original). Here, however, the district court never identified any specific individuals whose acts were purportedly attributable to the enterprise.

The absence of any "continuity" or "organization" or "common purpose" is also demonstrated by the lack of findings on the enterprise's goals or structure after December 1953. The district court claimed that, in a December 1953 meeting, "executives of five defendants" purportedly "agreed to launch their long-term campaign to deceive and mislead." [Op. 1534-35]. But even if true (it is not), the district court never hints how the "enterprise" decided to commit the fraudulent

"schemes" that could not have been contemplated in 1953. Nicotine manipulation claims were not even lodged against defendants until 1994. *See* [Op._637-46]. The first denial of marketing to youth was 1962 (RA 117), the first alleged assertion that nicotine was not addictive was 1983 (RA 56), the only alleged denial that ETS caused adverse health effects was 1977 (RA 42), and the first of the alleged acts relating to low tar cigarettes did not occur until 1967 (RA 119). [Op._App.III._10, 13, 26, 27]. The cCourt cited no evidence of some subsequent agreement among defendants to engage in joint criminal activity regarding those issues.

Indeed, in its nearly 200 pages of factual findings relating to the alleged enterprise, the district court never once suggested that the affairs of the enterprise related in any way to low tar cigarettes. *See* [Op._15-213].[48] To the contrary, defendants have always vigorously competed against each other in the development, advertising, and marketing of reduced-yield cigarettes. Likewise, although each manufacturing defendant's executive testified before Congress that,

[48] The only arguable joint conduct concerning low tar cigarettes involved the manufacturing defendants' and TI's participation in the political process: testimony by defendants' executives while sitting on the same congressional panel, *see [Op.* 872-75]; statements by defendants to the FTC and FDA, [Op._883, 868-70,874-875, and 884-885]; and defendants' joint submissions to a government agency regarding the FTC Method, *[Op._*867-69,873,8861. There is no finding or evidence that these statements were false and, in any event, they are constitutionally protected petitioning activities. *See supra* at IX(A).

contrary to the accusations of then-FDA Commissioner David Kessler, they did not spike their cigarettes to increase nicotine levels, ***see supra*** at VI(B), there is no evidence that these statements reflected joint activity as opposed each defendant's independent, individual interest in responding to Dr. Kessler's accusations. Nor did the district court find that defendants acted collectively in the suppression of research or destruction of documents. [Op. 1408] ("The evidence of Defendants' suppression of research and destruction of documents consists of events which often seem to be unrelated and to lack any unifying thread."). There is, therefore, absolutely no basis upon which the district court could have found a "nexus" between any "enterprise" and these so-called schemes of fraud.

In short, the district court failed to make the findings necessary to establish that defendants banded together in a structured RICO "enterprise" or that there was a "nexus" between that "enterprise" and the alleged predicate acts.

XI. THE DISTRICT COURT ERRED IN RULING THAT DEFENDANTS VIOLATED 18 U.S.C. § 1962(d)

For all of the reasons stated above, the district court erred in ruling that defendants violated 18 U.S.C. § 1962(d). That section of RICO makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Id. Because the district court's ruling that defendants violated § 1962(c) was predicated on the legal errors described above, its ruling that

defendants violated § 1962(d) must also be reversed. ***See Nolen v. Nucentrix Broadband Networks Inc.***, 293 F.3d 926,930 (5th Cir. 2002) (the "failure to plead the requisite elements of either a Section 1962(a) or a Section 1962(c) violation implicitly means that [plaintiff) cannot plead a conspiracy to violate either section"); ***Simon v. Value Behavioral Health, Inc.***, 208 F.3d 1073, 1084 (9th Cir. 2000) (same); ***see also Beck v. Prupis, 529 U.S.*** 494, 503-05 (2000).[49]

PART FOUR: REMEDIAL ISSUES

The district court also made numerous errors in imposing relief.

XII. THE DISTRICT COURT ERRED BY REQUIRING THAT DEFENDANTS ISSUE "CORRECTIVE COMMUNICATIONS"

The district court's remedial order requires the companies to make a series of "corrective" communications, ranging from the health effects of smoking to the companies' alleged improper manipulation of cigarette design. [Order 4-9]. This coerced speech exceeds the district court's remedial powers under § 1964(a),

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[49] Moreover, the district court erred in holding defendants liable under section 1962(d) simply on a showing that "each Defendant individually agreed to commit at least two Racketeering Acts," [Op. 1591], instead of finding, as required, "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts." ***United States v. Neapolitan,*** 791 F.2d 489,499 (7th Cir. 1986), ***abrogated in part on other grounds, Nat'l Org. for*** Women, ***Inc. v. Scheidler***, 510 ***U.S.*** 249 (1994). Indeed, the district court failed even to identify any individual who understood the scope of the alleged enterprise and agreed to participate in its operation or management. ***See Hernandez*** v. ***Balakian, 480*** F. Supp. 2d 1198,1214 (E.D. Cal. 2007).

conflicts with *Microsoft*, and violates the First Amendment, the Labeling Act, and due process.

A. Section 1964(a) And *Microsoft*

Under 18 U.S.C. § 1964(a), the district court's remedies must be shown to prevent and restrain RICO violations. *Philip* Morris, 396 F.3d at 1190. This is also mandated by this Court's ruling in United States *v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), which requires the district court to "base its relief on some clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended." ***Id.*** at 105.

The "corrective" communications ordered by the district court do not meet this standard because they are not intended to "prevent and restrain" *future* conduct. Instead, by definition, a "corrective" statement is designed to correct the effects of *past* conduct. Indeed, the court itself acknowledged the backward-looking character of the remedy, by contending that it was "required to correct" defendants' prior "campaign of deceptive or misleading marketing." [Op. 1633]. And the court confirmed the backward-looking character of the remedy by relying on two of this Court's decisions, which upheld corrective advertising under the First Amendment if, and only if, it was necessary to change an existing "false and material belief' among the public caused by past "deceptive advertisement[s]."

Warner-Lambert Co. v. ***FTC, 562*** F.2d 749,762 (D.C. Cir. 1977); ***see also*** *Novartis Corp. v. **FTC, 223*** F.3d 783,787-88 (D.C. Cir. 2000) (affirming finding "that the challenged [past] advertising played a 'substantial role' in creating or reinforcing a false belief").

The government argued below that such corrective statements would serve to "prevent and restrain" future RICO violations by inoculating the public against potential future frauds. ***See, e.g***, [DN_4847_11]. But this too is wrong, because the government never explained how -- let alone proved that -- "corrective communications" would deter future false statements, particularly in light of the prohibitions of the MSA and the ubiquitous information already available to the public on the risks of smoking.

B. First Amendment

Even if the district court's order is intended to correct lingering consumer confusion, it still violates the First Amendment. Indeed, the corrective advertisements remedy fails even the ***Central Hudson*** test for commercial speech. There was no finding that the government's interests are substantial or that the remedy truly advances these interests in a direct and material way, particularly given that the corrective advertisements add nothing to the health warnings already on every package of cigarettes and the massive public education campaigns already

being conducted by the government, defendants, and others. See *Warner-Lambert*, 562 F.2d at 762; Novartis *Corp.*, 223 F.3d at 787.

In any event, the relatively lenient commercial speech standard is not applicable here. That standard applies to coerced speech only if the coerced speech is a commercial "advertisement" and, then, only to "a requirement that [a party] include in his advertising purely factual and uncontroversial information." Zauderer v. *Office* of Disciplinary Counsel of Supreme Court of *Ohio*, 471 U.S. 626, 651 (1985). Thus, Warner-Lambert Co. and Novartis *Corp.*, permitted FTC corrective advertising orders only because, in their absence, the "advertisements themselves [would be] part of a continuing deception of the public." Warner-Lambert, 562 F.2d at 769 (emphasis added). Here, however, the district court's corrective advertising goes well beyond mandating uncontroversial disclosures relating to commercial speech in existing advertisements. It requires publication of freestanding statements, some of which defendants vigorously dispute, published in newspapers, television, and internet sites, wholly unconnected to any commercial advertisements. Accordingly, the ordinary First Amendment standard for coerced speech applies -- a standard that not even the district court contended can be satisfied here. See, *e.g.*, Riley, 487 U.S. at 800-01; United States v. *Nat'l Soc'y of Prof'l* Eng'rs, 555 F.2d 978,984 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679

(1978); *Nat'l Comm'n* on Egg Nutrition *v.* FTC, 570 F.2d 157, 164-65 (7th Cir. 1977).

C. Countertop And Header Displays

The district court also erred in requiring that defendants force retailers to maintain large and obtrusive counter-top and header displays containing warning information. The order requires the counter-top displays to be "free-standing display[s] with a minimum height of 30 inches and a minimum width of 18 inches that [are] placed on the counter at retail shops within the line-of-sight of any customer who is standing in line for the register." [Op._App.I_2]. And header displays are "banner[s] that [are] displayed by a retailer at the top of a cigarette display case, which may show a cigarette brand name, cigarette brand imagery, prices for cigarettes, or promotional offers to consumers." [Op._App.I_3].

The district court's order appears to require that each enjoined defendant separately require the *same* retail stores to display substantively identical, but separate, counter-top and header signs. [Order_6]. The court made no pretense of justifying such a multiple display requirement, and this duplication of warnings on large signs on the same retail countertops is facially redundant and excessive, and cannot possibly be justified under the last two prongs of Central Hudson. See, *e.g.*, *Zauderer*, 471 U.S. at 651; Cent. Hudson, 447 U.S. at 566.

The retail display order also would improperly impose severe burdens upon innocent third-party retailers. *See* Cook Inc. v. Boston *Scientific Corp.*, 333 F.3d 737,744 (7th Cir. 2003) ("[I]n determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on innocent third parties."); accord, *e.g.*, Nat'*l Wildlife* Fed'n v. *Burford*, 835 F.2d 305,326 (D.C. Cir. 1987); Population *Inst. v. McPherson*, 797 F.2d 1062, 1067 (D.C. Cir. 1986). Defendants have contractual relationships with hundreds of thousands of retailers. See [DN_5746_Ex.C_9]. Compliance with the display requirements, which would typically require signs exceeding the height of most Americans when placed atop store counters, would severely impede store clerks' ability to view their stores, a significant concern of retailers. [DN_5746_Ex.C_10-11, Ex.1].

Moreover, many retailers consider "[c]ountertop space -- particularly the most visible space at the point of sale -- [to be] the most valuable retail space in [their] retail outlets." [DN_5746_Ex.I_2]; [DN_5746_Ex.H_3]. Thus, displaying three or more separate, substantively identical signs meeting the large minimum dimensional requirements of the district court's order would force retailers either to "forgo the revenue from sales of items that are currently displayed on [their] countertops in favor of the displays required by the Order or to forgo the revenue from the merchandising agreements that [they] have with cigarette manufacturers." [DN_5746_Ex.I_2]; [DN_5746_Ex.H_3].

D. Labeling Act

The district court's requirement that corrective communications be placed on cigarette packs through package onserts, [Order_5], also runs afoul of the Labeling Act. The Labeling Act expressly provides that "[n]o statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package." 15 U.S.C. § 1334. The Supreme Court has made clear that, by enacting the Labeling Act, "Congress unequivocally preclude[d] the requirement of any additional statements on cigarette packages beyond those provided" by the Act. *Reilly*, 533 U.S. at 542.

E. Lack Of Fair Notice

The district court's remedies should be reversed because they were imposed without adequate notice and opportunity to respond as required by due process and, consequently, the record is devoid of evidence that these remedies would be effective in preventing and restraining future RICO violations. See *Microsoft*, 253 F.3d at 101-03 (noting the "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings"); *see* also United *States v. Armour &* Co., 402 U.S. 673,682 (1971) (due process guarantees parties the right to notice and an opportunity to litigate the issues presented); Lindsey *v. Normet*, 405 U.S. 56, 66 (1972).

Although the government raised the prospect of corrective communications before trial, it repeatedly refused to identify either their content or the manner in which they would be made. Indeed, during the final remedies phase of the trial, the only mention of corrective communications came from a government witness who endorsed the general idea of such a remedy but refused to discuss it in detail. [Ericksen_WD_11]; [5/16/05_Tr._21061]. After trial and closing argument, the government presented a proposed remedial order that *still* failed to identify the precise nature of the corrective communications, but finally set forth five general categories of corrective communications and recommended an extensive publication and distribution campaign. [DN_5531_16-23]. No evidence was ever introduced at trial on any of these points. Defendants objected to the government's late disclosure on the ground, among others, that they were deprived of a hearing and submitted an offer of proof that outlined the evidence they would have offered if the proposed remedies had been disclosed during trial. [DN_5657_9-10]. The district court adopted the government's proposal.

This violates *Microsoft.* The extensive program of publication and distribution required by the remedial order -- including publication in more than three dozen newspapers and magazines, prime time television advertising, onserts on packages of cigarettes, and signs in retail establishments throughout the United States -- *was never the* subject of any testimony or evidence at trial. It is simply

adopted wholesale from the government's post-trial submission. As detailed in defendants' Emergency Motion to Stay, the result was simply to ignore the tens of millions of dollars of costs imposed upon defendants by the campaign and the vast burdens imposed upon third party retailers.

Moreover, because the district court failed to hold a hearing on this issue, the record is devoid of evidence that these "corrective communications" remedies would be effective in preventing and restraining future RICO violations. Indeed, the government submitted a post-trial brief admitting that the record was insufficient to support any particular wording for corrective communications, requesting instead that the district court delegate the task of devising the "corrective statements" to a third party. [DN_5782] (The final remedial order fails to indicate precisely what defendants must state in the corrective communications.)

Likewise, there was no hearing with respect to many other remedies imposed by the district court -- remedies that the government requested after trial -- involving such matters as asset transfer restriction and document disclosure. Consequently, there was no evidence or findings that these remedies would prevent and restrain future RICO violations, and defendants never had the chance to challenge the remedies as duplicative of existing disclosure obligations, unnecessary to prevent future RICO violations, unduly burdensome, and in some

cases, impossible to follow.[50] *See also Califano v. Yamasaki*, 442 U.S. 682,702 (1979) ("injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief').

XIII. THE DISTRICT COURT'S GENERAL INJUNCTIONS ARE IMPERMISSIBLY VAGUE

Under the district court's order, defendants are "permanently enjoined from 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." [Order_2]. Defendants are also "permanently enjoined 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 is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." [Order–31. These amorphous proscriptions come nowhere close to specifying the precise acts enjoined and, thus, leave defendants to guess, at the peril of criminal contempt, whether their conduct conforms with the requirements of the Order.[51] In

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[50] [DN_5746_Exs.D, F, GI.

[51] In denying defendants' post-judgment motion for clarification, see supra at 13-14, the district court relied on three cases that are inapposite. [DN_5800_33. Two did not involve either RICO or an "obey the law" injunction. *See S.C. Johnson & Son, Inc. v. Clorox* Co., 241 F.3d 232 (2d Cir. 2001); *Prof'l Ass'n of Coll. Educators v. El Paso* County Cmty. *Coll.* Dist., 730 F.2d 258 (5th Cir. 1984).

addition, these proscriptions unconstitutionally threaten to chill 'defendants' exercise of First Amendment rights.

Federal Rule of Civil Procedure 65(d) expressly mandates that "[e]very order granting an injunction ... shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). The Supreme Court has emphasized that "the specificity provisions of Rule 65(d) are not mere technical requirements": "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." Schmidt v. *Lessard*, 414 U.S. 473, 476 (1974). The district court's vague order plainly runs afoul of these requirements. See SEC v. Savoy Indus., *Inc.*, 665 F.2d 1310, 1318-19 (D.C. Cir. 1981) (reversing injunction ordering defendant not "to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person"); Gulf Oil *Corp. v. Brock*, 778 F.2d 834, 843 (D.C. Cir. 1985);

Indeed, in Clorox, the Second Circuit acknowledged that "an injunction must be more specific than a simple command that the defendant obey the law." Clorox, 241 F.3d at 240. And the third case, United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), did not address whether the injunction at issue was an invalid "obey-the-law" injunction. See id. at 1183-85.

Common Cause *v.* Nuclear Regulatory *Comm'n*, 674 F.2d 921,926-27 (D.C. Cir. 1982).

The generalized injunction to obey the law in the face of more than 1,600 pages of findings also violates the First Amendment and due process. Although. some of these findings are express prohibitions, most simply reflect the district court's disapproval of various aspects of defendants' business practices -- for example, using white filter paper for cigarettes and selling cigarettes at price discounts -- that are not expressly found to be fraudulent. Thus, the court's decision provides no way for defendants to know precisely what conduct is barred -- making it impossible for defendants to conform their speech to the court's prohibitions without simply refraining from speaking at all. See Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

XIV. THE INJUNCTION IMPERMISSIBLY APPLIES TO DEFENDANTS' SUBSIDIARIES

The injunction purports to bind every single subsidiary of each defendant: "This Final Judgment and Remedial Order applies to each of the Defendants ... and to each of their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors." [Order–21 (emphasis added). This sweeping injunction, which attempts to include within its ambit both domestic

and foreign non-party subsidiaries, violates Fed. R. Civ. P. 65(d) and due process and so should be vacated.

Under Rule 65(d), "[e]very order granting an injunction ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert orparticipation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d) (emphases added). Rule 65(d) expressly omits subsidiaries, thereby prohibiting both the application of injunctive relief to non-party subsidiaries based merely on their corporate affiliation with a party and attributing the conduct of non-party subsidiaries to a corporate parent.

There are only two exceptions where an injunction extends to reach a non-party subsidiary: where the subsidiary (1) is an "agent" of an enjoined party or (2) is violating the injunction while "in active concert or participation" with an enjoined party. See, *e.g.*, Additive Controls & Measurement *Sys., Inc.* v. Flowdata, *Inc.*, 154 F.3d 1345, 1351 (Fed. Cir. 1998) (quoting *Alemite* Mfg. Corp. v. *Staff*, 42 F.2d 832,833 (2d Cir. 1930). Neither the government nor the district court has cited to any evidence sufficient to satisfy either of these exceptions.

First, the district court did not find that any of the non-party subsidiaries are acting as "agents" of a named defendant. Corporate affiliates are presumed to operate separately and to exist as independent legal entities. Dole Food *Co.* v.

Patrickson, 538 U.S. 468,475 (2003). Absent any evidence or findings sufficient to overcome this presumption, the court lacked authority to disregard corporate formalities, enjoin non-party subsidiaries, or attribute the conduct of non-party subsidiaries to their corporate parents.

Second, it is long-settled that an injunction cannot reach a non-party subsidiary under the "active concert or participation" language of Rule 65(d) unless there is a showing that its named parent is actually violating the injunction in the first instance. See, *e.g., NBA* Properties, *Inc.* v. Gold, 895 F.2d 30, 32-33 (1st Cir. 1990) (Breyer, J.); *Herrlein* v. *Kanakis*, 526 F.2d 252,253-54 (7th Cir. 1975); United *Pharmacal Corp. v.* United States, 306 F.2d 515, 517-18 (1st Cir. 1962) (quoting *Alemite Mfg. Corp.*, 42 F.2d at 833 (L. Hand, J.). There exists no authority for the proposition that, notwithstanding that a named parent company is not violating the injunction, its non-party subsidiaries may still be properly enjoined. Similarly, absent any evidence overcoming the presumption of corporate autonomy, a court may not hold a corporate parent -- that is not violating the injunction -- responsible for the conduct of its non-party subsidiaries. To allow such an injunction would improperly permit courts "to bootstrap" the conduct of non-party subsidiaries "into a violation by the [named parent]." Gold, 895 F.2d at 33.

Rule 65(d)'s scope is so limited precisely to prevent what the district court. attempted to do, for example, to BWH's foreign subsidiaries, which are completely separate and independent corporate entities operating solely in their respective foreign markets. See [JD_013295_146-53, 177]. There was no showing that the post-merger BWH, which no longer manufactures, markets, or sells tobacco, is violating the injunction. As a result, BWH's non-party subsidiaries simply cannot act in "concert or participation" with BWH to violate the injunction. Similarly, where BWH is not violating the injunction, it cannot be held accountable for conduct by its non-party subsidiaries.

The district court's attempt to enjoin non-party subsidiaries also violates due process. In Zenith Radio Corp. v. *Hazeltine* Research, *Inc.*, 395 U.S. 100, 108-12 (1969), the Supreme Court held that it was a violation of due process to enter a judgment against the parent corporation of a defendant, when the parent was not served with process and did not appear at the trial. Under this same reasoning, the district court's attempt to enjoin all of defendants' non-party subsidiaries likewise violates due process. This violation is particularly acute as to defendants' non-party foreign subsidiaries, entities that were never served with process, never had a chance to litigate personal jurisdiction, and over which the district court lacked personal jurisdiction. [DN_5800_7] (acknowledging that the injunction only encompassed those entities "over whom the Court has personal jurisdiction").

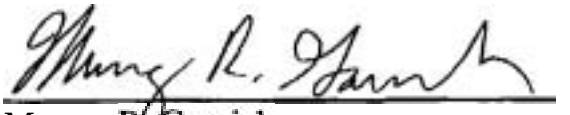
By attempting to extend its injunction to defendants' subsidiaries, whether domestic or foreign, the district court violated both Rule 65(d) and the due process clause. Accordingly, the injunction must be vacated.

CONCLUSION

For the reasons stated above, defendants respectfully request that this Court reverse the judgment in its entirety and remand the case with instructions to enter judgment for defendants.

Dated: August 10,2007

Respectfully submitted,



Murray R. Garnick
David S. Eggert
Robert A. McCarter
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

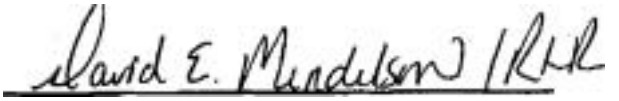
Attorneys for Defendant-Appellants Philip Morris USA Inc. and Altria Group, Inc.

Guy Miller Struve
Charles S. Duggan
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4192
Facsimile: (212) 450-3192

Attorneys for Defendant-Appellant
Altria Group, Inc.

Robert F. McDermott, Jr.
Michael A. Carvin
Peter J. Biersteker
Geoffrey K. Beach
Noel J. Francisco
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

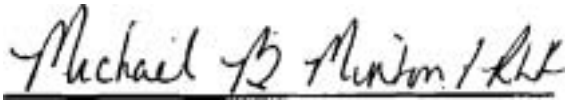
Attorneys for Defendant-Appellant
R. J. Reynolds Tobacco Company



David E. Mendelson
John K. Crisham
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

David M. Bernick
Stephen R. Patton
Renee D. Smith
KIRKLAND & ELLIS LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601
Telephone: (312) 861-2000
Facsimile: (312) 861-2200

Attorneys for Defendant-Appellant
Brown & Williamson Holdings, Inc.



Michael B. Minton
Bruce D. Ryder
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693
Telephone: (314) 552-6000
Facsimile: (314) 552-7597

Attorneys for Defendant-Appellant
Lorillard Tobacco Company

Bruce G. Sheffler
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Attorneys for Defendant-Appellant
British American Tobacco
(Investments) Limited

Joseph Kresse
COVNGTON AND BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 662-5036

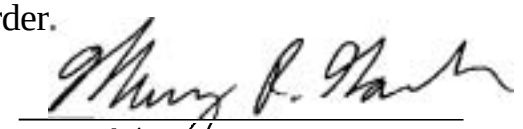
Attorneys for Defendant-Appellant
The Tobacco Institute, Inc. . .

Deborah Israel
WOMBLE CARLYLE SANDRIDGE
& RICE PLLC
401 I St., N.W., Suite 700
Washington, D.C., 20005
Telephone: (202).487-6900
Facsimile: (202) 261-0034

Attorneys for Defendant-Appellant
Council for Tobacco Research-USA,
Inc.

CERTIFICATE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)(i)

I hereby certify that this brief contains 32,766 words (exclusive of the certificate as to parties, rulings, and related cases, the table of contents, the table of authorities, the glossary, and this certificate), and that the brief (taken together with the other briefs for Defendants-Appellants) therefore complies with the word limit set forth in this Court's scheduling order.



Murray R. Garnick

CERTIFICATE OF SERVICE

The foregoing Proof Brief for Defendants-Appellants was served on counsel for the United States of America and the Intervenors on August 10, 2007 by hand delivery to the following:

Mark Freeman
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7228
Washington, D.C. 20530
(202) 514-5714

Counsel for the United States of America

Katherine **A.** Meyer
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1075
(202) 558-5206

Counsel for Intervenors-Appellees

And was served on counsel on August 10, 2007 by U.S. Mail to the following:

Peter **A.** Woolson
Robinson Woolson O'Connell
217 East Redwood Street
Suite 1500
Baltimore, Maryland 21202
(410) 625-0000

Leonard A. Feiwus
Kasowitz, Benson, Torres & Friedman
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Defendant Liggett Group; Inc.

Theodore B. Olson
Matthew D. McGill
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington D.C., 20036
(202) 955-8500

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

Andrew Gerald McBride
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Daniel J. Popeo
Paul Douglas Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C., 20036
(202) 588-0302

Attorneys for Amici Curiae Wash ngton Legal Foundation and National Association of Manufacturers

Scott A. Sinder
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202)-429-3000

Attorney for Amicus Curiae National Association of Convenience Stores

Ryan L. Richardson

AMENDMENTS

1990—Pub. L. 101447, title XXXV, § 3559, Nov. 29, 1990, 104 Stat. 4927, struck out "racketeering" after "Prohibited" in item 1962.

1970—Pub. L. 91452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961 to 1968.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 3582, 3663 of this title; title 7 section 12a.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 669 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "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;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activ-

ity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered In any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, 'document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub. L. 91452, title IX, §901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub. L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465; Pub. L. 95-598, title III, §314(g), Nov. 6, 1978, 92 Stat. 2677; Pub. L. 98-473, title II, §§901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub. L. 98-547, title II, $205, Oct. 25, 1984, 98 Stat. 2770; Pub. L. 99-570, title I, §1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub. L. 99-646, §50(a), Nov. 10, 1986, 100 Stat. 3605; Pub. L. 100-690, title VII, §§7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4308, 4402, 4489; Pub. L. 101-73, title IX, $968, Aug. 9. 1989, 103 Stat. 506; Pub. L. 101-647, title XXXV, §3560, Nov. 29,1990. 104 Stat. 4927; Pub. L. 103-322, title IX, §90104, title XVI, §160001(f), title XXXIII, §330021(1), Sept. 13, 1994, 108 Stat. 1987,2037. 2150; Pub. L. 103-394, title III, §312(b), Oct. 22, 1994, 108 Stat. 4140; Pub. L. 104-132, title IV, $433. Apr. 24,1996,110 Stat. 1274; Pub. L. 104-153, §3, July 2, 1996, 110 Stat. 1386; Pub. L. 104-208, div. C, title II, §202, Sept. 30, 1996, 110 Stat. 3009-565; Pub. L. 104-294. title VI, §§601(b)(3), (1)(3), 604(b)(6), Oct. 11,1996, 110 Stat. 3499, 3501, 3506.)

REFERENCES IN TEXT

Section 102 of the Controlled Substances Act. referred to in par. (1)(A), (D), is classified to section 802 of Title 21. Food and Drugs.

The Currency and Foreign Transactions Reporting Act, referred to in par. (1)(E), is title II of Pub. L. 91-508. Oct. 26, 1970, 84 Stat. 1118. which was repealed and reenacted as subchapter II of chapter 53 of Title 31, Money and Finance. by Pub. L. 97-258, §4(b), Sept, 13, 1982, 96 Stat. 1067. the first section of which enacted Title 31.

The Immigration and Nationality Act. referred to In par. (1)(F), is act June 27, 1952. ch. 477. 66 Stat. 163, as amended, which is classified principally to chapter 12 (§1101 et seq.) of Title 8, Aliens and Nationality. Bettions 274, 277, and 278 of the Act are classified to — tions 1324. 1327, and 1328 of Title 8. respectively. For complete classification of this Act to the Code. see Short Title note set out under section 1101 of Title 8 and Tables

The effective date of this chapter, referred to in par. (5). is Oct. 15, 1970.

AMENDMENTS

1996—Par. (1)(B). Pub. L. 104-294, §604(b)(6), amended directory language of Pub. L. 103-322, §160001(f). See 1994 Amendment note below..

Pub. L. 104-294, §601(1)(3), substituted "2260" for "2258".

Pub. L. 104-208 struck ont "if the act indictable under section 1028 was committed for the purpose of financial gain" before ", section 1029". inserted "section 1425 (relating to the procurement of citizenship or nationalization unlawfully),, section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers)," after "section 1344 (relating to financial institution fraud).", struck out "if the act indictable under section 1542 was committed for the purpose of financial gain" before ", section 1543", "if the act indictable under section 1543 was committed for the purpose of financial gain" before ", section 1544", "If the act indictable under section 1544 was committed for the purpose of financial gain" before ", section 1546", and "if the act indictable under section 1546 was committed for the purpose of financial gain" before ", sections 1581–1588".

Pub. L. 104-153 inserted ", section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright). section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances). section 2320 (relating to trafficking in goods or services bearing counterfelt marks)" after "sections 2314 and 2315 (relating to interstate transportation of stolen property)".,

Pub. L. 104-132, §433(1), (2). inserted "section 1028 (relating to fraud and related activity in connection with identification documents) if the act indictable under section 1028 was committed for the purpose of financial gain." before "section 1029" and "section 1542 (relating to false statement in application and use of passport) if the act indictable under section 1542 was committed for the purpose of Nnancial gain. section 1543 (relating to forgery or false use of passport) if the act indictable under section 1543 was committed for the purpose of financial gain. section 1544 (relating to misuse of passport) if the act indictable under section 1544 was committed for the purpose of financial gain. section 1546 (relating to fraud and misuse of visas, permits. and other documents) if the act indictable under section

1546 was committed for the purpose of financial gain, sections 1581–1588 (relating to peonage and slavery)." after "section 1513 (relating to retaliating against a witness, victim. or an informant).".

Par. (1)(D). Pub. L. 104–294, §601(b)(3), substituted ".section 157 of this title" for "section 157 of that title".

Par. (1)(F). Pub. L. 104–132, §433(3), (4), added subpar. (F).

1994–Par. (1)(A). Pub. L. 103–322, §330021(1), substituted "kidnapping" for "kidnaping".

Pub. L. 103–322, §90104, substituted "a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act)" for "narcotic or other dangerous drugs".

Par. (1)(B). Pub. L. 103–322, §160001(f), as amended by Pub. L. 104–294, §604(b)(6), substituted "2251, 2251A, 2252, and 2258" for "2251–2252".

Par. (1)(D). Pub. L. 103–394 inserted "(except a case under section 157 of that title)" after "title 11".

Pub. L. 103–322, $90104. substituted "a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act)" for "narcotic or other dangerous drugs".

1990—Par. (1)(B). Pub. L. 101–647 substituted "section 1029 (relating to" for "section.1029 (relative to" and struck out "sections 2251 through 2252 (relating to sexual exploitation of children)," before ", section 1958".

1989—Par. (1). Pub. L. 101–73 inserted "section 1344 (relating to financial institution fraud)." after "section 1343 (relating to wire fraud),".

1988—Par. (1)(B). Pub. L. 100–690, §7514, inserted "sections 2251 through 2252 (relating to sexual exploitation of children).".

Pub. L. 100–690, §7054, inserted ", section 1029 (relative to fraud and related activity in connection with access devices)" and ", section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251–2252 (relating to sexual exploitation of children)".

Pub. L. 100–690, §7032, substituted "section 2321" for "section 2320".

Pub. L. 100–690, $7013. made technical amendment to directory language of Pub. L. 99–646. See 1986 Amendment note below.

Par. (10). Pub. L. 100–690, §7020(c), inserted "the Associate Attorney General of the United States," after "Deputy Attorney General of the United States.".

1986—Par. (1)(B). Pub. L. 99–646, as amended by Pub. L. 100–690, $7013, inserted "section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness. victim, or an informant)." after "'sectlon 1511 (relating to the obstruction of State or local law enforcement),".

Pub. L. 99-570 inserted "section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity),".

1984—Par. (1)(A). Pub. L. 98–473, §1020(1), inserted "dealing in obscene matter," after "extortion,".

Par. (1)(B). Pub. L. 98–547 inserted "sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles)." and "sectlon 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts).".

Pub. L. 98–473, §1020(2), inserted' '.sections 1461–1465 (relating to obscene matter).".

Par. (1)(E). Pub. L. 98–473, §900(g), inserted cl. (E).

1918—Par. (1)(B). Pub. L. 95–575 inserted "sections 2341–2346 (relating to trafficking in contraband cigarettes).".

Par. (1)(D). Pub. L. 95–598 substituted "fraud connected with a case under title 11" for "bankruptcy fraud".

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 604(b)(6) of Pub. L. 104–294 effective Sept. 13. 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22. 1994, and not applicable with respect to cases commenced under Title 11, Bankruptcy. before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of Title 11.

EFFECTIVE DATE OF 1978 AMENDMENTS

Amendment by Pub. L. 95–598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95–598, set out as an Effective Date note preceding section 101 of Title 11. Bankruptcy.

Amendment by Pub. L. 95–575 effective Nov. 2, 1978. see section 4 of Pub. L. 95–575, set out as an Effective Date note under section 2341 of this title.

SHORT TITLE OF 1984 AMENDMENT

Section 301 of chapter III (§§301–322) of title II of Pub. L. 98–473 provided that: "This title [probably means this chapter, enacting sections 1589. 1600, 1613a, and 1616 of Title 19, Customs Duties and sections 853, 854, and 970 of Title 21, Food and Drugs. amending section 1963 of this title and sections 1602, 1605, 1606. 1607, 1608, 1609, 1610, 1611. 1612. 1613, 1614, 1615, 1618, 1619. and 1644 of Title 19. sections 824, 848, and 881 of Title 21, and section 524 of Title 28, Judiciary and Judicial Procedure. and repealing section 7607 of Title 26, Internal Revenue Code] may be cited as the 'Comprehensive Forfeiture Act of 1984'."

SHORT TITLE

Section 1 of Pub. L. 91–452 provided in part: "That this Act [enacting this section. sections 841 to 848. 1511. 1623, 1955, 1962 to 1968, 3331 to 3334, 3503, 3504, 3575 to 3578, and 6001 to 6005 of this title. and section 1826 of Title 28, Judiciary and Judicial Procedure, amending sections 835, 1073, 1505, 1954, 2424, 2516. 2517, 3148, 3486, and 3500 of this title. sections 15, 87f, 135c, 499m, and 2115 of Title 7, Agriculture, section 25 of Title 11, Bankruptcy. section 1820 of Title 12, Banks and Banking, sections 49. 77v, 78u, 79r, 80a–41, 80b–9, 155, 717m, 1271, and 1714 of Title 15, Commerce and Trade, section 825f of Title 16, Conservation. section 1333 of Title 19. Customs Duties. section 373 of Title 21, Food and Drugs. section 161 of Title 29, Labor. section 506 of Tttle 33. Navigation and Navigable Waters, sections 405 and 2201 of Title 42, The Public Health and Welfare, sections 157 and 362 of Title 45, Railroads, section 1124 of former Title 46, Shipping, section 409 of Title 47, Telegraphs. Telephones, and Radio telegraphs. sections 9, 43, 46, 916. 1017, and 1484 of former Title 49. Transportation, section 792 of Title 50. War and National Defense. and sections 643a, 1152, 2026, and former section 2155 of Title 50, Appendix. repealing sections 837, 895, 1406, and 2514 of this title. sections 32 and 33 of Title 15; sections 4874 and 7493 of Title 28, Internal Revenue Code, section 827 of former Title 46, sections 47 and 48 of former Title 49, and sections 121 to 144 of Title 50, enacting provisions set out as notes under this section and sections 841. 1511, 1955, preceding 3331, preceding 3481, 3504, and 6001 of this title. and repealing provisions set out as a note under section 2510 of this title] may be cited as the 'Organized Crime Control Act of 1970'."

SAVINGS PROVISION

Amendment by section 314 of Pub. L. 95-5% not to affect the application of chapter 9 (§151 et seq.). chapter 96 (§1961 et seq.), or section 2516. 3057. or 3284 of this title to any act of any person (1) committed before Oct. 1. 1979, or (2) committed after Oct. 1. 1979. in connection with a case commenced before such date, see section 403(d) of Pub. L. 95–598. set out as a note preceding section 101 of Title 11. Bankruptcy.

SEPARABILITY

Section 1301 of Pub. L. 91–452 provided that: "If the provisions of any part of this Act [see Short Title note set out above] or the application thereof to any person or circumstances be held invalid. the provisions of the other parts and their application to otber persons or circumstances shall not be affected thereby."

CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

Section 1 of Pub. L. 91–452 provided in part that:

"The Congress finds that (1)organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force. fraud, and corruption: (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling; loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs. and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert, and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the National economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

"It is the purpose, of this Act [see Short Title note above] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to. deal with the unlawful activities of those engaged in organized crime."

LIBERAL CONSTRUCTION OF PROVISIONS; SUPERSEDURE OF FEDERAL OR STATE LAWS; AUTHORITY OF ATTORNEYS REPRESENTING UNITED STATES

Section 904 of title IX of Pub. L. 91452 provided that:

"(a) The provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purposes.

"(b) Nothing in thfs title shall supersede any provision of Federal. State. or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

"(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

"(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

"(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

"(3) Institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person."

PRESIDENT'S COMMISSION ON ORGANIZED CRIME: TAKING OF TESTIMONY ANT) RECEIPT OF EVIDENCE

Pub. L. 98–368. July 17. 1984. 98 Stat. 490. provided for the Commission estnblished by Ex. Ord. No. 12435. formerly set out below. authority relating to taking of testimony. receipt of evidence, subpoena power. testimony of persons in custody. immunity. service of process. witness fees. access to other records and information. Federal protection for members and staff, closure of meetings. rules. and procedures. for the period of July 17, 1984. until the earlier of 2 years or the expiration of the Commission.

EXECUTIVE ORDER NO. 12435

Ex. Ord. No. 12435. July 28. 1983. 48 F.R. 34723, as amended Ex. Ord. No. 12507. Mar. 22, 1985, 50 F.R. 11835, which established and provided for the administration of the President's Commission on Organized Crime, was revoked by Ex. Ord. No. 12610. Sept. 30, 1987, 52 F.R. 36901. formerly set out as a note under section 14 of the Federal Advisory Committee Act in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 924. 1956. 1959 of this title; title 7 section 12a.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income. or the proceeds of such income, in acquisition of any interest in. or the establishment or operation of, any enterprise which Is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment. and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

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

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a). (b), or (c) of this section.

(Added Pub. L. 91-452. title IX. §901(a). Oct. 15. 1970, 84 Stat. 942; amended Pub. L. 100-690. title VII, §7033. Nov. 18. 1988. 102 Stat. 4398.)

AMENDMENTS

1988—Subsec. (d). Pub. L. 100-690 substituted "subsection" for "subsections".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1963. 1964. 3554 of this tltle: title 7 section 12a: title 8 section 1101.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life

erty, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and conuistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the 'relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right. title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or.

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection. or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any aubsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to. or deposited with. a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(Added Pub. L. 91-452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943; amended Pub. L. 98-473, title II, §§ 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040. 2192; Pub. L. 99-570, title I, § 1153(a), Oct. 27, 1986, 100 Stat. 3207-13; Pub. L. 99-646, § 23, Nov. 10.1986, 100 Stat. 3597; Pub. L. 100-690, title VII, §§ 7034, 7058(d), Nov. 18. 1988, 102 Stat. 4398, 4403; Pub. L. 101-647, title XXXV, 33561, Nov. 29, 1990, 104 Stat. 4927.)

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subsec. (d)(3), are set out in the Appendix to Title 28. Judiciary aqd Judicial Procedure.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-647 substituted "or both" for "or both." in introductory provisions.

1988—Subsec. (a). Pub. L. 100-690, § 7058(d), substituted "shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment). or both." for "shall be fined not more than $25,000 or imprisoned not more than twenty years, or both".

Subsecs. (m), (n). Pub. L. 100-690, § 7034, redesignated former subsec. (n) as (m) and substituted "act or omission" for "act of omission".

1986—Subsecs. (c) to (m). Pub. L. 99-646 substituted "(l)" for "(m)" in subsea. (c), redesignated subsecs. (n) to (m) as (d) to (l), respectively, and substituted "(l)" for "(m)" in subsec. (l) as redesignated.

Subsec. (n). Pub. L. 99-570 added subsec. (n).

1984—Subsec. (a). Pub. L. 98-473, § 2301(a), inserted "In lieu of a fine otherwise authorized by. this section, a defendant who derives profits' or other proceeds from an offense may be fined not more than twioe the gross profits or other proceeds." following par. (3).

Pub. L. 98-473, § 302, amended subsec. (a) generally, designating existing provisions as pars. (1) and (2); inserting par. (3), and provisions following par. (3) relating to power of the court to order forfeiture to the United States.

Subsec. (b). Pub. L. 98-473, § 302, amended subsec. (b) generally, substituting provisions relating to property subject to forfeiture, for provisions relating to jurisdiction of the district courts of the United States.

Subsec. (c). Pub. L. 98-473, § 302, amended subsec. (c) generally. substituting provisions relating to transfer of rights, etc., in property to the United States, or to other transferees, for provisions relating to seizure and transfer of property to the United States and procedures related thereto.

Subsec. (d). Pub. L. 98-473, § 2301(b), struck out subsec, (d) which provided: "If any of the property described in subsection (a): (1) cannot be located: (2) has been transferred to, sold to. or deposited with, a third party: (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value by any act or omission of the defendant; or (5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5)."

Pub. L. 98-473, § 302, added subsec. (d).

Subsecs. (e) to (m). Pub. L. 98-473, § 302, added subsecs. (d) to (m).

Subsec. (m)(1). Pub. L. 98-473, § 2301(c), struck out "for at least seven successive court days" after "dispose of the property".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2516, 3293. 3554 of this title; title 7 section 12a; title 50 App. section 2410.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of

any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on .the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub. L. 91–452, title IX, §901(a), Oct. 15, 1970, 84 Stat. 943; amended Pub. L. 98–620, title IV, §402(24)(A), Nov. 8, 1984, 98 Stat. 3359; Pub. L. 104–67, title I, §107, Dec. 22, 1995, 109 Stat. 758.)

AMENDMENTS

1995—Subsec. (c). Pub. L. 104–67 inserted before period at end ", except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final".

1984—Subsec. (b). Pub. L. 98–620 struck out provision that in any action brought by the United States under this section. tbe court had to proceed as soon as practicable to the hearing and determination thereof

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–67 not to affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or title I of the Securities Act of 1933 (15 U.S.C. 77a et seq.), commenced before and pending on Dec. 22, 1965. see section 108 of Pub. L. 104–67, set out as a note under section 77l of Title 15. Commerce and Trade.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note nnder section 1657 of Title 28, Judiciary and Judicial Procedure.

CONSTRUCTION OF 1995 AMENDMENT

Nothing in amendment by Pub. L. 104–67 to be deemed to create or ratify any implied right of action, or to prevent Securities and Exchange Commission, by rule or regulation, from restricting or otherwise regulating private actions under Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), see section 203 of Pub. L. 104–67, set out as a Construction note under section 78j–1 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1965 of this title.

§1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub. L. 91452, title IX, §901(a), Oct. 15, 1970, 84 Stat. 944.)

§1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States. the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

(Added Pub. L. 91–452, title IX, §901(a), Oct. 15, 1970. 84 Stat. 944; amended Pub. L. 98–620, title IV, §402(24)(B), Nov. 8, 1984, 98 Stat. 3359.)

AMENDMENTS

1984—Pub. L. 98–620 struck out provision that the judge so designated had to assign such action for hear-

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1)"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

(Added Pub. L. 93-583, § 1, Jan. 2, 1975, 88 Stat. 1916; amended Pub. L. 94-625, § 1, Oct. 17, 1976, 90 Stat. 2478; Pub. L. 96-90, § 1, Oct. 23,1979, 93 Stat. 698; Pub. L. 100-625, §§ 2(a), (b), 3(a)(1), (3). Nov. 7, 1988, 102 Stat. 3205, 3206.)

REFERENCES IN TEXT

Section 501 of the Internal Revenue Code of 1986, referred to in subsec. (d), is classified to section 501 of Title 26, Internal Revenue Code.

AMENDMENTS

1988—Pub. L. 100-625, § 3(a)(1), substituted "Exceptions relating to certain advertisements and other information and to State-conducted lotteries" for "State-conducted lotteries" in section catchline.

Subsec. (a). Pub. L. 100-625, § 2(a), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "The provisions of sections 1301. 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

"(1) contained in a newspaper published in Mat State or in an adjacent State which conducts such a lottery, or

"(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery."

Subsec. (d). Pub. L. 100-625, §§ 2(b), 3(a)(3), inserted "subsection (b) of' after "purposes of' and inserted at end "For purposes of this section. the term a 'not-for-proflt organization' means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986."

1979—Subsec. (b). Pub. L. 96-90, § 1(a), incorporated existing provision in text designated cl. (1), included mailing of equipment, and added cl. (2).

Subsec. (c). Pub. L. 96-90, § 1(b), designated existing text as cl. (1) and added cl. (2).

1076--Subset. (a)(1). Pub. L. 94-525 inserted "or in an adjacent State which conducts such a lottery" after "State".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-625 effective 18 months after Nov. 7, 1988, see section 5 of Pub. L. 100-625, set out as a note under section 1304 of this title.

SEVERABILITY

Section 4 of Pub. L. 100-625 provided that: "If any provision of this Act or the amendments made by this Act [amending sections 1304 and 1307 of this title and section 3005 of Title 39, Postal Service, and enacting provisions set out as notes under sections 1301 and 1304 of this title]. or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the amendments made by this Act. and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 39 section 3005.

CHAPTER 63—MAIL FRAUD

AMENDMENTS

1996—Pub. L. 104-191, title II, § 242(a)(2), Aug. 21. 1996, 110 Stat. 2016, added item 1347.

1990—Pub. L. 101-647, title XXXV, § 3541, Nov. 29, 1990. 104 Stat. 4925. substituted "or" for "and" in Item 1342.

1988-Pub. L. 100-690, title VII, § 7603(b), Nov. 18, 1988, 102 Stat. 4508, added Item 1346.

1984—Pub. L. 98-473, title II, §§ 1108(b), 1206(b), Oct. 12, 1984.98 Stat. 2147, 2153. added items 1344 and 1345.

1952—Act July 16, 1952, ch. 879, § 18(b), 66 Stat. 722, added item 1343.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 29 section 1111.

§ 1341. Frauds and swindles

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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article. or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing. or knowingly causes to be delivered by mail or such carrier according to the direction thereon. or at the glace at which it is directed to be delivered by the person to whom it is addressed. any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be, fined not

more than $1,000,000 or imprisoned not more than 30 years, or both.

(June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Pub. L. 91–375, § 6(j)(11), Aug. 12, 1970, 84 Stat. 778; Pub. L. 101–73, title IX, § 961(i), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101–647, title XXV, § 2504(h), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103–322, title XXV, 8250006, title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2087, 2147.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 338 (Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district Judge. in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

A brief reference to $1391, which proposes to reenact the present section covering the use of the malls to defraud. This section is almost a page in length. is involved, and contains a great deal of superfluous language, including such t e r n as "sawdust swindle. green articles, green coin, green goods and green cigars." This sectlon could be greatly simplified. and now-meaningless language eliminated.

The other surplusage was likewise eliminated and the sectlon simplified wlthout change of meaning.

A reference to causing to be placed any letter. etc. in any post office, or station thereof. etc. was omitted as unnecessary because of definition of "principal" in section 2 of this title.

1949 ACT

This section [section 34] corrects a typographical error in sectlon 1341 of title 18. U.S.C.

AMENDMENTS

1994—Pub. L. 103–322, § 330016(1)(H), substituted "fined under this title" for "fined not more than $1,000" after "thing. shall be".

Pub. L. 103–322, § 250006, inserted "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," after "Postal Service," and "or such carrier" after "causes to be delivered by mail".

1990—Pub. L. 101-647 substituted "30" for "20" before "years".

1989-Pub. L. 101–73 inserted at end "If the violation affects a financial institution. such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years. or both."

1970—Pub. L. 91–375 substituted "Postal Service" for "Post Office Department".

1949—Act May 24, 1949. substituted "of' for "or" after "dispose".

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–375 effective within 1 year after Aug. 12, 1970, on date established therefor by Board of Governors of United States Postal Service and published by it in Federal Register. see section 15(a) of Pub. L. 91–375, set out as an Effective Date note preceding section 101 of Title 39. Postal Service.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 24, 225, 981, 982. 1342. 1510. 1961. 2326, 2516. 3059A. 3293, 3322 of this title: title 7 section 12a: title 12 sections 1785. 1786, 1787, 1821. 1828, 1829, 1831k. 1832a, 2277a-10b, title 15 sections 78o, 80b-3; title 39 sections 3001, 3003.

§ 1342. Rctitioue name or address

Whoever, for the purpose of conducting. promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious. false, or assumed title, name, or address. or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 763; Pub. L. 91–375, § 6(j)(12), Aug. 12, 1970, 84 Stat. 778; Pub. L. 103–322, title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C.. 1940 ed., § 339 (Mar. 4, 1909, ch. 321, § 216, 35 Stat. 1131).

The punishment language used in section 1341 of this title was substituted in lieu of the reference to it in this section.

Minor changes in phraseology were made.

AMENDMENTS

1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $1,000".

1970—Pub. L. 91–375 substituted "Postal Service" for "Post Office Department of the United States'..

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–375 effective within 1 year after Aug. 12, 1970, on date established 'therefor by Board of Governors of United States Postal Service and published by it in Federal Register, see section 15(a) of Pub. L. 91–375, set out as an Effective Date note preceding section 101 of Title 39, Postal Service.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 982, 2326 of this title; title 7 section 12a; title 15 sections 78o, 80b-3; title 39 sections 3001, 3003.

§ 1343. Fraud *by* wire, radio, or television

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, transmits or causes to be transmitted by means of wire. radio, or television communication in interstate or foreign commerce, any writings. signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years. or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(Added July 16, 1952, ch. 879, § 18(a), 66 Stat. 722: amended July 11, 1956. ch. 561, 70 Stat. 523; Pub. L. 101-73, title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101–647, title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103–322, title XXXIII, § 330016(1)(H), Sept. 13. 1994.108 Stat. 2147.)

AMENDMENTS

1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $1,000".

1990—Pub. L. 101–647 substituted "30" for "20" before "years'..

1989—Pub. L. 101–73 inserted at end "If the violation affects a financial institution. such person shall be

fined not more than $1,000,000 or imprisoned not more than 20 years, or both."

1956—Act July 11. 1958, substituted "transmitted by means of wire. radio. or television communication in interstate or foreign commerce" for "transmitted by means of interstate wire, radio. or television communication".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 24, 225, 981, 982, 1510, 1961, 2326, 2516, 3059A, 3293, 3322 of this title; title 7 section 12a; title 12 sections 1785, 1786, 1787, 1821, 1828, 1829, 1831k, 1833a, 2277a-10b; title 15 sections 78o, 80b-3; title 47 sections 311.503.

§1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defrand a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promisea;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(Added Pub. L. 98-473, title TI, §1108(a), Oct. 12, 1984, 98 Stat. 2147; amended Pub. L. 101-73, title IX, §961(k), Aug. 9, 1989, 103 Stat. 500; Pnb. L. 101-647, title XXV, §2504(j), Nov. 29, 1990. 104 Stat. 4861.)

AMENDMENTS

1990—Pub. L. 101-647 substituted "30" for "20" before "years".

1989—Rub. L. 101-73 amended section generally. restating former subsec. (a) and striking out former subsec. (b) which defined "federally chartered or insured financial institution". Prior to amendment, subsec. (a) read as follows: "Whoever knowingly executes, or attempts to execute, a scheme or artifice--

"(1) to defraud a federally chartered or insured financial institution; or

"(2) to obtain any-of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises. shall be fined not more than $10.000, or imprisoned not more than five years, or both."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 225, 981, 982, 1510. 1961. 2328. 3059A, 3293, 3322 of this title; title 12 sections 1785, 1786, 1787. 1821, 1828, 1829, 1831k, 1833a, 2277a-10b.

51345. Injunctions against fraud

(a)(1) If a person is—

(A) violating or about to violate this chapter or section 287. 311 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title), or

(C) committing or about to commit a Federal health care offense.]

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property. or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violatfon, the Attorney General may commence a civil action in any Federal court—

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to—

(i) prohibit any person from withdrawing. transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A per[illegible] or [illegible] injunction or restraining [illegible] shall [illegible] with [illegible] bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action. and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules. of Criminal Procedure.

(Added Pub. L. 98-473, title II, §1205(a), Oct. 12, 1984, 98 Stat. 2152; amended Pub. L. 100-690, title VII, §7077, Nov. 18, 1988, 102 Stat. 4406; Pub. L. 101-647, title XXV, §2521(b)(2), title XXXV, §3542, Nov. 29, 1990, 104 Stat. 4865, 4925; Pub. L. 103-322, title XXXIII, §330011(k), Sept. 13, 1994, 108 Stat. 2145; Pub. L. 104-191, title II, §247, Aug. 21, 1996, 110 Stat. 2018.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure. referred to in subsec. (b), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure. referred to in subsec. (b), are set out in the Appendix to this title.

AMENDMENTS

1996—Subsec. (a)(1)(C). Pub. L. 104-191, §247(a), added subpar. (C).

Subsec. (a)(2). Pub. L. 104-191, §247(b), inserted "or a Federal health care offense" after "title)".

1994-Pub. L. 103-322, §330011(k), repealed Pub. L. 101-647, §3542. See 1990 Amendment note below.

1990—Pub. L. 101-647, §2521(b)(2), added subsec. (a), inserted subsec. (b) designation. and struck out former first sentence which read as follows: "Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of this chapter. or of section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereon, or 1001 of this title the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such violation."

Pub. L. 101-647, §3542, which directed insertion of a comma after "of this title". was repealed by Pub. L. 103-322, §330011(k).

1988—Pub. L. 100-690 inserted "or of section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title" after "violation of this chapter,".

[1] So in original. The period probably should be a comma

AMENDMENTS

1985—Subsec. (c). Pub L. 99–92 designated existing provisions as par. (1), substituted "Except as provided in paragraph (2), the" for "The label", and added par. (2).

Subsec. (c)(2)(A). Pub. L. 99–117 substituted "brand style" for "brand" in provisions preceding cl. (i).

1984—Pub. L. 98–474 amended section generally. designating existing provisions as subsec. (a), expanding choice of warnings to be placed on cigarette packaging and further expanding scope of places that must contain warnings to include advertisements and outdoor billboards, and adding subsecs. (b) to (d).

1970—Pub. L. 91–222 substituted "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health" for "Caution; Cigarette Smoking Mag Be Hazardous to Your Health."

EFFECTIVE DATE OF 1985 AMENDMENT

Section 11(c) of Pub. L. 99–92 provided that:

"(1) The amendments made by subsection (a) [probably refers to undesignated *par.* preceding subsec. (b), amending this section] shall take effect October 12, 1985, except that

"(A) on and after the date of the enactment of this Act [Aug. 16, 1985] a manufacturer or importer of cigarettes may apply to the Federal Trade Commission to have the label rotation specified in section 4(c)(2) of the Federal Cigarette Labeling and Advertising Act [subsec. (c)(2) of this section], as amended by subsection (a), apply to its brand styles of cigarettes and the Commission may take action on such an application, and

"(B) a manufacturer or importer of cigarettes may elect to have the amendments apply at an earlier date or dates selected by the manufacturer or importer.

"(2) The Federal Trade Commission may. upon application of a manufacturer or importer of cigarettes with an approved application under section 4(c)(2) of the Federal Cigarette Labeling and Advertising Act [subset. (c)(2) of this section], as amended by subsection (a). extend the effective date specified in paragraph (1) to January 11, 1986; The Commission mag approve an application for such an extension only if the Commission determines that the effective date specified in such paragraph (1) would cause unreasonable economic hardship to the applicant. Section 4 of the Federal Cigarette Labeling and Advertising Act [this section], as in effect before October 12, 1985, shall apply with respect to a manufacturer or importer with an application approved under this paragraph."

EFFECTIVE DATE OF 1984 AMENDMENT

Section 4(b) of Pub. L. 98–474 provided that: "The amendment made by subeection (a) [amending this section] shall take effect upon the expiration of a one-year period beginning on tbe date of the enactment of this Act [Oct. 12, 1984]."

EFFECTIVE DATE OF 1970 AMENDMENT

Section 3 of Pub. L. 91–222 provided in part that: "Section 4 of the amendment made by this Act [amending this section] shall take effect on the first day of the seventh calendar month which begins after the date of the enactment of this Act [Apr. 1. 1970]."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1334, 1336 of this title.

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

(Pub. L. 89–92, § 5, July 27, 1965, 79 Stat. 283; Pub. L. 91–222, § 2, Apr. 1, 1970, 84 Stat. 88.)

AMENDMENTS

1970—Subsec. (b). Pub. L. 91–222 substituted provision that no requirement or prohibition based on smoking and health should be imposed under State law with respect to the advertising or promotion of any cigarettes which packages are labeled in conformity with the provisions of this chapter for provision that no statement relating to smoking and health should be required in the advertising of any cigarettes which packages are labeled in conformity with the provisions of this chapter.

Subsecs. (c), (d). Pub; L. 91–222 struck out subsecs. (c) and (d) relating to the authority of the Federal Trade Commission with respect to unfair or deceptive advertising acts or practices. and reports to Congress by the Secretary of Health, Education, and Welfare and the Federal Trade Commission. See sections 1336 and 1337 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 3 of Pub. L. 91–222 provided in part that: "Section 5 of the amendment made by this Act [amending this section] shall take effect as of July 1, 1969."

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

(Pub. L. 89–92. 56. July 27, 1965; 79 Stat. 283; Pub. L. 91–222, § 2, Apr. 1, 1970. 84 Stat. 89; Pub. L. 93–109, § 3, Sept. 21, 1973, 87 Stat. 352.)

AMENDMENTS

1973—Pub. L. 93–109 extended prohibition against advertisements to little cigars.

1970—Pub. L. 91–222 substituted provision that after January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission, for provision that a violation of this chapter should constitute misdemeanor and be punishable by fine. See. now, section 1338 of thia title.

EFFECTIVE DATE OF 1973 AMENDMENT

Amendment by Pub. L. 93–109 effective thirty days after Sept. 21. 1973, see section 4 of Pub. L. 93–109, set out as a note under section 1332 of thia title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–222 effective Jan. 1, 1970, except where otherwise specified. see section 3 of Pub. L. 91–222, set out in part as a note under section 1331 of this title.

§ 1335a. List of cigarette ingredients; annual submission to ——— transmittal to Congress; confidentiality

(a) Each person who manufactures, packages, or imports cigarettes shall annually provide the Secretary with a list of the ingredients added to

Disposition of Evidence Regarding Alleged RICO Predicate Acts of Mail and Wire Fraud

Alleged Subscheme	RA[2] / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements[1]					Miscellaneous		District Court Opinion Citations to Alleged Predicate Act
					Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Public	Protected Speech[3]	
Adverse Health Effects[4]	1 PM RJR B&W Lorillard American	US 21418	"A Frank Statement to Smokers" (Jan. 4, 1954)	Yes	-	-	-	E	E	Y	O	¶¶ 16-20 (describing background and quoting); ¶ 595 (commenting on industry knowledge of carcinogens in smoke contemporaneous with); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects), 1534-35 (noting that Frank Statement initiated enterprise); 1555 (finding publication).
	2 PM RJR B&W Lorillard American CTR	US 20280	TIRC press release "Scientist Comments on Benzypyrene Report" (July 15, 1957)	Yes	-	-	-	-	-	Y	NP, O	¶ 615 (quoting and finding that statement contradicted internal research of one defendant); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1560 (finding mailing).
	3[5] PM RJR B&W Lorillard American TI	US 21319 US 22720	TI memo to Board of Directors re TI statement in reaction to SG's article (Nov. 27, 1959) TI press release commenting on SG's article (Nov. 27, 1959)	Yes Yes	- -	- -	- -	- - -	- -	N Y	n/a NP, O	¶ 137 (describing background, i.e., third party had advance notice of article by SG to be published and provided press statements criticizing SG conclusions) (citing both exhibits); ¶¶ 621-624 (describing issuance of statement); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (citing as RA involving correspondence).
	5	US 21762	TI press release "Allen Gives Tobacco Institute	Yes	-	-	-	-	-	Y	O	¶ 626 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to

[1] "F" = district court made finding of fact on referenced element of proof; "E" = evidence Cited by district court in record arguably related to referenced element of proof; "-" = no finding or evidence in record to support a finding regarding this element of proof.

[2] Slip op. at App. III lists 148 alleged RICO predicate acts. Two were listed twice (see RA 79 / 132 and RA 81 / 132) and three were stricken (RAs 55.59.101). The predicate acts stricken by the district court are not included in this appendix. All RAs dated from ten years prior to the filing of the Complaint (i.e., Sept. 22, 1989) to the present are Listed in bolded text for emphasis. Some predicate acts were listed by the district court under more than one alleged subscheme and they will be listed in this chart consist with such listing by the district court.

[3] "NP" = reflects speech protected under the *Noerr-Pennington* doctrine (i.e., congressional testimony, statements regarding governmental regulations, reports or related matters); "O" = statements of opinion subject to First Amendment protection.

[4] Am. Op. at 1506.

[5] The United States cites US 21319 as RA 3 (see DOJ-FOF, section IV, ¶¶34-6) while the Joint Defendants cite US 22720 as RA 3 (see JD-FOF, ch. 16, ¶ 270-5). The district court did not identify by exhibit number which document she believes was RA 3 in her opinion.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements					Miscellaneous		District Court Opinion Citation to Alleged Predicate Act
					Specific Intent	Material	Relate to M/P	Furtherance of Scheme	Part of a Pattern	Public	Protected Speech	
	PM RJR B&W Lorillard American TI		Position on "Health Scares"' (July 6, 1961)									defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	7 PM RJR B&W Lorillard American TI	US 77055	TI press release "Tobacco Industry Confident Research Will Find Answers, George Allen Says" (Nov. 3, 1963)	Yes	-	-	-	-	-	Y	O	¶ 634 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	10 PM RJR B&W Lorillard American TI	US 21330	TI press release "Year-End Statement" (Dec. 29, 1965)	Yes	-	-	-	-	-	Y	O	¶ 640 (quoting and paraphrasing); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	11 B&W	US 20990	Correspondence between two defendants (Feb. 28, 1966)	Yes	-	-	-	-	-	N		¶ 388 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19.
	12 PM RJR B&W Lorillard American TI	US 21550	TI press release "Tobacco Institute Comments on 'Tar' and Nicotine" (Oct. 21, 1966)	Yes	-	-	-	-	-	Y	O	¶ 641 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	13 PM RJR	US 20309	Correspondence between counsel for certain defendants (Jan. 12, 1967)	Yes	-	-	-	-	-	N	n/a	¶ 219 (citing exhibit to establish composition of "Ad Hoc Committee"); ¶ 224 (citing as example of activities of "Ad Hoc Committee"); ¶ 226 (regarding

Alleged Subscheme	RA[5] Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion's Citation to Alleged Predicate Act
	B&W Lorillard Liggett American CTR											discussion of possible witness for congressional testimony); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	14 PM RJR B&W Lorillard Liggett American	US 20229	Correspondence between counsel for certain defendants (Feb. 2, 1967)	Yes	-	-	-	-	-	No	n/a	¶ 226 (paraphrasing work of committee of lawyers regarding discussion of possible witness for congressional testimony); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	18[6] PM RJR B&W Lorillard American TI	US 21660	S. Frank article "To Smoke or Not to Smoke - That is Still the Question" (Jan. 1968)	Yes	-	-	-	-	-	Yes	O	¶ 167 (paraphrasing article); ¶¶ 718-21 (describing generally); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
		US 21628	Ad publicizing TRUE magazine article	*Yes*	-	-	-	-	-	Yes		¶ 168 (citing).
	23 PM RJR B&W Lorillard American TI	US 21305	Editorial statement published by TI entitled "The question about smoking and health is still a question" (Dec. 1, 1970)	Yes	-	-	-	-	-	Yes	NP, O	¶ 145 (noting that defendants published ... [illegible] ¶ 142 (citing amount quoted in this RA); ¶ 151 (citing as example of TI public statement regarding smoking and health); ¶ 734 (quoting and describing distribution of reprints to members of Congress); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	24	US 21337	TI press release re smoking-health	Yes	-	-	-	-	-	Yes	NP, O	¶ 738 (paraphrasing and quoting); 1506 n.11 (listing among "alleged" RAs under

[6] The United States cites to 7 exhibits (US 21660, US 21618, US 21619, US 21622, US 21624, US 21626, US 21628). *See* DOJ FOF, section IV, ¶¶79-81. Only two of these exhibits were admitted into evidence: US 21660 and US 21628.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to MJPA	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citation to Alleged Predicate Act
	PM RJR B&W Lorillard American TI		controversy (May 25, 1971)									scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	26 RJR	US 21727	Correspondence between two defendants (Aug. 20, 1971)	No[7]	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	27 PM RJR B&W Lorillard American TI	US 21687	TI press release re smoking and pregnancy report (Nov. 15, 1971)	Yes	-	-	-	-	-	Yes	O	¶¶ 739-40 (paraphrasing and quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	29 PM RJR B&W Lorillard American TI	US 21321	TI press release re congressional testimony on legislation (Feb. 1, 1972)	Yes	-	-	-	-	-	Yes	NP, O	¶ 742 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	30 B&W	US 20993	Correspondence between two defendants (May 19, 1972)	Yes	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing). Also cited as a RA for the Addiction subscheme. 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction).
	33 PM RJR B&[illegible] Lori[illegible]rd Ame[illegible]can	US 36675	TI press release re 10-year anniversary of 1964 SGR (Jan. 11, 1974)	No[8]	-	-	-	-	-	Yes	NP, O	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).

[7] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

[8] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

Alleged Subscheme	RA[9] & Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to MF	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citation re Alleged Predicate Act
	TI											
	34 PM RJR B&W Lorillard American TI	US 21698	TI press release re "The Cigarette Controversy" publication (Jan. 14, 1975)	Yes	-	-	-	-	-	Yes	O	¶ 142 (quoting and paraphrasing); ¶ 746 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	38 PM RJR B&W Lorillard Liggett American CTR	US 21805	Correspondence between counsel for certain defendants (Jan. 4, 1976)	No[9]	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	42 PM RJR B&W Lorillard American TI	US 21424	TI press release re smoking and health (Dec. 29, 1977)	Yes	-	-	-	-	-	Yes	O	¶ 750 (quoting and citing); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	43 PM RJR B&W Lorillard American TI	US 21303[10]	TI press release re Surgeon General's report (Jan. 17, 1979)[11]	Yes	-	-	-	-	-	Yes	NP, O	¶ 765 (quoting and citing as part of pr campaign to tout industry spending on research); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	46 PM	US 21280	TI brochure "Fact or Fancy?" (1979)[12]	Yes	-	-	-	-	-	Yes	O	¶ 754 (describing distribution and quoting re health effects); ¶ 3213 (quoting re impact of marketing); ¶ 3794

[9] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

[10] The United States cites US 21303 in their Findings of Fact for RA 43. See DOJ FOF, section N, ¶¶154-6. This exhibit was not admitted into evidence; however. US 87985 was admitted into evidence.

[11] This does not appear to be a press release; it is a UPI news release purporting to quote, in part, a TI spokesperson. See JD FOF, ch. 16 ¶ 315-6.

[12] A 1978 version of "Fact or Fancy." US 21466, was also admitted and cited by the court in the Amended Opinion. See Am. Op. at ¶754.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements					Miscellaneous		District Court Opinion Citation(s) to RA / Alleged Predicate Act
					Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Public	Protected Speech	
	RJR B&W Lorillard American TI											(quoting re ETS); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	50 BATCo	US 22976	Correspondence between two defendants (Nov. 9, 1981)	Yes	-	-	-	-	-	No	n/a	¶ 3902 (cited as see also, relates to receipt of foreign regulatory filing); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	51 BATCo	US 21382	Correspondence between two defendants (Dec. 17, 1981)	Yes	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	54 BATCo	US 21723	Correspondence between counsel for two defendants (Apr. 8, 1982)	Yes	-	-	-	-	-	No	n/a	¶ 3902 (citing as example of scientific document edited by lawyer to remove material that might be damaging to one defendant); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	57 BATCo	US 21383	Correspondence between two defendants (July 20, 1983)	Yes	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	62 RJR	US 20741	Draft internal document of defendant (1984)[13]	Yes	-	-	-	-	-	No	n/a	¶ 781 (describing and paraphrasing document); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	64 RJR	US 50268	Public opinion piece published by defendant (1984)	Yes	-	-	-	-	-	Yes	O	¶ 778 (describing and quoting); ¶ 3799 (same); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1635 (citing as example of use of newspapers).
	65	US 50882	Public opinion piece published by defendant	Yes	-	-	-	-	-	Yes[14]	O	¶ 774 (describing and quoting); ¶ 3401 (citing); ¶ 3432 (quoting); ¶ 3800

[13] Document is undated.

[14] This document was in fact never published. Nevertheless, since the Court apparently found to the contrary, it is categorized as a public statement.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Misrepresentation: Public	Protected Speech	District Court Opinion Cites for Alleged Predicate Act
	RJR		(1984)									(quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1635 (citing as example of use of newspapers).
	82 RJR	US 20869	Counsel between defendant and spouse of deceased consumer (Aug. 18, 1988)	Yes	-	-	-	-	-	Yes	O	¶ 782 (citing as example of letter to spouse of deceased smoker); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	85 RJR	US 20813	Correspondence between defendant and grade school principal (Jan. 11, 1990)	Yes	-	-	-	-	-	Yes	O	¶ 784 (quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	92 Altria	US 22725	Correspondence between counsel for certain defendants and 3rd parties (June 4, 1991)	Yes	-	-	-	-	-	No	n/a	¶ 797 (citing); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects).
	99 RJR	US 21815	Correspondence between defendant and spouse of deceased consumer (Nov. 12, 1993)	No[15]	-	-	-	-	-	Yes	O	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	105 PM	US 35622	Statements by defendant on television news program (Jan. 3, 1971)	Yes	-	-	-	-	-	Yes	O	¶ 735 (quoting statement by executive of defendant and citing as example of statement that harmful elements of cigarettes would be removed when discovered); ¶ 736 (finding statement false); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	106 B&W	US 20998	Correspondence between counsel for two defendants (Sept. 16, 1976)	Yes	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).

[15] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

Alleged Subscheme	RA[7] / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Legal Elements: Material	Legal Elements: Relates to Mail	Legal Elements: Furtherance of Scheme	Legal Elements: Pattern	Miscellaneous: Public	Miscellaneous: Protected Speech	Other Court Opinions Addressing Predicate
	107 RJR	US 22738	Correspondence between defendant and 3rd party (Feb. 25, 1981)	Yes	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1558 (finding that document was transmitted via wire).
	115 B&W	US 21539	Correspondence between defendant's in-house counsel and foreign affiliate of defendant (Apr. 27, 1995)	Yes	-	-	-	-	-	No	n/a	¶ 801 (describing and quoting); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting that parties' submissions concerning whether defendants' caused mailing were "unclear and at times inconsistent" leaving the court to "guess"); 1558 (finding that this predicate act was transmitted via the wires).
	120 PM RJR B&W Lorillard American CTR	US 47778	CTR press release "Studies Raise Questions About Smoking as Health Hazard" (Apr. 22, 1970)[16]	Yes	-	-	-	-	-	Yes	O	¶ 104 (paraphrasing); ¶ 732 (quoting statement about need for further research); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR); 1563 (finding not entitled to *Noerr-Pennington* protection).
	123 CTR	US 34576	Correspondence between researcher funded by defendant and defendant enclosing manuscript of scientific study (Mar. 1, 1976)	No[17]	-	-	-	-	-	No	n/a	1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects).
Addiction[18]	15 PM RJR B&W Lorillard Liggett American	US 20204	Correspondence between counsel for certain defendants (May 19, 1967)	Yes	-	-	-	-	-	No	n/a	¶ 254 (describing and quoting); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addictiveness of nicotine); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection).

[16] The district court did not affirmatively find that this statement was published and no affirmative evidence of publication was presented at trial. Evidence was presented as to a lack of record of publication, however. *See* JD PDF, ch. 16, ¶ 112 (quoting testimony of CTR witness regarding same).

[17] *See* United States' Notice Filing Am. List o Admitted Exs. Pursuant to Order #1001 (Dec. 1 2005) (Dkt. #5714).

[18] Am. Op. at 1508.

Alleged Subscheme	RA Defendant	Exhibit #	Title/Description	In Evid.	Legal Element: Specific Intent	Legal Element: Materiality	Legal Element: Relates to MT	Legal Element: Furtherance of Scheme	Legal Element: Pattern	Miscellaneous: Public	Miscellaneous: Protected Speech?	District Court Opinion Citation(s) re Alleged Predicate Act
	25 CTR	US 20719	Correspondence between two defendants (July 1, 1971)[19]	Yes	-	-	-	-	-	No	n/a	1508 n.12 (listing among "alleged" RAs under scheme to defraud re addictiveness of nicotine); 1554 (noting defense stipulation regarding mailing); 1563 (finding not entitled to *Noerr-Pennington* protection).
	30 B&W	US 20993	Correspondence between two defendants (May 19, 1972)	Yes	-	-	-	-	-	No	n/a	1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction). Also cited as a RA for the Adverse Health Effects subscheme. 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing).
	56 PM RJR B&W Lorillard American TI	US 21703[20]	TI press release re congressional testimony to amend the FCLAA to adopt rotational warnings (Mar. 17, 1983)	Yes	-	-	-	E	-	Yes	NP, O	¶ 150 (citing press release as example of citation to work of scientists who had received funding from defendants but failing to acknowledge that funding); ¶ 1217 (same); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR); 1563 (finding not entitled to *Noerr-Pennington* protection).
	58 PM	US 20476	Correspondence between counsel for defendant and subsidiary of defendant (July 27, 1983)	Yes	-	-	-	-	-	No	n/a	¶ 1295 (describing as letter between counsel summarizing internal research); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).; 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	60 BATCo	US 21384	Correspondence between two defendants (Jan. 23, 1984)	Yes	-	-	-	-	-	No	n/a	¶ 1667 (quoting); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1554 (noting

[19] The United States misstates the date of this document in their Findings of Fact. The correct date is July 1, 1970. *See* DOJ FOF, section IV, ¶¶100-2.

[20] A duplicate exhibit, US 85362, was also admitted and cited by the court in her Amended Opinion. *See* Am. Op. at ¶1217.

Alleged Subscheme	RA[1] / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specif. Intent	Legal Elements: Material	Legal Elements: Reliance (or M/P)	Legal Elements: Furtherance of Scheme	Legal Elements: Part of Pattern	Miscellaneous: Public	Miscellaneous: Protected Speech	District Court Opinion Cite(s) re Alleged Predicate Act
												defense stipulation regarding mailing); 1563 (finding not entitled to *Noerr-Pennington* protection).
	63 B&W	US 22129	Correspondence between two defendants (Aug. 28, 1984)	Yes	-	-	-	-	-	No	n/a	¶¶ 1331-32 (describing, construing and quoting); ¶ 4008 (citing as example referenced in testimony); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1554 (noting defense stipulation regarding mailing); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	71 Altria	US 22772	Correspondence with former PM employee (Apr. 23, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 1298 (quoting and describing); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as an alleged RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	72 Altria	US 44603	Correspondence with former PM employee (Apr. 23, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 1298 (quoting and describing); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as an alleged RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	74	US 21916[21]	Correspondence with former PM employee	Yes	-	-	-	-	-	No		¶ 1299 (quoting and describing); 1508 n.12 (listing among "alleged" RAs under

[21] The court cites to US 20380 in her Amended Opinion. *See* Am. Op. at ¶1299. US 20380 has been admitted into evidence.

Alleged Subscheme	RA # Defendant	Exhibit #	Title/Description	In Evid.	Specific Intent	Mailing/Wire	Related to Scheme	Furtherance of Subscheme	Part of Pattern	Pattern	Protected Speech	District Court Opinion Citations re Alleged Predicate Acts
	Altria		(Sept. 10, 1986)									scheme to defraud re addiction); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as an alleged RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	75 Altria	US 21916[12]	Correspondence with former PM employee (Sept. 10, 1986)	Yes	-	-	-	-	-	No		¶ 1299 (quoting and describing); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
	79 PM RJR B&W Lorillard American TI	US 21239	TI press release "Claims that Cigarettes are Addictive Contradict Common Sense" (May 16, 1988)	Yes	-	-	-	-	-	Yes	NP, O	¶ 151 (citing as example of press release issued by TI); ¶ 1220 (describing and quoting); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1509 (citing as example of statement made in response to "emerging scientific consensus"); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR); 1563 (finding not entitled to *Noerr-Pennington* protection).
	81 PM RJR	US 77065	TI press release re congressional testimony on smoking as an addiction (July 1, 1988)[13]	Yes	-	-	-	-	-	Yes	NP, O	¶ 150 (citing as example of press release issued by TI failing to disclose that scientist cited had received funding from defendants); ¶¶ 1222-23 (describing and

[12] The court cites to US 20380 in her Amended Opinion. *See* Am. Op. at ¶1299. US 20380 has been admitted into evidence.

[13] The United States misstates the date of this document in their Findings of Fact. *See* DOJ FOF, section IV, ¶¶264-6. The correct date is July 29, 1988.

Alleged Subscheme #	RA / Defendant	Exhibit #	Title/Description	Is Evid.	Legal Element: Specific Intent	Material	Relates to M/F	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citation to Alleged Predicate Act
	B&W Lorillard American TI											quoting); ¶ 1225 (noting failure to disclose that cited scientists had received research funding); 1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR); 1563 (finding not entitled to *Noerr-Pennington* protection).
	103 B&W	US 31045	Correspondence between counsel for two defendants (July 3, 1963)	Yes	-	-	-	-	-	No	n/a	1508 n.12 (listing among "alleged" RAs for addiction subscheme); 1554 (noting defense stipulation regarding mailing); 1558 (finding this predicate act was transmitted by wire); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence).
	104 Lorillard	US 21514	Correspondence between counsel for two defendants (July 22, 1970)	Yes	-	-	-	-	-	No	n/a	1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1563 (finding not entitled to *Noerr-Pennington* protection).
	109 PM	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	Also cited as a RA for the Nicotine Manipulation subscheme.
	110 RJR	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	Also cited as a RA for the Nicotine Manipulation subscheme.
	114 PM	US 21537	Correspondence between defendant and Congressman (May 9, 1994)	Yes	-	-	-	-	-	Yes	NP, O	
	116 B&W	US 76600	Defendant website statement (1999)	Yes	-	-	-	-	-	Yes	O	1508 n.12 (listing among "alleged" RAs under scheme to defraud re addiction); 1554 (noting defense stipulation regarding mailing); 1558 (finding

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Reliance (if RA)	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citations re Alleged Predicate Acts
												defendant caused transmission by wire); 1563 (finding not entitled to *Noerr-Pennington* protection).
	132 PM RJR B&W Lorillard American TI	US 21239	TI press release "Claims that Cigarettes are Addictive Contradict Common Sense" (May 16, 1988)	Yes	-	-	-	-	-	Yes	NP, O	Duplicate of RA 79.
	133 PM RJR B&W Lorillard American TI	US 77065	TI press release re congressional testimony on smoking as an addiction (July 29, 1988)	Yes	-	-	-	-	-	Yes	NP, O	Duplicate of RA 81.
Nicotine Manipulation[34]	109 PM	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	¶ 796 (citing congressional testimony); ¶ 1153 (quoting testimony); ¶ 1193 (same); ¶ 1195 (same); ¶ 1199 (same); ¶ 1206 (same); ¶ 1611 (citing testimony re disclosure of ingredients by defendants to DHHS); ¶¶ 1706-30 (describing and quoting testimony); ¶ 2366 (quoting testimony); 1513 n.15 (listing among "alleged" predicate acts for subscheme to deny nicotine manipulation); 1554 (noting defense stipulation as to mailing); 1558 (finding that wires used to transmit predicate act); 1561-62, 1564 (finding congressional testimony subject to protection under *Noerr-Pennington* doctrine). Also cited as a RA for the Addiction subscheme. 1508 n.12 (listing among "alleged" predicate acts for subscheme to deny addiction).
	110 RJR	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	¶ 796 (citing congressional testimony); ¶ 1153 (quoting testimony); ¶ 1193 (same); ¶ 1195 (same); ¶ 1199 (same); ¶ 1206

[34] Am. Op. at 1513.

Alleged Subscheme	RA's Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relate to RA's	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citations re Alleged Fraud in Addiction
												(same);¶ 1534 (same); ¶ 1611 (citing testimony re disclosure of ingredients by defendants to DHHS); ¶¶ 1706-30 (describing and quoting testimony); ¶ 2366 (quoting testimony); 1513 n.15 (listing among "alleged" predicate acts for subscheme to deny nicotine manipulation); 1554 (noting defense stipulation as to mailing); 1558 (finding that wires used to transmit predicate act); 1561-62 1564 (finding congressional testimony subject to protection under *Noerr-Pennington* doctrine). Also cited as a RA for the Addiction subscheme. 1508 n.12 (listing among "alleged" predicate acts for subscheme to deny addiction).
	111 Lorillard	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	¶ 796 (citing congressional testimony); ¶ 1153 (quoting testimony); ¶ 1193 (same); ¶ 1195 (same); ¶ 1199 (same); ¶ 1206 (same); ¶ 1534 (same); ¶ 1611 (citing testimony re disclosure of ingredients by defendants to DHHS); ¶¶ 1706-30 (describing and quoting testimony); ¶ 2366 (quoting testimony); 1513 n.15 (listing among "alleged" predicate acts for subscheme to deny nicotine manipulation); 1558 (finding that wires used to transmit predicate act); 1561-62, 1564 (finding congressional testimony subject to protection under *Noerr-Pennington* doctrine).
	112 Liggett	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	¶ 796 (citing congressional testimony); ¶ 1153 (quoting testimony); ¶ 1193 (same); ¶ 1195 (same); ¶ 1199 (same); ¶ 1206 (same);¶ 1534 (same); ¶ 1611 (citing testimony re disclosure of ingredients by defendants to DHHS); ¶¶ 1706-30 (describing and quoting testimony); ¶ 2366 (quoting testimony); 1513 n.15 (listing among "alleged" predicate acts for subscheme to deny nicotine manipulation); 1558 (finding that wires used to transmit predicate act); 1561-62, 1564 (finding congressional testimony subject to protection under *Noerr-*

Alleged Subscheme	RA # / Defendant	Exhibit #	Title/Description	Ltd. Evidence	Specific Intent	Material	Relating to Affairs of Enterprise	Furtherance of Scheme	Part of Pattern	Mail/Wire Fraud	Protected Speech	District Court's Findings re: Alleged Predicate Acts
												Pennington doctrine).
	113 American	US 21990	Congressional testimony by defendant (Apr. 14, 1994)	Yes	-	-	-	-	-	Yes	NP, O	¶ 796 (citing congressional testimony); ¶ 1153 (quoting testimony); ¶ 1193 (same); ¶ 1195 (same); ¶ 1199 (same); ¶ 1206 (same); ¶ 1534 (same); ¶ 1611 (citing testimony re disclosure of ingredients by defendants to DHHS); ¶¶ 1706-30 (describing and quoting testimony); ¶ 2366 (quoting testimony); 1513 n.15 (listing among "alleged" predicate acts for subscheme to deny nicotine manipulation); 1558 (finding that wires used to transmit predicate act); 1561-62, 1564 (finding congressional testimony subject to protection under *Noerr-Pennington* doctrine).
Marketing/ Design Low Tar[25]	36 RJR	US 48351[26]	Brand advertisement by defendant (1975)	Yes	-	E	E	-	-	Yes	Comm. speech	¶ 2314 (quoting advertisement); 1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar).
	37 Lorillard	US 21700	Brand advertisement by defendant (1975)	Yes	-	E	E	-	-	Yes	Comm. Speech	¶ 2609 (quoting advertisement); 1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar); 1563 (finding not entitled to *Noerr-Pennington* protection).
	39 RJR	US 48350	Brand advertisement by defendant (1976)	Yes	-	E	E	-	-	Yes	Comm. Speech	¶ 2495 (quoting advertisement); 1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar); 1563 (finding not entitled to *Noerr-Pennington* protection).
	47 PM	US 5951	Brand advertisement by defendant (1979)	Yes	-	E	E	-	-	Yes	Comm. Speech	¶ 2436 (quoting advertisement); 1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar).
	48 PM	US 21510	Brand advertisement by defendant (1979)	Yes	-	E	E	-	-	Yes	Comm. speech	¶ 2252 (quoting advertisement); ¶ 2429 (describing marketing of brand style and related brand styles); 1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar).
	53 BATCo	US 22763	Correspondence between two defendants (Apr. 7, 1982)	Yes	-	-	-	-	-	No	n/a	¶¶ 1056-57 (quoting); ¶ 1396 (citing for proposition that defendant intended products to deliver optimum amount of nicotine); ¶ 1903 (same); 1515 n.16

[25] Am. Op. at 1515.

[26] The United States cites US 48351 in their Findings of Fact for RA 36. See DOJ FOF, section IV, ¶¶133-5. This exhibit was not admitted into evidence; however, US *4998* was admitted *into* evidence.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Scienter	Material	Related to Mail	Furtherance of Scheme	Pattern	Public	Protected Speech	District Court Opinion Citation(s)
												(listing among "alleged" RAs re scheme to defraud re low tar); 1554 (identifying as subject to stipulation as to mailing); 1563 (finding not entitled to *Noerr-Pennington* protection).
	119 American	n/a[27]	Brand advertisement by defendant (Nov. 15, 1967)	No	-	E	E	-	-	Yes	Comm. Speech	1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar).
	124 B&W	US 20952	Correspondence between defendant and 3rd party (June 21, 1977)	No[28]	-	-	-	-	-	No	n/a	1515 n.16 (listing among "alleged" RAs re scheme to defraud re low tar); 1554 (identifying as subject to stipulation as to mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA).
Youth Marketing[29]	4 RJR	US 22366	Letter from 3rd party to defendant re internal survey research (Dec. 9, 1959)	Yes	-	-	-	-	-	No	n/a	¶ 2844 (quoting in part and noting that defendant requested research proposal re same); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (identifying as subject to stipulation as to mailing).
	6 PM RJR B&W Lorillard American TI	US 21270	TI press release "Statement by George V. Allen" (July 9, 1963)	Yes	-	-	-	-	-	Yes	O	¶ 631 (quoting re causation); ¶ 3209 (quoting re youth); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	35 PM RJR B&W Lorillard American TI	US 22345	TI press release re youth smoking and marketing (Sept. 1975)	Yes	-	-	-	-	-	Yes	NP, O	¶ 3210 (describing testimony to Congress and quoting excerpt from that testimony contained in exhibit); ¶ 3211 (describing press release and repeating quote); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	49	US 21271	TI press release re youth	Yes	-	-	-	-	-	Yes	NP, O	¶ 2393 (citing for proposition that

[27] *See* DOJ FOF, section IV, ¶¶376-8, JD FOF, ch. 16 ¶ 952.

[28] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

[29] Am. Op. at 1518.

Alleged Subscheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	Defers/Court Opinion Citation to Alleged Predicate Acts
	PM RJR B&W Lorillard American TI		smoking and adoption of code of sampling practices (May 13. 1981)									defendants have made public statements re adhering to Cigarette Advertising Code); 7 3t88-89 (describing regulatory background regarding adoption of voluntary industry ad *code);* ¶ 3216 (describing background regarding adoption of voluntary industry sampling code); 1518 n.17 *(listing* among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	61 RJR	US 21627[30]	Public opinion piece published by defendant (Apr. 1984)	Yes	-					Yes	O	¶ 3284 (describing background and quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud).
	76 RJR	US 20823[31]	Brand advertisement by defendant (Apr.-Jun.1988)	Yes	-	E	E			Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	83 RJR	US 20822[32]	Brand advertisement by defendant (1988)	Yes	-	E	E	-	-	Yes	Comm. Speech	¶ 3023 (citing as example of price promotion used with ad campaign); 1518 h i 7 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	84 RJR	US 76785[33]	Brand advertisement by defendant (1989)	Yes	-	E	E	-	-	Yes	Comm. Speech	¶ 2979 (quoting and describing ad); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target

[30] The United States cites US 21627 ("We Don't Advertise to Children," U.S. News and World Report, Apr. 1984) in their Findings of Fact for RA 61. *See* DOJ FOF, section IV, ¶¶204-6. This exhibit was not admitted into evidence; however, US 76544 ("We Don't Advertise to Children," Chicago Tribune, June 19, 1984) was admitted into evidence. The court cites to US 20644 in the Amended Opinion. *See* Am. Op. at ¶3284. US 20644 was not admitted into evidence.

[31] The United States cites US 20823 in heir Findings of Fact for RA 76. See DOJ FOF, section IV, ¶¶249-51. This exhibit was not admitted into evidence; however, US 76783 was admitted into evidence.

[32] The United States cites US 20822 in their Findings of Fact for RA 83. *See* DOJ FOF, section IV, ¶¶270-2. US 20822 was not admitted into evidence; however, a duplicate exhibit (US 76784) was admitted into evidence. [NB: The court cites to US 20822 in her Amended Opinion (Am. Op. at ¶3021), but it is not listed on Order #1014 of admitted exhibits. *See* Order #1014 (Aug. 17, 2006) (Dkt. # 5731).]

[33] The court cites to US 20854 in her Amended Opinion (Am. Op. at ¶3021), but it is not listed on Order #1014 of admitted exhibits. *See* Order #1014 (Aug. 17, 2006) (Dkt. # 5731).

Alleged Scheme	RA / Defendant	Exhibit #	Title/Description	In Evid.	Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Public	Protected Speech	District Court Opinion Citations to Alleged Predicate Acts
												youth").
	86 RJR	US 22718[34]	Correspondence between defendant and NYC commissioner (Mar. 5, 1990)	No[35]	-	-	-	-	-	Yes	O	¶ 3285 (quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	87 PM RJR B&W Lorillard American TI	US 62795[36]	TI press release "Discouraging Youth Smoking, Tax Burden on Smokers and Other Issues Discussed in Testimony" (May 24, 1990)	Yes	-	-	-	-	-	Yes	NP, O	¶ 3230 (quoting and noting that press release describes congressional testimony); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	89 RJR	US 20782[37]	Correspondence between defendant and individual (Sept. 18, 1990)	No[38]	-	-	-	-	-	Yes	O	¶ 3286 (quoting and describing); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	91 PM RJR B&W Lorillard American TI	US 21265	TI press release "Major New Initiatives to Discourage Youth Smoking Announced" (Oct. 11, 1990)	Yes	-	-	-	-	-	Yes	NP, O	¶ 2393 (citing as example of public statement regarding compliance with industry ad code); ¶ 3188 (citing and noting that ad codes were adopted to avoid regulation); ¶ 3189 (citing as example of publicity regarding ad code compliance); ¶ 3232 (describing and quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	93 PM RJR B&W	US 21266	TI press release re response to study published in JAMA criticizing a defendant's ad campaign and youth	Yes	-	-	-	-	-	Yes	O	¶ 3237 (quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by

[34] The court cites to US 20780 in her Amended Opinion (Am. Op. at ¶3285), but it is not listed on Order #1014 of admitted exhibits. *See* Order #1014 (Aug. 17, 2006) (DKT #5731).

[35] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

[36] The United States cites US 62795 in their Findings of Fact for RA 87. *See* DOJ FOF, section IV, ¶¶282-4. This exhibit was not admitted into evidence; however, US 22349 was admitted into evidence.

[37] The court cites to US 20782 in her Amended Opinion (Am. Op. at ¶3286), but it is not listed on Order #1014 of admitted exhibits. *See* Order #1014 (Aug. 17, 2006) (Dkt. # 5731).

[38] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

Alleged Subscriber	RA # (Defendant)	Exhibit #	Title/Description	Is Evid.	Legal Elements: Specific Intent	Material	Relates to A/P	Furtherance of Scheme	Part of Pattern	Misc. Issues: Public	Protected Speech	Dkt. # / Court Opinion Citation (and Alleged Predicate)
	Lorillard American TI		smoking (Dec. 11, 1991)									TI or CTR).
	94 RJR	US 51932[39]	Correspondence between defendant and 3rd party (state retail grocers association) (Jan. 28, 1992)	No[40]	-	-	-	-	-	No	n/a	¶ 3287 (quoting and paraphrasing); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	96 RJR	US 22994[41]	Correspondence between defendant and N.C. medical journal regarding JAMA article criticizing defendant's ad campaign (Aug. 28, 1992)	No[42]	-	-	-	-	-	Yes	O	¶ 3288 (quoting and describing); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	97 RJR	US 21717[43]	Brand advertisement by defendant (1992)[44]	Yes	-	E	-	-	-	Yes	Comm. Speech	¶ 2982 (describing advertisement and campaign); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	100 PM	US 21804	Defendant draft press release "Philip Morris Announces Initiatives to Prevent Youth Access to Cigarettes; Oversight Panel Named" (Dec. 1994)	Yes	-	-	-	-	-	No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud).
	102 RJR	US 33060[45]	Brand advertisements by defendant (1996)	In part[46]	-	E	-	-	-	Yes	Comm. Speech	¶ 2987 (describing advertisement and campaign); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as

[39] The court cites to US 22354 in her Amended Opinion (Am. Op. at ¶3287), but it is not listed on Orda #1014 of admitted exhibits. See Order #1014 (Aug. 17,2006) (Dkt. # 5731).

[40] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. I. 2005) (Dkt. #5714).

[41] The court cites to US 22994 and US 76095 in her Amended Opinion (Am. Op. at ¶3288), but neither exhibit is listed on Orda #1014 of admitted exhibits. See Order #1014 (Aug. 17,2006) (Dkt. # 5731).

[42] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1,2005) (Dkt. #5714).

[43] The United States cites US 21717 in their Findings of Fact for RA 97. See WJ FOF, section IV, ¶¶312-4. The court also cites to US 21717 in her Amended Opinion (Am. Op. at ¶2982), but it is not listed on Orda #1014 of admitted exhibits. See Orda #1014 (Aug. 17, 2006) (Dkt. #5731). This exhibit was not admitted into evidence; however, US 76786 was admitted into evidence.

[44] The date of US 76786 (version of exhibit admitted into evidence) is 1993.

[45] The court cites to US 21979 and US 21982 in her Amended Opinion (Am. Op. at ¶2987), but neither exhibit is listed on Order #1014 of admitted exhibits. See Order #1014 (Aug. 17.2006) (Dkt. # 5731).

[46] The United States cites US 33060 in their Findings of Fact for RA 102. See WJ FOF, section IV, ¶¶325-7. This exhibit was not admitted into evidence; however, US 76788 ("Wanna See a Show? Go Ahead. It's On Me"), one of the advertisements that makes up RA 102, was admitted into evidence. The other advertisement that makes up RA 102, 'Take a Rockin' Road Trip," was not admitted into evidence,

Alleged Fraud Count	RA / Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Privileged / Expected	District Court Opinion Citation to Alleged Fraudulent RA
												example of advertisements that "appeal to and target youth").
	117 PM RJR B&W Lorillard American TI	US 21724[47]	TI press release "Tobacco Institute Head Calls N.A.B. President's Charges Incorrect" (Nov. 20, 1962)	No[48]	-	-	-	-	-	Yes	O	¶ 3157 (citing as example of publicity by defendants of policies not to market to youth); ¶ 3208 (describing and quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	118 PM RJR B&W Lorillard Liggett American TI	US 20414	TI press release "Cigarette Manufacturers Announce Advertising Code" (Apr. 27, 1964)	Yes	-	-	-	-	-	Yes	NP, O	¶ 2393 (describing background); ¶ 3188 (citing, quoting and describing background); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	121 RJR	US 21865	Correspondence between defendant and 3rd party (Mar. 15, 1974)	Yes	-	-	-	-	-	No	n/a	¶ 2861 (describing); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	122 RJR	US 21868	Correspondence between defendant and 3rd party (Sept. 24, 1974)	No[49]	-	-	-	-	-	No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing).
	125 B&W	US 20890	Correspondence between defendant and government official (May 4, 1979)	Yes	-	-	-	-	-	Yes	NP, O	¶ 3205 (describing and quoting); ¶ 3267 (same); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA).

[47] The court cites to US 21724 in her Amended Opinion (Am. Op. at ¶3157, 3208), but it is not listed on Order #1014 of admitted exhibits. *See* Order #1014 (Aug. 17, 2006) (Dkt. # 5731).

[48] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

[49] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

Alleged Subschemes	RA # Defendant	Exhibit #	Title/Description	In Evid?	Legal Elements: Specific Intent	Material	Relates to [illegible]	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	Uncontested Opinion Holding [illegible]
	126 Liggett	US 20149	Correspondence between defendant and government official (May 18, 1979)	*Yes*	-	-	-	-	-	Yes	NP, O	¶ 3201 (describing and quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud).
	127 B&W	US 21524	Correspondence between defendant and government official (June 1, 1979)	Yes	-	-		-	-	Yes	NP, O	¶ 3268 (describing and quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA).
	128 RJR	US 20718	Correspondence between 3rd party and defendant (May 4, 1981)	No[50]				-		No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud).
	129 B&W	US 20976	Correspondence between 3rd party and defendant (Apr. 13, 1983)	No[51]	-	-	-	-	-	No	n/a	1518 n.17 (to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA).
	130 PM RJR B&W Lorillard TI	US 20999	Statements by TI on television news program (Oct. 20,1983)	Yes	-	-	-	-	-	*Yes*	O	¶ 3219 (quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1558 (finding this predicate *act* transmitted via the wires); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	131 PM	US 38212	Advertising contract between defendant and 3rd party (Jan. 14,1986)	No[52]	-	-	-	-	-	No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud).
	134 RJR	US 21540	Correspondence between employees of defendant (Apr. 5,1990)	No[53]						No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1558 (finding this predicate act transmitted via the wires).
	135 B&W	US 14557	Brand advertisement by defendant (1999)	*Yes*			E			*Yes*	Comm. speech	¶ 2943 (citing); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that *"appeal* to and target youth').

[50] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1.2005) (Dkt. #5714).

[51] See United States' Notice of Filing Am List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

[52] *See* United States' Notice of Filing *Am* List of Admitted Exs. Pursuant to *Order* #1001 (Dec. 1,2005) (Dkt. #5714).

[53] *See* United States' Notrceof Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1,2005) (Dkt. #5714).

Alleged Subsection	RA # / Defendant	Exhibit #	Title/Description	Date Valid	Legal Elements					Miscellaneous		Discussion in Court's Opinion
					Deceptive Intent	Material	Relates to M/P	Furtherance of Scheme	Part of Pattern	Public	Commercial Speech	
	136 RJR	US 9731	Brand advertisement by defendant (1999)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	137 PM	US 14325	Brand advertisement by defendant (2000)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth"); 1558 (finding this predicate act was transmitted by wire, radio or television).
	138 PM	US 14345	Brand advertisement by defendant (2000)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	139 RJR	US 21750[34]	Defendant internal document describing point-of-sale materials available to certain retailers (2001)	No[35]	-	-	E	-	-	No	n/a	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	140 RJR	US 21752[36]	Brand advertisement by defendant (2001)	No[37]	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	141 B&W	US 14472	Brand advertisement by defendant (2001)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisement that "appeal to and target youth").
	142 Lorillard	US 2702 US 2616	Brand advertisement by defendant (2001)	Yes	-	-	E	-	-	Yes	Comm. Speech	¶ 2928 (describing similar ads, but not actually citing these predicate acts); ¶ 2930 (finding that campaign uses themes known to appeal to youth such as "having fun with friends"); 1518 n.17 (listing among "alleged" RAs pertaining

[34] The United States cites to an internal "October/November Workplan" for RA 139, not an advertisement as described in their Findings of Fact and in the Court's amended opinion. *See* DOJ FOF, section IV, ¶¶435-7; Am. Op. at App. 3, ¶ 139. This exhibit was not admitted into evidence.

[35] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

[36] US 21752 is a promotional ad for Winston Racing Nation sweepstakes and consists of 10 pages in total and thus does not appear to be the Winston advertising referred to as RA 140.

[37] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

Alleged Subscheme	RA # / Defendant	Exhibit #	Title/Description	Is Exhibit?	Legal Elements: Specific Intent	Material?	Relates to M/P	Furtherance of Scheme	Part of Pattern	Misrepresentation: Public	Misrepresentation: Protected Speech	District Court Findings/Conclusions of Law (¶ #)
												to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
	143 Lorillard	US 72746	Defendant website statements regarding marketing and promotion (June 2001)	No[58]	-	-	-	-	-	Yes	O	¶ 3197 (citing); ¶ 3262 (quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1558 (finding this predicate act was transmitted by wire, radio or television).
	144 B&W	US 86656[59]	Defendant website statement (1999-June 2001)	Yes	-	-	-	-	-	Yes	O	¶ 1753 (quoting); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA); 1558 (finding this predicate act was transmitted by wire, radio or television).
	145 PM	US 87440[60]	Defendant website statement (June 2001)	No (see n.60)	-	-	-	-	-	Yes	O	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1558 (finding this predicate act was transmitted by wire, radio or television).
	146 RJR	US 72410[61]	Defendant website statement (June 2001)	Yes (see n.61)	-	-	-	-	-	Yes	O	¶ 2513-14 (citing statements found on May 2004 version of RJR's website); 1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1554 (noting defense stipulation regarding mailing); 1558 (finding this predicate act was transmitted by wire, radio or television).
	147 PM	US 15245	Brand advertisement by defendant (2001)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target

[58] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1.2005) (Dkt. #5714).

[59] US 86656 is identified by the DOJ as RA 144, however, this exhibit does not contain the cited statement. See DOJ FOF, section IV, ¶¶ 450-52. It appears that the document described as RA 144 is in fact US 76629.

[60] US 87440 is identified by the DOJ as RA 145, however, this exhibit does not contain the cited statement. See DOJ FOF, section IV, ¶¶ 453-54. It is the section from Philip Moms' website discussing "Our Mission and Values"; RA 145 is the section from Philip Moms' website discussing "Philip Morris U.S.A. Marketing Policies." (no exhibit admitted into evidence).

[61] The United States describes RA 146 as having been caused during June 2001; US 72410 is dated Jan. 16,2004. See DOJ FOF, section IV, ¶¶455-7.

Alleged Subscheme	RA # Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Materiality	Related to NTE	Furtherance of Scheme	Part of Pattern	Misc. Issues: Bona Fide	Protected Speech	District Court Opinion Citations re Alleged Predicate Act
												youth").
	148 PM	US 11200	Brand advertisement by defendant (2001)	Yes	-	-	E	-	-	Yes	Comm. Speech	1518 n.17 (listing among "alleged" RAs pertaining to youth scheme to defraud); 1519 (citing as example of advertisements that "appeal to and target youth").
ETS	42 PM RJR B&W Lorillard American TI	US 21424	TI press release re smoking and health (Dec. 29, 1977)	Yes	-	-	-	-	-	Yes	O	¶ 750 (quoting and citing); 1506 n.11 (listing among "alleged" RAs under scheme to defraud re adverse health effects); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
Suppression of Evidence[62]	11 B&W	US 20990	Correspondence between defendants (Feb. 28, 1966)	Yes	-	-	-	-	-	No	n/a	¶ 388 (quoting); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1554 (noting defense stipulation regarding mailing). Also cited as a RA for the Adverse Health Effects subscheme. 1506 n.11
	19 PM	US 21884	Correspondence between a defendant and a foreign third party (May 27, 1969)	Yes	-	-	-	-	-	No	n/a	1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	20 PM	US 22729	Correspondence between a foreign third party and a defendant (Sept. 10, 1969)	Yes	-	-	-	-	-	No	n/a	1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	21 PM RJR B&W Lorillard American TI	US 21237	TI press release re animal inhalation study performed by third party (Apr. 30, 1970)	Yes	-	-	-	-	-	Yes	O	¶ 730 (finding that press release contained false claim regarding alleged refusal by third party to release data underlying scientific study); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	28	US 21735	Correspondence between	No[63]	-	-	-	-	-	No	n/a	¶ 339 (quoting); 1527 n.19 (listing

[62] Am. Op. at 1527.

[63] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001, Dec. 1, 2005 (Dkt. #5714).

Alleged Subscheme	CRA# Defendant	Exhibit #	Title/Description	In Evid.?	Legal Elements: Specific Findings	Material	Related to MIS?	Furtherance of Scheme	Pattern	Mail/Wire: Parties	Proper Specific	Relevant Court Opinion Citations
	PM RJR B&W Liggett Lorillard		defendants re research that might be funded by NCI (Dec. 22, 1971)									among "alleged" RAs under scheme to suppress evidence).
	41 PM	US 20295	Correspondence between defendant and affiliated foreign corporation (Mar. 31, 1977)	Yes	-	-	-	-	-	No	n/a	¶ 3371 (quoting); ¶¶ 3911-12 (same); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	58 PM	US 20476	Correspondence between outside counsel for defendant and affiliated corporation (July 27, 1983)	Yes	-	-	-	-	-	No	n/a	¶ 1295 (describing); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	63 B&W	US 22129	Correspondence between two defendants (Aug. 28, 1984)	Yes	-	-	-	-	-	No	n/a	¶ 1331-32 (quoting and discussing); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	71 Altria	US 22772	Correspondence with former PM employee (Apr. 23, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 1298 (citing); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	72 Altria	US 44603	Correspondence with former PM employee (Apr. 23, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 1298 (citing); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	74 Altria	US 21916[64]	Correspondence with former PM employee (Sept. 10, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 1299 (quoting); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	75	US	Correspondence with	Yes	-	-	-	-	-	No	n/a	¶ 1299 (quoting); 1527 n.19 (listing

[64] The court cites to US 20380 in her Amended Opinion. See Am Op. at ¶1299. US 20380 has been admitted into evidence.

Alleged Subscheme	RA's Defendant	Exhibit #	Title/Description	In Evid.	Legal Elements: Specific Intent	Material	Relates to M/T	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	Basis for Court Omitting Citation to RA's Proof (or Not)
	Altria	21916[63]	former PM employee (Sept. 10, 1986)									among "alleged" RAs under scheme to suppress evidence) Also cited as an alleged RA for the Addiction subscheme.
	103 B&W	US 31045	Correspondence internal to defendant (July 3, 1963)	Yes	-	-	-	-	-	No	n/a	¶ 1321 (quoting and describing); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1554 (noting defense stipulation regarding mailing); 1558 (finding this predicate act was transmitted by wire); 1527 n.19 (listing among "alleged" RAs under scheme to suppress evidence); 1563 (finding not entitled to *Noerr-Pennington* protection). Also cited as an alleged RA for the Addiction subscheme. 1508 n.12.
	108 BATCo PM	US 46577	Internal memorandum purporting to summarize phone conversation between certain defendants (Oct. 26, 1983)	Yes	-	-	-	-	-	No	n/a	1554 (noting purported defense stipulation regarding mailing); 1558 (finding this predicate act transmitted via the wires). Also cited as a RA for the Suppression of Evidence subscheme. 1527 n.19 (listing among "alleged" RAs under scheme to defraud re suppression of evidence).
RAs not cited by district court for a specific subscheme	8 PM RJR B&W Lorillard American CTR	US 20815	CTR press release re reorganization of TIRC into CTR (Mar. 6, 1964)[64]	Yes	-	-	-	-	-	Yes	O	¶ 28 (noting press release); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	9	US 21491	Letter from 3rd party to	No[65]	-	-	-	-	-	No	n/a	1558 (noting that defendants contest

(continued...)

[63] The court cites to US 20380 in her Amended Opinion. See *Am.* Op. at ¶1299. US 20380 has been admitted into evidence.

[64] Note that TI disputes that it in fact issued this press release. JD-FOF, ch. 16, ¶ 61. Judge Kessler appears to conclude otherwise, although she fails to address the fact that publication was disputed by TI leading one *to* wonder whether she in fact considered the issue. See Am. Op. ¶ 28.

[65] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1.2005) (Dkt. #5714).

Alleged Misstatement	RA Defendant	Exhibit #	Title/Description	In Furtherance	Specific Intent	Material	Relates to MP	Furtherance of Scheme	Part of Pattern	Public	Protected Speech	District Court Opinion Quotation/Citation Alleged
	CTR		outside counsel re research (Nov. 23, 1965)									mailing but citing as RA involving correspondence).
	16 PM	US 22988	Correspondence between counsel for certain defendants (Oct. 3, 1968)	Yes	-					No	n/a	¶228 (quoting and finding that scientists willing to testify before Congress were provided certain research funding); ¶258 (citing as example of in-house counsel making recommendations re joint defense funding); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	17 PM RJR B&W Lorillard Liggett American CTR	US 20206	Correspondence between counsel for certain defendants (Oct. 21, 1968)	Yes	-					No	n/a	¶258 (citing as example of in-house counsel *making* recommendations re joint defense *funding);* 1554 (noting defense stipulation regarding mailing).
	22 PM RJR B&W Lorillard Liggett American CTR	US 216%	Correspondence between counsel for certain defendants and CTR research director (July 22, 1970)	Yes	-					No	n/a	1264 (quoting and discussing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	31 PM RJR B&W Lorillard Liggett American CTR	US 23019	Correspondence between counsel for certain defendants (Nov. 7, 1973)	No[68]						No	n/a	1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	32 B&W	US 21504	Correspondence between c o w l for certain defendants regarding research funding (Nov. 26. 1973)	No[68]	-					No	n/a	1554 (noting defense stipulation regarding mailing).

See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

[68] *See* United States' Notice of Filing Am List of Admitted Exs. Pursuant to Order #1001 (Dec. 1. 2005) (Dkt. #5714)

Alleged Subelement	RA # / Defendant	Exhibit #	Title/Description	Sig. Evid.	Legal Elements: Specific Intent	Legal Elements: Materials	Legal Elements: Relates to MF	Legal Elements: Furtherance of Scheme	Legal Elements: Part of Pattern	Miscellaneous: Public	Miscellaneous: Protected Speech	District Court Opinion Citation to Alleged Predicate Act
	40 PM	US 21923	Correspondence between counsel for certain defendants regarding research funding (Jan. 13, 1977)	No[70]	-	-	-	-	-	No	n/a	1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	44 PM RJR B&W Lorillard Liggett American	US 20784	Correspondence between counsel for certain defendants (Nov. 20, 1979)	Yes	-	-	-	-	-	No	n/a	¶ 283 (quoting and citing as example of outside counsel making suggestion re joint defense funding of research); 1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	45[71] B&W	n/a	Correspondence between counsel for certain defendants (Nov. 27, 1979)	No	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing).
	52 B&W	US 20887	Correspondence between defendant and counsel for certain defendants (Feb. 12, 1982)	Yes	-	-	-	-	-	No	n/a	¶ 303 (citing as example of research jointly funded by defendants per counsel); 1554 (noting defense stipulation regarding mailing).
	66 PM RJR B&W Lorillard Liggett American CTR	US 21809	Correspondence between counsel for certain defendants (Feb. 18, 1986)	Yes	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	67 PM RJR B&W Lorillard Liggett American CTR	US 21810	Correspondence between counsel for certain defendants (Feb. 25, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 304 (citing as example of research jointly funded by defendants per counsel); 1554 (noting defense stipulation regarding mailing) ; 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	68 RJR	US 22765	Correspondence between counsel for certain defendants (Mar. 11, 1986)	Yes	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing); 1555 n.24 (noting confusion about whether there is a stipulation as to mailing for this RA).

[70] See United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1,2005) (Dkt. #5714).

[71] The United States did not offer into evidence an exhibit for RA 45. See DOJFOF, section IV, ¶¶160-2, JD FOF, ch. 16 ¶ 222-3.

					Legal Elements					Miscellaneous		
Unresolved Objections	RA # / Defendant	Exhibit #	Exhibit Description	Adm. Evid.	Specific Intent	Material	Related to MIPs	Furtherance of Scheme	Part of Pattern	Public	Protected Speech	District Court Opinion Citations re Alleged Predicate Act
	69 Altria	US 37284[72]	Correspondence between defendant and counsel for certain defendants (Mar. 13, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 266 (citing as example of research jointly funded by defendants per counsel); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	70 PM RJR B&W Lorillard Liggett American CTR	US 21709	Correspondence between counsel for certain defendants (Apr. 1, 1986)	No[73]	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	73 PM RJR B&W Lorillard Liggett American	US 20796	Correspondence between counsel for certain defendants (Sept. 4, 1986)	Yes	-	-	-	-	-	No	n/a	¶ 282 (quoting and describing as decision to jointly fund research); 1554 (noting defense stipulation regarding mailing); 1558 (noting that defendants contest mailing but citing as RA involving correspondence); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	77 PM RJR B&W Lorillard Liggett American CTR	US 21811	Correspondence between counsel for certain defendants (Apr. 19, 1988)	Yes	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings by TI and CTR).
	78 Altria	US 20310	Correspondence between defendant and counsel for certain defendants (May 9, 1988)	Yes	-	-	-	-	-	No	n/a	¶ 266 (citing as example of research jointly funded by defendants per counsel).
	80 Altria	US 23047	Correspondence between defendant and counsel for certain defendants (May 16, 1988)	Yes	-	-	-	-	-	No	n/a	¶ 266 (citing as example of research jointly funded by defendants per counsel); 1558 (noting that defendants contest mailing but citing as RA involving correspondence).
	88	US 21812	Correspondence between	Yes	-	-	-	-	-	No	n/a	1554 (noting defense stipulation

[72] The United States cites the wrong exhibit for RA 69 in their Findings of Fact. *See* DOJ FOF, section IV, ¶¶228-30. The correct exhibit is US 20326.

[73] *See* United States' Notice of Filing Am. List of Admitted Exs. Pursuant to Order #1001 (Dec. 1, 2005) (Dkt. #5714).

Alleged Subscheme	RA #/ Defendant	Exhibit #	Title/Description/ Source	In Evid.	Legal Elements: Specific Intent	Material	Related to S/P	Furtherance of Scheme	Part of Pattern	Miscellaneous: Public	Protected Speech	District Court Opinion Citation to Alleged Predicate Act
	PM RJR B&W Lorillard Liggett American CTR		counsel for certain defendants (Aug. 31, 1990)									regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).
	90 American	US 58613	Correspondence between defendant and counsel for certain defendants (Oct. 2, 1990)	Yes	-	-	-	-	-	No	n/a	¶ 275 (citing in support of finding that certain defendants funded a particular outside scientist); 1554 (noting defense stipulation regarding mailing).
	95 Altria	US 20384	Correspondence between defendant and counsel for certain defendants (May 18, 1992)	Yes	-	-	-	-	-	No	n/a	¶ 278 (citing in support of finding that certain defendants funded a particular outside scientist); 1533 (citing as example of industry funding of scientists who could testify before courts and governmental bodies).
	98 PM RJR B&W Lorillard American	US 22979	Correspondence between counsel for certain defendants (Mar. 11, 1993)	Yes	-	-	-	-	-	No	n/a	1554 (noting defense stipulation regarding mailing); 1560 (listing and holding that all cigarette company defendants liable for mailings caused by TI or CTR).