UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' FINAL PROPOSED CONCLUSIONS OF LAW (Vol. One)

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THE UNITED STATES HAS ESTABLISHED THE SUBSTANTIVE RICO OFFENSE ALLEGED IN COUNT THREE

A. Introduction

1. History of Proceedings

On September 22, 1999, the United States filed a complaint against ten Defendants – six Cigarette Company Defendants and four related entities – pursuant to the Medical Care Recovery Act, 42 U.S.C. §§ 2651- 2653 (Count I), the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii) (Count II), and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") (Counts III and IV). The United States's complaint sought relief: (1) under Counts One and Two, to recover the health care costs borne by the federal government for expenditures for care of individuals with certain tobacco-related illnesses; (2) under Counts Three and Four, to restrain Defendants and their coconspirators from engaging in further fraudulent and unlawful conduct, including to compel Defendants to disgorge the proceeds of their unlawful conduct.

On September 28, 2000, the Court dismissed Counts One and Two of the complaint for failure to state a claim, and held that the RICO counts properly allege claims for relief. United States v. Philip Morris Inc., 116 F. Supp. 2d 131 (D.D.C. 2000). In particular, the Court held, among other matters, that the RICO counts adequately allege RICO's enterprise and pattern of racketeering activity elements. Id. at 152-54. The Court also held that the RICO counts adequately allege a basis for injunctive and other equitable relief and that disgorgement of Defendants' ill-gotten gains was an equitable remedy available to the United States under RICO. Id. at 147-52. Accord United States v. Philip Morris Inc., 310 F. Supp. 2d 58, 63 (D.D.C. 2004). Also on September 28, 2000, the Court dismissed one original Defendant, BAT Industries plc,

for lack of personal jurisdiction. United States v. Philip Morris Inc., 116 F. Supp. 2d 116 (D.D.C. 2000).

Subsequently, the Court held that Defendants were not entitled to a jury trial on the RICO counts because the RICO claims seek solely equitable relief to which a right to a jury trial does not attach. United States v. Philip Morris Inc., 273 F. Supp. 2d 3 (D.D.C. 2002). In that regard, the Court explained that the alleged RICO violations, unlike "common-law fraud [which carries a right to a jury trial] . . . do not require proof of reliance or damages or completion of the scheme to defraud." Id. at 6. Accord United States v. Philip Morris Inc., 304 F. Supp. 2d 60, 70 (D.D.C. 2004). Likewise, the Court held that the United States "is not required to prove that it suffered any injury as a result of Joint Defendants' conduct. Neither is the Government required to sue for damages." Philip Morris, 273 F. Supp. 2d at 6.

Rather, in government civil RICO suits to obtain equitable relief, as involved here, the United States need only prove the same elements as in a RICO criminal case. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 284 (3d Cir. 1985); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995). The United States must establish its claims by a preponderance of the evidence, the required standard of proof under civil RICO. See, e.g., Local 560, 780 F.2d at 279 n.12; Local 1804-1, 812 F. Supp. at 1309 (collecting cases). This action is similar to numerous other civil RICO suits brought by the United States in which courts have granted equitable relief, including permanent injunctions against future racketeering activity, disgorgement, and court-

appointed officers to monitor and implement the relief granted, as sought here.[1]

2. Summary of Defendants' Scheme to Defraud and Disgorgement

The Court finds that the United States is entitled to similar equitable relief for the reasons set forth below. As more fully explained in the Court's Findings of Fact, the Court finds that Defendants devised an extensive scheme to defraud the public of money that they have executed for nearly 50 years, and which continues to this day. Defendants have carried out this massive scheme to defraud through a variety of means, including, but not limited to, causing the public dissemination of numerous false, deceptive and misleading statements that, among other things: denied that smoking and secondhand smoke cause disease and other adverse health effects; denied that cigarettes and nicotine are addictive or that Defendants manipulated nicotine; denied that Defendants marketed to young people; and fraudulently promised to sponsor independent, disinterested research into the potential adverse health effects of smoking. Defendants have also endeavored to deceive, and have deceived, consumers through deceptive marketing to exploit smokers' desire for less hazardous and "low tar" cigarettes. Contrary to Defendants' fraudulent representations, overwhelming evidence, including Defendants' internal records and documents, conclusively establishes that Defendants long knew the falsity of their representations.

Defendants' fraudulent conduct is particularly pernicious because it was knowingly directed at the American public, including smokers, an overwhelming percentage of whom

[1] The United States has brought approximately 19 civil RICO suits against labor unions and related entities and at least another 17 civil RICO suits against other defendants to obtain equitable relief. These lawsuits have generated numerous reported decisions. For summaries of these civil RICO cases brought by the United States and the leading decisions ensuing from them, see Racketeer Influenced and Corrupt Organizations (RICO): A Manual For Federal Prosecutors, (United States Department of Justice, Washington, DC) (July 2000) at pp. 289-97. (Located online at http://www.usdoj.gov:/usao/eousa/foia_reading_room/usam/title9/rico.pdf).

started smoking and became addicted to smoking cigarettes in their youth.[2] The evidence establishes that the Cigarette Company Defendants well knew that their ability to continue to earn profits depended upon their acquiring replacements for smokers who had quit smoking or died, and have long known that almost all smokers begin smoking in their youth. Therefore, the Cigarette Company Defendants conducted research into young people's vulnerabilities to cigarette marketing, and knew that youth were highly susceptible to certain marketing and advertising approaches, would underestimate the health risks of smoking and that once addicted to cigarettes in their youth, the vast majority of Youth Addicted smokers are unable to quit smoking. Indeed, 88 percent of daily smokers tried their first cigarette before they were age 18, and 70 percent of people who have ever smoked daily began smoking daily before they were 18 years old. See Expert Report of Neal Benowitz, United States v. Philip Morris, et al., (R.682; filed Nov. 15, 2001) at 7-8. Accordingly, Defendants have designed advertising and other marketing activities that appeal to youth. The evidence also establishes that Defendants' fraudulent conduct succeeded in inducing youths to become addicted to smoking. Moreover, Defendants have suppressed and failed to disclose to the public evidence that smoking cigarettes causes disease and is addictive, information which is material to the decisions of persons, especially youth, whether to begin or to continue to smoke. See U.S. FPFF § IV.D. Therefore, Defendants' fraudulent misconduct is causally related to Defendants' proceeds from the sale of cigarettes to the Youth Addicted Population.

Consequently, the Court finds the United States is entitled to disgorgement of unlawful

[2] The United States refers to all smokers, regardless of age, who became addicted to smoking cigarettes in their youth as the "Youth Addicted Population."

proceeds Defendants obtained from the "Youth Addicted Population." In that regard, the United States seeks disgorgement of proceeds that Defendants unlawfully obtained during the period from 1971 to the date of judgment from approximately 33 million Youth Addicted smokers who were smoking more than five cigarettes per day when they became age 21 (which is a predictor of continued smoking and nicotine dependence). For the period from 1971 to 2001, that figure is approximately $280 billion. The Court's imposition in this case of the requested injunctive relief and disgorgement will significantly advance the salutary purposes of such relief – to deter unlawful conduct and deprive the wrongdoers of their ill-gotten gains – and hence will protect youths from Defendants' predatory, fraudulent conduct. Therefore, as explained more fully below, the Court concludes that the requested disgorgement of at least $280 billion is appropriate and reasonable, especially since the United States is entitled to disgorgement of a considerably greater amount, i.e., all unlawful proceeds Defendants obtained from smokers from late 1953, the beginning of their RICO offenses and scheme to defraud. In short, this subset of proceeds to be disgorged – proceeds derived from the Youth Addicted Population (as opposed to all proceeds) and from 1971 to the date of judgment (as opposed to 1953 to the present) – is both reasonable and appropriate.

3. Elements of the RICO Substantive Count

Count Three of the First Amended Complaint alleges that from the early 1950s and continuing up to the date of the filing of the Amended Complaint, Defendants comprised an association-in-fact enterprise ("Enterprise") and each Defendant participated in the conduct, management and operation of the alleged Enterprise through a pattern of racketeering activity, including, but not limited to, the alleged acts of racketeering, in violation of 18 U.S.C. § 1962(c).

Section 1962(c) provides:

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

18 U.S.C. § 1962(c). To establish this violation the plaintiff, the United States, must prove each of the following elements:

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

See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985); United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997) (listing elements); United States v. Starrett, 55 F.3d 1525, 1541 (11th Cir. 1995) (same); United States v. Console, 13 F.3d 641, 652-53 (3d Cir. 1993) (same); United States v. Alvarez, 860 F.2d 801, 818 (7th Cir. 1988) (collecting cases); United States v. Philip Morris USA, 2004 WL 1045767 at *1 (D.D.C. 2004).[3]

For the reasons set forth below, this Court finds that the United States has proved each of these elements by a preponderance of the evidence.

4. Corporate Liability For Acts of Officers, Employees, Agents

[3] Moreover, every court that has considered the issue has held that RICO does not require any mens rea or scienter element beyond what the predicate offenses require. See, e.g., United States v. Baker, 63 F.3d 1478, 1492-93 (9th Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); United States v. Biasucci, 786 F.2d 504, 512-13 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir. 1980).

Here, each Defendant is liable for the acts of its officers, employees, and agents. It is well established that a corporation may act only through its agents, a corporation may be held liable for the acts of its officers, employees, and other agents. This is true in both criminal prosecutions, see United States v. Wise, 370 U.S. 405 (1962); United States v. Najjar, 300 F.3d 466, 485 (4th Cir. 2002); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999), as well as civil cases. See United States v. Brothers Constr. Co., 219 F.3d 300, 310-311 (4th Cir. 2000). See also Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 378-80 (6th Cir. 1993) (respondeat superior liability in RICO cases permissible, since "corporate principals may act only through their agents.").[4] Therefore, a corporation may be held liable for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Restatement (Second) of Agency § 219 et seq. (1958), so long as the action is motivated, at least in part, to benefit the principal. Sun-Diamond Growers, 138 F.3d at 970; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir. 1984); Restatement (Second) of Agency § 236 (1958). However, the United States here need not show that the agent was acting **exclusively** for the Defendant corporation; it is enough that the employee was acting in part for the benefit of the corporation.[5]

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[4] See also Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 775-76 (9th Cir. 2002) ("This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering. It also serves to compensate the victims of racketeering activity. Vicarious liability based on the doctrine of respondeat superior thereby fosters RICO's deterrent and compensatory goals.") (citations omitted).

[5] For instance, in United States v. Gold, 743 F.2d 800 (11th Cir. 1984), the defendant (a corporate medical center) was prosecuted for violations of 18 U.S.C. § 1001 and § 371 for defrauding, and conspiring to defraud, the government through the corporation's employees. On appeal, the corporation argued that, because the employees were acting primarily for their own benefit, rather than that of the corporation, the company could not be found

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Likewise, "it is not necessary for agent's actions to have actually benefitted the corporate entity." Automated Medical Labs., Inc., 770 F.2d at 407 (citing Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945)); United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963); United States v. Sun-Diamond Growers, 964 F. Supp. 486, 490 (D.D.C. 1997) (citing cases).

Moreover, in civil actions, "there may be no need to show that the agent acted to further the principal's interests – a showing of 'apparent authority' is often enough." Sun-Diamond Growers, 138 F.3d at 970 n.9 (D.C. Cir. 1998) (citing American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1982)). And, even where the agent's action is beyond the original express, implied, or apparent authority, an act may be attributed to the principal if it is later ratified, either explicitly or by implication. Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1409 (11th Cir. 1994); IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F.3d 370, 375 (2d Cir. 1994); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local

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[5](...continued)
liable. Rejecting this argument, the court noted that the motivations were not mutually exclusive, and that, in fact, the employees had acted to benefit themselves (via larger bonuses) as well as the corporation (via increased revenue). Moreover, the court reasoned, so long as the employees were acting **in part** for the benefit of the corporation, the corporation may be held liable for their acts. Id. at 823 (citing United States v. Beusch, 596 F.2d 871, 877-78 & n.7 (9th Cir. 1979); United States v. Demauro, 581 F.2d 50, 54 & n.3 (2d Cir. 1978); and Prosser, Torts, § 70 at 461 (4th Ed. 1971)). See also Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 223-24 (1923); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982) (agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated – at least in part – by an intent to benefit the corporation" (emphasis added)); United States v. Automated Medical Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) ("It would seem entirely possible, therefore, for an agent to have acted for his own benefit while also acting for the benefit of the corporation."). Likewise, in United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990), the government sought forfeiture from the defendant, 141st Street Realty Corporation, of an apartment building that had been used to facilitate narcotics trafficking. At trial, the government established that the building superintendent, Nahmias, accepted bribes and collected extortionate rents from drug dealers in exchange for their use of the building for drug-related activities. On appeal, the corporation argued that the agent acted adversely to its interests "and therefore any knowledge that Nahmias may have had of the narcotics trafficking cannot be imputed to the corporation." Id. at 876. The Court of Appeals for the Second Circuit rejected the corporation's argument, noting that "Nahmias' actions were adverse to the corporation only in the sense that his actions contributed to the imputation of knowledge to Realty Corp.," and that, under the corporation's faulty logic, imputation of knowledge could never be used to impose liability "because the very actions of the agent that cause an imputation of knowledge are 'adverse' to the principal." Id.

Union 639, 883 F.2d 132, 136 (D.C. Cir. 1989), rev'd in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc).

If the act is done within the course of employment and with intent to benefit the corporation, the corporation is liable even if the act was unlawful,[6] or was done contrary to instructions or policies.[7]

Furthermore, it is well-established that "the knowledge of the employee is the knowledge of the corporation." Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976). See, e.g., United States v. Investment Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993) (corporation liable for offenses arising from interstate transportation of obscenity based on president's actions); In re Adams Labs., 3 B.R. 495, 499 & n.2 (Bankr. E.D. Va. 1980) ("The knowledge acquired by a secretary and treasurer who conducts negotiations with a third party with authority from the corporation to do so will be imputed to the corporation."); Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179, 182 (4th Cir. 1935) (corporation affected with constructive knowledge "of all material facts of which an officer acquires knowledge while acting in the course of his employment and within the scope of his authority."); United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (citing cases for agent's knowledge being imputed to the company).[8]

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

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

[8] See also Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1051-52 (2d Cir. 1979) (notice to bank's paying and receiving agent imputed to bank); Mallis v. Bankers Trust Co., 717 F.2d 683, 689 & n.9 (2d Cir. 1983) ("It is a basic tenet of the law of agency that the knowledge of an agent, or for that matter a partner or (continued...)

Furthermore, a principal is attributed with the knowledge acquired by its agent even if the information is never communicated to it, see, e.g., New York University v. First Financial Ins. Co., 322 F.3d 750, 753-54 & n.2 (2d Cir. 2003),[9] or even after termination of the services of that officer, employee, or agent. See Acme Precision Products, Inc. v. American Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970) (knowledge by a corporation, obtained by and through its officers and key employees, of facts of continuing importance to business of the corporation, even after termination of services of that officer or employee, is conclusive upon the corporation).

In affirming corporate criminal liability, the Supreme Court has noted that:

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[8](...continued)
joint venturer, is imputed to the principal." (citing cases)); Eitel v. Schmidlapp, 459 F.2d 609, 614-16 (4th Cir. 1972) (where defendant's agent fraudulently conveyed property to defendant, agent's knowledge of fraud would be imputed to principal even where no evidence of actual knowledge on part of principal: "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew."); American Standard Credit, Inc. v. National Cement Co., 643 F.2d 248, 270-71 (5th Cir. 1981) (imputation of joint venturer's knowledge to entire corporation); Bergeson v. Life Ins. Corp. of Am., 265 F.2d 227, 232 (10th Cir. 1959) (corporation necessarily acts vicariously and can acquire knowledge only through its officers and agents and their knowledge is knowledge of corporation); National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 243-44 (2d Cir. 1991) (corporation owned by Iranian government imputed with knowledge of its agent, United Arab Emirates intermediary, and therefore had imputed knowledge of illegal nature of shipment of chemicals from United States to Iran); Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 590 (9th Cir. 1983) (knowledge of four senior officers of corporation that corporation's agent had rebated was imputable to corporation; thus, record supported district court's finding that corporation's denial that it had engaged in rebating was knowingly false); Ritchie Grocer Co. v. Aetna Cas. & Sur. Co., 426 F.2d 499, 500 (8th Cir. 1970) (knowledge possessed by branch manager for one of corporate insured's stores that employee had previously committed tire theft was fully attributable to insured within exclusion provision of employee fidelity policy precluding coverage after insured or officer of insured discovers or has knowledge or information that employee has committed any fraudulent or dishonest act in service of insured or otherwise); Mollohan v. Masters, 45 App. D.C. 414, 421-22 (D.C. App. 1916) (where promissory notes infected with usury come into the possession of a corporation through its agents, who had notice of the usury, the corporation is not in a position to claim that it is an innocent purchaser; notice to the agents being notice to the principal); United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (there is no requirement that a person be a "central figure" at a corporation in order for that person's knowledge to be imputed to the corporation); Askanase v. Fatjo, 130 F.3d 657, 666 (5th Cir. 1997) (imputing corporate officer's knowledge to corporations for statute of limitations purposes); St. Paul Fire and Marine Ins. Co. v. FDIC, 968 F.2d 695, 700-701 (8th Cir. 1992) ("in general, an agent's actual notice or knowledge may be imputed to the agent's principal.").

[9] See also Hand & Johnson Tug Line v. Canada S.S. Lines, 281 F. 779, 783 (6th Cir. 1922) (corporation cannot avoid responsibility by showing that, when a written notice by mail was received in its general office, it was sent to the wrong department); Bowen v. Mount Vernon Sav. Bank, 105 F.2d 796, 799 (D.C. Cir. 1939) (presumption that a principal knows what his agent knows is irrebuttable, and cannot be avoided by showing that the agent did not in fact communicate his knowledge nor by showing that the agent had such an adverse interest that he would not likely communicate his knowledge).

> [w]e see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.

New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

The Court finds as a matter of law that the knowledge, conduct, and statements of Defendants' agents and employees, as set forth below and in the United States' Final Proposed Findings of Fact ("U.S. FPFF"), may be attributed to Defendants, as corporate-principals.

This litigation also involves one parent corporation, Defendant Altria Group, Inc., f/k/a Philip Morris Companies Inc. ("Altria" or "Philip Morris Companies"), which, although it does not itself manufacture or distribute cigarettes, has been a parent corporation for Defendant Philip Morris USA Inc., f/k/a Philip Morris Incorporated ("Philip Morris USA" or "Philip Morris"), since Altria was incorporated in 1985. Also, Defendant British American Tobacco (Investments) Limited ("BATCo") until 1979 was a parent corporation of Defendant Brown & Williamson, as well as (at various times, including currently) a direct manufacturer of certain brands of cigarettes sold in the United States. It is important to note that both Altria and BATCo, independently of their subsidiaries, have directly participated in the Enterprise, in the scheme to defraud, the pattern of racketeering activity and in the conspiracy as set forth in U.S. FPFF §§ I, III, IV, VI and VII and infra, Sections I and II. Therefore, their liability is not dependent upon the conduct of their afflicted entities, who are also Defendants in this litigation.[10]

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[10] Nevertheless, in RICO cases, a parent company can be held vicariously liable for the conduct of its subsidiary. See, e.g., In re Sumitomo Copper Litig., 104 F. Supp. 2d 314, 325 (S.D.N.Y. 2000) (parent company can be held vicariously liable under RICO for subsidiary's violations of Commodity Exchange Act); In re Conti

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Additionally, Defendant American merged into Brown & Williamson on February 28, 1995. By its own concession, Brown & Williamson is being sued directly and as successor by merger to American. See also United States v. Alamo Bank, 880 F.2d 828 (5th Cir. 1989); Holland v. Williams Mountain Coal Co., 256 F.3d 819 (D.C. Cir. 2001). See Brown & Williamson's Answer to the Complaint, "Statement As To The American Tobacco Company," at 1-2; U.S. FPFF § III ¶ 3.

5. Corporate Scienter May Be Established By The Collective Knowledge of The Corporation's Employees and Representatives

Insofar as a principal can be attributed with the knowledge of a single agent or employee, see supra Section I.A.4, a corporation, as a collection of employees and agents, "is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." United States v. T.I.M.E.-D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974). Therefore, Defendants are liable for the aggregate knowledge of all employees and agents

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[10](...continued)
Commodity Services, Inc., Securities Litig., 733 F. Supp. 1555, 1566 (N.D. Ill. 1990), rev'd in part, 976 F.2d 1104 (7th Cir. 1992), and aff'd in part, 63 F. 3d 438 (7th Cir. 1995) (§ 1962(a) & (b)).

The Court acknowledges – for the sake of distinguishing – that there are some cases indicating that vicarious liability for a substantive RICO offense in a private civil RICO action for treble damages does not attach from a subsidiary to a parent corporation where the parent corporation is the defendant and its subsidiary the alleged enterprise. See, e.g., Lorenz v. CSX Corp., 1 F.3d 1406, 1412 (3d Cir. 1993) ("it is still theoretically possible for a parent corporation to be the defendant and its subsidiary to be the enterprise under section 1962(c). However, the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity **which is distinct from the activities of its subsidiary**. A RICO claim under section 1962(c) is not stated where the subsidiary merely acts on behalf of, or to the benefit of, its parent.") (emphasis added). However, the Court recognizes (as have other courts) that these cases relate to the requirement that the RICO enterprise be distinct from each defendant. See Davis v. Mutual Life Ins. Co., 6 F.3d 367, 378-79 (6th Cir. 1993) (discussing limitations on vicarious liability as "firmly rooted in the non-identity requirement" and therefore "not . . . particularly instructive in the instant case, where the corporate defendant charged with vicarious liability is **separate from** the RICO 'enterprise.'"); Schofield v. First Commodity Corp., 793 F.2d 28, 32-33 (1st Cir. 1986) ("Both the language of [§1962(c)] and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal 'person' or 'persons.'"). Because in this case this Court has found that the RICO enterprise is distinct from each Defendant (see infra Section I.D.1 and II.B.3 and U.S. FPFF § III), there is no impediment to a finding that a parent-defendant is vicariously liable for the conduct of its subsidiary, another Defendant.

within (and acting on behalf of) the corporation, and cannot "plead ignorance" by claiming that the representative making the fraudulent statement, or obtaining the knowledge of its falsity, somehow was insulated from the rest of the corporation.

The seminal case on the "collective knowledge" doctrine is United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987). In that case, the bank was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court stressed that, unlike a natural person, the jury must consider the bank "as an institution." The trial court instructed the jury as follows:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all the employees. That is, the **bank's knowledge is the totality of what all of the employees know within the scope of their employment**. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

Id. (emphasis added). After conviction, the bank on appeal challenged the trial court's instructions regarding the bank's knowledge and intent, by allowing the jury to consider the aggregate knowledge of various employees, including the tellers at the bank window (who participated in the withdrawals) and the other employees (who might not have even known of the withdrawals). The individual making the withdrawals was acquitted on all counts, and none of the bank employees had been charged with a crime. Id. at 846. Therefore, the bank contended, "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the

other half." Id. at 856.

The First Circuit rejected the bank's argument, noting that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." Id. at 856. In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead ignorance":

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . . Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Id. at 856.

Earlier cases also demonstrate that corporate knowledge should be aggregated, and accordingly notice and knowledge of a fact by an employee-representative is imputed to the corporation-principal. For instance, in Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951), the court ruled that a corporation could be held responsible for the mistakes and falsification by its drivers in preparation of drivers' logs even where no individual agent or employee was shown to have actual knowledge of discrepancies between the business logs and reports. The court explained:

> The logs and the reports did not find their way into the hands of a single agent or representative of the company after they were filed. No single agent or representative in the offices of the company had actual knowledge of their conflicts and falsities. But one agent or representative had

> knowledge of the material contents of the logs and another had knowledge of the material contents of the reports. And the knowledge of both agents or representatives was attributed to the company.

Id. at 315.[11]

Likewise, since Bank of New England, several other courts have allowed such agents' knowledge to be aggregated and imputed to the corporation as a whole. For instance, in United States v. Sun-Diamond Growers, 964 F. Supp. 486 (D.D.C. 1997), the court noted that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation." Id. at 491 n.10. In addition, the Court noted that, under agency principles, the defendant could still be liable for Douglas' actions "even if Mr. Douglas had acted against corporate policy or the corporation's express instructions or even if Sun-Diamond had derived no benefit from Mr. Douglas' actions." Id.

In CPC Intern., Inc. v. Aerojet-General Corp., 825 F. Supp. 795 (W.D. Mich. 1993), the court stressed that "a corporation cannot plead innocence by asserting that the information

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[11] See also Matter of Pubs., Inc., 618 F.2d 432, 438 (7th Cir. 1980) (collective knowledge of all employees and departments within the corporation is generally imputed to the corporation); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721-22 (5th Cir. 1963) ("It is now beyond doubt that a corporation may be held criminally liable. [citing cases] These cases also settle the proposition that knowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to wilfulness on the part of the corporation."); United States v. U.S. Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (collective knowledge doctrine case in False Claims Act context); Camacho v. Bowling, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983) ("Other organizations, such as private corporations or partnerships, are held to have constructive notice of the collective knowledge of all the employees and departments within the organization."); People v. American Medical Centers, 324 N.W.2d 782, 793 (Mich. App. 1982) ("The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent acts."); United States v. Sawyer Transport Inc., 337 F. Supp. 29, 31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972) (knowledge of employees may be joined and imputed to the corporation); United States v. E. Brooke Matlack, 149 F. Supp. 814, 819-20 (D. Md. 1957) (corporation liable for knowingly and wilfully violating ICC regulations even where main office in Philadelphia did not know or suspect that branch agents in Baltimore were violating duties); General City Motors Inc. v. Minton, 137 S.E.2d 522, 525 (Ga. App. 1964) (corporation "chargeable with the **composite knowledge** of acquired by its officers and agents" (emphasis added)).

obtained by several employees was not acquired by any one individual employee." 825 F. Supp at 811-812 (quoting Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 400-401 (Mich. 1991) (in turn quoting T.I.M.E.-D.C. Inc., 381 F. Supp. at 738); United States v. LBS Bank-New York Inc., 757 F. Supp. 496, 501 (E.D. Pa. 1990) (knowledge from different employees can be joined in order to establish corporate knowledge, but specific intent cannot be so aggregated); United States v. Farm & Home Sav. Ass'n, 932 F.2d 1256, 1259 (8th Cir. 1991) (imputing collective knowledge of employees participating in multiple illegal transactions to employer).

Thus, under the collective knowledge doctrine "[t]he knowledge necessary to adversely affect the corporation does not have to be possessed by a single corporate agent; **the cumulative knowledge of several agents** can be imputed to the corporation." William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 790, at 16 (perm. Ed.) (emphasis added); accord William E. Knepper & Dan A. Bailey, Liability of Corporate Directors and Officers, § 1.02, at 4 (Supp. 1992).

Imposing the collective scienter upon the corporation follows equity as well as the extensive legal authority cited above. As the First Circuit noted in Bank of New England, the collective knowledge doctrine prevents a corporation from "plead[ing] innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import." 821 F.2d at 856 (citing T.I.M.E.-D.C., 381 F. Supp. at 738). Indeed, numerous courts have prevented corporations (and other organizations) from taking advantage of their corporate form by attempting to "ostrich" themselves away from liability by insulating the actors (or spokespersons) of a corporation from those within the organization who have certain information.

In the words of Dan Webb, a former United States Attorney (and now lead trial counsel for Defendant Philip Morris):

> Given the often complex and decentralized nature of many corporations, it is sometimes difficult, if not impossible, to prove that any single corporate agents acted with the necessary intent and knowledge to commit an offense. Under the judicially created "collective knowledge" doctrine, however, this will not preclude a corporation's conviction. That doctrine deems a corporation's knowledge to be the combined knowledge and intent of all its employees. Thus, even if no single employee has the intent and knowledge necessary to commit a crime, the corporation can be convicted on the basis of its employees [sic] collective knowledge and intent.

Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 Bus. Law 617, 625 (1994).[12]

Accordingly, under the foregoing authority, it is immaterial whether any single individual employed by Defendants knew both that cigarettes and exposure to secondhand smoke caused disease and that the corporation was making public statements to the contrary. For example, it is

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[12] See also Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?, 47 Rutgers L. Rev. 605, 625 (1995) (noting that corporations can be convicted of intent-based crimes even where none of their employees possessed the requisite intent); Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 Colum. L. Rev. 1252, 1256 n.26 (1996) ("Under the 'collective knowledge' doctrine, courts have found the required intent by imputing to the corporation the aggregate knowledge of more than one employee."); Steere Tank Lines v. United States, 330 F.2d 719, 721 (5th Cir. 1963) ("knowledge of employees of the corporation is attributable to the corporation, and . . . their acts may amount to wilfulness on the part of the corporation").

See also Fletcher, Corporations, § 790 (absent collective knowledge doctrine, "corporations could avoid the adverse implications of the [imputed knowledge] rule by restricting the intracorporate flow of information."). As noted by the Fifth Circuit in Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1376 (5th Cir. 1983), "Because a corporation operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed privity and knowledge of the organization, 'else it could always limit its liability.'" (citing Coryell v. Phipps, 317 U.S. 406, 410-11 (1943)); Silver Line, Ltd. v. United States, 94 F.2d 776, 780 (9th Cir. 1937) (ship owner may not escape liability by giving management functions to employee acting as agent)). As the Eleventh Circuit emphasized in First Alabama Bank, 899 F.2d 1045, 1060 n. 8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person."

immaterial whether, on January 11, 1990, when R.J. Reynolds Public Relations Manager Jo Spach sent a letter to Willow Ridge School, and informing the school (and asking that her information be passed along to students) that scientists did not know the causes of chronic diseases reported to be associated with smoking, Ms. Spach herself knew that R.J. Reynolds research department had longstanding proof of the causal connection between smoking and disease. See Racketeering Act #85. Similarly, for purposes of Defendants' liability,[13] it is immaterial whether, when Philip Morris CEO Joseph Cullman denied that cigarette smoking is hazardous or that smoking poses a hazard to pregnant women or infants, Cullman personally knew the contrary. See Racketeering Act #105. And, when the Chief Executive Officers of Defendants testified in 1994 before a congressional subcommittee (which testimony was televised), and denied that nicotine was addictive or that the companies manipulated the amount

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[13] It is black letter law that a corporation may be prosecuted along with its agents for a violation of the law. See, e.g., United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (corporation may be prosecuted along with its officers for violations of 18 U.S.C. § 1001, the false statements statute) (citing cases). See also United States v. Basic Constr. Co., 711 F.2d 570, 572-73 (4th Cir. 1983) (corporation can be held criminally liable for antitrust violation of employees, even if such acts were against corporate policy or express instructions); United States v. Am. Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970); United States v. Hilton Hotels Corp., 467 F.2d 1000,1004 (9th Cir. 1972) (corporate liability even if employee's acts were contrary to instructions or policies); Beusch, 596 F.2d at 877; Harry L. Young & Sons, Inc., 464 F.2d at 1297; Automated Medical Labs, 770 F.2d at 406-07 & n.5; Egan, 137 F.2d at 379; United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982) (§ 1001 false statements case).

At the same time, the corporation may be convicted of a willful violation even where the employees are acquitted. For instance, in Bank of New England, the bank employees who participated in the transactions (and whose collective knowledge was imputed to the bank) were both acquitted of conspiracy and of aiding and abetting the substantive violations of the Currency Transaction Reporting Act. 821 F.2d at 847. Indeed, various other courts have upheld the vicarious liability of the corporation even where the employee or agent who allegedly acted on the corporation's behalf is acquitted. See, e.g., LBS Bank-New York Inc., 757 F. Supp. 496; United States v. Young Bros., Inc., 728 F.2d 682 (5th Cir. 1984); United States v. Cargo Serv. Stations, Inc., 657 F.2d 676 (5th Cir. 1981); Dugan Drug Stores Inc. v. United States, 326 F.2d 835 (5th Cir. 1964); United States v. American Stevedores, Inc., 310 F.2d 47, 48-49 (2d Cir. 1962); Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (1959); American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941) ("we believe that the acquittal of the officers and agents, even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporation."); Hilton Hotels Corp., 467 F.2d at 1008 (citing cases); United States v. Austin-Bagley Corp., 31 F.2d 229 (2d Cir. 1929); American Socialist Society v. United States, 266 F. 212 (2d Cir. 1920).

of nicotine contained in their cigarettes, it is immaterial whether each of the CEOs were personally aware of the extensive information in their companies' files that these public statements were counterfactual.

For example, in United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1986), an accounting firm was convicted for making and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1), for preparing and submitting tax returns claiming deductions for illegal "straddle" investments. The firm's chief operating officer, Ashida, advised the customer about the investment, and provided information to another employee of the firm, Whatley, for the actual preparation of the customer's return. Id. at 1450-51. At trial, the firm contended that a corporation cannot be guilty of a § 7206 offense "when the person who actually subscribes the false return believes it to be true and correct." Id. The district court denied the motion, and the jury ultimately convicted the firm.

On appeal, the defendant claimed that six of the convictions should be overturned because there was no evidence that Whatley, the preparer and subscriber of these six tax returns, possessed the requite intent to wilfully make and subscribe a false tax return. The firm conceded that "Ashida, who supplied Whatley with all of his information regarding the straddle losses, did have the requisite intent," but pointed out that Ashida did not physically subscribe to the return. After considering the argument, the court of appeals concluded that it was "completely meritless":

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

Id. at 1454. In so concluding, the court precluded the organization from shielding itself from liability by artificially dividing its responsibilities – and its knowledge. As the court explained in T.I.M.E.-D.C., 381 F. Supp. at 738-39, "a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import." See also United States v. Sawyer Transport, Inc., 337 F. Supp. 29 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972).

Similarly in United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 919 (4th Cir. 2003), a False Claims Act case, though not formally needing to reach the "corporate scienter" rule, the court of appeals declined to adopt the defendant's proposed "single actor" requirement that the same employee know both the certifying requirement and the wrongful conduct. Under that rule, the court reasoned, "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability." Id. As acknowledged by the California Supreme Court, the single actor rule is "fraught with danger and opens up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand know what is in its left hand, to mislead and deceive . . . ." Sanders v. Magill, 70 P.2d 159, 163 (Cal. 1937).

For the foregoing reasons, Defendants in this case cannot escape their liability by insisting that a "single actor" must complete every step of the unlawful transaction, despite the fact that the corporation, in performing its various tasks, relies upon the concerted efforts – and collective knowledge – of various persons, departments, and other agents to function. Such a result would not only be contrary to extensive legal precedent, but inequitable, especially since

"the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew." Eitel v. Schmidlapp, 459 F.2d 609, 614 (4th Cir. 1974) (citing Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 223-24 (1923), and other cases). Therefore, Defendants are accountable for the collective knowledge of their employees and agents.

B. Defendants Established An Association-In-Fact Enterprise

The First Amended Complaint alleges (¶ 173) that the RICO Enterprise is a group of business entities and individuals associated-in-fact consisting of Defendants Philip Morris USA, R.J. Reynolds Tobacco Company ("Reynolds" or "RJR"), Brown & Williamson ("Brown & Williamson" or "B&W"), Lorillard Tobacco Company, Inc. ("Lorillard"), Liggett Group, Inc. ("Liggett"), American Tobacco Company ("American"), Altria, BATCo, Council For Tobacco Research – U.S.A., Inc. ("CTR"), and the Tobacco Institute, Inc. ("TI" or "Tobacco Institute"), and other entities and persons, including agents and employees of Defendants. Defendants have previously asserted defenses based on the contention that the United States' allegations do not "satisfy the statutory definition of 'enterprise.'" See Joint Defendants' Preliminary Proposed Rebuttal Findings of Fact and Conclusions of Law ("JD. RFFCL") at 1262-72, 1280-83. As demonstrated herein, Defendants' contention is legally and factually meritless. The United States has presented overwhelming evidence that Defendants formed a RICO Enterprise. See U.S. FPFF § I.

1. Corporations and Other Individuals May Comprise an Association-In-Fact Enterprise

The RICO statute provides:

> "enterprise" **includes** any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4) (emphasis added). Defendants argue that the word "includes" denotes "**confinement**," not "expansion," and that because RICO's definition of "enterprise" does not explicitly specify a group of corporations, it does not encompass a group of corporations associated-in-fact. See JD. RFFCL at 1268-70. Defendants have further argued that because the Complaint does not identify specific individuals who are members of the alleged Enterprise, the Enterprise is confined to an association of corporations. Defendants are wrong. It is not necessary to identify by name all the members of the enterprise in the complaint. See, e.g., United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995); United States v. Wilson, 79 F. Supp. 2d 1029, 1031-32 (E.D. Ark. 1999); United States v. Marcy, 777 F. Supp. 1393, 1395 (N.D. Ill. 1991).

Defendants have also claimed that as a matter of law, an association-in-fact enterprise may not consist of a group of corporations. See JD. RFFCL at 1264-73. However, the Court has previously held in this case, consistent with the law of this Circuit, that a RICO enterprise may consist of "a group of individual[s], partnerships, and corporations associated in fact," United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152 (D.D.C. 2000) (quoting United States v. Perholtz, 842 F.2d 343, 351, n.2 (D.C. Cir. 1988)), and that "the Government has adequately pleaded the enterprise element." Id. at 153.

Even if this Court were to revisit its decision in that regard, Defendants' argument is without merit. Contrary to Defendants' claim, in United States v. Turkette, 452 U.S. 576 (1981), the Supreme Court rejected a narrow interpretation of RICO's definition of enterprise, explicitly holding that:

> **There is no restriction upon the associations embraced by the definition**: an enterprise includes any union or group of individuals

> associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope.

Id. at 580 (emphasis added). There is nothing in Turkette to suggest that RICO's definition of enterprise does not "include" groups of individuals and corporations, or groups of corporations alone.

Moreover, in United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988), the District of Columbia Circuit squarely held that RICO's definition of "enterprise" **includes** an association-in-fact of corporations, legal entities and individuals, as alleged here, and rejected the same argument Defendants make here, stating:

> Appellants argue that the indictment in this case was fatally flawed because it charged [that the enterprise was comprised of] individuals, corporations and partnerships associated in fact. . . .
>
> We are unpersuaded. The statute defines "enterprise" as **including** the various entities specified; the list of entities is not meant to be exhaustive. "There is no restriction upon the associations embraced by the definition. . . ." On the contrary, Congress has instructed us to construe RICO "liberally . . . to effectuate its remedial purposes" . . . . Appellants' restrictive interpretation of the definition of enterprise would contravene this principle of statutory construction.
>
> Appellants' reading of Section 1961(4) would lead to the bizarre results that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

842 F.2d at 352-53 (citations deleted; emphasis in original). Perholtz is binding precedent and disposes of Defendants' arguments.

Defendants' contention that Perholtz may no longer be good law in light of the Supreme Court's decision in Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003), is frivolous. See JD. PFFCL at 1267. Scheidler held that the defendants did not "obtain" or

attempt to "obtain" property from the plaintiffs by their use of threats to induce abortion clinics to stop providing abortion-related services, and therefore did not commit "extortion" under the Hobbs Act, 18 U.S.C. § 1951, or state law. Scheidler did not even remotely address, much less turn on, an interpretation of RICO's definition of "enterprise."

Moreover, every federal court of appeals that has considered the issue has agreed with the District of Columbia Circuit that a RICO enterprise may consist of an association-in-fact combination of legal entities and individuals.[14]

Even if the enterprise alleged here were limited to a group of corporations – and it is not – every federal court of appeals that has considered the issue has held that, contrary to Defendants' argument, a RICO enterprise may consist of a group of corporations or other legal entities associated-in-fact.[15] Indeed, in Blue Cross & Blue Shield of N.J. v. Philip Morris Inc., 113 F. Supp. 2d 345, 365, 368 (E.D.N.Y. 2000), the court rejected the very same argument on a

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[14] See, e.g., United States v. Najjar, 300 F.3d 466, 484-85 (4th Cir. 2002) (a corporation, a sole proprietorship and an individual); United States v. Goldin Industries, Inc., 219 F.3d 1271, 1275-76 and n.6 (11th Cir. 2000) (three corporations and four individuals); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-64 (2nd Cir. 1995) (two corporations and their principal officer); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991) ("an informal consortium of a law firm and two police departments with the three individuals who are the defendants"); United States v. Ofchinick, 883 F.2d 1172, 1175 (3rd Cir. 1989) (four corporations and two individuals); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 748-49 (5th Cir. 1989) (six corporations and an individual); United States v. Feldman, 853 F.2d 648, 656-57 (9th Cir. 1988) (five corporations and two individuals); United Energy Owners v. United Energy Management, 837 F.2d 356, 362-63 (9th Cir. 1988) (a group of approximately 9 corporations and 26 individuals); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir. 1982) (a group of corporations and individuals).

[15] See, e.g., United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993); River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1461 (9th Cir. 1993); Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio, 900 F.2d 882, 887 (6th Cir. 1990); Shearin v. E.F. Hutton, 885 F.2d 1162, 1165-66 (3d Cir. 1989); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 995 (8th Cir. 1989); United States v. Kirk, 844 F.2d 660, 663-64 (9th Cir. 1988); United States v. Navarro-Ordas, 770 F.2d 959, 969 n. 19 (11th Cir. 1983); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979); United States v. Campanale, 518 F.2d 352, 357, n.11 (9th Cir. 1975). See also United States v. Walters, 711 F. Supp. 1435, 1448-49 (N.D. Ill. 1989); Pappas v. NCNB Nat. Bank, 653 F. Supp. 699, 702 (M.D. N.C. 1987); Trak Microcomputer Corp. v. Weaver Bros., 628 F. Supp. 1089, 1094-95 (N.D. Ill. 1985); Fustok v. Conticommodity Services Inc., 618 F. Supp. 1074, 1074-76 (S.D.N.Y. 1985); United States v. Perkins, 596 F. Supp. 528, 530 (E.D. Pa. 1984); Morosani v. First Nat'l Bank, 581 F. Supp. 945, 954 (N.D. Ga. 1984).

motion for summary judgment from Defendants in this case, holding that a RICO enterprise may consist of an association-in-fact of the Defendant tobacco companies and CTR and TI.

For the foregoing reasons, it is clear that a RICO enterprise may consist of a group of corporations, other legal entities and individuals associated-in-fact.[16]

2. The Governing Legal Principles Regarding An Association-In-Fact Enterprise

The Supreme Court has held that an association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). The Turkette Court also explained that although the "enterprise" and "pattern of racketeering"

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[16] Defendants rely upon two district decisions from other districts – United States v. McClendon, 712 F. Supp. 723, 730 (E.D. Ark. 1988), and Benard v. Hoff, 727 F. Supp. 211, 215 (D. Md. 1989) – to argue that a RICO enterprise may not consist of a group of corporations or other legal entities associated-in-fact. These decisions are not binding on this Court, have been criticized, have not been followed in their own circuits, and are contrary to the overwhelming weight of authority, including the Perholtz decision in the District of Columbia Circuit.

The Fourth Circuit has not specifically held that a RICO enterprise may consist of a group of corporations. See Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987) (noting that it "need not reach" the issue of whether corporations are capable of forming an association-in-fact enterprise, but assuming that they can), overruled on different grounds, Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1991). However, the Fourth Circuit has upheld a RICO conviction where the enterprise consisted of a group of corporations associated-in-fact. See United States v. Vogt, 910 F.2d 1184, 1193-94 (4th Cir. 1990). Also, other cases have criticized the Benard case as incorrect and ill-founded. See, e.g., Chisolm v. Charlie Falk AutoWholesalers, Inc., 851 F. Supp. 739, 747 (E.D. Va. 1994) (noting that Benard "cited no authority for [its] conclusion" and declining to follow it: "Eliminating associations-in-fact of corporations from the reach of RICO would thus allow the most powerful, sophisticated and potentially dangerous criminals to escape punishment. This was certainly not the intent of Congress. Thus, the Court finds that an association-in-fact of corporations can be an enterprise for purposes of RICO."), vacated on other grounds, 95 F.3d 331 (4th Cir. 1996). See also Mylan Labs., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1079 n. 44 (D. Md. 1991) (noting that Bernard "was actually at odds with the decisions of a number of Courts of Appeals which have held that corporations can associate in fact to constitute an enterprise") (citing United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), and Perholtz)).

Defendants' reliance upon McClendon fares no better. See United States v. Blinder, 10 F.3d 1468, 1475 (9th Cir. 1993) (pointing out that "McClendon. . . has neither been adopted nor approved of by the Eighth Circuit; indeed, it has not been cited by any court"). See also 38 Am. Crim. L. Rev. 1211, 1275 n. 115 (2001) ("McClendon appears to be distinctly minority view."). Moreover, McClendon itself rested its ruling on the rule of lenity governing criminal prosecutions, and pointed out that enterprises comprised of a group of corporations might be allowable "for civil purposes." See 712 F. Supp. at 730. Finally, other district court cases within the Eighth Circuit follow the majority rule, and have allowed enterprises composed of corporations and individuals. See, e.g., Ford Motor Co. v. B&H Supply, Inc., 646 F. Supp. 975, 999-1000 (D. Minn. 1986).

elements of RICO are separate elements "the proof used to establish these separate elements may in particular cases coalesce." Id.

In accordance with Turkette, the Court of Appeals for the District of Columbia Circuit has consistently held that an association-in-fact "enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity," and that the enterprise need only involve "some structure to distinguish an enterprise from a mere conspiracy." United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (citations omitted). Accord United States v. White, 116 F.3d 903, 924 & 925 n.7 (D.C. Cir. 1997) (collecting cases); United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir. 1988). As the District of Columbia Circuit further explained:

> It is not necessary that the enterprise . . . have any particular or formal structure but it must have sufficient organization that its members function and operated together in a coordinated manner in order to carry out the common purpose alleged.

Perholtz, 842 F.2d at 364.[17]

Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members' commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping

[17] The District of Columbia Circuit has rejected views expressed in United States v. Bledsoe, 674 F.2d 647, 665-67 (8th Cir. 1983), that the plaintiff is required to prove that the enterprise has an ascertainable structure distinct from that which is inherent in the conduct of a pattern of racketeering activity and has a hierarchical structure beyond what is necessary to commit the predicate acts of racketeering. See Perholtz, 842 F.2d at 362-63. Indeed, it is particularly significant that Turkette does not require the plaintiff to prove such matters to establish an enterprise.

nature of the wrongful conduct.[18]

Moreover, the District of Columbia Circuit stated that "it is not essential that each and every person named in the indictment [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to have been members at any time." Perholtz, 842 F.2d at 364.[19] Likewise, it is not necessary to prove "that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 699 F.2d 915, 922 (11th Cir. 1983). Accord United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984); United States v. Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989).

3. Defendants Formed an Enterprise

In a previous decision in this litigation, this Court held that under Turkette, Richardson, and Perholtz, the Complaint here adequately alleges an association-in-fact enterprise having the

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[18] See, e.g., United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (members of drug trafficking enterprise provided other members with financial assistance and coordinated transportation of drugs); Richardson, 167 F.3d at 625 ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern"); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997) ("The length of these associations, the number and variety of crimes the group jointly committed, and Davidson's financial support of his underlings demonstrates an ongoing association with a common purpose to reap the economic rewards flowing from the crimes, rather than a series of ad hoc relationships"); Securitron Magnalock, 65 F.3d at 263-64 (jury could infer that two corporations engaged in manufacturing electromagnetic locks were members of an association-in-fact enterprise from their pattern of disseminating false and deceptive statements about a competitor's electromagnetic locks to obtain business); Blinder, 10 F.3d at 1470 ("The essence of the enterprise . . . was the identical means by which the constituent blind pool companies were formed and taken public through Blinder Robinson"); Perholtz, 842 F.2d at 355 ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise"); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985) (holding that the jury could have inferred the existence of the alleged association-in-fact enterprise from the "coordinated nature of the defendants' activity" and that the defendants' racketeering acts were facilitated by their nexus to the enterprise); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) ("Proof of the existence of an associated-in-fact enterprise requires proof of a 'common purpose' animating its associates"); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) ("A jury is entitled to infer the existence of an enterprise on the basis of largely or wholly circumstantial evidence.").

[19] Accord White, 116 F.3d at 925 n.7; United States v. Mauro, 80 F.3d 73, 77 (2d Cir. 1996); United States v. Church, 955 F.2d 688, 698 (11th Cir. 1992); Elliott, 571 F.2d at 898 n.18.

requisite: "(1) common purpose among the participants, (2) organization and (3) continuity," stating that:

> [T]he Complaint alleges that Defendants decided on a joint objective to "preserve and expand the market for cigarettes and to maximize" their profits and "agreed that the strategy they were implementing was a 'long-term one' that required defendants to act in concert with each other on the current health controversy, as well as on issues that would face them in the future. Compl. at ¶¶ 33-34.

Philip Morris, 116 F. Supp. 2d at 152-53.

The Court finds that Defendants in this action established an association-in-fact enterprise as alleged. See U.S. FPFF § I. In order to further the common purposes of its members, the Enterprise had a discernible organization and functioned as a continuing unit beginning in late 1953 and continuing for decades. First, Defendants formed an association-in-fact enterprise to advance their principal common goals: to preserve and enhance their profits and to avoid adverse liability verdicts in litigation in the face of the growing body of scientific and medical evidence about the adverse health effects and addictiveness of smoking. In furtherance of this primary objective, the Enterprise developed and executed a scheme to defraud the public. Second, the Enterprise operated through both formal and informal structures. For example, certain Defendants organized themselves through jointly funded and directed entities, such as Defendants CTR and the Tobacco Institute, as well as various foreign organizations, committees and conferences, to further the execution of the scheme to defraud and to maintain a united front. See U.S. FPFF § I.B-H. In addition, Defendants entered formal and informal agreements intended to ensure adherence to achieve their shared aims. See U.S. FPFF § I.D-I. Third, the United States has proved that Defendants' association-in fact Enterprise has possessed the requisite continuity. The evidence is overwhelming that myriad formal and

informal mechanisms for joint communication and action have existed since at least late 1953, and that Defendants have indeed participated in and utilized such mechanisms to function as a continuing unit throughout the relevant time period. Moreover, although the plaintiff is not required to prove that the enterprise had an ascertainable structure distinct from that which is inherent in, and beyond what is necessary to commit, the charged predicate acts, this Court finds that the United States has established such a structure to the Enterprise. See U.S. FPFF § I.A.

a. Members of the Enterprise Had a Common Purpose

The central shared objectives of Defendants have been to maximize their profits by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud the public and to avoid legal liability that could result in large damage awards and increased public recognition of the harmful effects of smoking. Indeed, documents recounting the December 1953 meeting at the Plaza Hotel attended by the Chief Executive Officers for Defendants Philip Morris, RJR, B&W, Lorillard, and American – a meeting called by American's president to discuss an "industry response" to several research studies linking cigarette smoking to lung cancer – report that the executives agreed to jointly sponsor a public relations campaign

> which is positive in nature and is entirely "pro-cigarettes" . . . . **[The executives] are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future. Each of the company presidents attending emphasized the fact that they consider the program to be a long-term one**.

See U.S. FPFF § I.B ¶¶ 26-37 (emphasis added). Over the next several decades, that common goal remained central to the actions of Defendants, who, both individually and collectively,

uniformly denied: that smoking had been proven as a cause of cancer and other serious diseases, that smoking was addictive, that the industry marketed its products to young people, and Defendants falsely promised that the industry was funding independent research to discover the health effects of smoking.[20] The United States has shown that the Defendant members of the Enterprise who were not physically present at the Plaza Hotel meeting – including Liggett, Philip Morris Companies (which was formed in 1985), BATCo, TI (which was formed in 1958), and CTR (which was created as the Tobacco Industry Research Committee in the wake of that December 1953 meeting) – shared the common goals of the Enterprise and acted in furtherance of those goals. See U.S. FPFF § I.B(2).[21]

Moreover, in furtherance of the central objectives of the Enterprise, all Defendants endeavored to conceal or suppress information and documents or to destroy documents to avoid

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[20] See, e.g., May 1, 1972 memo from TI's Fred Panzer to TI President Horace Kornegay:

> For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts — litigation, politics, and public opinion . . . [a strategy] consisting of — creating doubt about the health charge without actually denying it — advocating the public's right to smoke, without actually urging them to take up the practice — encouraging objective scientific research as the only way to resolve the question of the health hazard. * * * In the cigarette controversy, the public — especially those who are present and potential supporters (e.g., tobacco state congressmen and heavy smokers) — must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor. As things stand, we supply them with too little in the way of ready-made credible alternatives.

See U.S. FPFF § I ¶ 241.

[21] In January 1954, Defendants Philip Morris, R.J. Reynolds, B&W, Lorillard and American founded TIRC, which changed its name to CTR in 1964. Liggett was a member of CTR from 1964 to 1969, and even when it was not a member, Liggett made contributions to CTR's Special Projects fund from 1966 through 1975 and to CTR's Literature Retrieval Division from approximately 1971 through 1983. See U.S. FPFF § I ¶¶ 32-35, 42-47, 51-58. These six Defendants contributed over $500 million to fund TIRC/CTR. See U.S. FPFF § I ¶¶ 56-58; §II ¶¶ 75-77.

In January 1958, Defendants Philip Morris, R.J. Reynolds, B&W, Lorillard, American and Liggett and the American Snuff Company, Larus & Brother Co., Inc. and Stephano Brothers, Inc. founded TI. See U.S. FPFF § I ¶¶ 157-158. These six Defendants, thereafter, contributed over $618 million to fund TI. See U.S. FPFF § I ¶¶ 163-165; § II ¶ 69.

adverse liability in litigation involving smoking and health issues and to prevent discovery of information that constituted, or could lead to, evidence showing or recognizing the causal link between smoking cigarettes and adverse health consequences and addictiveness. See U.S. FPFF § I.K & IV.H.

b. The Enterprise Has Utilized Both Formal and Informal Organization

The United States has also presented ample evidence that the Enterprise had a discernible organization. Each Defendant is a legally distinct corporation. Two Defendant members of the Enterprise – TIRC/CTR and TI – were jointly formed and funded by other Defendants of the Enterprise to help the industry execute the strategy devised to achieve their shared goal. TIRC/CTR served as the research sponsorship arm for the Enterprise. It sponsored and funded research and studies that attacked scientific studies demonstrating the harmful effects of smoking cigarettes and did not address the fundamental questions regarding the adverse health effects of smoking. Moreover, attorneys for Defendants also created a mechanism to fund "Special Projects" through CTR – research projects conceived and directed by industry representatives, including industry lawyers, to support scientists who had shown a willingness and ability to generate information and provide testimony that could bolster the industry's litigation defenses before courts and governmental bodies. See U.S. FPFF § I.B-H. Similarly, from 1958 to 1998, TI actively designed and wrote press releases, advertisements, pamphlets, and testimony that advanced Defendants' jointly formulated positions on smoking and health issues, including denying that smoking cigarettes caused diseases and was addictive, and supporting the false claim that the link between smoking cigarettes and secondhand smoke and adverse health effects was an "open question." TI also caused such materials to be publicly disseminated and

published. See U.S. FPFF § I.C.

Defendants used numerous other means – including structures of varying degrees of formality (e.g., the Committee of Counsel, the Ad Hoc Committee, research and scientific subcommittees under the aegis of CTR and TI, the Center for Indoor Air Research, and other industry organizations both in the United States and abroad) and direct communications between and among members of the Enterprise – to coordinate their activities, to ensure continued adherence to the joint strategy, and to enable the Enterprise to respond as new threats to the industry arose. See U.S. FPFF § I.D-H.

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

c. The Enterprise Has Functioned as a Continuous Unit

The evidence also convincingly demonstrates that the Enterprise has functioned as a continuous unit from December 1953, when the executives of five Defendants (Philip Morris, RJR, B&W, Lorillard and American) agreed to launch their long-term public relations campaign. A wealth of evidence shows that throughout the period covered by the United States' Complaint, Defendants not only communicated directly with one another on matters relevant to the aims of

the Enterprise, but also created, supported, and controlled a web of organizations, committees, and other bodies that facilitated coordinated behavior. See U.S. FPFF § I. For example, TIRC was founded in January 1954, changed its name to CTR in 1963, and existed through 1998, when certain Defendants entered the Master Settlement Agreement ("MSA") in settlement of 46 lawsuits brought by States' Attorneys General. See U.S. FPFF § I.B & J and supra n.21. Likewise, in January 1958, Defendants Philip Morris, R.J. Reynolds, Lorillard, American and Liggett founded TI, and like CTR it functioned as an industry-supported body acting in furtherance of the aims of the Enterprise continuously from its founding until 1998, when as part of the MSA, CTR and TI were required to disband. See U.S. FPFF § I.C & J.

In sum, the evidence establishes that all Defendants, which are members of the Enterprise, were entities having separate structures that worked together. Specifically, they worked together to coordinate significant activities for over 45 years, including through TIRC/CTR, TI, and other entities, to achieve shared objectives, including their primary goals of maximizing their profits by preserving and expanding the market for cigarettes and avoiding liability in smoking and health cases. Defendants formulated and executed a joint strategy of deceiving the public that the link between smoking cigarettes and secondhand smoke and adverse health effects was an "open question" and that cigarettes were not addictive. Pursuant to this joint strategy, the Cigarette Company Defendants caused Defendants CTR and TI to carry out numerous racketeering acts at the same time as the Cigarette Company Defendants also committed numerous parallel racketeering acts, all in furtherance of the Enterprise's primary objective and other shared objectives. Thus, the evidence shows the interlocking nature of the scheme to defraud, the overlapping nature of Defendants' wrongful conduct, and that this

Enterprise functioned as a continuous unit from its inception. In far less compelling circumstances than those present here, courts have found the existence of an association-in-fact enterprise.[22]

C. The Evidence Establishes That the Alleged RICO Enterprise Is Engaged in and Its Activities Affect Interstate and Foreign Commerce

1. Sections 1962(c) and (d) require the plaintiff to prove that the alleged "enterprise engaged in, or the activities of which affect[ed], interstate or foreign commerce." The courts of appeals uniformly have held that to satisfy this element, the plaintiff is not required to prove that each defendant or each member of the enterprise was engaged in, or affected, interstate or foreign commerce; rather, it is sufficient that the enterprise engaged in, or its activities considered in their entirety affected, interstate or foreign commerce, and that this requirement may be satisfied by evidence of the enterprise's members' individual nexus to interstate or foreign commerce.[23]

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[22] See, e.g., United Health Care Corp. v. American Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996) ("This association of corporations exhibited continuity in both structure and personnel in its insurance sales and marketing activities. . . . Further, the record shows that the enterprise engaged in some legitimate functions and maintained a discrete existence beyond that necessary to perform acts of mail and wire fraud"); Securitron Magnalock Corp., 65 F.3d at 263-64 (association-in-fact enterprise established by evidence that two corporations and an individual tied to both, engaged in manufacturing electromagnetic locks, made similar false and deceptive statements about a competitor's electromagnetic locks to obtain business); Perholtz, 842 F.2d at 355 ("[a] reasonable juror could conclude from the evidence that the members of the enterprise were all linked together by a network of contracts, transactions and pay-offs orchestrated and organized by defendant Perholtz with the knowing and willful participation and assistance of others. The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise that started with the alleged conspiracy of Perholtz, Jackson and Gentile and added or dropped members over time as the scheme became more complex and expansive."); Local 1804-1, 812 F. Supp. at 1310-15 (association-in-fact enterprise consisting of local union, employers, union officials, and members of La Cosa Nostra established by evidence that the members of the enterprise coordinated activities to control an "integrated" market on the waterfronts in the Port of New York and New Jersey); Mitland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 1055 (S.D.N.Y. 1992) (association-in-fact enterprise consisting of an individual and several limited partnerships that functioned as a continuing unit "with the purpose of defrauding plaintiffs and continuing such fraudulent activities through the continued fraudulent management" of the limited partnerships). See also cases cited supra n.18.

[23] See, e.g., United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (collecting cases); United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Muskovsky, 863 F.2d 1319, 1325 (7th Cir. 1988); Qaoud, 777 F.2d at 1116-17; United States v. Conn, 769 (continued...)

Moreover, when the enterprise "engaged in" interstate or foreign commerce, it is not necessary to prove that the enterprise's activities "affected" interstate or foreign commerce. For example, in United States v. Robertson, 514 U.S. 669 (1995), the defendant was convicted of a RICO violation for investing proceeds of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce." See 18 U.S.C. § 1962(a). The Supreme Court held that the government established sufficient evidence that the enterprise, a gold mine located in Alaska, "engaged in" interstate commerce by evidence that: (1) some of the $100,000 in equipment used in the mine's operation was purchased in California and transported to Alaska; (2) "on more than one occasion, [defendant] Robertson sought workers from out of state and brought them to Alaska to work in the mine"; and (3) "Robertson, the mine's sole proprietor, took $30,000 worth of gold, or 15% of the mine's total output, with him out of the state." Id. at 671. The Court added that "a corporation is generally 'engaged in commerce' when it is itself directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." Id. at 672 (citations and internal quotations omitted).

Because the Supreme Court found that the evidence was sufficient to establish that the enterprise was "engaged in" interstate commerce, it ruled that it need not consider "whether the activities of the [enterprise] 'affected' interstate commerce." Id. at 671.[24]

Here, undisputed evidence establishes that each of the Cigarette Company Defendants,

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[23](...continued)
F.2d 420, 423-24 (7th Cir. 1985); United States v. Bagnariol, 665 F.2d 877, 892-93 (9th Cir. 1981); United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). See also cases cited infra n.26.

[24] See also United States v. Thomas, 114 F.3d 228, 253 (D.C. Cir. 1997) (noting that the jurisdictional element of 18 U.S.C. § 1962(c) may be satisfied by alternative evidence that either the enterprise was "engaged in" **or** its activities "affect interstate or foreign commerce.").

that are members of the alleged RICO Enterprise, has been directly engaged in the manufacturing and sale of billions of dollars worth of cigarettes throughout the United States and in foreign countries for many years. Indeed, each of the Cigarette Company Defendants **stipulated** that from 1953 to the present it has been engaged in, and its activities affect, interstate and foreign commerce within the meaning of 18 U.S.C. § 1962(c) and (d). See U.S. FPFF § II ¶¶ 8, 17, 34, 33, 44, 50, 59, 65; United States v. Philip Morris, 2004 WL 1045768 at * 2 (D.D.C. May 6, 2004). Moreover, the relevant Defendants' financial reports establish that the Cigarette Company Defendants from 1954 through 2001 received approximately one trillion dollars in revenue in interstate and foreign commerce. See U.S. FPFF § II ¶¶ 6, 14, 22, 30, 40, 41, 49, 57, 64 and Appendix at App. 1-11 (which contains a chart of Defendants' revenues from 1954 through 2001). For the year 2001 alone, the Cigarette Company Defendants reported the following revenues from the sale of goods in interstate commerce (id.):

DEFENDANT	TOTAL REVENUES IN BILLIONS OF DOLLARS	TOTAL REVENUES FROM SALES OF CIGARETTES
Altria	$89.92	$51.37
Philip Morris	$24.78	$24.78
R.J. Reynolds	$8.59	$8.59
Lorillard	$4.53	$4.53
Liggett	$0.73	$0.73
Brown & Williamson (1999) (Latest data available)	$5.02	$5.02
BATCo (1999) (Latest data available)	£0.007 B (est. $.011 B)	£0.007 B (est. $.011 B)

In addition, since 1954, each of the Cigarette Company Defendants has purchased billions

of dollars of goods produced in interstate commerce, and had thousands of employees located in plants and offices in numerous states. See U.S. FPFF § II. One Defendant, Altria, calls itself "the largest consumer package goods company on earth." See U.S. FPFF § II ¶ 6. Another Defendant, BATCo, is based in London but markets its cigarettes throughout much of the United States. See U.S. FPFF § II ¶¶ 46-47.

Similarly, during the period 1954 to 1998, Defendants CTR and TI each received over $500 million in funding in interstate commerce via the interstate banking system from various Cigarette Company Defendants, some of which are located in different states from CTR and TI. See U.S. FPFF § II ¶¶ 68-70 and 75-77. Moreover, during that time period CTR funded millions of dollars of research projects in interstate commerce, which were conducted by researchers and institutions in various states and countries, and the results were published in periodicals and other venues throughout the United States and in foreign countries. See U.S. FPFF § II ¶¶ 76-81. Similarly, TI issued numerous press releases and funded numerous public relations advertisements which were disseminated in interstate commerce throughout the United States in various newspapers, magazines, periodicals and other venues. See U.S. FPFF § II ¶¶ 71-72.

Under Robertson, the foregoing undisputed evidence overwhelmingly establishes that the alleged RICO Enterprise was "engaged in" interstate or foreign commerce, and hence it is not necessary to establish that the Enterprise's activities "affected" interstate or foreign commerce.

2. In any event, the above-referenced evidence also establishes that the alleged Enterprise "affected" interstate or foreign commerce. In that regard, every court of appeals that has decided the issue has held that the plaintiff is only required to prove that the activities of the RICO enterprise, viewed in their entirety, had a "de minimis" effect on interstate or foreign

commerce.[25] The foregoing evidence which establishes that the alleged RICO Enterprise was "engaged in" interstate commerce also establishes that the activities of the Enterprise "affected" interstate or foreign commerce.[26] Indeed, Congress has explicitly recognized that the activities of tobacco companies substantially affects interstate and foreign commerce. See 7 U.S.C. § 1311(a): "The marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point. . . . Tobacco produced for market is sold on a Nation-wide market and, with its products, moves almost wholly in interstate and foreign commerce from the producer to the ultimate

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[25] See, e.g., United States v. Shryock, 342 F.3d 948, 985 (9th Cir. 2003); United States v. Chance, 306 F.3d 356, 373-74 (6th Cir. 2002); United States v. Marino, 277 F.3d 11, 34-35 (1st Cir. 2002); United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001); De Falco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001); United States v. Frega, 179 F.3d 793, 800-801 (9th Cir. 1999); White, 116 F.3d at 925 & n.8; United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996); Farmer, 924 F.2d at 651; Muskovsky, 863 F.2d at 1325.

[26] See, e.g., Riddle, 249 F.3d at 536-38 (Ohio based association-in-fact enterprise affected interstate commerce in that some members of the enterprise purchased lottery tickets from Pennsylvania to protect losses in an illegal gambling business, some members sold in Pennsylvania a ring stolen in Ohio, and some members extorted money from a victim who sold fireworks in New York); United States v. Feliciano, 223 F.3d 102, 107, 118-19 (2d Cir. 2000) (a Connecticut association-in-fact enterprise affected interstate commerce where members sold cocaine and heroin locally in Connecticut); United States v. Thomas, 114 F.3d at 253 (association-in-fact enterprise which distributed drugs in the District of Columbia affected interstate commerce by purchasing millions of dollars of cocaine from persons in New York and California); United States v. Beasley, 72 F.3d 1518, 1526-27 (11th Cir. 1996) (enterprise consisting of a religious cult affected interstate and foreign commerce by distributing publications and tapes in various states and foreign countries); United States v. Maloney, 71 F.3d 645, 663-65 (7th Cir. 1995) (enterprise consisting of a county court affected interstate commerce "through its purchase of law books and computer equipment"); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (enterprise consisting of the Laborers' International Union and its subordinate locals in various states, representing thousands of employees in the building and construction industries, affected interstate commerce); Muskovsky, 863 F.2d at 1325 & n.5 (enterprise consisting of a night club in Illinois affected interstate commerce by buying plastic cups and napkins from companies located outside Illinois and natural gas produced in six states other than Illinois); United States v. Allen, 656 F.2d 964, 964 (4th Cir. 1981) ("the supplies used in [one defendant's] bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce"); United States v. Altomore, 625 F.2d 5, 7-8 & n.8 (4th Cir. 1980) (sufficient evidence that the enterprise, a West Virginia prosecutor's office, affected interstate commerce where "interstate telephone calls regularly were placed from the prosecutor's office, that certain of the supplies and materials purchased and used by the prosecutor's office had their origins outside of West Virginia, and that persons who were not citizens or residents of the state were involved in investigations and litigation conducted by the prosecutor's office."); United States v. Parness, 503 F.2d 430, 439 n.11 (2d Cir. 1974) ("We reject out of hand the claim that the activities of Hotel Corp. [a foreign corporation in St. Maarten] did not have the requisite effect on interstate or foreign commerce. It was owned by Goberman, an American citizen. It was financed by Pennsylvania banks and Massachusetts businessmen. It had numerous domestic creditors. It served primarily American tourists. And its accounts were payable in U.S. dollars to Olympic, a New Jersey corporation.").

consumer."

Furthermore, in the execution of their fraudulent scheme, Defendants employed the mails and wires, which are instrumentalities of interstate commerce. See U.S. FPFF § V. This proof alone is sufficient to demonstrate the requisite nexus to interstate commerce. See, e.g., Cadle Co. v. Schultz, 779 F. Supp. 392, 397-98 (N.D. Tex. 1991) ("A plaintiff who alleges that the defendant used an instrumentality of interstate commerce, the United States postal service, to execute the defendant's fraudulent scheme sufficiently has alleged such a nexus."); State Farm Mutual Auto Ins. Co. v. Rosenfield, 683 F. Supp. 106, 109 n.9 (E.D. Pa. 1988) ("The nexus may be demonstrated merely by proving that defendants used an instrumentality of interstate commerce to execute their fraudulent scheme. Raskin used the United States mails in perpetrating the scheme to defraud." (citation omitted)); see also R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1353 (5th Cir. 1985).

To be sure, the evidence that Defendants since 1954 have bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce far exceeds the evidence of an effect on interstate commerce found sufficient in any reported RICO decision, and conclusively establishes the requisite effect on interstate commerce.

D. Each Defendant is Distinct From and Associated With The Enterprise

1. Each Defendant is Distinct From the Enterprise

It is clear that each Defendant is distinct from the alleged Enterprise, as required by RICO. In Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001), the Supreme Court held that "to establish liability under § 1962(c) [of RICO], one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the

same 'person' referred to by a different name." 533 U.S. at 161. The Court explained that Section 1962(c) "applies to 'person[s]' who are 'employed by or associated with' the 'enterprise.' In ordinary English one speaks of employing, being employed by, or associating with others, not oneself." Id. (citation omitted). Therefore, the Court concluded that a RICO defendant, or "person", must be distinct from the RICO enterprise that the defendant is "associated" with or "employed" by. Id. at 161-62.

Applying this principle, the Court ruled that the RICO enterprise in King, a corporation, was distinct from the defendant, a natural person who was the president and sole shareholder of the corporation-enterprise. Id. at 163. The Court stated: "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in [RICO] that requires more "separateness" than that." Id. Citing approvingly to McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985), the Court added that the distinctness requirement is satisfied where there is "either formal or practical separateness." Id.

In Suter, the Seventh Circuit held that a RICO enterprise consisting of a sole proprietorship with several employees was distinct from the defendant, the individual sole proprietor. 757 F.2d at 143-44. The Seventh Circuit explained:

> Suter had several employees working for him; this made his company an enterprise, and not just a one-man band. . . .
>
> A one-man band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But, if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference, so far as we can see, what legal form the enterprise takes. The only important thing is that it be either formally (as when there is incorporation) or practically (as when there are other people besides the

proprietor working in the organization) separable from the individual.

Id. at 144.

Here, the requisite distinctness between the individual Defendants and the Enterprise exists as a matter of legal formality and in practice. First, each Defendant is a corporation which is a legally distinct entity from the group of entities and individuals comprising the association-in-fact Enterprise (see supra pp. 21-22), and hence "formal" distinctness is established. See U.S. FPFF §§ II & III. Moreover, the group of entities and individuals which constitute the "Enterprise" is plainly broader than each corporate Defendant that is a member of the Enterprise. Hence, "practical" distinctness is also easily established.

For example, most courts of appeals have held that the requisite distinctness between the defendant-person and the enterprise is lacking only when there is complete identity between a particular defendant and the enterprise. As the Eleventh Circuit stated, "[A] defendant can clearly be a person under [Section 1962(c)] and also be **part** of the enterprise. The prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise." United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275-1276 (11th Cir. 2000) (collecting cases). Accordingly, the District of Columbia Circuit and other courts have concluded in a variety of circumstances that individual RICO defendants are distinct from an enterprise that is broader than any single defendant, notwithstanding that the defendants may collectively comprise the enterprise and may have close relationships among themselves.[27] Indeed, the typical RICO association-in-fact

[27] See, e.g., Perholtz, 842 F.2d at 352-53 (distinctness requirement satisfied where the association-in-fact enterprise consisted of corporations, partnerships and individual defendants who were also charged as defendants). See also Goldin Indus., 219 F.3d at 1273, 1275-1276 (distinctness requirement satisfied where enterprise consists of (continued...)

enterprise includes the group of charged defendants, as is the case here.[28]

In sum, the United States has established that each Defendant is distinct from the alleged Enterprise.

2. Each Defendant is Associated With the RICO Enterprise

a. Section 1962(c) of RICO requires proof that each defendant was "employed by or associated with" the alleged enterprise. It is well settled that to prove a defendant's association with an association-in-fact enterprise, it is not necessary to prove that the defendant had a formal position in the enterprise, participated in all the activities of the enterprise, "or had full knowledge of all the details of" its activities, or knew about the participation of all the other members in the enterprise; rather, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989) (collecting cases).[29]

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[27](...continued)
four natural persons and three corporations, all of whom were also defendants); United States v. Fairchild, 189 F.3d 769, 776-777 (8th Cir. 1999) (distinctness requirement satisfied where individual defendants collectively form the enterprise); United States v. London, 66 F.3d at 1243-1245 (distinctness requirement satisfied where the enterprise consists of defendant's sole proprietorship and a closely held corporation); Securitron Magnalock Corp., 65 F.3d at 262-263 (officer, agent, and owner of two corporations is distinct from RICO enterprise consisting of that individual and the corporations); Nabors, 45 F.3d at 240-41 (holding that "a 'collective entity is something more than the members of which it is comprised' and that individual members who are members of an enterprise may indeed be found guilty [under RICO] even if the enterprise is made up solely of those defendants"); Atlas Pile Driving Co., 886 F.2d at 995 (distinctness requirement satisfied where two corporate members of the association-in-fact enterprise were also defendants); Cullen v. Margiotta, 811 F.2d 698, 703, 729-730 (2d Cir. 1987) (distinctness requirement satisfied where enterprise consists of three entities, all of whom were also defendants), overruled in part on other grounds, Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).

[28] See, e.g., Turkette, 452 U.S. at 578-79; United States v. Torres, 191 F.3d 799, 803, 806 (7th Cir. 1999); Richardson, 167 F.3d at 625; Nabors, 45 F.3d at 246-41; United States v. Stefan, 784 F.2d 1093, 1103 (11th Cir. 1986); Elliott, 571 F.2d at 898; United States v. Di Gilio, 667 F. Supp. 191, 195 (D.N.J. 1987). See also cases cited supra nn. 14-15, 27.

[29] Accord United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002); United States v. Zichetello, 208 F.3d 72, 99 (2d Cir. 2000); United State v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); United States v. Console, 13 F.3d 641, 653 (3d Cir. 1993); United States v. Eufrasio, 935 F.2d 553, 577 n.29 (3d Cir. 1991); United States v.
(continued...)

Furthermore, courts have taken a flexible approach regarding the evidence sufficient to prove that the defendant was "associated with" the enterprise. For example, in Perholtz, 842 F.2d at 351 n.12, the RICO enterprise consisted of ten corporations and partnerships and seven individuals associated-in-fact to obtain government contracts through bribery and fraud. The District of Columbia Circuit found that the defendants were "associated with" the enterprise, stating: "The individual defendants joined with each other and formed the corporations to further their common objectives. This relationship of individuals and corporations is precisely what Section 1962(c) was designed to attack." Perholtz, 842 F.2d at 354.[30]

Moreover, "[a] defendant is considered to have 'associated with' a RICO enterprise if he either engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise," see Blue Cross & Blue Shield of N.J., Inc.,113 F. Supp. 2d at 366, or otherwise commits racketeering acts in the conduct of the enterprise's affairs.[31] Beyond this, a defendant "associates with" an enterprise when he conducts business with or through the enterprise, or otherwise has an effect on its activities, including its unlawful activities.[32]

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[29](...continued)
Riccobene, 709 F.2d 214, 225 (3d Cir. 1983); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981).

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

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

[32] See, e.g., United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992); United States v. Horak, 833 F.2d 1235, 1239 (7th Cir. 1987); United States v. Yonan, 800 F.2d 164, 167 (7th Cir. 1986); United States v. Tille, 729 F.2d 615, 620 (9th Cir. 1984); United States v. Bright, 630 F.2d 804, 830 (5th Cir. 1980).

b. Under the foregoing authority, the evidence establishes that not only did each Defendant know the general nature of the Enterprise and that it extended beyond its individual role, but each Defendant also knew that all the other Defendants were participating in the Enterprise to achieve their shared objectives. Thus, as noted above in Section I.B., Defendants Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American attended the December 15, 1953 meeting at the Plaza Hotel to devise a joint "industry response" to mounting evidence of the link between smoking cigarettes and adverse health effects. As planned at that meeting, the above named five Defendants created TIRC, which later became Defendant CTR. Defendant Liggett was a member of CTR from 1964 to 1969, and continued to fund TI even when it was not a member. Defendants Philip Morris, R.J. Reynolds, Lorillard, American, and Liggett created TI in 1958. These Defendants controlled and funded CTR and TI and other entities to further their shared unlawful objectives. See supra Section I.B. and U.S. FPFF §§ I.B & C and § II. Throughout the life of the Enterprise, all Defendants have coordinated their deceptive activities through TIRC/CTR, TI, the Committee of Counsel and other entities as well as through informal agreements to further their shared objectives. See supra, Section I.B and U.S. FPFF § I.D-I. The documentary and testimonial evidence of direct communications among Defendants – phone calls, meetings, and correspondence at the highest levels of their respective corporate, scientific, and legal hierarchies – is overwhelming. This evidence proves that each Defendant knew that (and in innumerable instances, knew how) other Defendants were knowingly acting to further the common purposes of the Enterprise.

Moreover, all Defendants associated with the Enterprise through periodic meetings, correspondence and decisions regarding, inter alia, research projects, public statements and

advertising designed to advance the primary objectives of the Enterprise – to maximize profits by acting in concert to preserve and enhance the market for cigarettes and to avoid legal liability that could result in large damage awards and increase public recognition of the harmful effects of smoking and its addictiveness. See supra Section I.B, infra Section I.E. and U.S. FPFF § I. Also, all the Cigarette Company Defendants (except for BATCo and Philip Morris Companies) caused and aided and abetted Defendants CTR and TI to engage in numerous, specifically alleged racketeering acts in furtherance of the shared objectives of the Enterprise, and the Cigarette Company Defendants also committed other racketeering acts in furtherance of the shared objectives of the Enterprise. See infra Section I.F and U.S. FPFF § I.B & C and § V.

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

E. Each Defendant Participated in the Conduct of the Enterprise's Affairs

1. Section 1962(c) requires proof that each defendant did "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." In Reves v. Ernst & Young, 507 U.S. 170 (1993), the Supreme Court addressed this element, holding that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation **or** management of the enterprise itself." Id. at 185 (emphasis added).[33]

In describing its "operation or management" test, the Supreme Court stated:

> Once we understand the word "conduct" to require some degree of

[33] The defendant in Reves, Ernst & Young, provided accounting services to the alleged RICO enterprise, a farmer's cooperative. Thus, the defendant was not an employee or member of the enterprise, but rather was an "outsider" of the enterprise. The plaintiffs alleged that Ernst & Young misled investors by preparing and explaining the cooperative's financial information through a pattern of false and misleading statements. The Court concluded that this tangential nexus to the enterprise was insufficient to impose RICO liability under 18 U.S.C. § 1962(c). Reves, 507 U.S. at 186.

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

Id. at 179 (emphasis added).

In Reves, the Supreme Court made clear that a defendant may satisfy this test even if he did not have significant control over the enterprise's affairs. For example, the Court stated that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs" and therefore "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '**significant control** over or within an enterprise.'" Reves, 507 U.S. at 179 & n.4 (citing Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) (emphasis in Reves)).

The Court further stated:

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

Reves, 507 U.S. at 184 (emphasis added).

Furthermore, the Court noted that:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "**enterprise's** affairs," not just their **own** affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of **its** affairs – that is, participate in the operation or management of the enterprise itself . . . .

Id. at 185.

Following Reves, the federal courts of appeals have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, a defendant need only intentionally perform acts that are related to, and foster, the operation or management of the enterprise. As one court explained: "The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performances of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993).[34]

Likewise, numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise implemented decisions directed by higher-ups in the enterprise or committed racketeering acts, which furthered the integral goals of the enterprise, at the direction of other members of the enterprise. See, e.g., United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998) ("[T]he [Reves] Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." The Parise court held

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[34] See also United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (finding that Reves does not require that the defendant have decision-making power, only that the defendant "take part in" the operation of the enterprise and holding that the defendant was liable under Reves since he bought multi-kilogram amounts of cocaine from the drug enterprise on a regular basis); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (holding that Reves test was satisfied by evidence that the defendant planned and carried out a robbery with other members of an Asian crime gang that committed a series of robberies targeting Asian-American business owners and managers); United States v. Houlihan, 92 F.3d 1271, 1298 (1st Cir. 1996) (upholding instruction that jury could find defendant participated in the conduct of the enterprise's affairs even though he had no part in the management or control of enterprise where defendant was an "insider" integral to carrying out enterprise racketeering activity); United States v. Darden, 70 F.3d 1507, 1526, 1542-43 (8th Cir. 1995) (holding Reves was satisfied by evidence that the defendant participated in several murders and murder conspiracies and at least three drug trafficking transactions in an association-in-fact drug enterprise; confirming that the defendant need not participate in control of the enterprise as lower rung participation may satisfy Reves); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (Reves test satisfied where evidence that attorneys, although "of counsel" to the law firm enterprise, were not merely providing peripheral advice, but participated in the core activities that constituted the affairs of the firm), reh'g granted, 45 F.3d 680, 683 (2d Cir. 1995) (upholding convictions of law firm investigators who were "lower-rung participants" whose racketeering activities were conducted "under the direction of upper management").

that Reves liability extended to an investigator for a law firm who paid kickbacks to union (the enterprise) agents to obtain personal injury cases for the law firm under the direction of the union's president), habeas corpus granted on other grounds, 2000 WL 876894 (E.D. Pa. 2000); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997) (defendant "set up" and referred prospective debtors to the leaders of a loanshark enterprise); United States v. Hurley, 63 F.3d 1, 9 (1st Cir. 1995) (defendants were employees of the enterprise who assisted higher-ups in money laundering activities); United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995) ("[W]e agree with the First Circuit that one may be liable under the operation or management test by knowingly implementing decisions, as well as by making them."); United States v. Wong, 40 F.3d 1347, 1371-75 (2d Cir. 1994) (Defendants included low level members of the Green Dragons organized group (the enterprise) who participated in acts of extortion and kidnapping. The court stated "Reves makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."); United States v. Oreto, 37 F.3d 739, 750-753 (1st Cir. 1994) (The defendant participated in the collection of loans by extortionate means on behalf of the loansharking enterprise; the court noted (id. at 750) that "nothing in [Reves] precludes our holding that one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them.").

2. Here, each Defendant not only participated in the operation and management of the Enterprise, but also was a significant participant in the making and implementation of decisions in furtherance of the Enterprise's affairs. See U.S. FPFF § I. For example, each Defendant had some part in directing the affairs of the Enterprise through directing and causing the public

dissemination of false, misleading or deceptive statements regarding the links between smoking cigarettes and adverse health effects and addictiveness and by the commission of related racketeering acts, all in furtherance of the primary, shared objective of the Enterprise. See supra, Section I.B, infra Section I.F and U.S. FPFF §§ I, IV and V.

Moreover, Defendants Philip Morris, R.J. Reynolds, American, B&W and Lorillard established TIRC/CTR, and thereafter these Defendants and Liggett controlled and funded TIRC/CTR to further the objectives of the Enterprise. See supra n.21 and accompanying text and U.S. FPFF § I.B. Likewise, Defendants American, Liggett, Lorillard, Philip Morris, B&W, and R.J. Reynolds established, funded and controlled TI to further the objectives of the Enterprise referenced above. See supra n.21 and U.S. FPFF § I.C and II. CTR and TI also participated in the operation and management of the Enterprise by helping to coordinate and implement aspects of the Cigarette Company Defendants' scheme to defraud the public, especially its fraudulent public relations schemes. See supra Section I.B and U.S. FPFF §§ I and IV.

Each Defendant (except for BATCo) caused and aided and abetted Defendants TIRC/CTR and TI to commit specifically alleged racketeering acts in furtherance of the affairs of the Enterprise. See U.S. FPFF §§ I, II and V.

Each Defendant participated in the conduct of the Enterprise's affairs through one or more of various projects and committees designed to further the above-referenced objectives of the Enterprise, including CTR Special Projects, Ad Hoc Special Projects, the Center for Indoor Air Research ("CIAR"), the Research Liaison Committee, the Industry Technical Committee, the International Tobacco Information Inc. ("INFOTAB"), Cooperation for Scientific Research Relative to Tobacco ("CORESTA"), the International Committee on Smoking Issues ("ICOSI")

and its successor, the International Tobacco Documentation Center ("TDC"), the Tobacco Research Council ("TRC") and the Tobacco Manufacturers' Standing Committee ("TMSC"). See U.S. FPFF § IV.D-H.[35]

Furthermore, overwhelming evidence of correspondence between and among Defendants and their representatives' participation in frequent meetings establishes that all Defendants directed and coordinated activities in furtherance of the affairs of the Enterprise and their joint scheme to defraud. See supra Section I.B., infra Section I.F. and U.S. FPFF § I.A-I.

The Cigarette Company Defendants agreed not to compete through use of explicit health-related claims in the marketing of cigarettes, and entered a "Gentlemen's Agreement" whereby they agreed that any tobacco company that discovered an innovation that could lead to the manufacture of a less hazardous or "safer" cigarette would share that discovery with other tobacco companies and that no domestic tobacco company would use intact animal for in-house

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[35] For example, each Defendant Cigarette Company (except for BATCo) agreed to fund, and did jointly fund, numerous Special Projects through CTR that were designed to generate information and support research that could bolster the tobacco industry's litigation positions. See U.S. FPFF § IV.D.

Each Defendant Cigarette Company (except for BATCo and Altria) also participated in the Committee of Counsel to further the Enterprise's objectives. See U.S. FPFF § I.C. 3(a).

For instance, in a presentation to the Committee of Counsel in the early 1980s, Ernest Pepples, B&W General Counsel reported that "[t]he products liability environment is growing more hostile with dramatic speed. . . . A mistake – any concession – by a defendant will be costly." Complaining of certain health claims in a Philip Morris advertisement that suggested that certain cigarettes were unsafe, Pepples noted that:

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

See U.S. FPFF § I ¶ 197 (emphasis added). This internal document corroborates the findings of the 1964 trip report, entitled "Report on Policy Aspects of the Smoking and Health Situation in U.S.A." from certain British scientists, including G.F. Todd, Director of the Tobacco Research Council. See U.S. FPFF § I ¶ 194. That report described the import of the lawyers' Policy Committee, made up from representatives from R.J. Reynolds, American, B&W, Philip Morris, Liggett, and Lorillard: "This Committee is extremely powerful; it determines the high policy of the industry on **all** smoking and health matters – research and public relations matters, for example, as well as legal matters – and it reports directly to the Presidents [of the cigarette companies]."

biomedical research to test their commercial products. Pursuant to this "Gentleman's Agreement," the Cigarette Company Defendants sought to avoid any actions that would contradict their fraudulent public relations position denying the adverse health effects of smoking. See U.S. FPFF §§ I.I & V.B.

Finally, each Defendant endeavored to conceal or suppress information and documents and/or to destroy records which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in tobacco and health related liability cases against Defendants or in Congressional and other governmental proceedings, and evidence of the link between smoking cigarettes and adverse health consequences and addictiveness. See U.S. FPFF § I.K & IV.H.

In all these circumstances, each Defendant participated in the operation or management of the Enterprise in full satisfaction of Reves.[36] Indeed, because each Defendant is an "insider" – i.e., a member of the Enterprise that had some part in directing significant aspects of the Enterprise's affairs, including the public dissemination of false, misleading or deceptive statements regarding the links between smoking cigarettes and adverse health consequences and

[36] See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 269 (3d Cir. 1995) ("[W]hen officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c)"); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 371-72, 380 (6th Cir. 1993) (holding that a corporation (The Mutual Life Insurance Company of New York "MONY") participated in the operation and management of an association-in-fact enterprise consisting of MONY, another insurance company (TWA), and an insurance agency (FIA) controlled by Donald Fletcher (an independent contractor who sold life insurance for MONY and later for TWA through fraud), because "the evidence revealed that, even after MONY had received numerous warnings concerning FIA's fraudulent sales tactics, MONY continued to allow, if not actively encourage, Fletcher and his associates to carry on with their [fraudulent] scheme"); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1540-42 (10th Cir. 1993) (holding that a corporation ("PIIGI") participated in the operation or management of an association-in-fact enterprise consisting of PIIGI and other corporations and some of their officers through PIIGI's control of one of the other corporate members of the enterprise and through PIIGI's deceptive and fraudulent conduct in coordination with other members of the enterprise to further the principal goal of the enterprise to sell automobile loan paper known as "enhanced automobile receivables" through fraud). See also cases cited supra, pp. 47-49 & n. 34.

addictiveness, this case does not even implicate the concerns of Reves. See, e.g., United States v. Owens, 167 F.3d 739, 754 (1st Cir. 1999) (holding that since Reves involved the liability of an "outsider" to an enterprise, the "Reves's analysis does not apply where a party is determined to be **inside** a RICO enterprise."). Accord Houlihan, 92 F.3d at 1298-99; United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995). Cf. Parise, 159 F.3d at 797.

F. Each Defendant Committed At Least Two Racketeering Acts

1. A Defendant's Liability For A Racketeering Act May Be Based On "Aiding and Abetting"

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). The federal circuits have uniformly held in both criminal[37] and civil[38] RICO cases that a defendant's liability for personally

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[37] See, e.g., United States v. Coon, 187 F.3d 888, 896 (8th Cir. 1999); Shifman, 124 F.3d at 36-37; Rastelli, 870 F.2d at 832; United States v. Pungitore, 910 F.2d 1084, 1131-32 (3d Cir. 1990); United States v. Cauble, 706 F.2d 1322, 1339-40 (5th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981); Qaoud, 777 F.2d at 1117-18; United States v. Hogan, 886 F.2d 1497, 1501-02 (7th Cir. 1989); United States v. Darden, 70 F.3d 1507, 1526 (8th Cir. 1995); United States v. Wyatt, 807 F.2d 1480, 1482-83 (9th Cir. 1987); United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990).

[38] See, e.g., Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994); McLaughlin v. Anderson, 962 F.2d 187, 192-93 (2d Cir. 1992); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356-57 (3d Cir. 1987); Local 560, 780 F.2d at 283-86; Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485 (5th Cir. 1986); Cox v. Adm'r United States Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994). See also In re American Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1057-59 (D. Md. 1997); Park v. Jack's Food Systems, Inc., 907 F. Supp. 914, 918-19 (D. Md. 1995); Wait Radio by Rosenfield v. Price Waterhouse, 691 F. Supp. 102, 108 (N.D. Ill. 1988); Baumer v. Pachl, 8 F.3d 1341, 1347 (9th Cir. 1993); Downing v. Halliburton & Assocs., Inc., 812 F. Supp. 1175, 1182 (M.D. Ala. 1993). Cf. First American Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 23-24 (D.D.C. 1998) (stating, without deciding, that "with respect to RICO, Congress intended there to be aiding and abetting liability in civil actions").

"To prove aiding and abetting, the evidence must show that the defendant in some way associated himself with the criminal venture as something he wished to bring about and that he sought by his actions to make it succeed." Pungitore, 910 F.2d at 1132 (internal quotations and citation omitted).

committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act.

Moreover, imposition of aiding and abetting liability for racketeering acts in this case does not conflict with Third Circuit's ruling that in a civil action for treble damages brought by "a private plaintiff", a defendant's liability for an entire RICO violation may not be based upon aiding and abetting the RICO violations. See, e.g., Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 841-44 (3d Cir. 2000); Rolo v. City Co. Liquidating Trust, 155 F.3d 644, 656-57 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000). The rationale of those cases is that "Congress has not enacted a general civil aiding and abetting statute . . . under which a person may sue and recover damages from a private defendant", and that 18 U.S.C. § 2 "has no application to private causes of action." Rolo, 155 F. 3d at 656-57 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)). However, this case, in contrast, is not a private action for damages, but rather is a RICO action for injunctive relief brought by the United States. The Third Circuit itself, and other courts as well, has held that in such **government** civil RICO suits, liability for predicate acts may be established by aiding and abetting under 18 U.S.C. § 2. See Local 560, 780 F.2d at 283-89. Accord Local 1804-1, 812 F. Supp. at 1338-39; United States v. District Council, 778 F. Supp. 738, 748-49 (S.D.N.Y. 1991). See also cases cited supra notes 37 & 38. As the court stated in Local 1804, 812 F. Supp. at 1347: "In a civil RICO suit [brought by the United States] the Court applies the criminal standard in determining aiding and abetting

liability." Accord Local 560, 780 F.2d at 284.[39]

Furthermore, Rightenour and Rolo, unlike here, turned on whether a defendant's liability for all the elements of a RICO violation could be based entirely on an aiding and abetting ground. Here, the issue presented is significantly different; i.e., whether a defendant's liability for **only** the element involving the commission of racketeering acts may be based on aiding and abetting. As stated above, every court to decide that narrow issue has held in the affirmative.

Indeed, even authority cited by Defendants recognizes the critical distinction between imposing aiding and abetting liability for the entire RICO violation and for **only** the predicate racketeering acts. For example, in Department of Economic Development, the court stated:

> [O]ne can commit a primary civil violation of § 1962(a) if one has aided and abetted racketeering activity. But this does not mean that someone who aids and abets another person's violation of § 1962(a) is liable to private parties for damages.

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[39] Defendants have not cited a single decision holding that liability for predicate racketeering acts may not be based on aiding and abetting **in a civil RICO suit for equitable relief brought by the United States, as involved here**. Rather, every case Defendants have relied upon **involved a suit for treble damages by private plaintiffs seeking to impose aiding and abetting liability for the entire alleged RICO violations**, and not just the predicate racketeering acts. See, e.g., Rightenour, 235 F.3d at 841 ("a **private plaintiff** could not maintain a claim of aiding and abetting an alleged RICO violation") (emphasis added); Rolo, 155 F.3d at 656-57 (same); In re Mastercard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 493 (E.D. La. 2001) ("it is doubtful that an aiding and abetting liability cause of action exists" for private plaintiffs seeking treble damages); Jubeliere v. Mastercard Int'l, Inc., 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999) ("Central Bank's analysis is controlling and requires dismissal of [private] plaintiff's claim for aiding and abetting a RICO violation"); Touhy v. Northern Trust Bank, No. 98 C 6302, 1999 WL 342700, at *4 (N.D. Ill. May 17, 1999) (same); Saranno v. N.Y. Life Ins. Co., No. 96 C 1882, 1999 WL 104403, at *7-8 (N.D. Ill. Feb. 24, 1999) (same); Ross v. Patrusky, Mintz & Semel, No. 90 Civ. 1356, 1997 WL 214957, at *11 (S.D.N.Y. April 29, 1997) (same); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) ("Following the reasoning in Central Bank this Court declines to create **a private right of action** for aiding and abetting a RICO violation") (citation deleted) (emphasis added); La Salle Nat. Bank v. Duff & Phelps Credit Rating Co., 951 F. Supp. 1071, 1088-89 (S.D.N.Y. 1996); Department of Econ. Dev. v. Arthur Anderson & Co., 924 F. Supp. 449, 475 (S.D.N.Y. 1996) (the private plaintiff's "claim for aiding and abetting a RICO violation must be dismissed because there is no such tort").

Moreover, Bondoin Const. v. Rhode Island Hosp. Nat. Bank, 869 F. Supp. 1004, 1009 (D. Mass. 1994), does not support preclusion of aiding and abetting liability here because Bondoin's preclusion of aiding and abetting liability was limited to racketeering acts under Section 10(b) of the Securities and Exchange Act of 1934 under a private civil RICO claim for treble damages because "[t]o hold otherwise would enable [private] plaintiffs to use RICO to circumvent the interpreted intent of the Securities Act."

924 F. Supp. at 475.[40]

Furthermore, imposition of aiding and abetting liability for **only** the commission of racketeering acts does not run afoul of the Supreme Court's decision in Reves (see supra, Section I.E.), especially because such aiding and abetting liability does not eliminate the requirement for proving a substantive RICO offense that the defendant participated in the operation or management of the enterprise. See, e.g., 131 Main Street Associates v. Manko, 897 F. Supp. 1507, 1528 n.17 (S.D.N.Y. 1995) ("We do not read the operation-or-management rule enunciated in Reves as changing the rule that '[c]ivil RICO liability can be predicated on aiding and abetting the commission of the predicate acts by the primary offender.' . . . Clearly, a person can operate or manage an enterprise and yet, through delegation, avoid directly committing predicate acts." (citation omitted)); Fidelity Federal Sav. & Loan Ass'n v. Felicetti, 830 F. Supp. 257, 261 (E.D. Pa. 1993) (aider and abettor liability for RICO predicate acts is not inconsistent with Reves' requirement for operation or management of the RICO enterprise).

In any event, for the reasons stated infra in Section II.C, the United States is not required to satisfy Reves's requirement that a defendant participate in the operation or management of the Enterprise to establish a defendant's liability for a RICO conspiracy violation. As set forth below, each Defendant personally committed at least two racketeering acts and also aided and abetted additional racketeering acts in furtherance of the affairs of the RICO Enterprise.

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[40] Moreover, there is no merit to Defendants' suggestion that aiding and abetting liability for racketeering acts is inconsistent with the requirement for a substantive RICO claim that the defendant **personally commit** at least two racketeering acts. Pursuant to 18 U.S.C. § 2, aiding and abetting racketeering activity "makes one punishable as a principal and amounts to [personally] engaging in that racketeering activity"; it does not constitute vicarious liability. See Shifman, 124 F.3d at 36. Accord Pungitore, 910 F.2d at 1131-32; Rastelli, 870 F.2d at 832. If aiding and abetting racketeering acts did not constitute personally committing racketeering acts, then such aiding and abetting liability would not apply in criminal RICO cases. However, Defendants do not dispute the numerous decisions holding that aiding and abetting liability applies to racketeering acts in criminal cases.

G. Defendants Committed the Alleged Mail & Wire Fraud Offenses

1. Elements of Mail and Wire Fraud Offenses

All the alleged predicate racketeering acts (which, as alleged, and conformed to match the evidence) in this case involve mail or wire fraud offenses, in violation of 18 U.S.C. § 1341 or § 1343. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

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

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

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

2. The defendant mailed any matter, or caused the mailing of any matter, for the purpose of furthering or executing such scheme or artifice, **and**

3. The defendant acted with the specific intent to defraud or deceive.[41]

As this Court recognized previously in this litigation, because the wire fraud statute, 18 U.S.C. § 1343, was patterned after the mail fraud statute and has virtually identical language, courts have construed them identically. See Philip Morris, 304 F. Supp. 2d at 69, n.5, Philip Morris, 116 F. Supp. 2d at 153 & n.31. Accord Sawyer, 85 F.3d at 723; Manzer, 69 F.3d at 226;

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[41] See Philip Morris, 304 F. Supp. 2d at 69; Neder v. United States, 527 U.S. 1, 24-25 (1999); Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Trapilo, 130 F.3d 547, 551-52 (2d. Cir. 1997); United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996); United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995); United States v. Jordan, 626 F.2d 928, 930-31 (D.C. Cir. 1980).

United States v. Griffith, 17 F.3d 865, 874 (6th Cir. 1994); United States v. Lemire, 720 F.2d 1327, 1335 n.6 (D.C. Cir. 1983). Accordingly, all references herein to the required elements of the mail fraud statute also apply to the wire fraud statute, and vice-versa. [42]

2. Mail and Wire Fraud Offenses Are Not Limited to Common Law Fraud and Hence Do Not Require Proof of Affirmative Misrepresentations of Fact. Rather, a Scheme to Defraud May Include Material Omissions, Half-Truths and Literally True Statements In Furtherance of a Scheme to Deceive

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

> effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it

[42] The only material difference is that the wire fraud statute requires that the wire transmission be "in interstate or foreign commerce", whereas the mail fraud statute covers "intrastate" use of the mails as well as those in interstate or foreign commerce. See, e.g., United States v. Photogrammetric Data Services, Inc., 259 F.3d 229, 247-48 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002), abrogated on different grounds by Crawford v. Washington, 124 S. Ct. 1354 (2004); United States v. Marek, 238 F.3d 310, 317-18 (5th Cir. 2001).

> into effect, although in the judgment of the jury they may be absolutely ineffective therefor.

Id. at 315.

In accordance with the Supreme Court's expansive reading of the mail fraud statute, the federal courts of appeals have repeatedly ruled that a mail or wire fraud offense does not necessarily require proof of any misrepresentation of fact or affirmative false statement, although such would be highly probative of a scheme to defraud.[43] It is sufficient, therefore, if under the totality of the circumstances, the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property.[44]

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

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[43] See Philip Morris Inc., 304 F. Supp. 2d at 70. See also United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000); United States v. Richman, 944 F.2d 323, 331-32 (7th Cir. 1991); United States v. Falcone, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991), modified in part on other grounds, 960 F.2d 988 (11th Cir. 1992) (en banc); McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 (1st Cir. 1990); United States v. Cronic, 900 F. 2d 1511, 1513-14 (10th Cir. 1990); Atlas Pile Driving, 886 F.2d at 991; United States v. Rafsky, 803 F.2d 105, 108 (3d Cir. 1986); United States v. Clausen, 792 F.2d 102, 105 (8th Cir. 1986); Blachly v. United States, 380 F.2d 665, 673-74 (5th Cir. 1967); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954).

[44] See, e.g., McEvoy Travel Bureau, Inc., 904 F.2d at 791-93; Cronic, 900 F.2d at 1513-14; Atlas Pile Driving, 886 F.2d at 991; United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987), vacated on other grounds, 484 U.S. 807 (1987); Blachly, 380 F.2d at 671; Silverman, 213 F.2d at 405-06; Deaver v. United States, 155 F.2d 740, 743 (D.C. Cir. 1946).

material omissions.[45]

3. Defendants Knowingly and Intentionally Devised and Executed a Scheme To Defraud the Public of Money

a. Defendants Intended to Defraud the Public of Money

The Court finds that, under the foregoing authority, Defendants intentionally devised and executed a scheme to defraud the public, consumers of cigarettes and potential consumers of cigarettes, of money and property in order to maximize their profits by preserving and enhancing the market for cigarettes through multiple principal means: (1) to deceive consumers into starting and continuing to buy and smoke cigarettes by endeavoring to misrepresent and conceal the adverse health effects caused by smoking cigarettes and exposure to cigarette smoke, by maintaining that there was an "open question" as to whether smoking cigarettes causes disease and other adverse effects, despite the fact that Defendants knew otherwise, and by ensuring that their research, development, and marketing of cigarettes (including potentially less hazardous products) remained consistent with these core public relations positions (see U.S. FPFF § IV.A-C); (2) to deceive consumers into starting and continuing to smoke cigarettes by undertaking an obligation to take actions, including funding independent research, in order to determine if

[45] See, e.g., Emery v. American General Finance, Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) ("A half truth, or what is usually the same thing a misleading omission is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled"); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) (holding that misleading newspaper ads and letters which were mailed "need not be false or fraudulent on their face, and the accused need not misrepresent any fact" since "it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading"); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) ("A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved") (collecting cases); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977) ("fraudulent representations [proscribed by the mail fraud statute include] deceitful statements or half-truths or the concealment of material facts"); Williams v. United States, 358 F.2d 972, 975 (10th Cir. 1966) (same); Lustigar v. United States, 386 F.2d 132, 134-38 (9th Cir. 1967) (holding that literally true statements in advertising materials provided the basis for mail fraud conviction where they were misleading and deceptive in context); Silverman, 213 F.2d at 407 ("the fact that there is no misrepresentation of a single existing fact makes no difference" provided that the scheme was otherwise reasonably calculated to deceive).

smoking cigarettes causes cancer or other diseases, while concealing and suppressing relevant research and funding self-serving or irrelevant research (see U.S. FPFF § IV.D); (3) to deceive consumers into becoming or staying addicted to cigarettes by maintaining that nicotine is not addictive, despite the fact that Defendants knew that nicotine is addictive (see U.S. FPFF § IV.F); (4) to deceive consumers into becoming or staying addicted to cigarettes by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they engaged in such manipulation (see U.S. FPFF § IV.E.2); (5) to deceive consumers, particularly parents and young people, by claiming that they did not market to young people, while engaging in marketing and advertising with the intent of addicting young people and enticing them into becoming lifetime smokers (see U.S. FPFF § IV.G); and (6) to deceive consumers through deceptive marketing and cigarette design modifications to exploit smokers' desire for less hazardous and "low tar" cigarettes (see U.S. FPFF § IV.F).

The Court notes that the District of Columbia Circuit and other courts have consistently held that it is not necessary to prove all the alleged alternative means or all the alleged fraudulent representations were undertaken since it is perfectly proper to allege in the conjunctive, and prove in the disjunctive. Accordingly, the various sub-components of the overarching scheme to defraud must be viewed in context of the entire scheme to defraud, and it is sufficient to prove under the totality of the circumstances that the defendant devised a scheme intended to defraud which included one or more of the alternatives alleged.[46] In any event, this Court finds the

[46] See, e.g., Philip Morris, 304 F. Supp. 2d at 66-67; United States v. Goodwin, 272 F.3d 659, 666-67 (4th Cir. 2001); United States v. O'Connell, 172 F.3d 921, 1998 WL 720696 (D.C. Cir. 1998) (table); United States v. Lemire, 720 F.2d at 1345-46; United States v. Jordan, 626 F.2d 928, 931 (D.C. Cir. 1980). Accord Clausen, 792 F.2d at 105; United States v. Stull, 743 F.2d 439, 442 & n.2 (6th Cir. 1984) (collecting cases similarly holding); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981); United States v. Amrep Corp., 560 F.2d 539, 546-47 (continued...)

United States has proven that Defendants knowingly and intentionally implemented all the various means alleged to execute the scheme to defraud. See U.S. FPFF § IV.

Beyond this, all Defendants, except for Philip Morris Companies, voluntarily undertook a duty to take action, including funding independent research, to determine if smoking caused cancer or other diseases and to disclose to the public the results of such independent research. See U.S. FPFF § I.A-E, § IV.D. However, Defendants intentionally violated their duty in this regard by concealing and suppressing relevant research and by funding self-serving, irrelevant research. See U.S. FPFF § I.K and § IV.H. Defendants' violation of their voluntary duty to disclose may provide the basis for mail and wire fraud charges. United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (defendant who established fraudulent loan scheme liable under 18 U.S.C. § 1343 because she "clearly held herself out as the trustee," and "thus, by her own actions and representations, she assumed the responsibilities and duties attendant to such a position of trust."); Tabas v. Tabas, 47 F.3d 1280, 1290 n.15 (3d Cir. 1995) (noting the "broad" scope of the mail fraud statute as encompassing "'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'") (quoting Durland, 161 U.S. at 313); Blue Cross & Blue Shield Inc., 113 F. Supp. 2d at 387-88 (plaintiff's civil RICO claims predicated in part on voluntarily assumed duty, including the Frank Statement).

Moreover, even absent a duty to disclose, it is well established that a defendant's concealment, non-disclosure and other omission of material information may provide the basis

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[46](...continued)
(2d Cir. 1977) (collecting cases similarly holding).

for mail and wire fraud charges where, as here, the omission was intended to induce a false belief and was part of a scheme involving deceptive conduct.[47]

b. Defendants' Fraudulent Intent May Be Based Upon Reckless Disregard For the Truth and Wilful Blindness

As set forth supra § I.G.3 and U.S. FPFF § IV, the United States has adduced ample proof that the that the various false statements and misrepresentations were knowingly made.

Additionally, statements made with reckless disregard for their truth can satisfy the scienter and intent requirement of mail fraud. See, e.g., United States v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000) (upholding jury instruction that "reckless indifference to the truth or falsity of a statement satisfies the specific intent requirement in a mail fraud case"); United States v. Love, 535 F.2d 1152, 1157-58 (9th Cir. 1976) (trial court did not err when it instructed jury that "a statement or representation is false and fraudulent within the meaning of [18 U.S.C. § 1341] if known to be untrue or **made with reckless indifference as to its truth or falsity** and made or cause to be made with intent to deceive." (Emphasis in original)).[48] The same is true of the wire

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[47] See, e.g., United States v. Hitt, 249 F.3d 1010 (D.C. Cir. 2001); United States v. Riebold, 135 F.3d 1226, 1229 (8th Cir. 1998); Emery v. Amer. Gen. Fin., Inc., 71 F.3d 1343, 1346-48 (7th Cir. 1995); United States v. Moore, 37 F.3d 169, 172-73 (5th Cir. 1994); United States v. Keplinger, 776 F.2d 678, 697-99 (7th Cir. 1985) (collecting cases similarly holding); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) ("half truths"); Blachly v. United States, 380 F.2d 665, 674 (5th Cir. 1967); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977); United States v. Curtis, 537 F.2d 1091, 1097 (10th Cir. 1976); Post v. United States, 407 F.2d 319, 325 (D.C. Cir. 1968); Cacy v. United States, 298 F.2d 227, 229 (9th Cir. 1961).

[48] See also United States v. Prows, 118 F.3d 686 (10th Cir. 1997); United States v. Coyle, 63 F.3d 1239, 1243 (3rd Cir. 1995); Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Offense Instruction Nos. 41.1 and 42.1 (1997); United States v. Simon, 839 F.2d 1461, 1470 (11th Cir. 1988) (intent to defraud can be found in reckless disregard of the truth); United States v. Frick, 588 F.2d 531, 536 (5th Cir. 1979) ("Nor was it necessary that the defendants knew for certain that MWT had no assets. Reckless indifference for the truth can be fraudulent under the mail fraud statute."); United States v. Amrep Corp., 560 F.2d 539, 543 (2d Cir. 1977); United States v. Marley, 549 F.2d 561, 563-64 (8th Cir. 1977) ("it should also be noted that criminal intent and guilty knowledge relate to the condition of the mind. Since the condition of the mind is rarely susceptible of direct proof, recourse must be had to all pertinent circumstances. [citing cases] It must also be noted that the courts have long recognized that scienter may be established where reckless disregard of truth or falsity is present." (continued...)

fraud statute, see, e.g., United States v. Armstrong, 654 F.2d 1328, 1336 (9th Cir. 1981) (knowledge or reckless disregard standard applied in wire fraud prosecution stemming from defendant's fraudulent activities regarding trust accounts), the false statements statute,[49] as well as the securities fraud laws. See, e.g., Boyer, 694 F.2d 58 (upholding jury instruction that recklessness can satisfy intent component of both securities and mail fraud); United States v. Farris, 614 F.2d 634, 638 (9th Cir. 1979) ("the law of this circuit establishes that reckless disregard for truth or falsity is sufficient to sustain a finding of securities fraud or a conviction for mail fraud."); In re Time Warner Inc. Sec. Litig., 9 F.3d 259 (2d Cir. 1993) (stating that recklessness can satisfy scienter requirement of securities fraud); Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990) (reckless satisfies scienter requirement of securities statute); United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986); United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984).[50]

Accordingly, "[o]ne who acts with reckless indifference as to whether a representation is

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[48](...continued)
(Citing Spurr v. United States, 174 U.S. 728, 735 (1899); United States v. Henderson, 446 F.2d 960, 966 (8th Cir. 1971)); United States v. Boyer, 694 F.2d 58, 59 (3d Cir. 1982); United States v. Dick, 744 F.2d 546, 550 (7th Cir. 1984).

[49] See, e.g., United States v. London, 66 F.3d 1227, 1241-42 (1st Cir. 1995) ("In the context of the False Statements Act, 18 U.S.C. § 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth.").

[50] See also Dirks v. SEC, 681 F.2d 824, 844-45 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646 (1983); IIT v. Cornfeld, 619 F.2d 909, 923 (2d Cir. 1980); Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3d Cir. 1981); Broad v. Rockwell Int'l Corp., 642 F.2d 929, 961-62 (5th Cir. 1981) (en banc); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495 (7th Cir. 1986); Searls v. Glasser, 64 F.3d 1061, 1066 (7th Cir. 1995); Van Dyke v. Coburn Enters., Inc., 873 F.2d 1094, 1099-1100 (8th Cir. 1989); Anixter v. Home-Stake Prod. Co., 77 F. 3d 1215 (10th Cir. 1996); Currie v. Cayman Resources Corp., 835 F.2d 780, 786 n.11 (11th Cir. 1988); see also SEC v. Jakubowski, 150 F.3d 675, 681-82 (7th Cir. 1998) ("deliberate ignorance" stemming from failure to read material document is reckless conduct sufficient to show scienter); (citing United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986)); Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977) (reckless disregard of truth constitutes intent to deceive or manipulate).

true or false is chargeable as if he had knowledge of its falsity." Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964). Therefore, a person's good faith belief in the truthfulness of a statement does not necessarily preclude culpability for reckless disregard for its truth. For instance, in United States v. Themy, 624 F.2d 963, 964-96 (10th Cir. 1980), a mail fraud prosecution, the court held thus:

> "[O]ne cannot be held to guilty knowledge of falsity of his statements simply because a reasonable man under the same or similar circumstances would have known of the falsity of such statements." However, indifference to the truth of statements made to induce others to action amounts to fraudulent intent. [Citing cases]. And even though a defendant may firmly believe in his plan, **his belief will not justify baseless or reckless representations**.

Id. at 965 (citations omitted; emphasis added). See also United States v. Reddeck, 22 F.3d 1504, 1507 (10th Cir. 1994) (defendant's belief does not excuse baseless or reckless representations); United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983).[51]

Moreover, one may be held criminally liable where he or she is wilfully blind to the truth. See United States v. Cassiere, 4 F.3d 1006, 1023-24 (1st Cir. 1993) (approving wilful blindness instruction). Therefore, "[g]uilty knowledge may be inferred where instances of fraud are repeatedly brought to a defendant's attention without prompting alteration of his facilitative

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[51] See also SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000) ("good faith, without more, does not necessarily preclude a finding of recklessness. Therefore, even if the defendants believed [the] investments were sound, they may still be liable for securities fraud if their belief was based upon nothing more than a reckless disregard of the truth"); United States v. Kimmel, 777 F.2d 290, 293 (5th Cir. 1985) (upholding jury instruction that good faith may be defense to mail fraud but not if statements were made with reckless disregard to their truth); United States v. Habel, 613 F.2d 1321, 1328 (5th Cir. 1980) (upholding jury charge that good faith does not excuse knowing or reckless behavior); United States v. Wiener, 578 F.2d 757, 786-87 (9th Cir. 1978) (upholding jury instruction that good faith will not excuse a reckless or knowing fraud); Dietrich v. Bauer, 126 F. Supp. 2d 759, 768 (S.D.N.Y. 2001) (denying defendant's summary judgment motion in private securities fraud litigation where evidence sufficient for jury to conclude that defendant's ignorance could have been result of wilful blindness, which would negate good faith defense); United States v. Cen-Card Agency/C.C.A.C., 724 F. Supp. 313, 316-17 (D.N.J. 1989).

conduct." United States v. Nivica, 887 F.2d 1110, 1114 (1st Cir. 1989). Wilful blindness or a failure to investigate the basis for claims can constitute recklessness. See also Eisenberg v. Gagnon, 766 F.2d 770, 777 (3d Cir. 1985) (securities fraud case: jury could have reasonably found that defendant accounting firm acted in reckless disregard for the truth by not investigating further); Infinity Group, 212 F.3d at 193 ("ignorance provides no defense to recklessness where a reasonable investigation would have revealed the truth to the defendant."); United States v. Dugan, 150 F.3d 865, 867 (8th Cir. 1998) (upholding jury instruction that it was no defense to mail fraud if defendant wilfully ignored co-defendant's misrepresentations); United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996) (evidence sufficient for conviction for mail fraud on basis of defendant's wilful blindness); United States v. Schnabel, 939 F.2d 197, 203-04. (4th Cir. 1991) (upholding wilful blindness jury instruction where defendant was a vice-president of mortgage company because it was reasonable to believe that the only way he could be unaware of mail fraud activity was if he "deliberately shut his eyes to it."); Bailey v. Meister Brau, Inc., 535 F.2d 982, 993-94 (7th Cir. 1976) (holding a corporation liable where it "wantonly ignored evidence of the unfairness of the transaction which was readily available, and failed to disclose the facts to other stockholders").

c. Defendants' Fraudulent Representations are Material

The Court also finds that all Defendants' false, misleading, and deceptive statements and omissions referenced above and in U.S. FPFF § IV are "material." In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court noted that "a matter is material if:

> '(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

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

Neder, 527 U.S. at 22, n.5 (quoting Restatement (Second) of Torts § 538 (1977)).

As a general rule, deceptive advertising or claims permits an inference "that the deception will constitute a material factor in a purchaser decision to buy." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).[52] Moreover, materiality is presumed for matters that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000). Accord Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992).

The above-referenced false statements, misrepresentations and concealments about the principal aspects of the scheme to defraud, particularly about the adverse health effects of smoking cigarettes and exposure to secondhand smoke, including the link to life-threatening diseases, premature death, and about the addictive properties of cigarettes and nicotine, and denials of youth marketing, are material because such false statements, misrepresentations, and concealment significantly involve heath and safety matters of concern to consumers and had a natural tendency to influence a person's decision to initiate, continue, or quit smoking, and also had a natural tendency to influence the decisions of others to initiate, forgo or otherwise affect efforts to address smoking and health issues. Accord Philip Morris Inc., 304 F. Supp. 2d at 69 n.4 and cases cited supra p. 66 and n.52. Defendants had reason to know – and Defendants'

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[52] Accord FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40-43 (D.C. Cir. 1985) (holding that deceptive advertising touting Defendants' low tar cigarettes created an "inherent tendency to deceive" consumers and was material); FTC v. Wilcox, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) ("Express claims or deliberately-made implied claims used to induce the purchase of a particular product or service are presumed to be material"). See also FTC v. Pantron I Corp., 33 F.3d 1088, 1095-96 (9th Cir. 1994).

internal documents demonstrate that Defendants in fact expressly recognized – that members of the public were likely to regard such matters as important in deciding whether to initiate, continue, or quit smoking. Accord Philip Morris, 304 F. Supp. 2d at 67-69 and n.4. Cf. United States v. Philip Morris Inc., Slip Op. p. 2 (D.D.C. September 30, 2002) (Order #235). See also U.S. FPFF § IV.E and § IX.A.

4. Defendants May Not Escape Liability for Their Scheme to Defraud by Claiming That the Public Was Not Deceived or Otherwise Injured by Their Misconduct and Could Not Have Reasonably Relied Upon Their Fraudulent Representations

As this Court ruled previously, it is well established that to establish a mail or wire fraud violation a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct.[53]

In accordance with these principles, the District of Columbia Circuit has repeatedly rejected the claims that "no fraudulent scheme existed because no reasonable [prudent] person would have believed [the defendant's] misrepresentations . . . [or] where the persons defrauded unreasonably believed the misrepresentations made to them." United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). Rather, the District of Columbia Circuit has explained that "it

[53] See Philip Morris, 304 F. Supp. 2d at 69-70; Philip Morris, 116 F. Supp. 2d at 153; Philip Morris, 273 F. Supp. 2d at 6. Accord Neder, 527 U.S. at 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in the federal fraud statutes."); Carpenter v. United States, 484 U.S. 19, 26-27 (1987) ("Petitioners cannot successfully contend . . . that a scheme to defraud [under mail and wire fraud statutes] requires a monetary loss."); Durland v. United States, 161 U.S. at 315 (proof that the mailing succeeded in deceiving the intended violation is not required); United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976) (the mail and wire fraud statutes "do not require that the deception bear fruit for the wrongdoer or cause injury to the intended victim").

makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright. . . . The only issue is whether there is a plan, scheme or artifice intended to defraud." Id. at 1036, quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980) (collecting other cases similarly holding). Accord Sun-Diamond Growers of Cal., 138 F.3d at 971 ("when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even 'gullible'"); Deaver, 155 F.2d at 744-45 (holding in mail fraud prosecutions that "the monumental credulity of the victim is no shield for the accused"); Pollack, 534 F.2d at 971 (to require reliance and actual loss to the fraud victim "would lead to the illogical result that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim.").[54]

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

[54] See also United States v. Masten, 170 F.3d 790, 795 (7th Cir. 1999) (rejecting the defense that the mail fraud victims "acted imprudently" when they invested in the defendant's business without first researching its solvency and that the defendant's "inept scheme was too unbelievable to fool any reasonable" victim); United States v. Stockheimer, 157 F.3d 1082, 1087 (7th Cir. 1998) (rejecting defense that the defendants' claims "were so preposterous that no reasonable person would have acted on them", stating that "a scheme that a sophisticated person would recognize as incredible is not beyond the reach of the mail fraud statute"); United States v. Biesiadeck, 933 F.2d 539, 544 (7th Cir. 1991) ("Those who are gullible, as well as those who are skeptical, are entitled to the protection of the mail fraud statute"); United States v. Faulhaber, 929 F.2d 16, 18 (1st Cir. 1991) (rejecting requested instruction that the jury "was required to find that [the defendant's] scheme would have to defraud a person of ordinary prudence and comprehension."); United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980) ("The victim's negligence is not a defense to criminal conduct. . . . [E]ven the monumental credulity of the victim is no shield for the accused.") (citations and internal quotation marks omitted).

contexts, the law recognizes that such minors are a "protected class" in need of special protection, because they lack "that full capacity for individual choice," Ginsberg v. New York, 390 U.S. 629, 650 (1968), and "are not assumed to have the capacity to take care of themselves." Schall v. Martin, 467 U.S. 253, 265 (1984). (See infra Section IV.E.5.). Accord United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980) ("The laws protecting against fraud are most needed to protect the careless and the naive from lupine predators, and they are designed for that purpose."). Indeed, the evidence establishes that Defendants designed their marketing to appeal to the youth market because of their vulnerability and because they believed that most of the non-smoking young people who become daily smokers in their youth will become addicted lifetime smokers. See U.S. FPFF § IV.G. Therefore, it would be legally incongruous to allow Defendants to avoid liability **because** they marketed their cigarettes to young people.

In sum, it is no defense that a reasonably prudent consumer would not have relied upon Defendants' representations at issue. Rather, the dispositive issue is whether Defendants devised a scheme intended to defraud, which they plainly did.

5. Defendants Caused the Alleged Mailings and Wire Transmissions For the Purpose of Executing the Scheme to Defraud

a. Governing Legal Principles

It is settled law that to establish a charge of mail or wire fraud under 18 U.S.C. §§ 1341 and 1343, the matter or communication sent via the mails or wires need not itself contain false or misleading information or evidence fraud. Rather, "'innocent' mailings – ones that contain no false information – may supply the mailing element." Schmuck v. United States, 489 U.S. 705, 715 (1989) (citing Parr v. United States, 363 U.S. 370, 390 (1960)). Accord Philip Morris, 304 F. Supp. 2d at 70. As this Court has noted (Philip Morris, 304 F. Supp. 2d at 70), the District of

Columbia Circuit has long held that 18 U.S.C. § 1341 does not require that any mailing utilized to establish a mail fraud prosecution be false: "Under the mail fraud statute it is not necessary that the individual mailing relied upon by the prosecution be shown to be in any way false or inaccurate, if the matter mailed is utilized in furtherance of or pursuant to the scheme to defraud." United States v. Reid, 533 F.2d 1255, 1263 (D.C. Cir. 1976) (footnote omitted); see also Deaver, 155 F.2d at 744 ("a 'scheme' may be fraudulent though no misrepresentation is made").[55]

It is also settled law that the mailing or wire transmission need not be essential to the scheme or succeed in deceiving, rather it need only be "for the purpose of executing the scheme." United States v. Maze, 414 U.S. 395, 400 (1974).[56] "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive . . . ." Schmuck, 489 U.S. at 715.[57]

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[55] See also Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413-14 (7th Cir. 1991) ("The actual violation is in the mailing, although the mailing must relate to the fraudulent scheme. . . .The mailing need not contain any misrepresentations. Rather 'innocent' mailings – ones that contain no false information – may supply the mailing element."); Tabas v. Tabas, 47 F.3d 1280, 1294 n.18 (7th Cir. 1995) (same; citing Kehr). Moreover, "it does not matter that some of these mailings contained no false or misleading information, and individually contained no pecuniary loss; routine and innocent mailings can also supply an element of the offense of mail fraud." United States v. Hickok, 77 F.3d 992, 1004 (7th Cir. 1996) (mailing or writing itself need not contain false or misleading information); United States v. Brocksmith, 991 F.2d 1363, 1368 (7th Cir. 1993) (same citing Schmuck); United States v. Sylvanus, 192 F.2d 96, 106 (7th Cir. 1951) ("Communication [with] false representations to the victims need be neither alleged nor proved."); Shapo v. O'Shaughnessy, 246 F. Supp. 2d 935, 957 (N.D. Ill. 2002) (routine and innocent mailings can support mail fraud; citing Brocksmith and Hickok).

[56] Accord United States v. Coyle, 63 F.3d 1239, 1244 (3d Cir. 1995); United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995); Kehr Packages, 926 F.2d at 1413; United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981); Reid, 533 F.2d at 1264.

[57] Moreover, courts have taken a flexible approach to the "in furtherance" requirement, holding that it is sufficient that the mailing or wire transmission was "incident to an essential part of the scheme. . . or 'a step in [the] plot.'" 489 U.S. at 711 (quoting Badders v. United States, 240 U.S. 391, 394 (1916)). Accord United States v. Sun-Diamond Growers, 138 F.3d 961, 972 (D.C. Cir. 1998); Coyle, 63 F.3d at 1244; United States v. Waymer, 55 F.3d (continued...)

It is also well established that the plaintiff is not required to prove that the defendant personally mailed the matter or even specifically knew about or intended the mailing to occur. Rather, the plaintiff need only prove that the defendant "caused" the use of the mails in an effort to further the scheme to defraud. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira v. United States, 347 U.S. 1, 8-9 (1954). Accord Maze, 414 U.S. at 400; United States v. Serang, 156 F.3d 910, 914 (9th Cir. 1998); Sawyer, 85 F.3d at 723; United States v. Alexander, 135 F.3d 470, 474-75 (7th Cir. 1998); United States v. McClelland, 868 F.2d 704, 707 (5th Cir. 1989); United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979).

An early case on the mail fraud statute (formerly 18 U.S.C. § 338), United States v. Weisman, 83 F.2d 470 (2d Cir. 1936), further illustrates that the "causing" requirement does not impose an onerous burden, and that the mailing need only be reasonably foreseeable. In that case, the defendant, who operated a fraudulent property purchase scheme, responded to a series of advertisements placed by individuals who sought to sell properties. The court of appeals noted that "Weisman, so far as possible, abstained from using the mails in connection with his fraudulent transactions," and that with regards to one customer, Lewis, the defendant dictated a typewritten response to Lewis' advertisement, and the defendant's agent delivered the response

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[57](...continued)
564, 569 (11th Cir. 1995); United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992). See also United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983) ("mailings made to promote the scheme . . . or which facilitate the concealment of the scheme"); United States v. McClelland, 868 F.2d 704, 707-09 (5th Cir. 1989) (mailings which tended to further the scheme).

to the newspaper by hand delivery. Id. at 472.

Unbeknownst to Weisman, Lewis had left instructions for the newspaper that any responses be forwarded to him by mail, and the newspaper followed these directions by sending Weisman's fraudulent response to Lewis. Id. Therefore, "[i]n spite of [Weisman's] general efforts on his part to avoid the use of the mails, they undoubtedly were used for the purpose of executing the schemes to defraud" his victims. Id. Moreover, despite the fact that Weisman had not himself used the mails, and neither intended – nor even knew of – Lewis' instructions to the newspaper to forward the response, Weisman in fact "caused" the letter to be mailed:

> When Weisman had a letter delivered to the [New York] Times office in New York, there was every chance that the Times would forward it to its customer by mail. It has long been settled that a defendant may cause a letter to be sent or delivered by mail though such a mode of transmission was neither known nor intended, provided mailing or delivery by post might reasonably have been foreseen.

Id. at 473 (citing United States v. Kenofskey, 243 U.S. 440 (1917)). See also cases cited infra n.61.

Furthermore, direct proof that the specific matter at issue was mailed or transmitted via the wires is not required. Rather, it is sufficient that the evidence shows that it was the defendant's routine or standard business practice to send or receive matters via the mails or wire transmission or other circumstantial evidence shows that it was more likely than not that the matter was sent or received via the mails or wires.[58]

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[58] See, e.g., United States v. Sprick, 233 F.3d 845, 854-55 (5th Cir. 2000) (testimony that checks "most likely" were mailed pursuant to routine business practice sufficient to establish mailing beyond a reasonable doubt); Alexander, 135 F.3d at 475 ("There also was nothing in the trial testimony to indicate that S.B. Baker may have deviated from that standard practice in its handling of the police report at issue here. Under our cases, such evidence of a standard office or business practice is sufficient circumstantial proof to take the mailing issue to the jury."); United States v. Griffith, 17 F.3d 865, 874-75 (6th Cir. 1994) ("Thus, in most cases, a witness's testimony that he (continued...)

b. Mailing Alternatives From 1953 to Present

The United States Postal Service has maintained, for the most part, a statutory monopoly on delivery of letters by virtue of the "Private Express Statutes."[59] Prior to 1974, private carrier mailing was permissible only by "opinion letter" permission of the Postal Department. Section 310.3 of 39 C.F.R., implemented September 14, 1974, set forth certain exceptions, but the largest exception occurred in 1979, which listed various suspensions of the Private Express statute. That included, on October 24, 1979, the "extremely urgent letter" suspension (39 C.F.R. Section 320.6), under which most courier services now operate. See O'Brien, 644 F. Supp. at 142; Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 519 (1991). Therefore, prior to 1974, the United States Mail was virtually the only means of authorized postal delivery in the United States. Defendants do not assert, and there is no evidence in the record that indicates, that Defendants obtained any "opinion letter" permission to transmit mail other than via the United States Mail.

Moreover, effective September 13, 1994, Congress amended the mail fraud statute to

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[58](...continued)
placed a telephone call to or received a call from an individual in another state will support the inference of the requisite interstate wire communication. Similarly, a witness's testimony that he mailed or received a document in the mail, or that his company routinely posts and receives documents through the mail, will suffice."); United States v. Metallo, 908 F.2d 795, 798 (11th Cir. 1990) (testimony "that it was the airline's routine practice to send business correspondence by United States mail . . . was sufficient to [establish the use of the mails])"; United States v. McClellan, 868 F.2d 210, 216 (7th Cir. 1998) (holding it was immaterial that the witnesses "could not remember exactly where or when the vouchers were mailed. The precise details of the mailing need not be established, however; it is sufficient to establish that mailing is the sender's regular business practice"); Keplinger, 776 F.2d at 691 ("The inference that the sender acted in accord with its ordinary practice [to use the mails] is reasonable, and the absence of a recollection of departure from the practice strengthens the inference that the practice was followed"). See also United States v. Shyres, 898 F.2d 647, 654-55 (8th Cir. 1990); United States v. Bowman, 783 F.2d 1192, 1196-97 (5th Cir. 1986); United States v. Green, 745 F.2d 1205, 1208 (9th Cir. 1985); United States v. Ledesma, 632 F.2d 670, 675 (7th Cir. 1980); United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir. 1979).

[59] See 39 U.S.C. §§ 401, 404, 601-606; 18 U.S.C. §§ 1693-1699, 1724. See also Associated Third Class Mail Users v. United States Postal Service, 600 F.2d 824 (D.C. Cir. 1979); United States Postal Service v. O'Brien, 644 F. Supp. 140 (D.D.C. 1986).

attach liability to anyone who in furtherance of a scheme to defraud, "deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Pub. L. No. 102-322 (codified as amended at 18 U.S.C. § 1341 (1994)). See, e.g., United States v. Photogrammetric Data Services, Inc., 259 F.3d 229, 247-49 (4th Cir. 2001), cert. denied, 535 U.S. 926 (2002), abrogated on different grounds by Crawford v. Washington, 124 S. Ct. 1354 (2004); United States v. Marek, 238 F.3d 310, 318 (5th Cir. 2001).

c. Defendants' Routine Mailing Practices

The evidence shows that Defendants employed the following routine mailing practices.

1. Philip Morris

All of Philip Morris' incoming mail flows either to its Richmond, Virginia, or New York, New York mail room facilities. See U.S. FPFF § V ¶ 16. Approximately 80% of United States mail would have flowed through Philip Morris' central Richmond facilities prior to September 11, 2001. Id. Since September 11, 2001, approximately 85% of the incoming correspondence and packages arriving at Philip Morris' Richmond mail room was sent by U.S. Mail. Id. Philip Morris estimated that as of July 1, 2002, about three-quarters of items arriving in its New York mail room were sent by U.S. Mail. Id. Since September 11, 2001, 75% of the mails and materials Philip Morris has sent have been transmitted by U.S. Mail Id. No earlier than 1967 did Philip Morris begin using private courier or commercial carriers to send correspondence or packages. Id. Philip Morris now uses fax machines, an Internet web site, and e-mail to transmit documents. Id.

2. Lorillard

Since 1994, seventy-five percent of the total mailings to and from Lorillard are made via

U.S. Mail. Lorillard generally sends its public statements and press releases electronically to the news organizations. See U.S. FPFF § V ¶ 16.

3. Liggett

Liggett sends correspondence by U.S. Mail and commercial carriers. Not until the mid-1980s did Liggett transmit documents by facsimile. U.S. FPFF § V ¶ 16.

4. R.J. Reynolds

In 1968, U.S. Mail was generally R.J. Reynolds' only means of transmitting documents. During the 1970s, most of R.J. Reynolds' correspondence was transmitted by U.S. Mail. See U.S. FPFF § V ¶ 17.

5. The Tobacco Institute

The Tobacco Institute transmitted its booklet, "Helping Youth Decide" by U.S. Mail when single copies were requested. U.S. Mail was Tobacco Institute's most frequently used mode of sending correspondence. Approximately 90% of its incoming mail was delivered by U.S. mail and 90% of its press releases were sent by U.S. Mail. U.S. FPFF § V ¶ 16.

6. Council For Tobacco Research

The Council For Tobacco Research ("CTR") would send its annual reports through mailing houses. U.S. FPFF § V ¶¶ 16 & 18. For those individuals who made specific requests for the annual reports, the method of transmission was by U.S. Mail. More often than not, CTR used the U.S. Mail to send award letters, checks, and routine correspondence to grantees. Id. It used U.S. Mail to send correspondence and funds to special projects recipients, and the recipients' affiliated institutions, as well as to send minutes of board of directors meetings and annual meetings. Id. CTR used U.S. Mail to send agenda books containing applications for

review by its Scientific Advisory Board. In fact, CTR did not even acquire a fax machine until 1989 or 1990. Id.

d. Prior Stipulations and Admissions Establish the Mailings and Wire Transmissions Underlying 45 of the Alleged 145 Racketeering Acts

The United States established that Defendants' stipulations and admissions, accounting for overlap among them, established the mailings and wire transmissions underlying the following 45 Racketeering Acts: 8, 11, 17, 26, 30, 31, 32, 38, 44, 45, 50, 51, 52, 53, 54, 57, 60, 63, 66, 67, 68, 70, 73, 77, 82, 86, 88, 89, 90, 94, 96, 98, 99, 103, 104, 106, 114, 115, 116, 118, 124, 125, 127, 129 and 144. See U.S. FPFF § V ¶¶ 2-4. Defendants concede that there is no genuine issue of material fact as to the mailings and wire transmissions established by Defendants' admissions and stipulations.[60]

e. The United States Established the Mailings and Wire Transmissions Underlying an Additional 30 of the 145 Alleged Racketeering Acts Which Involve Defendants' Press Releases and Advertisements Disseminated to the Public Via the United States Mails and Wire Transmissions.

The United States established that two research consultants and their staffs traced Defendants' Advertisements and Press Releases to various newspapers and magazines, that were thereafter disseminated to the public, which underlie an additional 30 Racketeering Acts. See U.S. FPFF § V.E. Declarations from representatives of twelve widely circulated newspapers and twelve major magazines established that these newspapers and magazines were sent to subscribers via the United States mails and provided the circulation of each publication. See

[60] See Defendants' Memorandum of Law in Opposition to United States' Motion for Partial Summary Judgment on Element that Defendants Have Caused Mailings and Wire Transmissions ("JD. Opp. Mailings") and Defendants' Rule 7.1/56.1 Counter-Statement in Support of their Opposition to United States Motion for Partial Summary Judgment of Element that Defendants Have Caused Mailings and Wire Transmissions ("JD. R. 56.1/7.1 St. Mailings") at ¶¶ 128, 134, 143, 147, 149, 155, 161, 162, 167-171, 173, 175, 178, 181, 182, 183, 185, 188, 192, 197, 201, 203, 204, 205, 209, 211, 213, 214, 217, 218, 220, 228, 229, 230, 232, 238, 239, 241, 243 and 258.

U.S. FPFF § V.E. These additional 30 Racketeering Acts which involve Defendants' press releases and advertisements, that were disseminated to the public by newspapers and magazines via the United States mails and wire transmissions, are: 1, 18, 23, 36, 37, 39, 47, 48, 61, 64, 76, 83, 84, 97, 100, 102, 119, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147 and 148.

Moreover, it is well established that when a defendant sends press releases and advertisements to newspapers and magazines for dissemination, it is reasonably foreseeable to the defendant that the newspapers and magazines would use the United States mails to send such matters to their subscribers, and therefore, the defendant "caused" the use of the mails within the meaning of the mail fraud statute. See supra pp. 69-71.[61] For the foregoing reasons, the United States adduced sufficient evidence to establish that Defendants caused the mailings and wire transmissions underlying the 30 Racketeering Acts involving the news media's dissemination of Defendants' press releases and advertisements to their subscribers.[62]

f. Defendants Caused Wire Transmissions Underlying An Additional 6 of the

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[61] See, e.g., Carpenter, 484 U.S. at 28 ("[U]sing the wires and the mail to print and send the [Wall Street] Journal to its customers" containing the column at issue "was not only anticipated but an essential part of the scheme."); Atlas Pile Driving, 886 F.2d at 992 ("[I]t was almost certain that notice of [foreclosure sales] would be mailed to other claimants or that notice would be published in newspapers and copies of the notice distributed through the mails."); United States v. Bowers, 644 F.2d 320 (4th Cir. 1981) (holding that it was reasonably foreseeable that newspapers would be mailed to some subscribers containing the advertisements the defendant placed in the newspaper); United States v. Shepherd, 587 F.2d 943, 944 (8th Cir. 1978) (same); United States v. Buchanan, 544 F.2d 1322, 1324-25 (5th Cir. 1977) (same); Pritchard v. United States, 386 F.2d 760, 764 (8th Cir. 1967) (same for advertisements in magazines as well as newspapers); Atkinson v. United States, 344 F.2d 97, 98-99 (8th Cir. 1965) (same for advertisements in newspapers); Weisman, 83 F.2d at 473 (holding that it was reasonably foreseeable to the defendant that his letter hand-delivered to a newspaper in response to an advertisement would be sent by the newspaper to its customer via the U.S. mails).

[62] Defendants admit that the mailings and wire transmissions underlying 5 of these 30 Racketeering Acts have been established. These 5 Racketeering Acts are: 18, 23, 143, 145 and 146. See U.S. FPFF § V ¶ 5; J.D. R. 7.1/ 56.1 St. Mailings ¶ ¶ 135, 140, 257, 259 and 260. Moreover, Defendants admit that the "Frank Statement to Cigarette Smokers", which underlies Racketeering Act 1, was published "on January 4, 1954 in 448 newspapers throughout the United States." See Joint Defendants' Preliminary Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses at ¶ 1219, p. 588. See also Response No. 86 for CTR to United States' First set of Requests for Admissions to All Defendants.

145 Alleged Racketeering Acts.

The United States established that Defendants caused the wire transmissions underlying six of the 145 alleged Racketeering Acts (Racketeering Acts 105, 109, 110, 111, 112 and 113) since they involved wire transmission of televised statements made by Defendants' representatives. See U.S. FPFF § V ¶ 15. In that regard, the United States set forth settled authority that to establish the requisite causation, it is not necessary to prove that the defendant personally mailed or transmitted the wire communication, or even knew about or intended the mailing or wire transmission to occur. Rather, it is sufficient that the defendant "caused" the use of the mails or the use of wire transmissions. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira, 347 U.S. at 8-9 (1954). See supra pp. 71-73. Obviously, it was reasonably foreseeable that Defendants' representatives' televised statements would be broadcast to the public via the wire transmissions of television. Indeed, 18 U.S.C. § 1343 explicitly provides that it applies when a person "causes to be transmitted by means of. . . **television communication** in interstate or foreign commerce" a communication to execute a scheme to defraud. (Emphasis added).

g. The United States Established the Mailings and Wire Transmissions Involving Communications Underlying the Remaining 64 of the 145 Alleged Racketeering Acts.

The United States established that Defendants caused the mailings and wire transmissions, which involve communications sent or received by Defendants and their

representatives, that underlie the remaining 64 of the 145 alleged racketeering acts.[63] In that regard, the plaintiff is not required to prove that the defendant personally mailed a matter, or intended the mails to be used, or adduce direct evidence that a particular matter was mailed. Rather, it is sufficient that the defendant "caused" the use of the mails in that it was reasonably foreseeable that the mails would be used or the use of the mails would follow in the ordinary course of business. Therefore, it is sufficient that the evidence shows that it was Defendants' routine or standard business practice to send or receive matters via the mails or wire transmissions, or other circumstantial evidence shows that it was more likely than not that the matter was sent or received via the mails or wires. See supra n.58 and accompanying text.

Plainly, Defendants "caused" the mailings of matters which they had sent or received in response to correspondence that they sent. See, e.g., United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992); McClelland, 868 F.2d at 707; Diggs, 613 F.2d at 998-99; United States v. United Medical & Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (defendant's broker mailed fraudulent reports); United States v. Bortnovsky, 879 F.2d 30, 36-37 (2d Cir. 1989) (defendant's agent sent the mailings); United States v. Tiller, 302 F.3d 98, 103 (3d Cir. 2002) (defendant's employer). See also cases cited supra n.58. Where the defendant sets a course of events in motion, and then receives a mailing, this is sufficient to "cause" the use of the mails for purposes of § 1341. See, e.g., United States v. Toliver, 541 F.2d 958, 966-67 (2d Cir. 1976) (where defendants made fraudulent representations to state unemployment office, which then mailed unemployment checks to defendants, defendants "caused" the mailings); United

[63] These 64 Racketeering Acts are: 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 24, 25, 27, 28, 29, 33, 34, 35, 40, 41, 42, 43, 46, 49, 56, 58, 62, 65, 69, 71, 72, 74, 75, 78, 79, 80, 81, 85, 87, 91, 92, 93, 95, 107, 108, 117, 120, 121, 122, 123, 126, 128, 130, 131, 132, 133 and 134. See U.S. FPFF § V. ¶¶ 7, 13-14, 19-23, and § D.

States v. Otto, 742 F.2d 104, 109 (3d Cir. 1984) (letter written by investor-victim was responsive to defendant's failure to fulfill terms of earlier agreement); United States v. Weisman, 83 F.2d 470, 472-73 (2d Cir. 1936).[64]

Under these governing standards, the United States sufficiently established that in light of Defendants' routine mailing practices and other circumstantial evidence, Defendants "caused" the mailings and wire transmissions of correspondence underlying the remaining 64 Racketeering Acts. See supra nn.58 & 61 and U.S. FPFF § V. In fact, Defendants now admit that the mailings underlying 25 of these 64 Racketeering Acts were mailed by a Defendant.[65]

Moreover, 33 of the 39 challenged Racketeering Acts involve correspondence mailed from one city to another. They are Racketeering Acts 2, 3, 6, 7, 9, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 33, 40, 41, 58, 62, 69, 71, 72, 74, 75, 79, 80, 81, 85, 117, 132 and 133. And, 20 of the 39 challenged Racketeering Acts involve mailings prior to September 14, 1974, during the period that the United States Mails were virtually the only authorized means of mailing (RAs 2, 3, 6, 7, 9, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 28, 29, 33 and 117). See U.S. FPFF § V ¶¶ 7-9. Such evidence firmly supports the conclusion that the United States mails were used to send the correspondence underlying these Racketeering Acts.

6. The Mailings and Wire Transmissions Were in Furtherance of the Scheme to Defraud

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[64] Furthermore, it is important to note that 18 U.S.C. § 1341 proscribes not only sending the communication in furtherance of the scheme to defraud, but also receiving the communication. See, e.g., United States v. Coyle, 943 F.2d 424, 425 (4th Cir. 1991). For instance, as detailed in Racketeering Act 17, CTR mailed a communication to Liggett, Philip Morris, Reynolds, Brown & Williamson, and Lorillard. In addition to the Cigarette Company Defendants' "causing" of CTR to send the mailing, they (as members of the scheme to defraud) are liable for receiving it.

[65] These 23 Racketeering Acts are: 3, 4, 5, 6, 7, 10, 12, 21, 24, 25, 27, 33, 34, 35, 42, 46, 49, 79, 81, 87, 117, 121, 122, 132 and 133. See U.S. FPFF § V ¶¶ 4-5; JD R. 56.1/ 7.1 St. Mailings ¶¶ 120-124, 127, 129, 138, 141, 142, 144, 150-152, 163, 166, 194, 196, 231, 235, 236, 246 and 247.

Under the authority set forth above, supra notes 56-57 and accompanying text, each of the alleged mailings and wire transmissions was in furtherance of the overarching scheme to defraud for the reasons set forth in U.S. FPFF § V.D. For example, many of the mailings include false statements and misrepresentations that are the gravamen of the scheme to defraud. Others transmitted matters that assisted Defendants in carrying our their scheme to defraud.

7. The Cigarette Company Defendants Are Liable for the Mailings and Wire Transmissions Underlying the Racketeering Acts Committed By Defendants CTR and TI

All the Defendant Cigarette Tobacco Companies, except for BATCo, are charged in the Amended Complaint with various of the mailings and wire transmissions of CTR and the Tobacco Institute while they were members of or involved in these organizations.[66] All of those Defendants are liable for causing the mailings or wire transmissions involved in those on three independent legal grounds: (1) under liability principles as aiders and abettors, pursuant to 18 U.S.C. § 2(a); (2) pursuant to 18 U.S.C. § 2(b), for having "caused" an offense; and (3) under the predicate provisions of 18 U.S.C. §§ 1341 and 1343, the mail and wire fraud statutes, respectively.[67]

Each of the charged six Cigarette Company Defendants, participated in the creation of, funding, or the activities of TIRC/CTR, and TI. See U.S. FPFF §§ I.B & C and II. The charged six Cigarette Company Defendants formed, funded, and staffed these groups for the purposes of

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[66] See Racketeering Acts 2, 3, 5, 6, 7, 8, 10, 12, 13, 17, 18, 21, 23, 24, 27, 29, 31, 33, 34, 35, 42, 43, 44, 46, 49, 56, 66, 67, 70, 73, 77, 79, 81, 87, 88, 91, 93, 98, 117, 118, 120, 130, 132, and 133.

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

furthering a joint venture, including to fund research that supported the Cigarette Company Defendants' position on smoking and health issues and to serve as a forum to issue public statements on smoking and health and related matters.[68] See id.

First, under 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[69] See, e.g., In re Nofziger, 956 F.2d 287, 290-91 (D.C. Cir. 1992) ("[T]he law is well-settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating . . .

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[68] Even by Defendants' own "sterilized" accounts of these organizations, these trade associations were established for the purpose of jointly sponsoring "disinterested" research on behalf of the cigarette companies; to lobby and conduct public relations activities on behalf of the cigarette companies; and to otherwise act, at least in part, as Defendants' research and public relations arms. See, e.g., "A Frank Statement to Cigarette Smokers" (describing mission of Tobacco Industry Research Committee: "We are pledging aid and assistance to the research effort into all phases of tobacco and health. . . . 2. For this purpose we are establishing a joint industry group consisting initially of the undersigned [tobacco company sponsors and leaf grower associations]. This group will be known as the TOBACCO INDUSTRY RESEARCH COMMITTEE."); Statement Concerning the Origin and Purpose of the Tobacco Industry Research Committee and its Proposed Functions, dated January 25, 1954 (See U.S. FPFF § I ¶¶ 35-40) (noting the formation of TIRC "in the interest of the public as well as of the industry to meet the challenge raised by widely publicized reports in the press, purporting to link tobacco smoking with the cause of lung cancer," and further noting that "In the light of the foregoing agitation and in the absence of authoritative findings, there is a responsibility on the part of the management of the tobacco manufacturers and others engaged in the tobacco industry to aid in the final determination of this controversy. It is the earnest wish of the industry to encourage competent scientific authority to find ultimate facts which will dispel the present confusion and to communicate authoritative factual information on the subject to the public." The Statement further listed the members (tobacco executives and related associations), and described Paul Hahn's telegram to the executives in December 1953, and the meetings in New York City on December 14, 15, and 28, 1953, and the plan for the joint funding of the Committee, its chairmanship, and the retainer of a public relations firm. See also Certificate of Incorporation of The Tobacco Institute, Inc., (listing various tobacco company executives as members of the Board of Directors and the purpose of TI as including "to promote a better understanding by the public of the tobacco industry and its place in the national economy; to cooperate with governmental agencies and public officials with reference to the tobacco industry; to collect and disseminate information relating to the use of tobacco; to collect and disseminate scientific and medical material relating to tobacco; to collect and disseminate information relating to the tobacco industry published or released by any governmental agency, federal or state, or derived from sources independent of the industry; to collect and disseminate information relating to legislative and administrative developments, federal or state, affecting the tobacco industry; to promote public good will; . . . ."). See U.S. FPFF § I ¶¶ 25-33, 162-64, 169.

[69] A defendant's liability for a racketeering act under RICO may be established on the ground of aiding and abetting. See supra § I.F.1.

. The doctrine is of ancient origin."). Accord United States v. Raper, 676 F.2d 841, 849 (D.C. Cir. 1982).[70]

As applied to the mailing or wire transmission element, when a defendant is proven to be a participant in a joint venture, and a document is transmitted via the mails or wires in furtherance of that joint venture, the defendant may be liable for aiding and abetting, even if he did not know about the mailing or wire transmission, provided he in some way associated himself with the venture and assisted it.[71]

As set forth in U.S. FPFF § I.B & C and § II, the six Cigarette Company Defendants who created, funded and controlled TI and CTR were indisputably associated with a joint venture with CTR and TI. Moreover, in addition to actually forming these two entities, the Cigarette Company Defendants were the primary source of the funding of CTR and TI; provided directors and officers of the associations; reviewed, approved or recommended approval of various research proposals and public statements (including research reports and press releases); and provided sundry other forms of assistance which both enabled and encouraged the mailings and wire transmissions at issue. See id. Indeed, Defendants' essential purpose in forming CTR and TI was to use them to issue advertisements, press releases, and research reports that are the

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[70] See also United States v. Kegler, 724 F.2d 190, 200-201 (D.C. Cir. 1983) (18 U.S.C. § 2 "abolishes the distinction between common law notions of 'principal' and 'accessory.' Under it, the acts of the perpetrator become the acts of the aider and abettor and the latter can be charged with having done the acts himself. An individual may be indicted as a principal for commission of a substantive crime and convicted by proof showing him to be an aider or abettor. The indictment need not specifically charge a violation of 18 U.S.C. § 2. An aiding and abetting instruction may be given in a case where the indictment does not allege violation of the aiding and abetting statute. An aider and abettor of a crime may be tried and convicted even though the principal is not tried, convicted or identified.") (footnotes omitted).

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

gravamen of many of the mailings and wire transmissions at issue. Accord United States v. United Medical & Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (defendant liable where defendant's broker mailed fraudulent reports) (citing Kenofskey, 243 U.S. at 443; United States v. Tiller, 302 F.3d 98, 100-102 (3d Cir. 2002) (defendant's employer, unaware of the fraud, performed the mailings); United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988).[72]

Second, under subsection (b) of 18 U.S.C. § 2, "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." The Court of Appeals for the District of Columbia Circuit interpreted 18 U.S.C. § 2(b) in two recent cases. See United States v. Hsia, 176 F.3d 517 (D.C. Cir. 1999); United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999). In Hsia, the defendant was charged with violating various laws by willfully causing illegal campaign contributions through straw donors, or conduits, thus causing false statements to the Federal Election Commission. Rejecting the district court's conclusion that such contributions were too "attenuated," the circuit court concluded that "Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may 'cause' another to commit the act, nor the degree of permissible 'attenuation' between these two people's actions." 176 F.3d at 522. In Kanchanalak, the court of appeals reiterated its holding in Hsia and concluded that, by its reasoning, "[b]y thus causing political committees to report conduits instead of the true sources

[72] Accord United States v. Serafino, 281 F.3d 327, 333 (1st Cir. 2002) (defendant in "kickback" scheme liable where victim sends money to vendors, the "eminently foreseeable mechanism" money was delivered to defendants for the surpluses); United States v. Buchanan, 544 F.2d 1322 (5th Cir. 1977) (defendant liable for advertisements sent by newspaper); Richardson v. United States, 150 F.2d 58, 62 (6th Cir. 1945) (defendant liable for cotton grower's association's mailing of loan release).

of donations, defendants have caused false statements to be made to a government agency." 192 F.3d at 1042. See also Maxwell, 920 F.2d at 1036 (D.C. Cir. 1990) (use of intermediary does not insulate defendant for purposes of wire fraud liability so long as defendant was member of fraudulent scheme).

As stated above, CTR and TI were created for the express purpose of serving as the industry's research and public relations arms, respectively. Over the course of several years, the Cigarette Company Defendants provided over half a billion dollars each to both CTR and TI, reviewed and approved certain research proposal and press releases, and provided corporate officers and directors to serve as directors of each entity. See supra n.21 and U.S. FPFF § I.B & C.

Finally, as demonstrated supra, pp. 80-84, the Cigarette Company Defendants are liable for the racketeering acts committed by CTR and TI under the mail and wire fraud statutes, wholly independent of aiding and abetting liability. As stated supra pp. 71-73, to establish a violation of the mail fraud statute it is not necessary to show that the defendant actually mailed anything himself or herself; it is sufficient to prove that he caused it to be done or that use of the mails was reasonably foreseeable. Therefore, the same evidence that establishes the six Defendant Cigarette Companies' aiding and abetting liability also establishes that the mailings and wire transmissions of CTR and TI were reasonably foreseeable or otherwise caused by the six Defendants. For example, certain Defendants created, designed, organized, and controlled the Special Projects program at CTR. See U.S. FPFF § I.D(2). Thus, these Defendants caused the mailings and wire transmissions made in execution of that program. Indeed, they often received such communications, and responded to them in writing, utilizing the mails and/or wires to

transmit their responses. Thus, the mail and wire transmissions by CTR were reasonably foreseeable to Defendants. Similarly, TI's communications disseminated through the mails and via the wires that touted the industry's joint position on smoking and health issues – including causation, addiction, nicotine, ETS, and youth marketing – were reasonably foreseeable to Defendants who founded, and funded for the purposes, and participated in the direction of TI. As such, the Defendant tobacco companies must be held liable for the mailings of their "co-schemers." United States v. Rodgers, 624 F.2d 1303, 1308-1309 (5th Cir. 1980) ("co-schemers" liable for mail fraud); United States v. Craig, 573 F.2d 455 (7th Cir. 1977); Maxwell, 920 F.2d at 1036 ("All that is required is that appellant have knowingly and willingly participated in the scheme; she need not have performed every key act herself."); Amrep Corp., 560 F.2d at 545 ("So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind as to which all parties had agreed."); United States v. Stapleton, 293 F.3d 1111 (9th Cir. 2002); United States v. Joyce, 499 F.2d 9, 16 (7th Cir. 1974) ("As a member of a mail fraud scheme, [the defendant] was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme.") (citing cases).

Therefore, under each of the above grounds, CTR and TI and the other charged Defendants are liable for the mailings and wire transmissions of TI and CTR, as alleged in the Racketeering Acts referenced in n.66, supra.

8. Defendants Caused Literally Thousands of Mailings and Wire Transmissions Not Specifically Alleged as Racketeering Acts.

1. The substantive RICO count, Count Three, of the First Amended Complaint alleges that Defendants committed "numerous acts of racketeering . . . **including, but not limited to,** the

acts of racketeering alleged in the Appendix to [the] Complaint." ¶ 172. (emphasis added). The RICO conspiracy count, Count Four, similarly alleges that it "was part of the conspiracy that defendants and their co-conspirators would commit numerous acts of racketeering activity in the conduct of the affairs of the Enterprise, **including but not limited to,** the acts of racketeering set forth in the Appendix." ¶ 203 (emphasis added). It is well established that the indictment or complaint need not specify all the racketeering acts that the defendant agreed would be committed by some member of the conspiracy in furtherance of the conduct of the affairs of the enterprise. Rather, it is sufficient to allege that it was agreed that multiple violations of a specific statutory provision which qualifies as a RICO racketeering offense would be committed, and accordingly the fact finder is not limited to consideration of the specific racketeering acts, if any, specified in the charging instrument. See, e.g., United States v. Glecier, 923 F.2d 496, 499-500 (7th Cir. 1991); United States v. Crockett, 979 F.2d 1204, 1208-09 (7th Cir. 1992); United States v. Phillips, 874 F.2d 123, 125-28 (3d Cir. 1989).

In accordance with the foregoing authority, numerous courts have held that uncharged unlawful conduct or racketeering acts may be proven to establish the requisite continuity and pattern of racketeering activity[73] and the RICO Enterprise or conspiracy and the defendant's participation in either or both.[74] Accordingly, this Court previously ruled that such "[u]ncharged,

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[73] See, e.g., Richardson, 167 F.3d at 625-26; Tabas, 47 F.3d at 1294-95; United States v. Alkins, 925 F.2d 552, 551-53 (2d Cir. 1991); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991); United States v. Gonzalez, 921 F.2d 1530, 1544-45 & n.23 (11th Cir. 1991); United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991); United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989).

[74] See, e.g., United States v. Keltner, 147 F.3d 662, 667-68 (8th Cir. 1998); United States v. Salerno, 108 F.3d 730, 738-39 (7th Cir. 1997); United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997); United States v. Krout, 66 F.3d 1420, 1425 (5th Cir. 1995); United States v. DiSalvo, 34 F.3d 1204, 1221 (3d Cir. 1994); United States v. Thai, 29 F.3d 785, 812-13 (2d Cir. 1994); United States v. Brady, 26 F.3d 282, 286-88 (2d Cir. 1994); United States v. Clemente, 22 F.3d 477, 483 (2d Cir. 1994); United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991);
(continued...)

unlawful conduct may be proven to establish for example, continuity and pattern of racketeering activity, the RICO enterprise or conspiracy, and the Defendants' participation therein." United States v. Philip Morris USA, 219 F.R.D. 198, 201 (D.D.C. 2004).

2. The United States identified 625 advertisements from more than two dozen marketing campaigns initiated by Defendants Philip Morris, Reynolds, Brown & Williamson and Lorillard from 1998 to the present.[75] Ms. Figliulo and her staff traced these 625 advertisements to various magazines and one newspaper, including the following: *Allure; Car and Driver; Car Craft; Cosmopolitan; Entertainment Weekly; GQ; Glamour; In Style; Life Magazine; Mademoiselle; Maxim; Motorcyclist; People Weekly; Playboy; Rolling Stone; Spin; Sports Illustrated; Time; Vanity Fair; Vibe; Vogue; and The Village Voice.*[76] Declarations from representatives from various of these publications establish that these publications since their inception routinely have been sent to their subscribers, which number in the hundreds of thousands, via the United States Mails.[77] See U.S. FPFF § V.E.

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[74](...continued)
Eufrasio, 935 F.2d at 572-73; United States v. Ellison, 793 F.2d 942, 949 (8th Cir. 1986); United States v. Murphy, 768 F.2d 1518, 1534-35 (7th Cir. 1985); Gonzalez, 921 F.2d 1530 at 1545-47.

[75] These advertisements involved, inter alia, marketing to youths, or false and misleading statements regarding low tar cigarettes.

[76] See U.S. FPFF § V.E ¶¶ 467, 469, 471. Ms. Figliulo prepared spreadsheets regarding these additional 625 advertisements, indicating the defendant, its ad campaign and the publications where the advertisements appeared. Figliulo Declaration, at Ex. A-D.

[77] The United States has submitted declarations from representatives of 12 newspapers and 12 magazines (see U.S. FPFF § V.E ¶ 467), but has not submitted declarations from several other publications to which advertisements were traced. Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of the fact that newspapers and magazines are mailed. Cf. Federal Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981) (taking judicial notice of the fact that newsletters and other publications solicit subscriptions); Protein Foundation, Inc. v. Edward J. Brennan, 260 F. Supp. 519, 521 (D.D.C. 1966) (District Court took "judicial notice of the fact that second class mail does not travel and is not distributed as rapidly as first class mail."); see also 39 U.S.C. § 3685 (postal service statute requiring "owner of a publication having periodical publication mail privileges" to submit annual report to Postal Service, including information about volume and methods of distribution. In any (continued...)

Similarly, Ms. Tobin and her staff traced an additional 10 of Defendants Philip Morris, Brown & Williamson, Reynolds, Liggett, Lorillard, American, and Tobacco Institute's statements and advertisements (8 of which were transmitted by U.S. Mail and two via the Internet) from March 1954 through August 2003. See U.S. FPFF § V.E.[78]

Clearly, Defendants caused the mailings of advertisements they placed with newspapers and the wire transmissions of matters they placed on their Internet websites. See supra pp. 71-73, 76-77 and n.61. Pursuant to the above-referenced authority, such mailings and wire transmissions were in furtherance of the scheme to defraud and the Enterprise's affairs and hence constitute evidence of Defendants' continuing scheme to defraud, the threat of continuity, and their participation in the RICO enterprise and conspiracy.

H. Defendants Engaged in A Pattern of Racketeering Activity

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

1. The Racketeering Acts Are Related

a. As for the requisite relationship, the Supreme Court stated "that Congress intended to

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[77](...continued)
event, the declarations of Ms. Figliulo and Dr. Margaret Morrison establish that the publications without declarations from the representatives of the publications were sent to their subscribers via the U.S. Mails. See U.S. FPFF § V.E ¶ 467.

[78] At trial, the United States will prove that these advertisements involve marketing to youth, "light" and "low tar" cigarettes, and adverse health effects of smoking.

take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." Id. at 238. The Supreme Court added that the requisite relationship would be established when the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events", but that such was not the exclusive means of establishing the requisite relationship. Id. at 240.

In accordance with Congress' intended flexible approach, the federal courts of appeals have repeatedly held that the racketeering acts need not be similar or directly related to each other; rather it is sufficient that the racketeering acts are related in some way to the affairs of the charged enterprise,[79] including, for example, that the racketeering acts furthered the goals of or benefitted the enterprise,[80] or the enterprise or the defendant's role in the enterprise enabled the defendant to commit or facilitated the commission of the racketeering acts.[81]

b. Here, the alleged predicate acts possess the requisite relationship under all of the permissible alternatives. See U.S. FPFF § VI. All the racketeering acts have the same or similar

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

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

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

purposes and methods of commission – i.e., the acts involve mailings or wire transmissions by Defendants to carry out shared purposes of the charged scheme to defraud consumers and potential consumers of cigarettes. (See H.J. Inc., 492 U.S. at 249-250; see also cases cited infra n.84; and supra Section F). Moreover, all the predicate acts furthered the goals of the Enterprise and benefitted the Enterprise in that they were in furtherance of the overarching scheme to defraud the public. Additionally, Defendants' control of, or participation with others in, the Enterprise facilitated their commission of the racketeering acts. See U.S. FPFF § I & VI.

2. The Requisite Continuity Has Been Established

Regarding the requisite "continuity," the Supreme Court made clear in H.J. Inc., 492 U.S. at 240-243, that a wide variety of proof may establish the required "continuity" and that no single particular method of proof is required. By way of illustration, the H.J. Inc. Court provided several alternative methods of establishing the "continuity" requirement, stating:

> [1] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. [Id. at 242].
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> * * *
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> [2] A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. [Id.].
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> * * *
>
> [3] The continuity requirement is likewise satisfied where it is shown

> that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise." [Id. at 243].[82]

The determination of the requisite continuity is not confined to consideration of the specific racketeering acts charged against each defendant standing alone. Rather, as the Supreme Court, the District of Columbia Circuit and other courts have ruled, the requisite continuity may be established by the nature of the enterprise and other unlawful activities of the enterprise and its members considered in their entirety, including uncharged unlawful activities.[83]

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[82] Following H.J. Inc., the District of Columbia Circuit has likewise adopted a flexible approach to determine whether "continuity" has been established. See Richardson, 167 F.3d at 626.

[83] For example, in H.J. Inc., 492 U.S. at 242-43, the Supreme Court noted that a relatively few predicate acts over a short time span may nevertheless satisfy the threat of continuity where the racketeering acts were committed in association with other individuals or businesses that likewise committed or posed a threat of commission of other unlawful activities. Similarly, in Richardson, 167 F.3d at 625-26, the District of Columbia Circuit explained that in light of the totality of all the co-defendants' serious unlawful conduct, their "'past conduct . . . by its nature project[ed] into the future with a threat of repetition,' thus satisfying RICO's pattern requirement." Id. at 626 (quoting H.J. Inc., 492 U.S. at 241).

See also Tabas, 47 F.3d at 1294-95 (continuity in RICO case based on mail fraud predicates may be established by the overall nature of the underlying fraudulent scheme in addition to the alleged predicate acts); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (The defendant, a union president and trustee of a benefit fund, embezzled $258,435 from the fund by issuing six checks to himself over a 2 ½ month period. The court said that "the threat of continuity need not be established solely by reference to the predicate acts alone; facts external to the predicate acts may, and indeed should, be considered." The court found the requisite threat of continuity from the defendant's control of the union and the fund, the acts of concealment and disregard for proper procedures, and that there was nothing to stop the defendant's unlawful conduct until he was found liable); Alkins, 925 F.2d at 551-53 (The requisite continuity may be established against a defendant by evidence of crimes by other members of the enterprise not charged in the indictment); Coiro, 922 F.2d at 1017 (continuity established where a corrupt attorney's bribery of public officials and money laundering spanning approximately four months was part of a long term drug enterprise that engaged in other unlawful activities that was likely to continue "absent outside intervention"); Gonzalez, 921 F.2d at 1544-45 & n.23 (evidence of continuity was not limited to the defendant's single short lived episode of interstate travel to possess or import drugs and the act of importation and possession of the drugs on the same day, but rather was adequately established by evidence of ongoing drug trafficking by other members of the enterprise); Link, 921 F.2d at 1527 (evidence of continuity was not limited to the defendant's two acts of possession of drugs with intent to distribute, but rather was adequately established by evidence of other unlawful drug trafficking by other members of the enterprise); United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990) (continuity established where the defendant's two racketeering acts for importation of a load of marijuana and possession of the **same** load of marijuana where they were committed pursuant to an enterprise's ongoing drug trafficking); Kaplan, 886 F.2d at 543 (continuity may be established by "external facts" in addition to the defendant's racketeering acts and the nature of the enterprise); Indelicato, 865 F.2d at 1383-84 (continuity established where the defendant's simultaneous murder of three persons was done in furtherance of an organized crime group that was an ongoing

(continued...)

Here, Defendants committed over 145 racketeering acts over 45 years which clearly constitutes a "substantial period" of time which easily satisfies "closed ended" continuity. See U.S. FPFF § VI. Moreover, these racketeering acts "are a regular way of conducting defendant's ongoing legitimate business" (H.J. Inc., 492 U.S. at 243), and since Defendants continue to be in a position to continue their fraudulent activity, "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." Id. at 242. Therefore, the evidence establishes "open-ended" continuity. See FPFF § VI. Moreover, Defendants have continued to commit over 650 violations of the mail and wire fraud statutes in addition to the specifically alleged racketeering acts. Accordingly, the evidence convincingly establishes that all the several alternative methods of establishing the "continuity" requirement are satisfied. Indeed, in far less compelling circumstances than those found here, the circuit courts of appeals have frequently held in civil RICO cases that multiple acts of mail and/or wire fraud extending over considerably shorter periods of time than were sufficient to satisfy the requisite "relationship plus continuity."[84] Moreover, many of these cases involved the sale of lawful products or other

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[83](...continued)
enterprise).

[84] See, e.g., Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1338 (7th Cir. 1997) (multiple mailings and wire transmissions over six years designed to lure the plaintiff into purchasing $800 million in stock of an otherwise lawful entity controlled by the defendant); United Health Care Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 571-72 (8th Cir. 1996) (multiple acts of mail fraud and wire fraud over two years to fraudulently divert insurance premium payments; Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 962-64 (7th Cir. 1996) (multiple mailings and wire transmissions during four year period to defraud investors in an otherwise legal cable television limited partnership); Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 522-24 (7th Cir. 1995) (multiple mailings and wire transmissions during three years to defraud the plaintiff of money through four schemes); Tabas, 47 F.3d at 1293-95 (multiple mailings during 3½ years to defraud heirs of their interest in a business); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560-61 (1st Cir. 1994) (multiple mailings of false insurance claims over two years); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (multiple mailings and wire transmissions to sell otherwise legitimate stock through fraud); Akin v. Q-L Inv., Inc., 959 F.2d 521, 533 (5th Cir. 1992) (multiple mailings over several years containing misrepresentations to sell limited partnership interests); Abell v. Potomac Ins. Co. of Illinois, 946 F.2d 1160, 1167 (5th Cir. 1991) (multiple mailings over six years to sell tax-exempt revenue
(continued...)

property interests through schemes to defraud. At bottom, the requisite pattern of racketeering activity has been established. See U.S. FPFF § VI.

II

DEFENDANTS CONSPIRED TO VIOLATE RICO

A. Elements of a RICO Conspiracy Offense

Count Four of the First Amended Complaint alleges that from the early 1950s and continuing up to the date of the filing of the Amended Complaint, each Defendant conspired to conduct and participate in the affairs of the Enterprise, "through a pattern of racketeering activity consisting of multiple acts indictable under 18 U.S.C. §§ 1341 and 1343, in violation of 18 U.S.C. § 1962(d)." (Compl. ¶ 201). The Complaint also alleges that:

> Each defendant agreed that at least two acts of racketeering activity would

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[84](...continued)
bonds involving more than 500 victims); Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 428-29, 432-33 (5th Cir. 1990) (multiple acts of mail and wire fraud to defraud the plaintiff-pilots of their jobs and pension benefits by relocation of the pilots' base from New Orleans to El Salvador); Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 884-86 (6th Cir. 1990) (multiple mailings of bills and invoices during 17 year period to further scheme to defraud plaintiff through misrepresentations that plaintiff would be receiving the benefit of cost reductions resulting from hospital rebates); Morley v. Cohen, 888 F.2d 1006, 1009-11 (4th Cir. 1989) (multiple mailings and wire transmissions during six year period to sell otherwise legitimate interests in coal mines); Atlas Pile Driving, 886 F.2d at 993-95 (multiple mailings over three years by contractors to defraud subcontractors who provided materials and labor free for housing projects); Fleischhauer v. Feltner, 879 F.2d 1290, 1297-98 (6th Cir. 1989) (multiple mailings and wire transmissions during two year period to defraud 19 plaintiffs in the marketing and selling of film rights to the plaintiffs); Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 18 (2d Cir. 1989) (over 8000 mailings during two year period to defraud plaintiff in connection with construction costs and television studio leases); Beauford v. Helmsley, 865 F.2d 1386, 1391-92 (2d Cir. 1989) (thousands of mailings over several years to defraud purchasers of condominium apartments), vacated, 492 U.S. 914 (in light of H.J. Inc.), adhered to on further consideration, 893 F.2d 1433 (2d Cir. 1989); Blake v. Dierdorff, 856 F.2d 1365, 1368-69 (9th Cir. 1988) (multiple mailings and wire transmissions over 14 months to inflate the price of stock to defraud purchasers); United Energy Owners Comm., Inc. v. United Energy Mgmt. Sys., Inc., 837 F.2d 356, 361 (9th Cir. 1988) ("We conclude that the plaintiffs' allegations of multiple fraudulent acts involving multiple victims over more than one year are sufficiently related and pose a sufficient threat of continuing activity to satisfy the rules"); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304 (7th Cir. 1987) (57 acts of mail and wire fraud over a 7 month period to defraud one victim); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-94 (9th Cir. 1987) (four acts of mail fraud occurring over several months to defraud a single victim); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) ("the defendant's mailing of nine fraudulent tax returns . . . over a nine month period constitutes a pattern of racketeering").

> be committed by a member of the conspiracy in furtherance of the conduct of the Enterprise. It was part of the conspiracy that defendants and their co-conspirators would commit numerous acts of racketeering activity in the conduct of the affairs of the Enterprise, including, but not limited to, the acts of racketeering set forth in the Appendix, in the District of Columbia and elsewhere.

(Compl. ¶ 203).

To establish this conspiracy violation under 18 U.S.C. § 1962(c) and (d), the United States must prove each of the following elements.

1. The existence of an enterprise;
2. That the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and
3. That each defendant knowingly agreed to the commission of a violation of 18 U.S.C. 1962(c).[85]

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

Although a substantive RICO offense requires proof that each defendant committed at least two racketeering acts, it is settled law that to establish a RICO conspiracy charge, the plaintiff is not required to prove that any defendant committed any racketeering act[86] or any overt

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

[86] See, e.g., Salinas, 522 U.S. at 61; United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986) (collecting cases); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); United States v. Brooklier, 685 F.2d 1208, 1222-23 (9th Cir. 1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981).

act.[87] "The RICO conspiracy provision, then, is more comprehensive than the general conspiracy offense in [18 U.S.C.] § 371." Salinas, 522 U.S. at 63. Moreover, as in the case of conventional conspiracy offenses, each co-conspirator is liable for the acts of all other conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy.[88] Furthermore, to establish a RICO conspiracy charge, the plaintiff is not required to prove that the defendant participated in the operation or management of the enterprise. See infra Section II.C.

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

1. There Are Two Alternative Methods of Establishing a Conspiratorial Agreement to Violate RICO

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

> In order to be guilty of a RICO conspiracy, a defendant must either agree to [personally] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise.[89]

"If the government can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts." United States v. Abbell, 271 F.3d 1286, 1299

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[87] See, e.g., Salinas, 522 U.S. at 63; United States v. Corrado, 286 F.3d 934, 937 (6th Cir. 2002); Glecier, 923 F.2d at 500; Gonzalez, 921 F.2d at 1547-48; United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988); United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987).

[88] See, e.g., Salinas, 522 U.S. at 63-64; P & B Autobody, 43 F.3d at 1562; Pungitore, 910 F. 2d at 1145-48; United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

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

(11th Cir. 2001). Accord To, 144 F.3d at 744; United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995).

To prove the conspiratorial agreement under the first method, the plaintiff must prove that the defendant personally agreed to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise. See cases cited supra n.86. In Salinas, 522 U.S. 52, the Supreme Court made clear that while evidence of such an agreement is sufficient to establish a RICO conspiracy, RICO does not require the plaintiff to prove that the defendant agreed to personally commit two predicate acts of racketeering. The Supreme Court explained:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254 (1940). The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. See Pinkerton v. United States, 328 U.S. 640, 646 (1946) ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward"). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." United States v. Holte, 236 U.S. 140, 144 (1915).
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> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues.
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> * * *
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> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy

> provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 63-65 (alteration in original).

Thus, to prove a RICO conspiracy under the Salinas alternative,

> [t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.

Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted).[90] Hence, it is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995), quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986). Accord Brouwer, 199 F.3d at 964; United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993).[91]

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

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

[91] Moreover, the indictment or complaint need not specify the predicate racketeering acts that the defendant agreed would be committed by some member of the conspiracy in furtherance of the conduct of the affairs of the enterprise. Rather, it is sufficient to allege that it was agreed that multiple violations of a specific statutory provision which qualifies as a RICO racketeering offense would be committed, See, e.g., Glecier, 923 F.2d at 499-500; United States v. Crockett, 979 F.2d 1204, 1208-09 (7th Cir. 1992); United States v. Phillips, 874 F.2d 123, 125-28 (3d Cir. 1989).

participating in different and unrelated crimes is irrelevant." Starrett, 55 F.3d at 1544 (internal quotations and citations deleted).[92] Rather, to establish sufficient knowledge it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." Rastelli, 870 F.2d at 828 (collecting cases).[93] Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857 (citations and internal quotations omitted). Accord cases cited supra, notes 90 & 93.

Moreover, it is well-established that proof of a conspiracy is not defeated merely because membership in the conspiracy changes and some defendants cease to participate in it.[94] In

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[92] Accord United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000); To, 144 F.3d at 744; United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); Rastelli, 870 F.2d at 828 (collecting cases); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985); Elliott, 571 F.2d at 902-03.

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

[94] See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986) ("An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time."); United States v. Warner, 690 F.2d 545, 549 n.7 (6th Cir. 1982); United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Boyd, 595 F.2d 120, 123 (3d Cir. 1978); United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) ("Nor does a single conspiracy become several merely because of personnel changes."); United States v. Michel, 588 F.2d 986 (5th Cir. 1979); United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982) (for RICO conspiracy, continuity may be met even with changes in personnel or even when different individuals manage the affairs of the enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Ci r. 1985) (personnel change does not prevent RICO conspiracy); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992) ("What was essential is that the criminal 'goal or overall plan' have persisted without fundamental alteration, notwithstanding variations in personnel and their roles."); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir. 1988) (single conspiracy can be found even where "the cast of characters changed over the course of the enterprise"); United States v. Nasse, 432 F.2d 1293 (7th Cir. 1970); United States v. Sepulvedam, 15 F.3d 1161, 1191 (1st Cir. 1993) ("in a unitary conspiracy it is not necessary that the membership remain static") (citing United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988)); United States v. Bryant, 364 F.2d 598, 603 (4th Cir. 1966) ("The addition of new members to a conspiracy or the withdrawal of old ones from it (continued...)

addition, each co-conspirator is liable for the acts of all other co-conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy even if the conspirator did not participate in, or was unaware of, such acts.[95] Moreover, such liability remains even if the defendant has ceased his participation in the conspiracy.[96]

2. Each Defendant is Liable for the RICO Conspiracy Charge Under Both Alternative Methods of Proof Although Either Method Alone is Sufficient

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

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[94](...continued)
does not change the status of the other conspirators.") (quoting Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956)); United States v. Shorter, 54 F.3d 1248 (7th Cir. 1995).

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

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

(5th Cir. 1981).

Moreover, each Defendant agreed to facilitate the commission of a substantive RICO offense with the knowledge that others were also conspiring to participate in the same Enterprise through racketeering activity. In that regard, the evidence shows that all Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of the shared objective – to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public. Defendants executed the scheme in several different ways: (1) by making false, misleading, and deceptive public statements designed to maintain doubt about whether smoking and exposure to secondhand smoke cause disease; (2) by denying the addictiveness of smoking cigarettes and the role of nicotine therein; (3) by undertaking a publicly announced duty to conduct disinterested and independent research into the health effects of smoking, and to disseminate to the public the results of such research, a public commitment which Defendants violated. See U.S. FPFF § IV. Initially, Defendants American, Brown & Williamson, Lorillard, Philip Morris, and Reynolds hatched this scheme to defraud at a conspiratorial meeting at the Plaza Hotel in 1953, and they and other Defendants subsequently reiterated and renewed their false promise at various times. See U.S. FPFF §§ I.B.2.

Moreover, the Cigarette Company Defendants jointly participated at various times in creating, funding, directing and controlling Defendants CTR and TI and other entities to further their shared unlawful objectives, see U.S. FPFF §§ I.B-C & II and the Cigarette Company Defendants (except for BATCo and Philip Morris Companies) jointly caused Defendants CTR and TI to commit numerous, specifically alleged racketeering acts to further their shared objective, while the Cigarette Company Defendants were also committing numerous parallel

racketeering acts in furtherance of their unlawful objectives. See U.S. FPFF §§ I.B-C, II and V and supra Section I.F & G. Furthermore, correspondence between and among Defendants evidences their working together to pursue their shared primary objective. Significantly, Defendants worked together to publicly disseminate their agreed upon deceptive party line denying the link between smoking cigarettes and adverse health effects, and denying that smoking cigarettes or nicotine are addictive, or that they marketing their products to young people. See U.S. FPFF §§ I, IV. The Cigarette Company Defendants also entered into agreements to restrict their marketing of and research into potentially less hazardous cigarettes. See U.S. FPFF § IV.B.

Each Defendant also agreed to facilitate the substantive RICO violation by endeavoring to conceal or suppress information and documents which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in smoking and health liability cases against Defendants or in congressional or other governmental proceedings and information that could constitute, or lead to, evidence of the link between smoking cigarettes and adverse health effects and addictiveness. See U.S. FPFF §§ I.K & IV.H.

The foregoing evidence establishes overwhelmingly that each Defendant knew the general nature of the conspiracy and that it extended beyond the Defendant's individual role. Indeed, each Defendant took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy, including committing numerous racketeering acts in furtherance of the Enterprise's affairs. Hence, each Defendant entered into the requisite conspiratorial agreement. Accord Salinas, 522 U.S. at 66 ("even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c).

The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d).").[97]

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[97] See, e.g., P & B Autobody, 43 F.3d at 1562-63 (§ 1962(d) RICO conspiracy relating to scheme to defraud insurance company by submitting false claims from defendant body shops through co-conspirator appraisers; "the jury reasonably could have found that, although each defendant may not have known the entire sweep of the conspiracy, each defendant knew that he or she was a part of a larger fraudulent scheme," and where the appraisers, as the "hub" of the RICO conspiracy: "Through evidence of each individual Arsenal defendant's actions, the jury could infer that each defendant had the requisite state of mind for a RICO conspiracy violation--knowing participation." Despite the fact that the defendants disclaimed knowledge of the other body shop owners' fraudulent claims, the court noted that the defendants' racketeering activities were "unusually similar": "The body shops all defrauded Aetna, they reported nearly identical types of fraudulent claims, and they obtained appraisals from the same appraisers. Evidence of these similarities, considered along with other evidence, was sufficient to support a jury finding that the owners of the body shops conspired directly with one another."); Gagan v. Am. Cablevision, 77 F.3d 951, 962 (7th Cir. 1996) ("From the substantial direct and circumstantial evidence introduced at trial regarding the use of interstate mails and wires to contact the limited partners, inform them of the condition of their limited partnerships, deceive them, and acquire their interests, the jury could reasonably find that the defendants agreed to conduct or participate in the conduct of the affairs of South Hesperia with respect to the Falcon sale through a pattern of mail and wire fraud by employing those modalities in a scheme to obtain money from the limited partners through false pretenses."); Atlas Pile Driving, 886 F.2d at 997 (RICO conspiracy involving scheme to defraud housing subcontractors; where defendant (Conry) controlled entities involved in the sale and financing of the projects, and where defendant made misrepresentations in furtherance of fraudulent scheme, "it can be inferred that Conry was intimately involved in the scheme to defraud subcontractors of their labor and materials and that Conry agreed that the necessary predicate acts would be committed."); Hill v. Equitable Bank, 655 F. Supp. 631, 652-53 (D. Del. 1987), aff'd 851 F.2d 691 (3d Cir. 1988) (scheme to defraud investors in purchase of partnership interests: conspiracy conviction upheld where meetings between defendants "provide[d] sufficient evidence for a possible jury finding that an agreement existed."); see also United States v. Boylan, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy conviction upheld where "the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash, from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. The services themselves bore hallmarks of similarity. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy. "); Ashman, 979 F.2d at 492 (in investment scheme, evidence sufficient for RICO conspiracy where defendants served as "bag men" for each other, used similar procedures for covering losses, and "were well aware that they were part of an ongoing and flexible agreement to commit fraud as the need – or perhaps the opportunity – arose."); Church, 955 F.2d at 695 (defendant guilty of RICO conspiracy where government proved that he agreed personally to commit two predicate acts of selling cocaine, and defendant knew that a codefendant was a part of a group distributing cocaine, "thus proving agreement on an overall objective as well."); United States v. Hughes, 895 F.2d 1135, 1141-43 (6th Cir. 1990) (sufficient evidence for doctor's RICO conspiracy conviction in "blood-for-[illegal]-drugs" scheme where doctor's involvement with clinic, including assurances to pharmacists that prescriptions for controlled substances should be filled, "invites the inference drawn by the jury – he **agreed** to participate in the RICO enterprise"); Phillips, 874 F.2d at 128 (evidence sufficient to support appellants' RICO conspiracy convictions where there was "not only knowledge but actual commission of four specific acts on the part of Phillips and two on the part of Brown"); Rastelli, 870 F.2d at 828-30 (RICO conspiracy convictions upheld where evidence demonstrated each defendant knew of general nature of the enterprise, involving a group of employees, union

(continued...)

3. The Prohibition Against Intracorporate Conspiracies Under The Antitrust Laws Does Not Apply To This Case

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation "and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," 15 U.S.C. § 1. 467 U.S. at 477. But, the Supreme Court rested its decision in Copperweld on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See id. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, the Court held in Copperweld that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. Id. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

In fact, numerous courts have held that these antitrust considerations simply do not apply to RICO. For example, in Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the court ruled that Copperweld did not apply to civil RICO conspiracy charges, explaining that "the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' The policy considerations discussed in Copperweld therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity." 747 F.2d at 403 n.22 (citation

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[97](...continued)
officials and organized crime figures, and knew that the enterprise extended beyond the individual role of each defendant, even if the defendant was not aware of each component of the enterprise).

omitted). Similarly, in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the court stated:

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

875 F.2d at 1281 (citations omitted). In accordance with the foregoing reasoning, numerous courts have likewise ruled that the rationale of Copperweld does not apply to civil RICO claims and that, therefore, a civil RICO conspiracy claim properly applies to a conspiracy between a parent corporation and its subsidiary, between affiliated corporations, or between a corporation and its own officers and representatives.[98]

Assuming arguendo that the rationale of Copperweld and its progeny applied to RICO conspiracy charges, the United States had adequately proven its RICO conspiracy claim against all Defendants, including BATCo. For example, the Complaint alleges, and the evidence demonstrates, that BATCo conspired with other Defendants in addition to B&W and BATCo admits that BATCo and B&W are and always have been distinct legal entities that "operated as

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[98] See, e.g., Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 787 (9th Cir. 1996); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-67 (3d Cir. 1989); Fed. Reserve Bank of S.F. v. HK Sys., Inc., No. C-95-1190 MHP, 1997 WL 765952, at *3-*4 (N.D. Cal. Nov. 12, 1997); N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp., No. 92 C 6533, 1996 WL 435192, at *3 (N.D. Ill. July 31, 1996); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., No. 95-1698, 1996 WL 135336, at *5 (E.D. Pa.. Mar. 19, 1996); Bowman v. W. Auto Supply Co., 773 F. Supp. 174, 180 (W.D. Mo. 1991), rev'd on other grounds, 985 F. 2d 383 (8th Cir. 1993); Dun-Rite Tool & Fabricating Co. v. Am. Nat'l Bank of DeKalb, No. 89 C 20370, 1991 WL 293092, at *5 (N.D. Ill. Apr. 11, 1991); Rouse v. Rouse, No. 89-CV-597, 1990 WL 160194, at *14 (N.D.N.Y. Oct. 17, 1990); Atlass v. Tex. Air Corp., Civ. A. No. 88-9637, 1989 WL 51724, at *5 (E.D. Pa. May 10, 1989); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989); Pandick Inc. v. Rooney, 632 F. Supp. 1430, 1435 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

Moreover, Copperweld's prohibition on intracorporate conspiracies does not apply to criminal RICO conspiracy charges or other criminal conspiracy charges. See, e.g., Crockett, 979 F.2d at 1218 n.12; United States v. Hughes Aircraft Co., Inc., 20 F. 3d 974, 979 (9th Cir. 1994) (collecting cases).

separate and distinct corporate entities"; hence they are capable of conspiring together. See U.S. FPFF § II ¶¶ 46-47, 52 & § III.[99]

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

1. As noted above in Section I.E., in Reves v. Ernst & Young, 507 U.S. 170, 185 (1993), the Supreme Court held that a defendant is not liable for a **substantive RICO violation** under 18 U.S.C. § 1962(c) unless the defendant "participates in the operation or management of the enterprise itself." Reves did not involve a RICO conspiracy offense and its "operation or management" test does not apply to a RICO conspiracy offense because it is well settled that a defendant may be liable for a conspiracy to violate a law even if he may not be liable for a substantive violation of the law because he does not fall within the category of persons who could commit the substantive offense directly.[100]

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[99] See, e.g., Geneva Pharms. Tech. v. Barr Labs., 201 F. Supp. 2d 236, 275 (S.D.N.Y. 2002); Simon v. Philip Morris, 86 F. Supp. 2d 95, 121 (E.D.N.Y. 2000); Borden, Inc. v. Spoor Behrins Campbell & Young, Inc., 828 F. Supp. 216, 224 (S.D.N.Y. 1993); Wilcox Dev. Co. v. Interstate Bank of Oregon, N.A., 605 F. Supp. 592, 597 (D. Or. 1985); In Re Ray Dobbins Lincoln-Mercury, Inc., 604 F. Supp. 203, 205 (W.D. Va. 1984), aff'd on other grounds, No. 84-2299, 1985 WL 14172 (4th Cir. July 11, 1985) (unpublished).

BATCo's prior reliance upon Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 934 (7th Cir. 2003) and Fogie v. Thorn Americas, Inc., 190 F.3d 889, 898-99 (8th Cir. 1999) is misplaced. In Fogie, unlike here, the RICO conspiracy claim was limited to a parent corporation and its wholly owned subsidiaries and all the "entities [were] under common control and there is no distinctiveness or independence of action", id. at 899. Bucklew held that the RICO claim was defective because the corporate defendant was not distinct from the RICO enterprise, the defendant's wholly owned subsidiary. Here, however, BATCo is not only distinct from the Enterprise, but it is also distinct from every Defendant comprising the Enterprise. See supra § I.D.

[100] For example, the Hobbs Act, 18 U.S.C. § 1951, makes it a crime for public officials to extort property under "color of official right." Nevertheless, private citizens have been convicted of Hobbs Act conspiracy, i.e., extortion under "color of official right," where they have conspired with public officials to violate the Hobbs Act even though they are not within the class of persons who may be liable for the substantive Hobbs Act violation. See, e.g., United States v. Collins, 78 F.3d 1021, 1031-32 (6th Cir. 1992); United States v. Torcasio, 959 F.2d 503, 505-06 (4th Cir. 1992); United States v. Marcy, 777 F. Supp. 1393, 1396-97 (N.D. Ill. 1991). See also United States v. Jones, 938 F.2d 737, 741-42 (7th Cir. 1991) (conspiracy charge legally sufficient against defendant who was not a financial institution, although underlying substantive statutes, 31 U.S.C. §§ 5313, 5322, proscribe the failure to file Currency Transaction Reports with the Internal Revenue Service only by financial institutions); United States v. Hayes, 827 F.2d 469, 472-73 (9th Cir. 1987) (same); United States v. Sans, 731 F.2d 1521, 1531-32 (11th Cir. 1984) (continued...)

In Salinas, 522 U.S. 52 (1997), the Supreme Court squarely applied this principle to RICO cases. As explained supra Section II.B.1., in Salinas, the Supreme Court held that even though a defendant may not be liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless he himself committed at least two racketeering acts, a defendant, nevertheless, may be liable for a RICO conspiracy offense even if he did not himself commit or agree to commit at least two racketeering acts. Id. at 61-65. In reaching this conclusion, the Supreme Court relied upon two well-established tenets of conspiracy law which govern Section 1962(d) and are applicable here. The Supreme Court first observed that "a person may conspire for the commission of a crime by a third person." Id. at 64, citing United States v. Holte, 236 U.S. 140, 144 (1915). The Salinas Court also recognized the that "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." Id. at 64, citing United States v. Rabinowich, 238 U.S. 78, 86 (1915).

Thus, the rationale of Salinas and the long-standing tenets of conspiracy law which it relied upon compel the conclusion that a defendant may be liable for a conspiracy to violate RICO even if he is not among the class of persons who could commit the substantive RICO offense (i.e., a defendant who participates in the operation or management of the enterprise). Rather, it is sufficient that the defendant knowingly agree to facilitate a scheme that would, if completed, constitute a substantive violation of RICO involving at least one other conspirator who would participate in the operation or management of the enterprise.

2. Consistent with Salinas, the Second, Third, Fifth, Seventh and Eleventh Circuits have

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[100](...continued)
(defendant could be convicted of conspiracy to defraud United States, in violation of Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1058, 1081, although he was not a specified party required to file reports under the Act).

held that a defendant may be liable for a RICO conspiracy offense under 18 U.S.C. § 1962(d) even if that defendant did not personally operate or manage the RICO enterprise himself, or conspire to personally do so. See Napoli v. United States, 45 F.3d 680, 683-84 (2d Cir. 1995) (Reves does not apply to section 1962(d) RICO conspiracy conviction); United States v. Viola, 35 F.3d 37, 42-43 (2d Cir. 1994) ("A defendant can be guilty of [violation of section 1962(d) for] conspiring to violate a law [section 1962(c)], **even if he is not among the class of persons who could commit the crime directly**.") (emphasis added); Smith v. Berg, 247 F.3d 532, 537-38 (3d Cir. 2001) (holding that "Salinas makes 'clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability,'" and therefore "a defendant may be held liable for conspiracy to violate Section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise" by another person); Posada-Rios, 158 F.3d at 857 ("We conclude that the better-reasoned rule is the one adopted by the Second, Seventh, and Eleventh Circuits, especially in light of the Supreme Court's recent decision in Salinas" that the Reves operation or management test does not apply to RICO conspiracy charges); MCM Partners, 62 F.3d at 979 ("A defendant may conspire to violate section 1962(c) **even if that defendant could not be characterized as an operator or manager of a RICO enterprise under Reves**."); United States v. Quintanilla, 2 F.3d 1469, 1484-85 (7th Cir. 1993) (same); United States v. Castro, 89 F.3d 1443, 1452 (11th Cir. 1996) ("The Reves 'operation or management' test does not apply to section 1962(d) convictions."); Starrett, 55 F.3d at 1547-48 ("[W]e agree with the Second and Seventh Circuits that the Supreme Court's Reves test does not apply to a conviction

for RICO conspiracy.").[101]

The majority position regarding the proper scope of Section 1962(d) with respect to the Reves "operation or management" test is succinctly stated by Seventh Circuit in Quintanilla:

> [Section] 1962(d) liability is not coterminous with liability under section 1962(c). It follows that the Supreme Court's decision in Reves does not disturb [the defendant's] conviction for RICO conspiracy. Reves addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy law undergirding section 1962(d). . . .
>
> [T]o hold that under section 1962(d) the government must show that an alleged coconspirator was capable of violating the substantive offense under section 1962(c), that is, that he participated to the extent required by Reves, would add an element to RICO conspiracy that Congress did not direct.

2 F.3d at 1485 (internal quotations and citations omitted).

In sum, although the Court has found (supra Section I.E.) that each Defendant participated in the operation or management of the Enterprise, even assuming arguendo that a Defendant did not itself participate, or agree to participate personally, in the operation or management of the Enterprise, each Defendant is liable for the RICO conspiracy charge because

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[101] Only the Ninth Circuit has ruled that Reves' "operation or management" test applies to RICO conspiracy charges. See Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128-29 (9th Cir. 1997). However, Neibel was decided **before** Salinas was decided, and the Ninth Circuit has not yet revisited its ruling in Neibel since Salinas was decided. As other federal circuits have noted, Neibel is inconsistent with the rationale of Salinas and well established tenets of conspiracy law. See, e.g., United States v. Warneke, 310 F.3d 542, 547-48, (7th Cir. 2002) (listing cases disagreeing with Neibel's holding) ; Posada-Rios, 158 F.3d at 857-58. Moreover, Neibel, 108 F.3d at 1128, explicitly relied upon United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995), another pre-Salinas decision, which the Third Circuit subsequently ruled was no longer good law in light of Salinas. See Smith v. Berg, 247 F.3d at 534.

In Thomas, 114 F.3d at 242-43, which was decided before Salinas, the District of Columbia Circuit noted the conflict between the Ninth Circuit and other circuits on this issue, but found it unnecessary to resolve the dispute because the evidence established the defendant's guilt on the RICO conspiracy charge "[r]egardless of which approach this circuit adopts." Significantly, in Jones v. Meridian Towers Apartments, Inc., 816 F. Supp. 762, 772-73 (D.D.C. 1993), the District Court for the District of Columbia held that to establish a RICO conspiracy it is not necessary to prove that the defendant personally participated, or agreed to participate personally, in the operation or management of the enterprise. No court has held to the contrary after Salinas.

each Defendant knowingly agreed to facilitate a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who participated in the operation or management of the Enterprise.

III

THE UNITED STATES HAS ESTABLISHED THAT THERE IS A REASONABLE LIKELIHOOD THAT DEFENDANTS WILL VIOLATE THE LAW IN THE FUTURE

A. Defendants' Past Intentional Unlawful Conduct Over A 45-Year Period Sufficiently Establishes A Reasonable Likelihood of Future Violations. Mere Cessation of Unlawful Conduct and Defendants' Alleged Compliance With the MSA Does Not Preclude the United States' Claim For Injunctive and Other Equitable Relief

Earlier in this litigation, the Court explicitly ruled that:

> To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting SEC v. Savoy Ind., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978)); SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994).
>
> To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." First City, 890 F.2d at 1228 (citing Savoy Indus., 587 F.2d at 1168); Bilzerian, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." First City, 890 F. 2d at 1228 (citing SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984).

Philip Morris, 116 F. Supp. 2d at 148.

The Court also ruled that the requisite "reasonable likelihood" of future violations may be established by inferences drawn from past conduct alone. See Philip Morris USA., 2004 WL

1045766 at * 4 n.3 (Order #537); United States v. Philip Morris USA, Inc., 2004 WL 1161455 at *9 n.5 (D.D.C. May 21, 2004) (Order #550).

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

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

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

Since this Court has found that the evidence establishes the above-referenced allegations (see supra Sections I and II and U.S. FPFF §§ IV & VI), the United States is entitled to injunctive relief and other equitable relief on the basis of Defendants' past extensive pattern of wrongdoing alone, without any need to establish any Defendant's continuing unlawful conduct after the filing of the Complaint or after Defendants entered into the MSA with the settling states. Indeed, the District of Columbia Circuit and other courts have repeatedly held, under less compelling circumstances than those found here, that a plaintiff is entitled to injunctive relief upon evidence of a defendant's intentional pattern of past unlawful activities standing alone.[102]

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[102] See, e.g., Bilzerian, 29 F.3d at 695; SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993); SEC v. First City Financial Corp., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989); Commodity Futures Trading Comm'n. v. Hunt, 591 (continued...)

Moreover, the Court has rejected Defendants' arguments that their alleged cessation of unlawful activity, changes in policies and compliance with the MSA precludes the United States' claims for disgorgement and other injunctive relief. See Philip Morris, 2004 WL 1045766 at * 2-4; United States' Final Proposed Conclusions of Law (Vol. Two) Regarding Defendants' Affirmative Defenses ("U.S. FPCL Vol. 2") at § VII.

B. Defendants' Ongoing Fraudulent Conduct Also Establishes A Reasonable Likelihood of Future Unlawful Activity

1. The United States Is Not Required To Prove That Defendants Committed The Elements of a RICO Violation After The MSA Was Adopted

The United States has established that Defendants' commission of an extensive pattern of mail and wire fraud offenses over 45 years arising from a multi-faceted, overarching scheme to defraud the public, by itself creates a reasonable likelihood of future violations, which is not and cannot be vitiated by the MSA. Therefore, contrary to Defendants' erroneous argument, the United States need not show that Defendants have engaged in unlawful conduct after the MSA was entered into in November 1998 in order to obtain the sought relief.

Assuming arguendo that to establish a reasonable likelihood of future violations the United States is required to adduce evidence that Defendants have engaged in unlawful conduct after November 1998, Defendants have erroneously argued that the United States must prove that the post-November 1998 conduct by itself establishes the elements of a RICO violation. Significantly, Defendants have not cited any case that holds that the United States must prove

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[102](...continued)
F.2d 1211, 1220-21 (7th Cir. 1979); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978); SEC v. Commonwealth Chem. Secs., Inc., 574., 574 F.2d 90, 98-100 (2d Cir. 1978); SEC v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998). Accord Philip Morris, 2004 WL 1045766 at *4 n.3.

completed RICO violations based entirely on conduct after a complaint or order granting partial relief was filed. On the contrary, it is clear that in suits for equitable relief brought by the United States under 18 U.S.C. § 1964(a), as involved here, "the government need not, as [the defendant] asserts, demonstrate a new RICO violation to justify issuance of the injunction." Local 560, 974 F.2d at 325 n.5, aff'g United States v. Local 560 (I.B.T.), 754 F. Supp. 395, 403 (D.N.J. 1991) ("[Defendant] erroneously argues . . . that to succeed the government must prove a new RICO offense based on conduct which occurred after the March 16, 1984 Judgment Order"). Accord United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192, 195 (S.D.N.Y. 1986) (rejecting argument that "the Government must show present RICO violations to secure [injunctive] relief").[103]

Consistent with the law governing injunctive relief generally and in the RICO context specifically, courts have frequently granted injunctive relief in RICO and other cases without requiring proof that a defendant committed all the elements of a violation at some point after the filing of the complaint. Rather, it is sufficient that the United States demonstrates that there is a reasonable likelihood that the defendant **might** continue unlawful conduct in the future, which may be inferred from past conduct.[104] Moreover, to make that determination the court does not

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[103] This Court previously rejected Defendants' related argument that to obtain equitable relief the United States was required to allege with particularity future RICO violations. The Court stated that Defendants' argument "simply defies common sense. It is difficult to see how a plaintiff could ever allege with 'particularity' an offense which has not yet happened." Philip Morris, 116 F. Supp. 2d at 149.

[104] See, e.g., Carson, 52 F.3d at 1183-84 (RICO "grants courts broad discretion and latitude in enjoining violators from activities that **might** lead to future violations" including "**enjoin[ing] possible future violations** where past violations have been shown") (emphasis added) (citations omitted); United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377 (2d Cir. 1993) (same); Local 30, United Slate, 871 F.2d at 408-09 (holding under 18 U.S.C. § 1964(a) that past unlawful racketeering activity by itself established a reasonable "likelihood of future wrongful acts"); United States v. Local 1804-1, Int'l Longshoremens Ass'n, 831 F. Supp. 177, 191 (S.D.N.Y. 1993) (RICO empowers courts "to enjoin RICO violators from activities that **might** lead to future violations") (emphasis (continued...)

begin "with a clean slate" as if it were "a new case"; rather, the court considers the totality of the evidence of the underlying case. See Local 560, 754 F. Supp. at 403. Accord cases cited supra nn.102 & 104.[105] See infra Section III.D.3.

2. The United States Is Not Required to Prove That All Defendants Are Continuing to Commit RICO Violations or Are Reasonably Likely to Commit Unlawful Conduct in the Future

Defendants have not cited a single decision holding that to establish a reasonable likelihood of future unlawful activity, the United States must establish that all the charged Defendants are continuing to commit RICO violations or are reasonably likely to commit such violations in the future. It bears repeating that to the contrary, this Court and numerous other courts have held that evidence that Defendants have intentionally engaged in a pattern of past unlawful conduct is sufficient by itself to establish a reasonable likelihood of future violations, without the need to show that any Defendant, much less each and every one of them, is continuing to commit unlawful violations. See supra p. 110-111 & nn.102 & 104.

Defendants' proposed rule is not only unprecedented, but also it would pose an undue

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[104](...continued)
added); United States v. Local 295, Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19-22 (E.D.N.Y. 1992) (RICO injunction granted based upon evidence of past corruptions, and the court noted that "[i]nstitutional practices and traditions tend to endure long after specific individuals are gone") (id. at 19); Local 6A, 663 F. Supp. at 194 (ruling that the United States was entitled to injunctive relief under RICO without showing "present RICO violations" where reasonable likelihood of future unlawful activity "can and should be inferred from the defendants' past criminal conduct"); See also cases cited supra n.102.

[105] Burke v. Gould, 286 F.3d 513 (D.C. Cir. 2002), Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999), and Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), upon which Defendants rely do not support their argument that to establish a reasonable likelihood of future violations the United States is required to prove that after November 1998 Defendants engaged in unlawful conduct that itself satisfies all the elements of RICO. First, none of these cases involved RICO suits for equitable relief. Burke and Greene did not even address the issue of "reasonable likelihood of future violations"; rather, they simply set forth the standards governing summary judgment. Reimerdes ruled that the defendants' misconduct that undermined a preliminary injunction was sufficient to establish a reasonable likelihood of future violations even though the defendants' conduct "was not contumacious", or a violation of the statute at issue. See 111 F. Supp. 2d at 343. At bottom, Reimerdes supports the United States' position here, not Defendants'.

burden and be unworkable in significant multi-defendant cases. For example, the United States has brought civil RICO lawsuits for equitable relief against corrupt union and business officials and organized crime figures involving scores of defendants, including one case with over 100 Defendants.[106] Nothing in these cases suggest that to impose equitable relief against a particular defendant that the government is required to prove that the particular defendant continued to engage in unlawful activity beyond his past violations. Indeed, in such government civil RICO cases, courts granted injunctive relief even though many of the wrongdoers were not in a position to continue their unlawful conduct because they were imprisoned for lengthy terms or removed from their office in the corrupt enterprise.[107]

At bottom, the central rationale underlying co-conspirator liability (see supra pp. 99-100 and U.S. FPCL Vol. 2 at pp. 24-26) dictates the conclusion that a defendant remains liable for the continuation of events it conspired with its co-defendants to set in motion, even if a particular defendant ceased its unlawful activity. Therefore, the United States is not required to prove that there is a reasonable likelihood that all Defendants will commit violations in the future. Rather, it is enough that there is a reasonable likelihood that the unlawful conduct set in motion by the conspirators will continue.

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

[107] See, e.g., United States v. Private Sanitation Indus. Ass'n., 995 F.2d 375, 377-78 (2d Cir. 1993); United States v. Local 30, United Slate Tile, 871 F.2d 401, 405-09 (3d Cir. 1989); United States v. Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate Tile, 686 F. Supp. 1139, 1162-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 319-326 (D.N.J. 1984), aff'd 780 F.2d 269, 292-94 (3d Cir. 1986).

3. Subsequent to Their Entry into the MSA in November 1998, Defendants Have Continued to Engage in Conduct Consistent with Their Past Pattern of Behavior Undertaken in Furtherance of Their Fraudulent Scheme

The totality of evidence establishes that Defendants devised and executed a single, multi-faceted scheme to defraud the public underlying the alleged RICO violations. Defendants used the several, intertwined components of the scheme to further the overall purposes of the Enterprise and fraudulent scheme – to defraud consumers of the purchase price of cigarettes in order to preserve and expand the market for cigarettes and to maximize Defendants' individual profits, including by avoiding adverse litigation judgments.

Further, the United States has established that Defendants, subsequent to their entry into the MSA, have continued to engage in conduct that is materially indistinguishable from that which preceded Defendants' entry into the MSA and that was undertaken to further the overarching scheme to defraud. That evidence, briefly summarized below, is more than sufficient to establish a reasonable likelihood of ongoing or threatened future unlawful activities by Defendants after the MSA became effective.

a. Defendants Have Violated The MSA

Defendants continue to violate the MSA, thus demonstrating Defendants' ongoing misconduct and that the MSA does not obviate the need for the requested relief.[108] Aside from

[108] See, e.g., Arizona v. R.J. Reynolds Tobacco Co., 2003 WL 22076645 (Ariz. Ct. App. Sept. 9, 2003) (holding that Defendant Reynolds violated MSA § III(a) which inter alia, bans tobacco brand name sponsorship of concerts or events at which the intended audience is comprised of a significant percentage of youth); People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 2002 WL 1292994 (Cal. Super. Ct. June 6, 2002) (holding that Reynolds violated MSA § III(a), which precludes placing cigarette advertisements in magazines with a large percentage of readers, aged 12-17, and ordering Reynolds to comply with the MSA and to pay $20 million in sanctions, plus attorneys' fees and other costs); People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal.Rptr. 2d 151 (Cal. Ct. App. 2003) (holding that Reynolds violated MSA § III(c)(2)(A), which limits the settling defendant to one brand name sponsorship in any 12-month period); State ex rel. Petro v. R.J. Reynolds Tobacco Co., 787 N.E.2d 717 (Ohio Ct. App. 2003) (holding that Defendant Reynolds' distribution of matchbooks imprinted with its brand name violated (continued...)

the published decisions documenting Defendants' continued violations of the MSA, the National Association of Attorneys General makes available on its website summaries of the Tobacco Enforcement Committee. See http://www.naag.org/issues/tobacco/index.php?sdpid=922. The Tobacco Enforcement Committee was established to enforce the MSA and is also an effort to have consistent interpretation of the MSA and to document the alleged continued violations of the MSA. Currently, there are approximately twenty separate alleged violations summarized, which do not identify the specific Defendant but which involve all the Defendant Tobacco Company signatories to the MSA. The provisions of the MSA that have been allegedly violated include:

> (1) MSA § III(k), which prohibited the selling of packs of less than twenty cigarettes (known as "kiddie packs") both in retail establishments and over the internet. This provision expired on December 31, 2001. (The manufacturer denied making such sales but confirmed that it no longer manufactures or distributes such packs, and that any packs that were sold were remaining stocks of retailers.);
>
> (2) MSA § III(c)(3)(A), which bans combination advertising and states that "advertising of the Brand Name Sponsorship event shall not advertise any Tobacco Product (other than by using the Brand Name to identify such Brand Name Sponsorship Event). (The manufacturer had distributed a videotape in conjunction with Brand Name Sponsorship that included advertisements for cigarettes; the manufacturer disagreed with committee position but agreed not to continue distribution of the videotape.);
>
> (3) MSA § III(b), which bans the use of cartoon images. (The manufacturer had newspapers delivered in a bag that advertised brand of

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[108](...continued)
MSA § III(f) that bans the distribution of tobacco brand name merchandise).

But see State of New York v. R.J. Reynolds Tobacco Co., 761 N.Y.S.2d 596 (N.Y. App. Div. 2003), the appellate division affirmed the trial court's ruling dismissing state's claim on § III(c)(2)(A) holding that § III(c)(3)(E) permits such signs to be placed "90 days before the start of the initial sponsored event" and requires removal "within 10 days after the end of the last sponsored event."). This ruling, inconsistent with the ruling in California, highlights one of the weaknesses of the MSA – the potential for inconsistent interpretations of the MSA in the different settling states.

cigarettes with the depiction of a cute dog staring at a long line of fire hydrants and also depicting the dog fetching cigarettes; the manufacturer discontinued use of newspaper bags after being informed by committee that the use of the bag violated not only MSA § III(b) but also MSA § III(a) (marketing to youth), and MSA § III(d) (ban on outdoor advertising).); and

(4) MSA § III(r), which prohibits the manufacturers from making material misrepresentations about health consequences of using any Tobacco Product. (Public statements by manufacturers on their websites indicated their belief that scientific evidence does not establish that secondhand smoke (referred to by Defendants as environmental tobacco smoke, or "ETS") is a risk factor for, or cause of, disease in nonsmokers; the manufacturers modified their website statements on ETS, but as of February 2003, discussions about the content was still under discussion).

b. Health Effects of Smoking

The signing of the MSA in November 1998 did not prompt Defendants to publicly state what they had long recognized internally: that smoking the cigarettes they manufacture and sell cause many serious diseases in the people who smoke them, including lung cancer and other serious cancers, heart disease, and emphysema. Even now, certain Defendants continue to employ the same "risk factor" language they have utilized for many years without admitting that their cigarettes have ever caused disease in anyone, or that they are even capable of causing such diseases. See, e.g., U.S. FPFF § IV.A ¶¶ 348-354; U.S. FPFF § IV.C ¶¶ 1058-1059.[109]

What the signing of the MSA did prompt Defendants to do was immediately plan to continue their efforts to deny and distort the health risks of exposure to secondhand smoke through the continuation of the function of the Center for Indoor Air Research ("CIAR"), an organization jointly created and funded by certain Defendants which had operated much like

[109] Indeed, it was not until June 2000 – in the course of testimony seeking to avoid punitive damages during the Engle case in Florida – that any Defendant other than Liggett stated, without equivocation, that smoking cigarettes causes disease. See U.S. FPFF § IV.A ¶¶ 336-353. Further, it was not until October 2000 that any Defendant made a statement directed at the public that it agreed that smoking causes disease. Id.

CTR and the Tobacco Institute on ETS issues. U.S. FPFF § IV.C ¶¶ 632-634, 670-673, 845, 1027, 1031, 1058.[110] The MSA required that Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard "cease all operations" of CIAR and dissolve it permanently. MSA § III(o) (3). Within days of signing the MSA, however, Defendants and their attorneys began devising a "plan to reinstate CIAR," which included a proposal to create a new organization to continue funding research which CIAR had funded up until its dissolution. See U.S. FPFF § IV.C ¶ 1058. Philip Morris established an operation nearly identical to CIAR, called the Philip Morris External Research Program ("PMERP"). PMERP essentially reincarnated CIAR: the program operates out of the very same CIAR suite in Linthicum, Maryland, uses the CIAR phone numbers, employs former CIAR Executive Director Max Eisenberg to run the day-to-day operations (through a newly-created entity called Research Management Group LLC), funds the same types of research, uses a Scientific Advisory Board ("SAB") with members of the former CIAR SAB, and vests final approval authority of all research with that SAB. U.S. FPFF § IV.C ¶ 1066. Moreover, after entering into the MSA, Philip Morris and BATCo continued efforts to jointly fund industry research through structures that existed prior to the MSA, undertaking joint funding of external research efforts through Philip Morris's Scientific Research Review Committee. Id.

Additionally, Defendants continue to make public statements denying that secondhand

[110] Moreover, the substantial evidence presented by the United States demonstrates Defendants' internal acknowledgment that in the United States, **"ETS issue will have devastating effect on sales**," and that ETS "**threatens the number of smokers & number of cigarettes they smoke**." U.S. FPFF § IV.C ¶¶ 683-692 (emphasis added). Consistent with that internal recognition of the connection between ETS and their profits, Defendants undertook extensive, coordinated efforts to deny the health effects of ETS, to preserve the "social acceptability" of smoking, and to "restore the confidence" of smokers who might smoke less, or stop altogether, in order to avoid harming nonsmokers. See, e.g., U.S. FPFF § IV.C.

smoke causes adverse health effects in nonsmokers, denials that are contrary to the prevailing medical and scientific consensus and the conclusions of leading medical and scientific public health bodies. See, e.g., U.S. FPFF § IV.C ¶¶ 1004, 1058-1065 (website statements of BATCo, Brown & Williamson, and R.J. Reynolds).[111]

c. Marketing to Young People

Since November 1998, Defendants have continued to publicly state that they do not and have never marketed to young people, including persons under age 21. See, e.g., U.S. FPFF § IV.G ¶¶ 3313-3448, 3460, 3466, 4084, 4271. However, Defendants' internal statements of their marketing strategies and goals, and their carefully designed, heavily funded marketing practices – which continue the past patterns of conduct – belie the fraudulent nature of these representations.

First, the United States has presented evidence that, from 1998-2003, Defendants have caused thousands of additional mailings and wire transmissions to further the purposes of their fraudulent scheme, and has detailed hundreds of thousands of examples of such use of the mails and wires. See, e.g., FPFF § V.E and supra § I.G.8. The United States' experts have stated that these marketing campaigns, including advertising and promotional activities, have employed themes and imagery that appeal to young people. See, e.g., Expert Report of Anthony Biglan, United States v. Philip Morris, et al., (R.1136; filed May 10, 2002); Expert Report of Dean

[111] Other conduct around the time that Defendants entered the MSA indicates how Defendants' conduct remained consistent with their past pattern of behavior in addressing ETS. In November 1998 – the same month Philip Morris entered into the MSA – leading Philip Morris scientists in its Worldwide Scientific Affairs department continued were meeting with at least one of the "independent" consultants whom in 1988 had agreed in a meeting with industry scientists to help organize a European version of CIAR; to "extend[] the network of industry-friendly consultants on ETS in the UK"; and to "join – also financially – the PM-stimulated scheme" coordinated on behalf of the industry by Covington & Burling. See U.S. FPFF § IV.C ¶¶ 768-769, 853; 2028441207-1221 at 1214, 1216-1218 (U.S. Ex. 22,326). In addition, the industry has continued to support scientists – including James Enstrom and Peter N. Lee – who have, since 1998, published articles (including in publications heavily supported by Defendants) attempting to counter or attack the scientific evidence of ETS's adverse health effects. See, e.g., id. ¶¶ 939-957, 1055-1056, 1065.

Krugman, United States v. Philip Morris, et al. (R. 665; filed Nov. 15, 2001) ("Krugman Report"); Declaration of Dean Krugman, United States v. Philip Morris, et al. (Oct. 21, 2003) at ¶¶ 4-17 ("Krugman Decl.") (filed with R.2641; Oct. 24, 2003). These materials have been placed in media that reach substantial numbers of young people. See Declaration of Margaret Ann Morrison, United States v. Philip Morris, et al., (Sept. 26, 2003) (U.S. Ex. 75,942) ("Morrison Decl. #1"). As communications taken in furtherance of the alleged fraudulent scheme, each of these communications using the mails or wires constitutes evidence of additional violations of law and the conviction of the charged RICO offenses.

Additionally, Defendants' marketing expenditures have increased substantially in the years after entry of the MSA. In the year after the MSA, total marketing expenditures by these Defendants rose 22.3% to $8.24 billion, the most ever reported to the FTC. U.S. FPFF § IV.G ¶ 4177. Defendants also concentrate their marketing on "herd" brands – those that youth disproportionately smoke: Marlboro, Camel, Winston, Kool, and Newport. Id. ¶¶ 3295, 3613, 3654. For example, between 1997 and 2000, Philip Morris's retail promotions budget for Marlboro increased substantially. Id. ¶ 4186. See also id. ¶¶ 4247-4255, 4276-4277.

Philip Morris, for example, made its governing marketing philosophy clear in internal presentations. Recognizing that "Marlboro's favorable demographics" – over a 60% share of "young adult smokers" – was "the key to long term growth," one Philip Morris Five-Year Plan emphasized Philip Morris's intention to continue to grow Marlboro's market share by emphasizing the popularity and market leadership of Marlboro:

> (1) investing in large scale, high impact equity building marketing programs and (2) keeping a balance between Marlboro's price and the value the band provides for smokers.

> We will continue to reinforce Marlboro's preeminent position in the marketplace with traditional image based advertising, promotion and event marketing as well as superior merchandising . . . . Throughout the plan period, we will work to develop bold new promotion techniques that reinforce Marlboro's market leadership.

U.S. FPFF § IV.G ¶¶ 3654, 4251. This long-established strategy for marketing Marlboro, the disproportionately popular brand among young people, has continued to the present day. See U.S. FPFF § IV.G ¶¶ 4176-4206; Krugman Decl. ¶¶ 9-10.

Additionally, after the MSA Defendants continued to advertise in youth-oriented publications, and indeed increased their advertising expenditures in such publications. See Declaration of Carlotta Figliulo, United States v. Philip Morris, et al., (Sept. 29, 2003) (U.S. Ex. 75,941) ("Figliulo Decl. #1"); Morrison Decl. #1; U.S. FPFF § IV.G ¶¶ 4268, 4327. In fact, at least one court has fined Defendant R.J. Reynolds $20 million for targeting youths in magazine advertising campaigns between 1998 and 2001, in violation of the MSA. See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 2002 WL 1292994 (Cal. Super. Ct. Jun. 06, 2002). See also U.S. FPFF § IV.G ¶ 4339.[112] Defendants also continue to market to youth by providing promotional items and by sponsoring events that appeal to young people. See U.S. FPFF § IV.G.7(b) & (c).

Contrary to Defendants' claim that their vast marketing expenditures are aimed only at getting existing smokers to switch brands, Defendants, in their marketing, advertising, and promotional activities, continue to employ imagery and messages that they know appeal to teenagers. See U.S. FPFF § IV.G ¶ 3300. For example, Defendants have continued to utilize

[112] Additionally, despite its false statements to the contrary, Defendants continue to track young people through direct mail marketing and to send millions of marketing mailings to young people under 21 and under 18 for whom Defendants have no identification (such as a driver's license) to verify their age and to other young people who are under the age of 21 and 18. U.S. FPFF § IV.G ¶¶ 3768, 3790, 4101, 4272-4285.

themes and images with immediate, emotive appeal to which younger persons are particularly susceptible. See id. ¶¶ 3302-3303 (opinions of U.S. expert Paul Slovic); see also Krugman Decl. According to another of the United States' experts, Defendants' marketing utilizes the themes of independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness, and being "cool." See U.S. FPFF § IV.G ¶ 3500. Indeed, Geoffrey Bible, Altria's former Chief Executive Officer, exhorted Philip Morris' lead advertising agency to "[l]everage core values which are attractive to YAMS [Young Adult Male Smokers] by portraiting [sic] the full breadth of Marlboro country: Masculinity, Freedom, Limitless Opportunity, Self-sufficiency, Mastery of Destiny, Harmony with Nature." See id. ¶ 3663.

Further, Defendants have structured their retail marketing programs to appeal to young people. For example, according to one of the United States' experts, Defendants have used price-related marketing efforts, including coupons, multi-pack discounts, and other retail value added promotions, to partially offset the impact of higher list prices for cigarettes. Indeed, Defendants' use of price promotions to reach price-sensitive young people and encourage trial and initiation has dramatically increased in recent years, going from $856 million in 1987 to **$3.54 billion in 1999** – a sum representing 43% of the tobacco industry's marketing and promotion expenditures. See id. ¶¶ 4139-4140.

d. Defendants' Marketing of "Low Tar" and "Light" Cigarettes

Defendants have long known that smokers mistakenly consider "light" and "low tar" cigarettes to be less hazardous than full flavor cigarettes, and that smokers view such products as a step toward quitting. See, e.g., U.S. FPFF § IV.F ¶¶ 2505, 2630, 2636, 2873, 2878, 2885,

2888, 2897, 2911. However, Defendants have also long known, from their own research, that such products as smoked by consumers are not likely to be safer than regular cigarettes. See, e.g., id. ¶¶ 3008, 3010-3012, 3028, 3037, 3065. Defendants nevertheless designed and marketed their products to exploit consumers' misperceptions. See, e.g., id. ¶¶ 2500, 3012, 3037, 3163, 3284.

Since November 1998, Defendants have continued to market cigarettes using the "light" and "low tar" descriptive phrases to convey a "less hazardous" message to smokers. For example, in 1999 Brown & Williamson began marketing an "ultra light" product with the slogan "Isn't it time you started thinking about number one?" a phrase intended both to refer to the product's one milligram tar rating by the FTC test and to get smokers to think about their health. See id. ¶ 3107; see also id. ¶¶ 2738-2739.[113]

In addition, from 1998-2003, Defendants caused the use of the mails and wires to communicate with the public regarding light or low tar products in ways both consistent with Defendants' past pattern of conduct and in furtherance of Defendants' unlawful scheme. See U.S. FPFF § V; see also supra Section I.G.5.

e. Addiction

Similarly, entry into the MSA did not prompt Defendants to inform the public, including consumers, about the addictive nature of cigarette smoking or that nicotine is the powerful

[113] Brown & Williamson has also taken steps to withhold from consumers accurate information about the limits of the FTC tar and nicotine ratings. On or after 1999, Star Scientific developed onserts attached to packs of Advance cigarettes informing smokers that the FTC Method results in potentially unrealistically low tar and nicotine yields. When Brown & Williamson later acquired and test marketed Advance in Lexington and Richmond in 2000 or thereafter, Brown & Williamson revised the Advance onsert to omit any reference to the FTC Method. U.S. FPFF § IV.F ¶¶ 3231-3232; U.S. FPFF § IV.B ¶¶ 451-456; see also U.S. FPFF § IV.F ¶¶ 2523, 2590-2591 (Philip Morris reference to "Lower Tar and Nicotine" on Marlboro Lights packaging without any explanation that phrase refers to FTC test, the limitations of the test, or additional information about tar and nicotine yields of Marlboro Lights when smoked by humans).

pharmacological agent delivered by cigarettes that creates and sustains the physiological dependence experienced by the overwhelming majority of smokers. Only one Defendant, Liggett, has placed a warning on its packages stating that nicotine is addictive. Indeed, Philip Morris has taken affirmative steps to **withhold** information about addiction from its customers since its entry into the MSA. When Philip Morris purchased three premium brands from Liggett in 1999, Philip Morris affirmatively removed the addiction warning from those brands' packages. Deposition of Geoffrey Bible, United States v. Philip Morris USA, et al., Aug. 22, 2002, 112:12-113:17; U.S. FPFF § IV.E ¶ 1865; see also U.S. FPFF § IV.B ¶¶ 451-456 (Brown & Williamson's altering of onsert for Advance product to **remove** statement that "All smoked tobacco products are addictive").[114]

f. Nicotine Manipulation

Additionally, Defendants continue to make misleading public statements about their ability to control and manipulate the levels of nicotine delivered to the smoker. See, e.g., U.S. FPFF § IV.E ¶¶ 2052-2054. For example, R.J. Reynolds's website states that it does not "do anything to enhance the effects of nicotine on the smoker." Id. ¶ 2052. The statement is misleading because the central focus of the United States' claims is **not** that Reynolds "enhances the effects of nicotine," (i.e., whether Reynolds modifies the physiological effects that delivered nicotine has on the smoker), but rather that Reynolds has carefully designed and manufactured its

[114] Moreover, contrary to Defendants' prior contention in their Motion for Summary Judgment on the Grounds That There Is No Reasonable Likelihood of Future RICO Violations at 26, Defendants' continued failure to publicly state that the addictiveness of smoking has a primarily pharmacological basis – nicotine – is neither a meaningless or unintentional omission. See, e.g., Expert Report of Jack E. Henningfield, United States v. Philip Morris, (R. 681; filed Nov. 15, 2001). This is particularly true in light of Defendants' longstanding and well-documented internal recognition of the primary importance of designing cigarettes to ensure that smokers can obtain sufficient levels of nicotine to develop and maintain addiction. See U.S. FPFF § IV.E.

cigarettes with a primary consideration of ensuring that the cigarettes enable smokers to obtain sufficient nicotine to create or sustain their addiction. See id. ¶¶ 687-693.

g. Concealment/Suppression of Information

The United States has presented evidence that a primary purpose underlying Defendants' conduct was to avoid, forestall, or at a minimum, limit liability for smoking and health related claims in litigation, and to prevent the public from learning the truth about smoking's adverse effect on health and the addictiveness of nicotine. Indeed, documents show that Defendants undertook efforts to destroy and conceal documents and withhold information in furtherance of these goals. See U.S. FPFF § IV.H.

Where Defendants' misuse of privileges has been an integral part of their scheme to defraud, such misconduct may be considered as evidence underlying a scheme to defraud.[115] At least seven courts have made findings of crime-fraud, abuse of privilege, and improper concealment and/or destruction of documents by these very Defendants, and considered such conduct to be evidence of Defendants fraud on the public.[116] One court specifically found that abuse of privilege by these Defendants to be evidence of the "explicit and pervasive" nature of Defendants' fraud. Haines v. Liggett Group, Inc., et al., 140 F.R.D. 681, 689-95 (D.N.J. 1992),

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

[116] See State of Minnesota v. Philip Morris Inc. et al., No. C1-94-8565, 1998 WL 257214, at *9 (Minn. Dist. Ct. Mar. 7, 1998), mandamus denied sub nom., State of Minnesota v. Philip Morris, Inc. et al., No. CX-98-414 (Minn. App. Mar. 17, 1998), petitions for further review denied sub nom., State of Minnesota v. Philip Morris Inc. et al., Nos. CX-98-414, CX-98-431, 1998 WL 154543 (Minn. Mar. 27, 1998), stay denied, 523 U.S. 1056 (1998); State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., filed Feb. 21, 1995); State of Minnesota v. Philip Morris, et al., No. C1-94-8565 (Minn. Dist. Ct. Dec. 30, 1997); State of Washington v. American Tobacco Co., Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct. 1998); Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 362-64 (E.D.N.Y. 1997); Burton v. R.J. Reynolds Tobacco Co., 167 F.R.D. 134, 142 (D. Kan. 1996) and 170 F.R.D. 481, 490 (D. Kan. 1997); Carter v. Brown & Williamson, Case No. 95-00934 CA (Duval Cty. Cir. Ct., Fla., Transcript July 26, 1996 pp. 1329-32); Haines v. Liggett Group, Inc., et al. 140 F.R.D. 681, 689-95 (D.N.J. 1992), vacated on procedural grounds, 975 F.2d 81 (3d Cir. 1992).

vacated on procedural grounds, 975 F.2d 81 (3rd Cir. 1992).[117]

C. The United States Is Entitled To Disgorgement Independent Of Its Entitlement To A Permanent Injunction

The Court has found that the United States is entitled to a permanent injunction. Even if the United States were not entitled to a permanent injunction, the United States, nonetheless, is entitled to disgorgement of Defendants' ill-gotten gains derived from their past unlawful conduct because disgorgement vindicates significant public interests independent from those served by an injunction against Defendants at hand. In that respect, this Court, the District of Columbia Circuit, and other courts have repeatedly held that the primary purposes of disgorgement are "to deprive a wrongdoer of his unjust enrichment and to deter **others** from violating the . . . laws." First City Fin. Corp., 890 F.2d at 1230 (emphasis added). See also United States v. Philip Morris, 310 F. Supp. 2d 58, 63-64 (D.D.C. 2004).

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

> [O]ften, no logical connection exists between an order of restitution or disgorgement of **past** illicit gains and an injunction addressing **future** conduct. Sometimes, a court may find that an injunction is moot as a practical matter, for example because of the age, illness, disability or even death of the defendant. In other circumstances, a court may find that an injunction is unwise or impractical because of the difficulty of enforcement, for example when the defendant is located out of state. Occasionally, a court is disinclined to issue an injunction because of the technical expertise needed for proper enforcement. . . . In other situations,

[117] In this case, the Court has found at least one Defendant's unjustified, repeated failure to comply with discovery orders requiring the production of documents to warrant a conditional finding of civil contempt. See Order #411 (Oct. 3, 2003). Other evidence adduced by the United States in this case suggests recent or continuing conduct that has the intent or effect of preventing or stalling the discovery of relevant, potentially probative evidence. See, e.g., U.S. FPFF § IV.H(2)(d) (describing document management policies established and implemented by Brown & Williamson and BATCo that, according to persons responsible for their development and implementation, were intended to cause the destruction of documents potentially relevant to plaintiffs in smoking and health litigation, to keep such documents from reaching the United States, and to frustrate and delay discovery by plaintiffs in smoking and health litigation).

> a court may find that an injunction may not be the most appropriate remedy to redress unfair practices committed only during a brief and unique circumstance involving a change in business circumstance, such as the acquisition or spin off of another company. In all of these cases, however, the offender is not entitled to keep the fruits of its unfair, deceptive, or unlawful conduct. The defendant's victims may be entitled to restitution, and the court may also conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance. [Defendant's arguments]. . . would frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit.

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

Similarly, in Interstate Commerce Comm'n v. B&T Transportation Co., 613 F.2d 1182, 1183 (1st Cir. 1980), the court held that restitution of a defendant's ill-gotten gains was appropriate even though "there is no reasonable expectation that [the defendant's] alleged illegal conduct will recur." See also Comfort Lake Ass'n v. Dressel Contracting Inc., 138 F.3d 351, 355 (8th Cir. 1998) ("When a claim for injunctive relief becomes moot, a related claim for money relief is not mooted.").

The logic of Defendants' position dictates a rule of law that a wrongdoer may keep hundreds of billions of dollars that it unlawfully obtained through fraud merely by providing assurances that he would not defraud others in the future. That rule of law would not deprive a wrongdoer of unjust enrichment and would hardly constitute effective deterrence of "others"; rather it would be an invitation to commit crime, because it would allow the wrongdoer to keep vast sums of ill-gotten gains. It cannot be overemphasized that a wrongdoer does not have, and never had, a cognizable legal interest in the proceeds of his unlawful conduct. See Philip Morris, 310 F. Supp. 2d at 63-64; U.S. FPCL (Vol. 2) at 10-13. Therefore, a wrongdoer is not entitled to

keep his ill-gotten gains even if there are adequate assurances that he will not commit crimes in the future. To rule otherwise would eviscerate the deterrent effect of disgorgement and would permit unjust enrichment, and hence would vitiate the primary purposes of disgorgement. Consequently, the United States' right to disgorgement of Defendants' proceeds of unlawful conduct is not defeated even if Defendants have ceased their unlawful conduct.

IV

THE UNITED STATES IS ENTITLED TO DISGORGEMENT OF AT LEAST 280 BILLION DOLLARS OF DEFENDANTS' ILL-GOTTEN PROCEEDS TO WHICH THEY NEVER HAD A RIGHT IN THE FIRST PLACE

The Court has rejected Defendants' reliance upon United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), to limit the scope of disgorgement in this case. See Philip Morris USA, 2004 WL 1161455. Rather, for the reasons set forth below, the Court concludes that the United States is entitled to disgorgement of $280 billion dollars of Defendants ill-gotten proceeds. Moreover, Defendants are jointly and severally liable for the full amount of disgorgement. See United States v. Philip Morris USA Inc., 2004 WL 1045768 at *3-5 (D.D.C. May 6, 2004).

A. Disgorgement Need Only Be A Reasonable Approximation Of Profits Causally Related To The Violation

The District of Columbia Circuit has explained that because "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task . . . disgorgement need only be a reasonable approximation of profits causally connected to the violation," and that once the plaintiff establishes such a "reasonable approximation," the burden shifts to the defendants "clearly to demonstrate that the disgorgement figure was not a reasonable approximation." SEC v. First City Fin. Corp., 890 F.2d 1215, 1231-

32 (D.C. Cir. 1989).[118] Moreover, "the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge," not merely the actual money that he wrongfully obtained. SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000). The District of Columbia Circuit has emphasized that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." First City Fin. Corp., 890 F.2d at 1232.[119]

B. Because of the Systematic and Pervasive Nature of Defendants' Scheme to Defraud, and the Equitable Principles Governing Disgorgement, the United States Is Entitled to Disgorge All of Defendants' Proceeds from 1954 to 2001

To effectuate disgorgement's primary purposes, courts have held in various contexts that the courts are empowered to order disgorgement of **all** of a defendant's ill-gotten proceeds. For example, in Pierce v. Amaral, 938 F.2d 94, 95-96 (8th Cir. 1991), the circuit court upheld an order disgorging all sales proceeds in violation of the Interstate Land Sales Act, noting that the district court's equity powers are "unrestricted" in government enforcement actions brought under the Act. Likewise, in the SEC insider trading context, violators are required to disgorge all profits made from the unlawful trade. See First City Fin. Corp., 890 F.2d at 1231-32; SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301, 1307 (2d Cir. 1971).

Similarly, in the antitrust context, the Supreme Court directed "complete divestiture" of

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[118] Accord Bilzerian, 29 F.3d at 697 ("Calculations of [the causal nexus] are often imprecise – it is impossible to say with certainty what portion of [the defendant's] profits is attributable to his securities violations. [The Defendant], however, bears the burden of establishing" that the approximation of his unlawful profits was not reasonable). See also SEC v. First Jersey Securities, 101 F.3d 1450, 1475 (2d Cir. 1996); United States Dep't of Housing & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); Kenton Capital, 69 F. Supp. 2d at 16.

[119] Accord SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); First Jersey Securities, 101 F.3d at 1475; SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); Patel, 61 F.3d at 140. See also Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

the defendant's stock in another company to remedy its antitrust violations, because "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." United States v. E.I. du Pont De Nemours & Co., 366 U.S. 316, 334 (1961). Likewise, in Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222 (8th Cir. 1976), a trademark infringement case, the court cited the important deterrence principles behind disgorgement, noting that "equity requires that Freuhauf relinquish **all** of its profits." Id. at 1222 (emphasis added); see also W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 662 (2d Cir. 1970) (ordering full accounting by defendant). In short, it "is simple equity that a wrongdoer should disgorge his fraudulent enrichment." Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965).

Accordingly, courts have held in a variety of contexts that where the defendant's fraud is pervasive, it is reasonable to infer that **all** of the defendant's profits were unlawfully obtained, and a court is justified in disgorging the entirety of the defendant's profits. See, e.g., CFTC v. British Am. Commodity Options Corp., 788 F.2d 92 (2d Cir. 1986) (concluding that a nexus between the unlawful conduct and the disgorgement figure need not be shown because of the pervasiveness of the fraud); SEC v. Graystone Nash, Inc., 820 F. Supp. 863, 875-76 (D.N.J. 1993) ("If benefits result from both lawful and unlawful conduct, plaintiff must distinguish these legal and illegal profits, . . . unless the fraud was systematic and pervasive." (citation omitted)), rev'd on other grounds, 25 F.3d 187 (3d Cir. 1994); SEC v. Inorganic Recycling Corp., 2002 WL 1968341, *2 (S.D.N.Y. 2002) ("Where the fraud is 'pervasive,' courts will order all profits stemming from the scheme to be disgorged."); SEC v. Hasho, 784 F. Supp. 1059, 1111-12 (S.D.N.Y. 1992) ("When a defendant engages in a pervasive pattern of fraudulent conduct as opposed to isolated instances, it is unnecessary to prove a direct nexus between each instance of

unlawful conduct and the disgorgement amount due."); SEC v. Interlink Data Network of Los Angeles, Inc., 1993 WL 603274, *14 n.118 (C.D. Cal. 1993) ("Even if the defendants had accounted for what they did with these funds, because their fraud was pervasive the Commission need not distinguish between profits arising from legal or illegal conduct."); see also Kenton Capital, 69 F. Supp. 2d at 16 ("The SEC has provided ample evidence that all the funds collected by Kenton were obtained fraudulently, and Defendants may not escape disgorgement by asserting that expenses associated with this fraud were legitimate. . . . Disgorgement, therefore, is a proper remedy."). Likewise, in the SEC insider trading context, violators are required to disgorge all profits from the unlawful trade. See First City Fin. Corp., 890 F.2d at 1231-32; Texas Gulf Sulphur, 446 F.2d at 1307.

Substantial evidence establishes the United States' claim that since late 1953 Defendants have engaged in a pervasive scheme to defraud the public of money that they executed for nearly 50 years, and which continues to this day. Defendants carried out this massive scheme to defraud through a variety of means, including, but not limited to, causing the public dissemination of numerous false, deceptive and misleading statements that, among other things: denied that smoking and exposure to second had smoke causes disease and other adverse health effects (U.S. FPFF §§ IV.A & C); denied that cigarette smoking or the nicotine in cigarette smoke is addictive, or that Defendants manipulated nicotine (id. § IV.E); denied that Defendants marketed to young people (id. § IV.G); fraudulently promised to sponsor independent, disinterested research into the potential adverse health effects of smoking (id. § IV.D); and deceptively marketed "low tar" cigarettes as less hazardous (id. § IV.F). The evidence also establishes that Defendants concealed and suppressed information relating to these matters. See generally id. §§ I.K & IV.H. Contrary to Defendants' fraudulent representations, overwhelming evidence, including

Defendants' internal records and documents, conclusively establishes that Defendants long knew the fraudulent nature of their representations. See generally U.S. FPFF § IV. Indeed, evidence from Defendants confirms that the components of the fraudulent scheme, and Defendants' commitment to adhere to that unlawful course of conduct, permeated the full range of their business activities – including product research and development, and marketing – and influenced how Defendants conducted their businesses. In furtherance of this scheme to defraud, Defendants caused literally thousands of statements and matters to be disseminated to the public via the mails and interstate wire transmissions. See U.S. FPFF § V; supra § I.G). Thus, all of Defendants' sales of cigarettes to all consumers from 1954 to 2001 were inextricably intertwined with their massive scheme to defraud the public during that time period.

Therefore, because of the pervasive nature of Defendants' scheme to defraud, under the foregoing authority the United States is entitled to disgorgement of all Defendants' ill-gotten gains obtained from consumers of cigarettes from 1954 to present.

C. The United States' Calculation Of Disgorgement Fully Comports With The Governing Legal Principles

1. The United States' Calculation of Disgorgement Based on the Youth Addicted Population is Reasonable

Although the United States is entitled to disgorgement of **all** Defendants' unlawful gains from their massive scheme to defraud that they obtained from **all** their victims during the entire period of their fraud scheme from 1954, the United States seeks a lesser amount of disgorgement. The United States seeks **only** the gains Defendants unlawfully obtained during the period from 1971 (after RICO's effective date) to the date of judgment, from at least 33 million youth addicted smokers who were smoking more than five cigarettes a day when they became age 21.

This amount totals at least $280 billion dollars through 2001 alone. See U.S. FPFF § IX.B.[120]

Contrary to Defendants' argument, the relationship between smoking "more than five cigarettes a day" – the standard used by Jonathan Gruber, Ph.D., in computing the Youth Addicted Population – and addiction is well supported by a scientific understanding of addiction. First, there is substantial scientific agreement that smoking intensity is an indicator of addiction. Second, there is substantial scientific agreement that smoking more than five cigarettes a day is a strong predictor of nicotine addiction among adult smokers. Third, there is substantial scientific agreement that even lower levels of smoking intensity well below the "more than five cigarettes a day" cutoff used by Dr. Gruber are strong predictors of nicotine addiction among adolescent smokers. See, e.g., U.S. FPFF § IX ¶¶ 21-33.

Moreover, Defendants' argument that it is legal in most states to market cigarettes to individuals 18 and older is immaterial. See Philip Morris, 304 F. Supp. 2d at 69-70. The Complaint charges Defendants with violations of the mail and wire fraud statutes, not violations

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[120] The United States' experts set forth a range of potential proceeds for disgorgement of unlawful gains from approximately $108 billion to approximately $742 billion, which includes the following:

Time Period	Age Began Smoking	Number of Cigarettes Smoked Daily	Youth Addicted Population in Millions	Approximate Proceeds in Billions of Dollars
1. 1954 to 2001	under 21	more than 5	49	$742
2. 1954 to 2001	under 21	more than 10	33	$562
3. 1954 to 2001	under 18	more than 5	30	$421
4. 1954 to 2001	under 18	more than 10	17	$249
5. 1971 to 2001	under 21	more than 5	33	$289
6. 1971 to 2001	under 21	more than 10	22	$227
7. 1971 to 2001	under 18	more than 5	21	$170
8. 1971 to 2001	under 18	more than 10	13	$108

Generally, the "Youth Addicted Population" consists of every smoker (regardless of age) who was addicted to smoking while in their youth. See U.S. FPFF § IX ¶ 13 (U.S. Ex. 60, 712 and 86, 902).

of state laws regarding underage sales of cigarettes. Substantial evidence establishes that Defendants have falsely represented since 1964 that they have not marketed cigarettes to young people under the age of 21 as part of their broad scheme to defraud. See U.S. FPFF § IV.G.

Furthermore, Defendants knowingly exploited an especially vulnerable class, youth addicted smokers.[121] The evidence establishes that the Cigarette Company Defendants well knew that their ability to continue to earn profits depended upon their acquiring young smokers to replace smokers who had quit smoking or died. In fact, 88% of daily smokers tried their first cigarette before age 18, and 70% of people who have ever smoked daily began smoking daily before they were 18 years old. See U.S. FPFF § IX ¶ 69. Accordingly, Defendants designed their advertising and other marketing practices to induce the youngest smokers to smoke their brands and to continue smoking. See U.S. FPFF § IV.G. 4-6. The evidence also establishes that Defendants' conduct succeeded in inducing young people to become addicted to smoking. See U.S. FPFF § IV.G ¶¶ 3295, 3498. Once young people began to smoke, other aspects of Defendants' fraudulent conduct kept them smoking, including Defendants' false denials regarding adverse health effects and addictiveness, and deceptive advertising that low tar cigarettes were less hazardous to smokers' health. U.S. FPFF §§ IV.E & F. Young people do not adequately understand and appreciate the cumulative risk that smoking entails. Most smokers only begin to think of risk after they have started smoking regularly and have become addicted. Accordingly, Defendants' marketing efforts intended to appeal to young people contributed to their goal of creating lifetime smokers. See, e.g., U.S. FPFF § IV.G ¶¶ 3298, 3304, 3493.

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[121] "Youth Addicted Smokers" includes minors, typically under age 18. In a variety of contexts, minors are a "protected class" subject to the States' parens patriae authority and protection. See infra § IV.E.5.

Therefore, Defendants' fraudulent misconduct is causally related to Defendants' proceeds from the sale of cigarettes to the Youth Addicted Population, and the focus of disgorgement on the class of young addicted smokers who were smoking more than five cigarettes per day before reaching age 21 is reasonable.

2. The United States' Use of the Civil Forfeiture Statute as a Guide in Calculating Disgorgement Is Reasonable

Having reasonably narrowed the pool of victims to youth addicted smokers who began smoking more than five cigarettes daily when under the age of 21, the United States then calculated Defendants' ill-gotten gains from those youth addicted smokers, using the civil forfeiture statute as a guide. See 18 U.S.C. § 981(a)(2)(B). This statute provides for calculating proceeds to be forfeited "[i]n cases involving lawful goods or lawful services that are sold or provided in an illegal manner," and states that the proceeds to be forfeited "means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." Id. Notably, that statute also explicitly excludes from direct costs "any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity." Id. In other words, Defendants' overhead and income taxes are not to be deducted from the proceeds figure.

Contrary to Defendants' argument, use of § 981(a)(2)(B) as a guide to calculate disgorgement does not conflate disgorgement with criminal forfeiture of proceeds because this statute is a civil forfeiture statute, not a criminal one. The criminal forfeiture statutes would result in far more extensive forfeiture than is available under § 981(a)(2)(B).[122]

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[122] For example, under criminal forfeiture provided in 18 U.S.C. § 982 and 18 U.S.C. § 1963, forfeiture is not limited to the proceeds from an illegal transaction, but also extends to: (1) "any property . . . derived from, proceeds (18 U.S.C. § 982(a)(2)); (2) "any property, real or personal, which represents or is traceable to the gross (continued...)

Equitable principles support the application of § 981(a)(2)(B)'s inclusion of taxes and indirect costs in the disgorgement calculation performed by Franklin Fisher, Ph.D. See, e.g., Kenton Capital, 69 F. Supp. at 16 (rejecting argument that business expenses, including overhead and other costs, should be deducted from disgorgement amount based on "overwhelming weight of authority" (citing cases)); SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 n.20 (E.D. Mich. 1991) ("[I]t is within the district courts' equitable discretion to disallow expenses incurred in perpetration of the fraud even if there were Sixth Circuit authority for the proposition that expenses may be deducted from disgorgement."), aff'd, 12 F.3d 214 (6th Cir. 1993); cf. Citronelle-Mobile Gathering, Inc. v. Herrington, 842 F.2d 16, 28 (Temp. Emer. Ct. App. 1987) (reversing district court's subtraction of taxes paid from equitable restitution award). Just as "separating legal from illegal profits exactly may at times be a near-impossible task," see First City Fin. Corp., 890 F.2d at 1231, tracing and calculating the portion of taxes and indirect costs paid by Defendants that are linked to their unlawful conduct would also be a "near-impossible task." That is particularly true for these Defendants, large corporations (most part of larger conglomerates) engaged in myriad complex business transactions. Recognizing this difficulty, courts have repeatedly held that in the context of disgorgement, the plaintiff's approximation of

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[122](...continued)
proceeds" (18 U.S.C. § 982(a)(5)); (3) "any conveyance, including any vessel, vehicle, or aircraft used in the commission of the [listed] offenses" (18 U.S.C. § 982(6)(A)(I)); (4) "any property real or personal . . . that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted" (18 U.S.C. § 982(a)(6)(A)(ii)); (5) "any interest the person has acquired or maintained in violation of [RICO]; any (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of [RICO]." (18 U.S.C. § 1963(a)). Moreover, criminal forfeiture would not allow for the deduction from gross proceeds of "the direct costs incurred in providing the goods or services," as does § 981(a)(2)(B). See, e.g., United States v. Keeling, 235 F.3d 533, 537 (10th Cir. 2000); United States v. Simmons, 154 F.3d 765, 770-71 (8th Cir. 1989); United States v. McHan, 101 F.3d 1027, 1041-42 (4th Cir. 1996); United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995).

Moreover, the Court has ruled that RICO disgorgement does not constitute "punishment," but rather is remedial. See Philip Morris USA, 310 F. Supp. 2d at 63-65.

the amount of unlawfully obtained money need only be "reasonable," and the brunt of any uncertainty falls on the wrongdoer. See, e.g., id. at 1231-32; see also cases cited supra at nn.118-119. Thus, the United States' calculation of disgorgement is a reasonable approximation of Defendants' unlawful gains; contrary to Defendants' contention, it is not tantamount to a request for forfeiture.

Defendants have not cited any authority that would either preclude the Court from referring to 18 U.S.C. § 981(a)(2)(B) to aid its calculation of the amount of disgorgement, or restrict the Court to **any** particular mode of calculation. On the contrary, binding case law vests the Court with considerable discretion to select any calculation that is a "reasonable approximation" of the wrongdoers' ill-gotten gains. See cases cited supra n.118 and accompanying text. Therefore, it is immaterial that there may be other equally, or even more, reasonable alternatives, provided that the calculation adopted by the Court constitutes a "reasonable approximation" of the wrongdoers' ill-gotten gains. The statutory provision, 18 U.S.C. § 981(a)(2)(B), provides a "reasonable" calculation of ill-gotten gains subject to disgorgement because it reflects the considered judgment of the Executive Branch and Congress, embodied in a duly enacted statute, that wrongdoers' unlawful gains from the sale of an otherwise lawful product in an illegal manner, as involved here, should be determined by deducting "the direct costs incurred in providing the goods" from "the amount of money acquired through" the transaction, without any deduction for "overhead expenses" or "income taxes," as the United States calculated here.

Defendants' complaint that the United States did not direct its experts (Drs. Gruber and

Fisher)[123] to estimate the causal effect of Defendants' alleged RICO violations on their cigarette sales is unfounded. First, the United States' disgorgement and statistical experts not only created a reliable and conservative model, but also obtained results properly based on the reliable causal evidence that was presented by other witnesses. See generally U.S. FPFF § IX. Second, whether there is a causal nexus between Defendants' unlawful conduct and their sales of cigarettes and the standards to be used to calculate Defendants' ill-gotten gains from such sales are issues of law solely for the Court to decide. Doctors Gruber and Fisher are not lawyers or experts on the law; the United States did not ask them to opine on these legal issues that are solely within the province of the Court to decide. See U.S. FPFF § IX ¶¶ 13, 127-136. Rather, the United States directed its experts to calculate the amount of Defendants' ill-gotten gains by applying 18 U.S.C. § 981(a)(2)(B) for the above-stated reasons.

3. The United States' Inclusion of the Time Value of Money For Defendants' Gains from the Illegal Proceeds in its Disgorgement Calculation Serves the Purpose of Disgorgement

The United States seeks $280 billion dollars in disgorgement. U.S. FPFF § IX. This figure represents Cigarette Company Defendants' ill-gotten gains derived from the sale of cigarettes to the Youth Addicted Population for the years 1971 to the end of 2000. See id. § IX.B. Of the $280 billion in proceeds from the Youth Addicted Population, $75.49 billion represents the contemporaneous value of the proceeds and $204.39 billion is the adjustment that accounts for the time value of money, or Defendants' additional gains. See id. ¶¶ 142-145. Specifically, the United States' expert, Dr. Fisher, calculated the contemporaneous value of the proceeds at the time of the sale of cigarettes (i.e., the value of the proceeds in 1971, 1972, 1973,

[123] Defendants have also complained that the United States did not direct Dr. Jeffrey Harris to make this ill-defined estimation. Defendants' complaint is misleading and unfounded because Dr. Harris was not retained by the United States to perform any calculation.

etc.) and then adjusted them to account for their value, as of December 31, 2000. See id. The "additional gains" adjustment was for the "time value of money" using the Weighted Average Cost of Capital ("WACC"), a standard methodology used by economists. See id. ¶ 144.

Defendants' argument that the United States improperly included in its disgorgement calculation an amount reflecting the "time value of money" is without merit. Accounting for the "time value of money," or prejudgment interest, is a well established principle necessary to prevent a wrongdoer from reaping unjust enrichment from his unlawful conduct. See cases cited infra n.124. The Supreme Court, the District of Columbia Circuit, and other courts have made it clear that absent "exceptional circumstances," awarding prejudgment interest should be the general rule to account for the time value of money in order to deprive a wrongdoer of all his ill-gotten gains, fully compensate the injured party (where appropriate), and to eliminate an incentive for the wrongdoer to delay resolution of the litigation.[124] In accordance with the foregoing presumption, disgorgement that accounts for the "time value of money" or "prejudgment interest" is routinely imposed under the securities laws to achieve the remedial purposes of disgorgement.[125] So too here, disgorgement should account for the time value of

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[124] See, e.g., Kansas v. Colorado, 533 U.S. 1, 10-11 (2001); City of Milwaukee v. Cement Div. Nat'l Gypsum Co., 515 U.S. 189, 196-97 (1995); General Motors Corp. v. Devex Corp., 461 U.S. 648, 655-57 and n.10 (1983); Modern Electric, Inc. v. Ideal Electronic Sec. Co., Inc., 145 F.3d 395, 396-97 (D.C. Cir. 1998); Oldham v. Korean Airlines Co., Ltd., 127 F.3d 43, 54 (D.C. Cir. 1997); Barbour v. Merrill, 48 F.3d 1270, 1277-79 (D.C. Cir. 1995); Motion Picture Ass'n of Am. Inc. v. Oman, 969 F.2d 1154, 1157 (D.C. Cir. 1992). See also Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 923 (9th Cir. 1995); Partington v. Broyhill Furniture Indus., 999 F.2d 269, 274 (7th Cir. 1993); Matter of Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1331 (7th Cir. 1992); Williamson v. Handy Buttom Machine Co., 817 F.2d 1290, 1297 (7th Cir. 1987); Accord 1 Dan B. Dobbs, Law of Remedies § 4.3(1) (2d Ed. 1993); Crude Co. v. FERC, 923 F. Supp. 222, 241 (D.D.C. 1996); SEC v. Sekhri, 2002 WL 31100823, at *18 (S.D.N.Y. 2002). Cf. In Re Kidd, 315 F.3d 671, 677-78 (6th Cir. 2003); Forman v. Korean Airlines Co. Ltd., 84 F.3d 446, 450-51 (D.C. Cir. 1996).

[125] See, e.g., First Jersey Secs., 101 F.3d at 1476; Commercial Union Assur. Co., PLC v. Milken, 17 F.3d 608, 613-14 (2d Cir. 1994); SEC v. Antar, 97 F. Supp. 2d 576, 589 (D.N.J. 2000); Kenton Capital, 69 F. Supp. 2d at 16; SEC v. Cross Financial Services, Inc., 908 F. Supp. 718, 734 (C.D. Cal. 1995); SEC v. Stephenson, 732 F. Supp. 438, 439 (S.D.N.Y. 1990).

money to achieve the remedial purposes of RICO disgorgement that are identical to the remedial purposes of disgorgement under the securities laws.[126]

Dr. Fisher explained that adjusting for the "time value of money," through the use of WACC, is essential to determine the total gains that Defendants realized from their proceeds from their sales of cigarettes to the Youth Addicted Population; it accounts for the additional gains Defendants realized from investing such proceeds and from avoiding expenses that Defendants would have incurred had they not had the use of the ill-gotten proceeds. See U.S. FPFF § IX ¶¶ 144, 147-49. Dr. Fisher further explained that the adjustment for the "time value of money" serves the purposes of disgorgement to deter wrongdoers from engaging in unlawful conduct and to prevent unjust enrichment, and that the absence of disgorgement to include this adjustment would create perverse economic incentives whereby Defendants would not be required to pay for the use they made of the money over time.[127] See id.

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[126] Moreover, the United States' use of the "time value of money" to calculate Defendants' gains which are subject to disgorgement is also supported by the common-law "relation back" doctrine. Under the "relation back" doctrine, when the United States obtains a court judgment ruling that it is entitled to obtain unlawful proceeds and property traceable to such proceeds, the United States' interest and title in such proceeds and property vests at, or "relates back" to, the time of the unlawful conduct giving rise to the United States' right to obtain the proceeds and property. Therefore, under the relation back doctrine the United States is entitled to obtain all the unlawful proceeds and property traceable thereto from the time of the unlawful conduct giving rise to the United States' right to obtain such property. See, e.g., United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, 507 U.S. 111, 127 (1993); United States v. Hooper, 229 F.3d 818, 822-23 (9th Cir. 2000); United States v. Martinez, 228 F.3d 587, 590 (5th Cir. 2000); United States v. Colonial Nat'l Bank N.A., 74 F.3d 486, 487 (4th Cir. 1996); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II), 961 F. Supp. 287, 300-01 (D.D.C. 1997).

[127] Accord Dobbs, Law of Remedies § 4.3(1) (Generally, "when the defendant has received the use value of property or money, restitution will be owed for that value," which may include, inter alia, measurable gains, interest, or increase in the market value of defendant's assets); Crude Co. v. F.E.R.C., 923 F. Supp. at 241 (Defendant "has had the use of monies received under the [unlawful transactions] for nearly 20 years. Further, [Defendant] has had the use of the more than $1.2 million it owes in restitution during the entire pendency of this action. Money has a 'time value', and unless [defendant] is required to include the time value of money in the amount of its liability, there will not have been full disgorgement of ill-gotten gains"); Sekhri, 2002 WL 31100823, at *18 (calculation "to approximate the time value of money" is necessary to deprive defendant of "his or her ill-gotten gain and will prevent his or her unjust enrichment."). Cf. In Re Kidd, 315 F.3d at 677-78 (holding that a monetary judgment should include an amount to account for the change in the "value of money over time").

"The causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge," not merely the actual money that Defendants wrongfully obtained. Banner Fund Int'l, 211 F.3d at 617. Therefore, the United States' disgorgement calculation properly includes Defendants' gains from the illegal proceeds as calculated by the "time value of money," and ensures that Defendants do not profit from their RICO violations. Accord cases cited supra nn.124 & 125.[128]

The Court further notes, and appreciates, that the United States' experts were conservative in their estimates, effectively "rounding down" in several instances where the calculations or raw data were ambiguous. Cf. First City Fin. Corp., 890 F.2d at 1232 (noting that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty."); see also cases cited supra n.119. A similar prudence was exercised in its request for disgorgement: though the experts were able to reasonably calculate the "Youth Addicted proceeds" from 1954 (the beginnings of the scheme to defraud) to 2050 (projecting outward from youths who begin smoking today and who will, in likelihood, continue smoking), the United States seeks only to disgorge proceeds obtained from 1971 to 2001. It is also important to note that the "end date" of December 31, 2000 (i.e., ending the period 1971 to 2001) for calculation of proceeds was for logistical reasons (in that the United States' experts have calculated proceeds up to that point), and marks neither the cessation of Defendants' unlawful activities, see supra § III, nor the legal limit of disgorgement. In light of these factors, the Court concludes that the

[128] Moreover, Defendants' argument regarding their perceived differences between the meaning of "proceeds" and disgorgement of "ill-gotten gains" is an empty semantic diversion. Regardless of whether the two terms may have a different meaning in the abstract, throughout the course of this litigation the United States has used the terms "proceeds" from Defendants' unlawful conduct and Defendants' "ill-gotten gains" to mean the same thing – that is, Defendants' unlawful gains that are causally related to their unlawful conduct. More fundamentally, the label attached to Defendants' ill-gotten gains is irrelevant; rather, the dispositive issue is whether the United States' calculation of Defendants' ill-gotten gains constitutes a "reasonable approximation" of Defendants' gains that are causally connected to their unlawful conduct, which it does. See supra pp. 130-131.

request for $280 billion in disgorgement is both reasonable and appropriate.

For the foregoing reasons, the United States has demonstrated that its calculations of $280 billion dollars constitutes a "reasonable approximation" of Defendants' ill-gotten gains that are causally connected to Defendants' pervasive, fraudulent conduct.

D. "Causality" Does Not Require a Showing of Reliance, Which Is a Creature of Compensatory Damages Actions, Including Private Civil RICO Actions Under § 1964(c)

It is important to note that in order to determine the amount of profits unlawfully obtained, the United States need not show – and the Court need not find – the element of "reliance" that is required in a fraud suit for damages at common law or in a private civil RICO action brought under 18 U.S.C. § 1964(c).

Indeed, in this Court's decision denying Defendants' request for a trial by jury, the Court underscored the distinction between such equitable and legal actions, and concluded that "the disgorgement the Government seeks in this case is restitutionary," and explained that "[u]nlike damages, the purpose of which is to compensate the victims of a defendant's unlawful conduct, the purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains." Philip Morris, 273 F. Supp. 2d at 8, 10; see also id. at 9 n.9. ("Here, it is clear that the disgorgement the Government seeks is measured by Joint Defendants' gain and therefore meets the Crocker definition of restitution.").[129]

Generally, to demonstrate a right to relief in a damages action, the plaintiff must show

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[129] In addition, the Court rejected Defendants' attempt to conflate compensatory damages actions, which require proof of reliance, and the instant action under 18 U.S.C. § 1962(a), which does not. For the predicate offenses, the Court recognized that "[u]nlike common-law fraud, the mail and wire fraud statutes, whose violation constitute the predicate acts for the Government's RICO claim, **do not require proof of reliance or damages or completion of the scheme to defraud**," id. at 6, and for the United States' RICO conspiracy count, the United States need not "prove that it suffered any injury as a result of Joint Defendants' conduct. Neither is the Government required to sue for damages." Id. In other words, such common law damages claims depend upon a connection between "causation-in-fact" and the plaintiff's claimed injury.

that he or she was injured by the tortfeasor. See, e.g., Kitt v. Capital Concerts, Inc., 742 A.2d 856, 860-61 (D.C. 1999) (common law fraud action); Restatement (Second) of Torts § 525 (1979) (reliance an element of common-law fraud). The purpose of such compensatory relief is to make the plaintiff – the victim of the injury – whole. See Restatement (Second) of Torts § 901 (1979) (describing role of compensatory relief).[130] "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988) (private securities 10b-5 action); Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc., 3 F.3d 208, 214 (7th Cir. 1993) ("Sometimes this principle comes under the name 'loss causation': the plaintiff must establish that the misstatement caused him to incur the loss of which he complains; it is not enough to establish that the misrepresentation caused him to buy or sell the securities.").

The same interests are implicated in **private** civil RICO actions brought pursuant to 18 U.S.C. § 1964(c), which, unlike 18 U.S.C. § 1964(a), expressly incorporates the requirement that the plaintiff be "injured in his business or property by reason of a violation of section 1962" and provides that a private plaintiff may recover "threefold the damages he sustains."[131] See also First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1122 (D.D.C. 1996) (holding that § 1964(c) action survives the death of the defendant because the purpose of civil RICO's treble-

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[130] See also Restatement (Second) of Torts § 548A: "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance."

[131] "The phrase 'by reason of' in Section 1964(c) imposes a proximate cause requirement on the [private] plaintiffs." Masnik v. Bolar Pharm. Co., 1991 WL 138331, *6 (E.D. Pa. 1991) (citing cases); see also Nodine v. Textron, Inc., 819 F.2d 347, 348-49 (1st Cir. 1987).

Indeed, some courts have held that, even in private civil RICO cases, although the plaintiff must prove an injury to business or property, this does not necessarily require a showing of reliance. See, e.g., Systems Mgt., Inc. v. Loiselle, 303 F.3d 100, 104 (1st Cir. 2002) ("reliance is a specialized condition that happens to have grown up with common law fraud. Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way. . . . There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO.").

damages provision is compensatory); cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (purpose of treble damages provisions in Clayton Act is primarily compensatory).

As the Court has noted, equitable disgorgement, on the other hand, serves different objectives: "Disgorgement of ill-gotten gains is instead remedial, serving to deprive a wrongdoer of unjust enrichment as well as to deter." Philip Morris USA, 310 F. Supp. 2d at 63. Accord Bilzerian, 29 F.3d at 697 (quoting SEC v. Blatt, 583 F.2d at 1335); First Jersey Secs., Inc., 101 F.3d at 1475 ("Since disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched, it is unlike an award of damages . . . and is neither foreclosed nor confined by an amount for which injured parties were willing to settle.") (citation omitted).[132] Tull v. United States, 481 U.S. 412, 424 (1987) (purpose of disgorgement is restitution); SEC v. Alliance Leasing Corp., 28 Fed. Appx. 648, 652 (9th Cir. 2002) ("Disgorgement prevents unjust enrichment, requires return of ill-gotten gains and is independent of other remedies. The theory behind disgorgement is deterrence, not compensation." (citing cases)); FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) (purpose of disgorgement is not to compensate the victim, but to deter the offense); SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The [SEC] seeks disgorgement in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws. The theory behind the remedy is deterrence and not compensation. . . . Indeed, a district court may grant the

[132] The Restatement of Restitution also provides the distinction between the animating principles of restitution, as opposed to tort. Whereas tort law attaches liability "for pecuniary loss caused ... by ... justifiable reliance upon the misrepresentation," see Restatement (Second) of Torts § 525 restitution has no such requirement of injury. See Restatement (Third) of Restitution (Tentative Draft No. 1, 2001) § 13 cmt. e ("By contrast to the rule in tort, where a misrepresentation is actionable only if it results in pecuniary loss to the plaintiff, the rule of this section allows rescission without any showing that the transferor has suffered economic injury.").

Commission's request for disgorgement even where no injured investors can be identified.") (citations omitted); Blavin, 760 F.2d at 7136.

As the Supreme Court explained in the securities law context, profits can be disgorged to prevent unjust enrichment, which "clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the buyer's fraud." Randall v. Loftsgaarden, 478 U.S. 647, 663 (1986); Dobbs, Law of Remedies, § 3.1, at 278-280; Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965).[133] In light of the distinctive deterrence purposes served by disgorgement, it is immaterial whether a victim relied to his detriment on a wrongdoer's conduct.

E. Even Assuming That Reliance Were Required, the Court Finds Reliance

Even if reliance were a required element of proof to obtain disgorgement in a civil RICO action brought pursuant to § 1964(a), the Court concludes that there is sufficient evidence to demonstrate this reliance. It is particularly significant to note that the United States is not required to provide **individualized** proof that each consumer relied upon Defendants' misleading and fraudulent conduct. Rather, there are a variety of ways in which a court may find (and in which courts have found) reliance. Thus, courts are entitled to find reliance based upon circumstantial evidence, reasonable inferences, expert testimony, and various other types of evidence. See, e.g., Group Health Plan, 621 N.W.2d at 14 (Minn. 2001) ("[W]here the plaintiffs'

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[133] In ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990) the circuit court noted the difference between "actual damages" (such as those awarded in a Section 35(a) action), which "requires some showing of actual loss," and a profits award, as in trademark infringement actions, where "[a]wards of profits are justified under the theory because they deter infringement in general and thereby vindicate consumers' interests." Id. at 968. Importantly, the court of appeals stressed the distinction between such cases and the problems with confusing damages awards and disgorgement awards, noting that in compensatory "actual damages" cases, "deterrence alone cannot justify such an award." 913 F.2d 968-69; see also Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 48 F. Supp. 2d 37, 40-43 (D.D.C. 1999) ("Plaintiff's claim for disgorgement does not depend upon the vindication of individual class members' rights, but instead upon the disgorgement of money alleged to be unlawfully and inequitably held by defendants, ..."); Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 15 (Minn. 2001) ("To impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard . . . .").

damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of Defendants' products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct."); see also American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 167 (2d Cir. 1978). Indeed, even in private civil actions in the securities context, the Supreme Court has emphasized "[t]here is, however, more than one way to demonstrate the causal connection." Basic Inc. v. Levinson, 485 U.S. at 243.

Finally, the Court is entitled to rely on its own common sense and experience, including its "own experience and understanding of human nature in drawing reasonable inferences about the reactions of consumers" to Defendants' advertising and other misrepresentations. FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41-42 (D.C. Cir. 1985) (quoting McNeilab, 501 F. Supp. at 525); see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652-53 (1985) (noting that, in the context of contingency-fee advertisements regarding legal fees and costs, "it is a commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'" and that, where advertisements deception is "self-evident," it will not require survey evidence to conclude that a statement is misleading) (citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-392 (1965) (refusing to require consumer survey evidence in deceptive advertising case, because of reasonable inference that once the deceptiveness is proven, "the deception will constitute a material factor in a purchaser's decision to buy.")).

Based on the foregoing permissible categories of evidence, the Court concludes that

consumer reliance upon Defendants' fraudulent misconduct, though not required, has been established.

1. Evidence that Defendants Intended Reliance Constitutes Evidence That Defendants, In Fact, Caused Reliance

As discussed in the Court's Findings of Fact, Defendants intended the public, including and especially youths, to rely upon their false, fraudulent, and misleading statements, and to be influenced by their marketing and advertising. See U.S. FPFF §§ IV.G.4-7 & IX ¶¶ 6-11, 68-105, 122-126. The Cigarette Company Defendants spent billions of dollars, directly and through others (including Defendants TI and CTR), to publicize their "party line" regarding smoking and health, about addiction, and concerning the other aspects of the scheme to defraud. See U.S. FPFF §§ I.B., II ¶¶ 75-77 and IX ¶¶ 68-70. Individually and collectively, Defendants employed numerous consultants, including advertising agencies and public relations firms, to perfect the efficacy of their message. These facts allow the Court to make the entirely reasonable inference that, in fact, the public relied on Defendants' false, fraudulent, and misleading statements. See also FTC v. Brown & Williamson, 778 F.2d at 41-43 (defendant's "vast expenditure of advertising dollars on tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended.")[134]

Moreover, where the deceptive and false statements were intentional, as here, a court may conclude that Defendants' profits were causally related to the fraud. See, e.g., U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-42 (9th Cir. 1986) ("'[p]ublication of deliberately false

[134] Indeed, one Defendant in this litigation has asked another court, in a commercial dispute, to find reliance based on the intent of its competitor. Philip Morris Inc. v. Star Tobacco Corp., 879 F. Supp. 379, 386-87 (S.D.N.Y. 1995) (evidence that defendant intentionally copied Philip Morris' "Marlboro" with defendant's "Gunsmoke" cigarettes, "justifies a presumption of confusion, even in the absence of actual proof"); accord McNeilab, Inc. v. Am. Home Products Corp., 501 F. Supp. 517, 529-30 (S.D.N.Y. 1980), modified on other grounds, 501 F. Supp. 540 (S.D.N.Y. 1980), aff'd, 938 F.2d 1544 (2d Cir. 1991) ; Polo Fashions, Inc. v. Extra Special Prods., Inc., 451 F.Supp. 555, 562 (S.D.N.Y. 1978).

comparative claims gives rise to a presumption of actual deception and reliance'" (quoting the district court); accordingly, "[t]he amount to be awarded is [not limited to defendant's profits, but is] the financial benefit [the defendant] received because of the advertising"); PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc., 818 F.2d 266, 272-73 (2d Cir. 1987) ("Having established falsity [of advertising], the plaintiff should be entitled to both injunctive and monetary relief, regardless of the extent of impact on consumer purchasing decisions" (citation and internal quotation marks omitted)); McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517, 529-30 (S.D.N.Y. 1980) (false advertising case), modified on other grounds, 501 F. Supp. 540 (S.D.N.Y. 1980), aff'd, 938 F.2d 1544 (2d Cir. 1991); Polo Fashions, Inc. v. Extra Special Products, Inc., 451 F. Supp. 555, 562 (S.D.N.Y. 1978) (trade dress/consumer confusion case); Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 543 n.3 (2d Cir. 1956) ("Evidence of the alleged infringer's intent to cause confusion, though not essential to a trade-mark or unfair competition action is relevant as an opinion by one familiar with market conditions, the alleged infringer himself, that there is likelihood of confusion.").[135]

When a non-false but allegedly misleading advertisement or representation is at issue, a court may infer consumer reliance or confusion when the plaintiff demonstrates that the defendant acted with intent to deceive the public. See, e.g., Riggs Inv. Mgmt. Corp. v. Columbia Partners, 966 F. Supp. 1250, 1269 (D.D.C. 1997) (injunction); Resource Developers, Inc. v.

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[135] Cf. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15 (1st Cir. 1986) ("a court may grant [injunctive] relief on the basis of its own findings without reference to consumer reaction to the product when the defendant's representations are actually false.") Accord Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 317 (2d Cir. 1982) (collecting cases); Harold F. Ritchie, Inc. v. Chesebrough-Pond's Inc., 281 F.2d 755, 761 (2d Cir. 1960) ("Actual confusion or deception of purchasers is not essential to a finding of trademark infringement or unfair competition, it being recognized that 'reliable evidence of actual instances of confusion is practically almost impossible to secure'") (citations omitted); see also Vasquez v. Superior Court, 484 P.2d 964, 972 (Cal. 1971) (reliance "may be inferred from the circumstances attending the transactions which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." (internal quotation marks omitted; citing cases)).

Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991) (damages).[136] Some courts have also indicated that deliberately deceptive conduct is of such "egregious nature" that a presumption of reliance is warranted. PPX, 818 F.2d at 272; Resource Developers, 926 F.2d at 140.

Similarly, in advertising cases, courts regularly assume that advertisements have at least some effect on their targeted market. See, e.g., McNeilab, 501 F. Supp. at 529-30 (collecting cases; "in a false advertising case such as this one, proof that the advertiser intended to communicate a false or misleading claim is evidence that that claim was communicated, since it must be assumed that more often than not advertisements successfully project the messages they are intended to project, especially when they are professionally designed, as the ones involved here were."); accord Polo Fashions, 451 F. Supp. at 562 ("Once the intent to cause confusion is established, the Court will presume that the infringer accomplished his purpose. The presumption is supported on the theory that the infringer, as an expert in the market he has chosen to enter, is correct in his assessment that public confusion will result."); see also Philip Morris Inc. v. Star Tobacco Corp., 879 F. Supp. at 387 (granting preliminary injunction despite lack of any evidence of actual consumer confusion, where products were similar, and where evidence that defendant's conduct in copying Marlboro cigarettes was intentional) (citing Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 204 (1942)).

Defendants' intention that consumers would rely on their statements and marketing communications is evinced in both their documents and in testimony. For instance, Philip

[136] In Resource Developers, the court stated: "Once it is shown that a defendant deliberately engaged in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public. Therefore, upon a proper showing of such deliberate conduct, the burden shifts to the defendant to demonstrate the absence of consumer confusion." 926 F.2d at 140.

Morris executives in 1964 emphasized how "we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." Along similar lines, BATCo concluded in 1979 that many smokers do not accept that smoking is dangerous and that "smokers are more ready to deny the validity of the evidence, or consciously suppress their awareness of overt propaganda." See 105562110-2189 at 2165 (U.S. Ex. 21,516).

In particular, Defendants' promotion and public statements regarding "light" cigarettes shows this intent to "intercept" smokers to prevent them from quitting. For example, a Brown & Williamson document from 1986 states "Quitters may be discouraged from quitting, or a least kept in the market longer. . . . A less irritating cigarette is one route (indeed, the practice of switching to lower tar cigarettes and sometimes menthol in the quitting process tacitly recognises this)." See U.S. FPFF § IV.F ¶ 2909. Likewise, a BATCo report from a conference in the mid-1980s describes low-tar cigarettes "more as a third alternative to quitting and cutting down – a branded hybrid of smokers' unsuccessful attempts to modify their habit on their own." U.S. FPFF § IV.F ¶ 2917.

As described in the Court's Findings of Fact, see U.S. FPFF § IV.G. 3-7; § IX ¶¶ 71-104. Defendants' intent to market to young people was a central focus of their fraudulent scheme. As Diane Burrows of Reynolds wrote in February of 1984, "Younger adult smokers are the only source of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." See U.S. FPFF § IV.G ¶ 4053. In September of 1974, Mr. C. A. Tucker, Reynolds' vice president of marketing, wrote as follows in a presentation to the Board of Directors: "this young adult market, the 14-24 age group, ... represent tomorrow's cigarette business. As this 14-24 age group matures, they will account for a key share of the total cigarette volume – for at least the next 25 years." See

U.S. FPFF § IV.G ¶ 3959. A document produced by B&W, entitled the "The 'New' Smoker," concludes in a section entitled "Summing Up" that "the younger smoker is of pre-eminent importance." See 682341328-1367 at 1361 (U.S. Ex. 30,956). As Lorillard put it quite bluntly, "the base of our business is the high school student." See U.S. FPFF § IV.G ¶ 3755.

In sworn testimony, Defendants' own representatives corroborate their intent to induce reliance on their public statements. Joseph Cullman, who was vice-president of Philip Morris in 1954 and ultimately became its President and CEO, admitted in the State of Minnesota litigation that the industry intended that smokers rely upon the Frank Statement, one genesis of Defendants' deception of the public:

> Q. . . . The cigarette companies intended consumers to read this Frank Statement; correct?
> A. Yes.
>
> Q. And you hoped people would believe them; right?
> A. Yes.
>
> Q: Conduct their affairs with the belief that what is asserted herein is true and accurate.
> A. I believe it was true and accurate.
>
> Q. And you wanted the people who read this to believe that it was true and accurate; correct?
> A. I would expect that was the reason, yes.
>
> Q: Okay. And you wanted them, in conducting their affairs, to rely on the facts asserted herein as being true and accurate; right?
> A. They were true and accurate.
>
> Q. And you wanted people to believe and rely on that; right?
> A. I see no reason why they shouldn't . . . . We hoped they would.
>
> Q. . . . And that's what you wanted then; right?
> A. Yes.

See U.S. FPFF § IX ¶ 123.

Likewise, Lorillard's former CEO, Alexander Spears, testified that he believes smokers should rely upon statements by the Tobacco Institute that smoking does not cause cancer:

> Q. And to the extent that Tobacco Institute has made that statement [smoking not proved to cause lung cancer] publicly in the past, do you believe that smokers have the right to rely upon that statement?
> A. I believe they should have – they should rely on information that's provided along with other information that they have.

See id. ¶ 124.

Walker Merryman, former spokesperson for the Tobacco Institute, explained how Defendants intended that smokers rely upon the industry's public statements that no scientific proof showed cigarette smoking to be hazardous:

> Q. . . . And it is true, isn't it, that the Tobacco Institute has consistently in its public statements on smoking and health taken the position that no scientific proof had been found to convince – to convict smoking as a hazard to health?
> A. We have said that from time to time.
>
> Q. And in fact you intended people who received this publication and read it to believe what was being said; correct?
> A. Correct.
>
> Q. . . . And sir, the sentence – the paragraph goes on to say, quote, "The statistical, clinical and experimental findings have not established smoking as a cause of any disease," close quote.
> A. That – that is correct.
>
> Q. And in fact The Tobacco Institute intended the people who received this publication and read it to believe what the Tobacco Institute was saying.
> A. Yes.

See id. ¶ 125.

2. Defendants' Substantial Expenditures in Furtherance of Their Fraudulent Scheme, and Their Resulting Profits, Demonstrate Reliance

Additionally, reliance may be presumed where, as here, Defendants spend billions of dollars in promulgating the fraud. In FTC v. Brown & Williamson, 778 F.2d at 42, the D.C.

Circuit noted that the defendant's "vast expenditure of advertising dollars on tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended." See also U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986) ("[t]he expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded."); Resource Developers, 926 F.2d at 140; Riggs Investment, 966 F. Supp. at 1269 n.12.

Here, given the efforts Defendants have made and expended in furtherance of their scheme, such an inference is justified. In furtherance of their scheme to defraud, Defendants have employed high-profile public relations firms; marketing and advertising experts; psychologists and behavioral scientists; they have created entire departments related to marketing and public relations; and they have spent **billions** of dollars annually in marketing their products, and over a billion dollars in funding TI and CTR to promulgate false and misleading public statements and fictitious research. See U.S. FPFF §§ I.B, I.C, IV.G. In 2000 alone, Defendants spent over $9 billion marketing cigarettes. See U.S. FPFF §§ IV.G ¶ 4184; IX ¶ 70. No person – let alone a Fortune 500 company – does so without the prospect of a return on their investment. The Court concludes that such efforts in themselves evince reliance.[137]

Furthermore, the profitability of Defendants' misconduct also allows for a fair inference of reliance. See Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1257 (D. Kan.

[137] Despite Defendants' representations to the contrary, brand switching between companies could not possibly justify over $9 billion in marketing expenditures since only 6.7% of adult smokers switch companies. See also U.S. FPFF § IV.G ¶¶ 3291-3292, 3298-3300, 3496-3505 (discussing role of advertising and marketing in smoking initiation, rather than "brand-switching"). Defendants' internal admissions corroborate this finding. See, e.g., id. (1990 R.J. Reynolds document noting that "much of switching tends to be random noise").

2002):

> Reynolds is hugely profitable. . . . [T]here is no question that Reynolds reaped enormous profits from the sale of its cigarettes. **The court infers from the evidence that but for Reynold's misconduct, fewer people would have begun to smoke and those who had begun but desired to quit would have realized that the task might involve professional help. Knowledge that a product is not only risky to your health but also is addictive would seem to be a severe deterrent to consumption**. The evidence does not permit a precise estimate of how many fewer cigarettes Reynolds would have sold had it been honest about the choice its potential consumers were asked to make. **But, the vigor with which Reynolds pursued its campaign of concealment and obfuscation leads this court to the conclusion that the profitability of the misconduct was high**.

Id. at 1257 (emphasis added). As in Burton, the Court concludes that Defendants' extensive scheme to defraud, well-funded and staffed and generating billions of dollars of profits, provides additional circumstantial evidence that these profits were causally derived from the fraud.[138]

3. Expert Testimony Demonstrates Reliance

Furthermore, the United States' expert reports and testimony, which the Court is entitled to credit, demonstrates the causal connection between Defendants' fraud and their improper profits. See FTC v. Brown & Williamson, 778 F.2d at 41 ("A Court may give weight to expert testimony" to determine whether representations had a tendency to deceive consumers); First City Fin. Corp., 890 F.2d at 1231-32; Silver v. United States Postal Serv., 951 F.2d 1033, 1042 (9th Cir. 1991) (expert testimony that the average reader would be deceived by advertisements); Resorts Int'l, Inc. v. Greater Bay Hotel & Casino, Inc., 830 F. Supp. 826, 838 (D.N.J. 1992)

[138] Additionally, where the alleged misrepresentation may impact public health, the burden of proving reliance should be relaxed. For instance, in McNeilab, the court considered the defendant's "insensitivity [to intimations that its commercials were misleading] irresponsible" in part because "those commercials have a bearing on matters of public health." 501 F. Supp. at 531. The court stated: "Here we are concerned primarily with public health, not profits. . . . There is thus a public interest in avoiding confusion . . . above and beyond the economic interest normally present in infringement cases. With the consequences of confusion so much more serious, relief should be granted upon lesser proof of confusing similarity in a prescription drug case than in other areas of infringement litigation." Id. at 540 (internal citations omitted).

(expert testimony regarding "subliminal" or "unconscious" consumer confusion); Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 486 F. Supp. 414, 428 (S.D.N.Y. 1980) (expert testimony that consumers would act in a particular way to find an inference of confusion between magazine titles), aff'd 687 F.2d 563 (2d Cir. 1982).

As set forth in the Court's Findings of Fact, the United States' experts reasonably and credibly demonstrate how Defendants' decades-long campaign of fraud could, and did, attract and maintain smokers. For example, the United States' marketing experts showed how cigarette marketing stimulates demand for cigarettes and, contrary to Defendants' explanation, is not solely (or even primarily), used for "brand switching" purposes. Those experts also demonstrated how such marketing appeals to young people, whom Defendants recognize are the primary source of (in the words of one Defendant) "replacement" smokers – new consumers, frequently teenagers, who substitute for those who have quit or died off as a result of smoking. The vast majority of new smokers begin as adolescents, and Defendants depend on youth for the survival of their business. See U.S. FPFF § IV.G ¶¶ 3490-3505; § IX ¶¶ 68, 72-79, 84-87.

The expert witnesses further explained how youth underestimate the health hazards of smoking, as well as their failure to appreciate the risk of addiction. See U.S. FPFF § IV.G ¶¶ 3292, 3303, 3493; § IX ¶¶ 11, 77-79. Defendants' messages, images, and merchandise used in cigarette marketing have corresponded to adolescent aspirations, and appeal to those themes and imagery most attractive to youth. Defendants exploit this vulnerability to imagery and selects marketing themes of independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness, and being "cool." See U.S. FPFF § IV.G ¶¶ 3500-3504; § IX ¶¶ 72-89.

While encouraging a theme, Defendants also disseminate their marketing messages and

materials in forums where they are very likely to reach a youth audience. For instance, as explained by the United States' experts, Defendants have long placed certain advertisements in magazines and other venues that traditionally and currently reach millions of teenagers. Defendants' recent expenditures show a dramatically increased attention to trade promotions, including "slotting fees," rebates, free products, display cases, and other point-of-sale benefits for retailers. These payments and promotions reduce prices and create tobacco-friendly environments that stimulate a lift in sales, particularly among new or occasional smokers. Young people are also tempted to smoke by the ubiquity of these tobacco-friendly environments in retail outlets, such as convenience stores, gas stations, and groceries, and payments to retailers encourage stores to be lax about youth pilferage and underage sales of cigarettes. See U.S. FPFF § IV.G ¶¶ 3506-3516, 4176-4206.

Moreover, expert testimony establishes that cigarette marketing has been and continues to be quite effective in influencing young people to smoke. The data indicates that young people who are more familiar with cigarette advertising are more likely to begin smoking; that increased expenditures on cigarette marketing campaigns have been associated with increases in the incidence of smoking among adolescents; adolescents who are exposed to more cigarette advertising are more likely to begin smoking; and the brands that are most popular with young people are the ones where ads are designed to appeal to their needs and the most money has been spent on marketing activities, including advertising and promotions. See U.S. FPFF § IV.G ¶ 3497.

Over the past ten years, at least six comprehensive reviews have been conducted of the scientific evidence concerning the effects of cigarette marketing activities on smoking decisions by young people. Each review has come to the same conclusion: the weight of all available

evidence, including survey data, scientific studies and experiments, and behavioral and econometric studies, supports the conclusion that marketing, including advertising and promotion, is a substantial contributing factor in the smoking decisions of young people, including the decision to initiate and to discontinue smoking. See U.S. FPFF § IV.G ¶ 3296; § IX ¶13. Analysis by economists and public health specialists support the conclusion that the initiation rates of young people are enhanced by pro-smoking marketing and depressed by anti-smoking information. For example, the rise in the rate of initiation among twelve to eighteen year-old girls during the late-1960s and early 1970s paralleled the marketing of cigarette brands specifically targeted to women. U.S. FPFF § IV.G ¶ 3504.

Similarly, Defendants recognize the importance of price-based marketing efforts, particularly to attract and maintain young people. Typically, youth are two to three times more price-sensitive than adults. Likewise, price-related marketing efforts, such as coupons, multi-pack discounts, and other retail value-added promotions, have partially offset the impact of higher list prices for cigarettes, particularly with regard to young people. See U.S. FPFF § IV.G ¶¶ 4138-4139; § IX ¶¶ 104-105.

Additionally, the United States' experts explained how Defendants' false and misleading statements not only attract new consumers, but also allow smokers to "rationalize" their continued smoking, and to encourage them not to quit. For instance, Defendants' maintenance of an "open controversy" public relations position allowed smokers to believe that, because the case for causation had not yet been scientifically proven, they could continue smoking. Certain experts pointed out that "light" or "low tar" cigarettes, though no less hazardous than "full flavor" or regular cigarettes, are believed to be safer by smokers. Through their advertising and marketing, Defendants themselves have aggressively exploited this belief by implying such

comparative safety, and that smoking "light" cigarettes is an acceptable alternative to quitting. Indeed, Defendants themselves referred to such products as "health reassurance" cigarettes, even while their own research yielded data showing that such cigarettes were unlikely to be any safer than other cigarettes. See U.S. FPFF § IV.F ¶¶ 2489, 2494, 2870-2875; § IX ¶¶ 88-98, 119-121.

The United States also presented extensive evidence, both in expert testimony and from Defendants' own documents, on addiction and the role of nicotine. As explained more fully in the Court's Findings of Fact, see U.S. FPFF § IV.E, nicotine is a dependence-producing drug that meets all widely accepted criteria for determining that a drug is dependence producing. Although nicotine naturally occurs in the tobacco plant, the modern cigarette is a highly engineered and sophisticated product in both manufacture and design. In addition to engineering a product that allows smokers to obtain their optimum dose of nicotine sufficient to maintain pharmacological addiction, Defendants manipulate the cigarette to optimize the delivery of the nicotine itself so that it efficiently delivers the drug to the brain. See U.S. FPFF § IV.E(1). Nicotine addiction alters brain chemistry and affects the way a person feels, behaves, and functions – including a person's propensity and difficulty in quitting smoking. Thus, as Defendants have long known, smokers' physiological and psychological need to satisfy their nicotine addiction influences how they receive, interpret, and respond to Defendants' public statements about the health effects and addictiveness of smoking, and their marketing of "light" cigarettes.

Finally, economic theory as well as other scientific evidence demonstrate that American consumers have reduced their use of cigarettes in response to accurate information concerning the health hazards of smoking. For instance, there was a 20% reduction in teenage smoking prevalence during 1968-1970 Fairness Doctrine when Public Service Announcements concerning the health hazards of smoking ran in one to four ratio with cigarette advertising, and then per

capita consumption rebounded during the years 1971-1974, after anti-smoking commercials were removed from the airways. See Expert Report #1 of Jeffrey Harris, United States v. Philip Morris, et al. (R.660; filed Nov. 15, 2001) at 37-38. Dr. Jeffrey Harris's analysis of surveys performed during 1964-1975, which appeared in the 1979 Surgeon General's Report, strongly suggested that quitting smoking was a major factor in the decline in per capita consumption during 1968 to 1970, when anti-smoking advertisements aired on prime time television. See id. at 38-39. A recent recalculation of historical quit rates by Dr. Burns, another expert, has confirmed the marked rise in quit rates during the prime-time anti-smoking advertisements and a decline in quitting after the barrage of public service ads disappeared from the airways . See id. at 39. Likewise, expert testimony establishes that had Defendants not engaged in a concerted campaign of misinformation and concealment, smoking rates would have been higher and the rate of smoking initiation would have been lower. Therefore, absent Defendants' misconduct, the total consumption of cigarettes would have declined more rapidly over time. See U.S. FPFF § IV.F ¶ 2872; § IX ¶ 37, 71-78, 121.

Accordingly, the Court credits the United States' proffered expert testimony that Defendants' actions substantially contributed to, and continue to contribute to, widespread initiation of smoking behavior among young people and others and to the persistence of smoking among adolescents and adults in the United States.

4. Defendants' Own Admissions Demonstrate Reliance

Finally, Defendants themselves have admitted, directly and indirectly, that not only did they intend reliance, but in fact members of the public did, in fact, rely on their false, misleading, and fraudulent statements. As noted in the Court's Findings of Fact, Defendants intended that their scheme to defraud would enhance and preserve the market for cigarettes. See U.S. FPFF §§

I, IV and IX.

Defendants' own documents show that such plans were successful. For instance, in 1955, the scientific director of TIRC stated that "the phase of uncontrolled fear . . . created by the original premature and overbalanced statement of the American Cancer Society is rapidly passing," and noted the "general trust which the American people had begun to place in our efforts." Another industry response also lauded the success of TIRC in inspiring this trust: "There is absolutely no question in my mind that if this committee [TIRC] had not been formed, the industry by now would have been in a deplorable position. . . . In other words, the TIRC has been a successful defensive operation." See U.S. FPFF § IX ¶¶ 90-91.

One Defendant's executive, Eric Gesell of the American Tobacco Company, admitted in a deposition in the State of Minnesota litigation that sales are one of the best measures of reliance.

> Q: You expect people to be able to rely on the advertising that you place on behalf of the American Tobacco Company; correct?
>
> DEFENSE COUNSEL: Object to the form.
> A. Sure.
> Q. And you know, in fact, people will rely?
> A. Yes.
> Q. And one of the best measures of reliance would be sales; correct?
> DEFENSE COUNSEL: Object to the form.
> A. Correct.

See U.S. FPFF § IX ¶ 126.

A 1989 tobacco industry document created by Ronald Tully of INFOTAB stressed the import of using manufacturers' organizations, such as TI and INFOTAB, as well as industry networks. Tully noted that

> [a]s an industry we must be pre-emptive by developing and fostering coalitions with long-established and well respected trade, political and

> freedom associations. . . . We need to frame the advertising issue at a very basic level and present the case to the public. The way to influence opinion former is to take your case to the public and obtain their participation in the fight against advertising restrictions.

Tully's point was made evident in his conclusion: "Just remember, we lose more to the bottom line each year in markets as a direct result of the policies pushed by the anti-smoking fraternity. Can we afford to let these groups continue their propaganda unabated.??" 2021593776-3779 (U.S. Ex. 20,350).

Similarly, various Defendants' internal documents show Defendants' efforts to capitalize upon smokers' "rationalization" of smoking. For instance, high level Philip Morris executives described how "we must in the near future provide some answers which we give smokers a psychological crutch and a self-rationale to continue smoking." And as noted supra, a 1979 study by BATCo found that many smokers do not accept that smoking is dangerous and "smokers are more ready to deny the validity of the evidence, or to consciously suppress their awareness of overt propaganda." See 105562110-2189 at 2165 (U.S. Ex. 21,516). Defendants knew that their maintenance of an "open controversy" enabled smokers to justify their continued smoking. For instance, Reynolds commissioned a "smoking environment" study and discovered that smokers rationalized the risks of smoking and "discounted the 'statistical risks' of smoking." See U.S. FPFF § IV.A ¶ 308.

Similarly, a 1989 market plan for R.J. Reynolds' Salem brand cigarettes promotion "Salem Soundwaves," showed both the nature of the critical market, as well as the reason why the company should plan its success. The document describes the target demographic as:

> less educated than others . . . . into escapism because they have no intellectual diversions . . . . more immature in some cases than college kids . . . . They're less formed intellectually . . . more malleable. . . . These kids see themselves as grownups . . . . There are lots of young people at

> Rolling Stones concerts . . . . Should we be more involved with skin events? . . . with kids trying to meet each other?

See 515603998-4000 (U.S. Ex. 20,864).

Likewise, in the area of "light" or "low tar" cigarettes, Defendants not only intended consumers to rely on their implied (and false) statements that such cigarettes were somehow healthier, but they remarked upon the success of these statements in reassuring consumers and in discouraging them from quitting smoking. For instance, Philip Morris referred to such "light" cigarettes as the company's "traditional response to anti-smoking publicity." See U.S. FPFF § IV.F ¶ 2599. Moreover, a November 13, 1973 presentation by A.W. Spears, a Lorillard scientist and later CEO, stated: "Clearly, the consumer is concerned about smoking and health, and is convinced in varying degrees that smoking is a possible detriment to his health. Presently, this factor is of active interest to R & D, since it has been used to an advantage in marketing both the KENT and TRUE brands." U.S. FPFF § IV.F ¶ 3284. Brown & Williamson conducted a focus group survey of smokers in 1977, discovering that "almost all smokers agree that the primary reason for the increasing acceptance of low tar brands is based on the health reassurance they seem to offer." See U.S. FPFF § IV.F ¶ 2684. Brown & Williamson concluded that such reassurances were indeed effective, and noted that its Viceroy longer, "high-filtration" cigarettes, touted as "double-barreled health protection" in fact "attracted smokers in droves," and "could not begin to supply the demand . . . ." See U.S. FPFF § IV.F ¶ 2669. The presence of what was perceived, in reliance on industry action, to be a safer cigarette was a substantial cause of continued smoking. BAT knew, for example, that the ventilated cigarette ("low tar") "is emerging as an important health reassurance mechanism for many smokers" and that such a mechanism would prevent smoking rates from declining. See U.S. FPFF § IV.F ¶ 3274.

Finally, Defendants' internal documents indicate that Defendants knew that, because most "starter smokers" are teenagers, their marketing efforts should appeal to this important demographic. While publicly denying that they marketed their products to attract youth, internal documents reveal that Defendants understood the import of their marketing to obtaining the next generation of smokers, and documented their success in doing so. In 1978, a Lorillard employee indicated the "success" one of his brands, Newport: "**the base of our business is the high school student.**" See U.S. FPFF § IX ¶ 85; § IV.G ¶ 3755 (emphasis added). Philip Morris also boasted of its success rate in attracting youths: "It has been well established . . . [by studies] that Marlboro has for many years had its highest market penetration among younger smokers. Most of these studies have been restricted to people age 18 and over, but my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15-17 year-olds." See U.S. FPFF § IV.G ¶ 3582. Indeed, Philip Morris marketing documents show that the company knew that "Marlboro dominates in the 17 and younger age category, capturing over 50% of this market." Id.

5. Youth Marketing

The Court's consideration of reliance is also informed by the fact that one principal target of Defendants' fraudulent campaign was minors. As recognized in both judicial decisions and positive enactments, "[c]hildren have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The law provides that minors are a "protected class" subject to the state's parens patriae authority and protection. Prince v. Massachusetts, 321 U.S. 158 (1944); Ginsberg v. New York, 390 U.S. 629, 631 (1968); Chesapeake & O. Ry. Co. v. Stapleton, 279 U.S. 587 (1929) (state has power to forbid employment of children of tender age in dangerous work); (Santosky v. Kramer, 455 U.S. 745,

766 (1982) (discussing parens patriae powers and interests regarding children and parental fitness determination)); Lassiter v. Dep't of Social Servs. of Durham Cty., 452 U.S. 18, 27 (1981) (upholding involuntary termination of parental rights and noting state's "urgent interest in the welfare of the child").

Moreover, the law recognizes that minors are not held to the same standards of responsibility and cannot be held to the same standards of care as adults. "Because of their youth and inexperience, minors are subject to different rules with respect to contractual responsibilities, criminal law, voter rights, and driver's license requirements." In re Welfare of C.P.K., 615 N.W.2d 832, 836 (Minn. App. 2000). At common law, minors cannot appoint an agent,[139] including a power of attorney.[140] Nor can (subject to narrow exceptions) minors be bound by contract,[141] and special rules govern them in tort.[142]

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[139] See, e.g., Restatement (Second) of Agency § 10 (1958); Schmidgall v. Engelke, 224 N.E.2d 590 (Ill. App. 1967); Appel v. Smith, 63 F. Supp. 173 (N.D. Ind. 1945); Bell v. Green, 423 S.W.2d 724 (Mo. 1968); Siegelstein v. Fenner & Beane, 17 S.E.2d 907 (Ga. App. 1941); Wilson v. Moudy, 123 S.W.2d 828 (Tenn. App. 1938); Hodge v. Feiner, 78 S.W.2d 478 (Mo. App. 1935); Potter v. Fla. Motor Lines, 57 F.2d 313 (S.D. Fla. 1932); Blomquist v. Jennings, 250 P. 1101 (Or. 1926); Curtis v. Alexander, 257 S.W. 432 (Mo. 1923); Sims v. Gunter, 78 So. 62 (Ala. 1918); Weidenhammer v. McAdams, 98 N.E. 883 (Ind. App. 1912); Holden v. Curry, 55 N.W. 965 (Wis. 1893); Trueblood v. Trueblood, 8 Ind. 195 (Ind. 1856); Ware v. Cartledge, 24 Ala. 622 (Ala. 1854); Palmer v. Miller, 43 N.E.2d 973 (Ill. 1942).

[140] See, e.g., McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918); Glass v. Glass, 76 Ala. 368 (1884); Philpot v. Bingham, 55 Ala. 435 (1876); Fuller v. Smith, 49 Vt. 253 (1875); Lutes v. Thompson, 5 Pa. C.C. 451 (Pa. Com. Pl. 1874); Pickler v. State, 18 Ind. 266 (1862); Knox v. Flack, 22 Pa. 337 (1853); Semple v. Morrison, 23 Ky. 298 (1828); Siegelston v. Fenner & Beane, 17 S.E.2d 907 (Ga. App. 1941).

[141] See, e.g., Sims v. Everhardt, 102 U.S. 300 (12 Otto 300) (1880); Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) ("The universal law . . . is that a minor cannot be held liable on his personal contracts or contracts for the disposition of his property."); Restatement (Second) of Contracts § 12(2)(b) (1981) (infants lack capacity to contract); Restatement (Second) of Contracts § 14 & cmt. a (1981) (noting that most states, by statute, have changed the age of majority to 18); Palmer v. Miller, 43 N.E.2d 973 (Ill. 1942); Johnson v. Turner, 49 N.E.2d 297 (Ill. App.2.Dist. 1943); In various states, a contract by a minor is voidable, not void. See, e.g., Simmons v. Parkette Nat. Gymnastic Training Center, 670 F. Supp. 140, 142 (E.D. Pa. 1987); Towle v. Dresser, 73 Me. 252 (1882); Feagles v. Sullivan, 32 Pa. D&C 47 (Pa. Com. Pl. 1938); Scott v. Schisler, 153 A. 395 (N.J. Sup. 1931); Benson v. Tucker, 98 N.E. 589 (Mass. 1912).

[142] In most tort actions, minors are not held to the same standards of care as are adults. See Restatement (Second) of Torts § 283A (1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid

(continued...)

The purpose of this heightened protection for minors is because, as Justice Stewart rightly observed, a child "is not possessed of that full capacity for individual choice . . . ." Ginsberg v. New York, 390 U.S. at 649-50 (Stewart, J., concurring). As the Supreme Court emphasized in Schall v. Martin, 467 U.S. 253, 265 (1984), "Children, by definition, are not assumed to have the capacity to take care of themselves," and the law accordingly reflects "the desirability of protecting the juvenile from his own folly." Id. (quoting People ex rel. Wayburn v. Schupf, 385 N.Y.S.2d 518, 520-21 (N.Y. 1976)); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").[143]

Indeed, the Supreme Court has on several occasions remarked about the "recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," Bellotti v. Baird, 443 U.S. 622, 635 (1979), and note the "Court's concern for the vulnerability of children" as a premise for its authority and protection. Id. at 634; see also Schall, 467 U.S. at 265-66 n.15 ("Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted . . . ." (citation and internal quotation marks omitted)); Bonner v. Moran, 126 F.2d

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[142](...continued)
being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances."). It should be reiterated that, despite Defendants' protestations to the contrary, none of the United States' claims for relief involve a "contributory negligence" or "assumption of the risk" analysis on the part of individual smokers.

[143] Of course, these legal principles are not mere legal fictions, but rather are grounded on fact. As reflected in this Court's Findings of Fact, this is particularly true of minors in appreciating the health hazards, and addictiveness, of smoking. Adolescents, more so than adults, underestimate the harmful consequences of smoking and substantially underestimate their risks of becoming addicted, long-term smokers. See U.S. FPFF § IX ¶ 77.

121, 122 (D.C. Cir. 1941) (surgeon may not perform nonemergency surgery on fifteen year old child without parents' consent, even where child consents; "In deference to common experience, there is general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.")[144]

The Court finds that Defendants chose to exploit this vulnerability. Accordingly, even if the Court were to assume – contrary to law and the evidence presented by the United States – (1) that the majority of the American public were **fully** aware of the actual hazards of smoking (despite Defendants' concealment and fraud); **and** (2) that Defendant's believability or unbelievability were somehow a defense in an action brought under § 1964(a) based on mail and wire fraud; **and** (3) that reliance were a required element of the United States' claims – because components of Defendants' fraudulent scheme was intended to attract teenagers, any assessment of "reliance" must account for children's greater vulnerability to Defendants' fraudulent representations, their greater susceptibility to addiction, their decreased ability to fully appreciate the hazards of smoking and the risk of addiction, and their lack of legal capacity in a variety of areas.

For the foregoing reasons, the evidence establishes that Defendants engaged in a massive pattern of intentional unlawful conduct in violation of RICO from late 1953 to the present. Accordingly, the Court concludes that each Defendant is liable under Counts III and IV of the

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[144] Accord City of New York v. Stringfellow's of New York, Ltd., 684 N.Y.S.2d 544, 550-51 (N.Y. App. Div. 1999) ("Infancy, since common law times and most likely long before, is a legal disability and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.").

First Amended Complaint, and awards appropriate equitable relief, including disgorgement and a permanent injunction.

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