

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED, et al.

Defendants.

Civil Action

No. 99-CV-02496 (GK)

Next scheduled court appearance:

July 15, 2004

**REDACTED FOR
PUBLIC FILING¹**

UNITED STATES' FINAL PROPOSED FINDINGS OF FACT

¹Information designated by Defendants as "Confidential" pursuant to Order #7 and Order #36 in the above-captioned action has been redacted. Order #7 allows each Defendant to designate as "Confidential" such information, document or material that it in good faith believes "derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure and use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy;" or information otherwise entitled to protection under Rule 26(c) of the Federal Rules of Civil Procedure. Order #36 allows each Defendant to designate as "Confidential" information that is entitled to protection pursuant to Order #7 and meets the further requirement that it is "so proprietary or competitively sensitive that its disclosure to a competitor would cause irreparable competitive injury."

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The Final Proposed Findings of Fact submitted by the United States establish facts that support the allegations set forth in Counts 3 and 4 of the United States' First Amended Complaint. Both counts are brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-1968. These facts establish entitlement to equitable relief, including the disgorgement of Defendants' ill-gotten gains and non-monetary injunctive measures. As set forth in these Final Proposed Findings of Fact, substantial evidence establishes that Defendants have engaged in and executed – and continue to engage in and execute – a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO. Moreover, Defendants' past and ongoing conduct indicates a reasonable likelihood of future violations.

Cigarette Smoking, Disease and Death

Cigarette smoking and exposure to secondhand smoke kills nearly 440,000 Americans every year. The annual number of deaths due to cigarette smoking is substantially greater than the annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides and AIDS combined. Approximately one out of every five deaths that occur in the United States is caused by cigarette smoking. Smoking causes lung cancer, atherosclerosis, bladder cancer, cerebrovascular disease, chronic obstructive pulmonary disease, cardiovascular disease, including myocardial infarction and coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, oral cancer, peptic ulcer disease, and respiratory morbidity. Smoking also causes cancers of the stomach, uterine cervix, pancreas, and kidney;

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acute myeloid leukemia; pneumonia; abdominal aortic aneurysm; cataract; and periodontitis. On May 27, 2004, the U.S. Surgeon General announced causal conclusions in connection with a substantial number of additional diseases and further acknowledges that smoking generally diminishes the health of smokers.

By the middle of the twentieth century, physicians and public health officials in the United States had widely noted an alarming increase in numbers of cases of lung cancer. Virtually unknown as a cause of death in 1900, by 1935 there were an estimated 4,000 deaths annually. A decade later, the annual death toll from lung cancer had nearly tripled. The meteoric rise in lung cancers followed the dramatic increase in cigarette consumption that had begun early in the twentieth century. Annual per capita consumption of cigarettes in 1900 stood at approximately forty-nine cigarettes; by 1930, annual per capita consumption was over 1,300; by 1950, it was over 3,000. Population studies showed that the increases in lung cancer cases and deaths, though they lagged in time behind this increase in cigarette use, closely tracked the spike in cigarette smoking. This apparent association led to considerable speculation about the relationship between cigarette smoking and ill health. The initial speculation was confirmed by scientific study.

By late 1953, there had been at least five published epidemiologic investigations, as well as others identifying and examining carcinogenic components in tobacco smoke and their effects. The researchers conducting these studies had come to a categorical understanding of the link between smoking and lung cancer. This understanding was both broader and deeper than that obtained from the case studies and preliminary statistical findings earlier in the century. While

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some of the epidemiological methods were innovative, the scientists using them were careful to approach them in a thorough manner; these methods were completely consistent with established scientific procedure and process. Epidemiology was not just based on statistics, but also was an interdisciplinary, applied field. The studies substantially transformed the scientific knowledge base concerning the harms of cigarette use. Unlike earlier anecdotal and clinical assessments, these studies offered new and pathbreaking approaches to investigating and resolving causal relationships.

The Formation of the Enterprise

In response to this growing body of evidence that smoking caused lung cancer, Defendants and their agents joined together and launched their coordinated scheme in the early 1950s. Defendants developed and implemented a unified strategy that sought to reassure the public that there was no evidence that smoking causes disease. At the end of 1953, the chief executives of the five major cigarette manufacturers in the United States at the time – Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard, and American – met at the Plaza Hotel in New York City with representatives of the public relations firm Hill & Knowlton and agreed to jointly conduct a long term public relations campaign to counter the growing evidence linking smoking as a cause of serious diseases. The meeting spawned an association-in-fact enterprise (“Enterprise”) to execute a fraudulent scheme in furtherance of their overriding common objective – to preserve and enhance the tobacco industry’s profits by maximizing the numbers of smokers and number of cigarettes smoked and to avoid adverse liability judgments and adverse publicity. The fraudulent scheme would continue for the next five decades.

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As a result of the Plaza Hotel meetings, the companies launched their long term public relations campaign by issuing the “Frank Statement to Cigarette Smokers,” a full page announcement published in 448 newspapers across the United States. The Frank Statement included two representations that would lie at the heart of Defendants' fraudulent scheme – first, that there was insufficient scientific and medical evidence that smoking was a cause of any disease; and second, that the industry would jointly sponsor and disclose the results of “independent” research designed to uncover the health effects of smoking through the new industry-funded Tobacco Industry Research Committee (“TIRC”), later renamed the Council for Tobacco Research (“CTR”). At the same time that Defendants announced in their 1954 "Frank Statement to Cigarette Smokers" that "we accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," they established a sophisticated public relations apparatus in the form of TIRC – based on the "cover" of conducting research – to deny the harms of smoking and to reassure the public. Once they had organized and set in motion the essential strategy of generating “controversy” surrounding the scientific findings linking smoking to disease, Defendants stuck to this approach, without wavering, for the next half-century.

Over time, other entities joined and actively participated in the affairs of the ongoing Enterprise and conspiracy, including Defendants Liggett and BATCo, Brown & Williamson's affiliate. In 1958, the members of TIRC formed Defendant The Tobacco Institute, Inc., to assume many of TIRC's public relations functions. In 1985, Philip Morris Companies joined the Enterprise, becoming a direct parent to Philip Morris as well as Philip Morris International,

which had previously been a division of Philip Morris.¹ The Enterprise operated through both formal structures, including jointly funded and directed entities such as TIRC/CTR and the Tobacco Institute, and other less formal means, including scientific and legal committees, to communicate, advance, and maintain a united front, and to ensure lockstep adherence to achieve their shared aims. Defendants developed and used this extensive and interlocking web because they recognized that any departure from the industry-wide approach to the content of public statements made anywhere in the world, or the nature of research would have severe adverse consequences for the entire industry. To coordinate and further their fraudulent scheme, Defendants made and caused to be made and received innumerable mail and electronic transmissions from the 1950s through present.

The Role of TIRC/CTR and the Tobacco Institute in Defendants' Decades-Long Campaign to Deny and Distort the Health Effects of Smoking

From the outset, the dual functions of TIRC/CTR, public relations and scientific research, were intertwined. Rather than carefully and critically assessing the emerging scientific data concerning the harms of smoking, TIRC/CTR focused its energies and resources in two areas. First, in its public relations capacity, it repeatedly attacked scientific studies that demonstrated the harms of cigarette smoke and worked to reassure smokers about cigarettes. Second, it developed and funded a research program that concentrated on basic processes of disease and

¹ In January 2003, Defendant Philip Morris Inc. changed its name to Philip Morris USA Inc., and Defendant Philip Morris Companies Inc. changed its name to Altria Group, Inc. These Final Proposed Findings of Fact refer to Philip Morris USA as “Philip Morris” and “Philip Morris USA” interchangeably, and refer to Altria as “Philip Morris Companies” and “Altria” interchangeably.

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that was distant from, if not completely irrelevant to, evaluating the immediate and fundamental questions of the risks and harms associated with smoking.

Similarly, the Tobacco Institute actively designed and wrote issue statements, advertisements, pamphlets, and testimony that advanced Defendants' jointly formulated positions on smoking and health issues, including denying that smoking cigarettes was addictive and caused diseases, and supporting the false claim that the link between smoking cigarettes (and exposure to secondhand smoke) and adverse health effects remained a legitimate "open question." In this way, the functions (public relations and research) of these two entities were integrally related; both were fully committed to Defendants' goals of denying and discrediting the substantial scientific evidence of smoking's harms and convincing the public (especially smokers and potential smokers) that smoking was not harmful to health.

Defendants repeatedly represented to the public that they sponsored independent research aimed at discovering the health effects of smoking. Indeed, Defendants claimed that they created TIRC/CTR to administer this effort. These statements were misleading and deceptive half-truths, because the Cigarette Company Defendants² used TIRC/CTR to serve as a "front" organization to advance their public relations and litigation defense objectives. Through CTR, the Cigarette Company Defendants funded "Special Projects" – research projects conceived and directed by committees of industry representatives, including lawyers, to support scientists who had shown a

²As used here and throughout these Final Proposed Findings of Fact and Conclusions of Law, "Cigarette Company Defendants" refers to Defendants American Tobacco, British American Tobacco (Investments) Limited, Brown & Williamson, Liggett, Lorillard, Philip Morris, and R.J. Reynolds.

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willingness and ability to generate information and provide testimony that could bolster the industry's litigation defenses before courts and governmental bodies and cast doubt on the scientific evidence that smoking caused cancer and other diseases. Similarly, Defendants also sponsored jointly funded research through lawyer-administered "Special Accounts" – to recruit and support industry-friendly researchers to serve as expert witnesses in litigation and to represent the industry's scientific position in legislative and regulatory proceedings.

Within the individual Cigarette Company Defendants, high-ranking corporate employees and lawyers, as well as outside lawyers representing the companies, acknowledged that if they conducted research internally that confirmed that cigarettes cause disease and are addictive, such research, if disclosed, would jeopardize their unified public relations and legal positions, would threaten industry profits, and would expose not just individual companies, but the entire industry, to legal liability and product regulation. Of course, the Cigarette Company Defendants did, in fact, acknowledge internally that cigarettes caused lung cancer and other diseases: they recognized the legitimacy of the scientific consensus, and the limited amount of internal research that their scientists did perform was wholly consistent with the results of mainstream scientific study.

The public statements issued through organizations like TIRC/CTR, the Tobacco Institute, and by Cigarette Company Defendants themselves, were flatly inconsistent with Defendants' actual understanding of the causal link between smoking and disease. At the same time that Defendants assured the public through their "Frank Statement" that "there is no proof that cigarette smoking is one of the causes [of cancer]," internally they documented a large

number of known human carcinogens in their products and replicated mainstream scientific research showing the health effects of smoking. Defendants' internal documents acknowledge that their public denial that smoking cigarettes causes disease both was contrary to the overwhelming medical and scientific consensus – established through extensive epidemiological and other scientific investigation by the early 1950s – and was intended to convince smokers and potential smokers that there remained genuine scientific “controversy” about whether smoking caused disease.

**The Agreement Not to Compete on Health Claims
or to Perform Certain Biological Research**

Defendants' joint commitment to publicly denying that cigarettes were a proven cause of disease had profound effects on all aspects of their business, including their marketing and research activities. For example, extensive documentary evidence proves that Defendants recognized that there was a substantial market for a cigarette that could be marketed as potentially less hazardous, but that they collectively agreed not to do anything in the marketing and development of cigarettes that would jeopardize the public relations position at the core of the scheme to defraud: the denial that any commercially sold cigarettes were a proven cause of disease.

Defendants made public statements proclaiming their commitment – and ability – to develop potentially less hazardous cigarettes, but indicated that such actions were unnecessary unless and until cigarettes were proven to cause disease:

- In March 1954, George Weissman, a Philip Morris Vice President, publicly reaffirmed the industry's commitment to protect the health of its customers, claiming that the cigarette industry would “stop business tomorrow” if it “had any

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thought or knowledge that in any way we were selling a product harmful to consumers.”

- In 1964, Bowman Gray, Chairman of the Board of R.J. Reynolds, stated publicly on behalf of R.J. Reynolds, Philip Morris, Brown & Williamson, Lorillard, Liggett, and American, that “[i]f it is proven that cigarettes are harmful, we want to do something about it regardless of what somebody else tells us to do. And we would do our level best. This is just being human.”
- In 1971, Philip Morris chief executive officer Joseph Cullman III explained in a “Face the Nation” TV interview that “this industry can face the future with confidence because when, as, and if any ingredient in cigarette smoke is identified as being injurious to human health, we are confident that we can eliminate that ingredient.”
- In the January 24, 1972 issue of the *Wall Street Journal*, Philip Morris Senior Vice President James Bowling declared that “[i]f our product is harmful . . . we’ll stop making it. We now know enough that we can take anything out of our product, but we don’t know what ingredients to take out.” Bowling further stated that “[w]e don’t know if smoking is harmful to health, and we think somebody ought to find out.”

Moreover, Defendants repeatedly recognized the potential economic boon to selling a cigarette that could be truthfully marketed as potentially less hazardous. For example, in a June 1966 report, a key Philip Morris researcher told research executives that “If we could develop a . . . ‘healthy’ cigarette that tasted exactly like a Marlboro, delivered the nicotine of a Marlboro, and was called Marlboro, it would probably become the best selling brand.” However, Defendants agreed not to compete on smoking and health issues in the marketing of cigarettes. Accordingly, when a Defendant designed a cigarette – or developed a cigarette component – intended to potentially reduce the delivery of harmful smoke constituents to the smoker, the Defendant limited the types of information that it provided to consumers in marketing such products.

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Evidence shows that Defendants failed to provide information – even if they believed it to be truthful scientific information – that certain brands or types of cigarettes were likely to be less harmful than others, because such information carried the obvious implication that cigarettes were harmful. In one of the most notable of such instances, after Defendant Liggett spent twelve years and \$15 million developing a cigarette – the XA – that its research showed to be significantly less carcinogenic than its conventional cigarettes, it killed the entire project before marketing the cigarette to consumers after Defendant Brown & Williamson threatened Liggett's "very existence" if it marketed the cigarette. Brown & Williamson also threatened to freeze Liggett out of joint defense agreements and exclude Liggett from the Tobacco Institute. Delivered through Brown & Williamson's representative on the Tobacco Institute's Committee of Counsel, the threat was based on Brown & Williamson's fear that selling XA would be an admission against the interest of all Cigarette Company Defendants. Later, in the late 1980s, R.J. Reynolds told the FDA that it would not make health-related marketing claims about its Premier cigarette because the tobacco industry maintained that “conventional cigarettes are not unsafe, and that it would never reverse this position.” Promoting one cigarette as “safer” than others “would be an indictment of the tobacco industry and its long standing position that conventional cigarettes are not unsafe.”

Similarly, documents show that Defendants limited the types of research they conducted, because they did not want to generate internal evidence to suggest that the companies believed there was any need to examine whether a causative link existed between smoking and disease, let alone create scientific information that demonstrated such a link. Accordingly, Defendants

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jointly agreed not to perform certain types of biological tests using commercially sold cigarette brands in their domestic research facilities. Further, there is substantial evidence that during the past five decades Defendants have decided not to incorporate design features or processes that Defendants' own research concluded were likely to reduce the hazards of smoking, were technically feasible, and were acceptable to smokers. In short, Defendants' conduct in this area is powerful evidence of Defendants' well documented agreement not to compete on smoking and health issues.

Environmental Tobacco Smoke

In their efforts to prevent restrictions on where and when people could smoke, in the face of growing evidence since the 1970s of the adverse health effects of secondhand smoke, Defendants engaged in similar conduct and misleading public statements concerning the health effects of secondhand smoke. Environmental tobacco smoke ("ETS"), also called secondhand smoke, is a mixture of mostly sidestream smoke given off by the smoldering cigarette and some exhaled mainstream smoke, which is the smoke an active smoker exhales. Conclusions about the causal relationship between ETS exposure and health outcomes are based not only on epidemiological evidence, but also on the extensive evidence derived from epidemiological and toxicological investigation of active smoking. Additionally, studies using biomarkers of exposure and dose, including the nicotine metabolite cotinine and white cell adducts, document the absorption of ETS by exposed nonsmokers, adding confirmatory evidence to the observed associations of ETS with adverse effects.

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In adults, ETS exposure causes lung cancer and ischemic heart disease. In 1986, the Surgeon General and the National Research Council of the National Academy of Sciences concluded that passive smoking causally increases the risk of lung cancer in nonsmokers, accounting for two to three percent of all lung cancer cases. ETS exposure of infants and children has adverse effects on respiratory health, including increased risk for severe lower respiratory infections, middle ear disease (otitis media), chronic respiratory symptoms and asthma, as well as a reduction in the rate of lung function growth during childhood, and is associated with sudden infant death syndrome and cognitive and behavioral disorders.

Defendants approached the issue of the health effects of exposure to secondhand smoke with a sense of urgency, based on their concern as expressed in internal documents, that in the United States, the ETS issue would have a devastating effect on sales. Defendants specifically saw concerns about the health effects of ETS as a threat to the "number of smokers & number of cigarettes they smoke." Publicly, Defendants promised to "seek answers," assuring the public that they would fund and support "independent" and "arms length" research into the health effects of exposure to secondhand smoke. These public promises, however, were false and fraudulent and were intended to deceive the public. Defendants' true goal with respect to passive smoking was not to support independent and valid research in order to answer questions about the link between ETS and disease, but rather the goal was simply "to keep the controversy alive," just as they had done with active smoking. Defendants designed a sophisticated public relations and research strategy to attempt to "alter public perception that ETS is damaging," but did so despite their specific, internal acknowledgment that there was a "[l]ack of objective science" to support

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their public relations campaign. This lack of objective science did not stand in Defendants' way.

They asked: "Is \$100 million campaign worth an x increase in sales?" The answer: "Yes."

Pursuant to Defendants' carefully designed and coordinated strategy, the Center for Indoor Air Research (CIAR) was officially created in 1988 to take over the research responsibilities of the a committee that had previously operated under the direction of Defendants' law firms Shook, Hardy & Bacon and Covington & Burling – that is, to act as a coordinating organization for Defendants' efforts to fraudulently mislead the American public about the health effects of ETS exposure. CIAR was created by Philip Morris, Lorillard, and R.J. Reynolds. Brown & Williamson joined CIAR as a voting board member in 1995. While Liggett was never officially a member of CIAR, it attended meetings of the organization and participated in ETS seminars and meetings organized by Covington & Burling and was fully cognizant of, and in fact assented to, the activities of the organization. BATCo, while not a member of CIAR, provided funding to CIAR to hide BATCo and Philip Morris's involvement in at least one CIAR "sponsored" study.

CIAR's stated mission was to serve as a hub that would sponsor and foster quality, objective research in indoor air issues with emphasis on ETS and effectively communicate pertinent research findings to the broad scientific community. But while Philip Morris, Lorillard, and R.J. Reynolds publicly represented that CIAR was independent, its by-laws revealed otherwise. The by-laws required that charter members be tobacco companies; dictated that only charter members have the power to choose CIAR's officers; and, significantly, gave charter members the exclusive power to decide what research the organization would fund. CIAR was intended to allow Defendants to perpetuate a "scientific controversy" surrounding the health

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effects of ETS exposure. As Covington & Burling attorney John Rupp explained in March 1993: "In sum, while one might wish it otherwise, the value of CIAR depends on the industry's playing an active role (1) in identifying research projects likely to be of value and (2) working to make sure that the findings of funded research are brought to the attention of decision makers in an appropriate and timely manner." According to a former CIAR board member, "ETS was a litigation issue and a PR issue."

Defendants engaged in a global effort to fraudulently deny and distort the harms associated with exposure to secondhand smoke. The international ETS Consultancy Program was an extension and amplification of multifaceted domestic initiatives by industry counsel to counter ever-mounting evidence implicating secondhand smoke as a cause of disease and other health problems; however, Defendants acted on a global scale. Through this program, Defendants worked to identify, "educate," and financially reward scientists in every world market to generate research results, present papers, pen letters to scientific journals, plan and attend conferences, and publicly speak on behalf of the cigarette companies. The overarching goal was to "keep the controversy alive" and forestall legislation and any restrictions on public or workplace smoking. Defendants issued numerous false and deceptive statements denying and distorting the health risks of involuntary exposure in connection with this massive, coordinated effort to maintain cigarette sales efforts in the face of what they recognized internally as legitimate scientific evidence of the dangers associated with secondhand smoke.

Addiction and the Manipulation of Nicotine Levels in Cigarettes

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Cigarette smoking is an addictive behavior, a dependency characterized by drug craving, compulsive use, tolerance, withdrawal symptoms, and relapse after withdrawal. Underlying the smoking behavior and its remarkable intractability to cessation is the drug nicotine. Nicotine is the primary component of cigarettes that creates and sustains addiction to cigarettes.

Defendants have studied nicotine and its effects since the 1950s, and the documents describing their examination and knowledge of nicotine's pharmacological effects on smokers – whether they characterized that effect as "addictive," "dependence" producing or "habituating," – demonstrate unequivocally that defendants understood the central role nicotine plays in keeping smokers smoking, and thus its critical importance to the success of their industry. Additional internal records demonstrate that Defendants knew that cigarette smoking was the vehicle for delivering nicotine, which was the critical component in maintaining the addiction necessary to sustain and enhance their profits. Indeed, Defendants purposefully designed and sold products that delivered a pharmacologically effective dose of nicotine in order to create and sustain nicotine addiction in smokers. Indeed, an internal document drafted by Philip Morris scientist Helmut Wakeham in 1969, for example, recognized:

We share the conviction with others that it is the pharmacological effect of inhaled smoke which mediates the smoking habit. . . .

We have then as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.

In the past we at R & D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine, and nicotine is the agent of a pleasurable body response.

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This primary incentive to smoking gets obscured by the overlay secondary incentives, which have been superimposed upon the habit. Psychoanalysts have speculated about the importance of the sucking behavior, describing it as oral regression. Psychologists have proposed that the smoker is projecting an ego-image with puffing and his halo of smoke. One frequently hears "I have to have something to do with my hands" as a reason. All are perhaps operative motives, but we hold that none are adequate to sustain the habit in the absence of nicotine.

We are not suggesting that the effect of nicotine is responsible for the initiation of the habit. To the contrary. The first cigarette is a noxious experience to the novice. To account for the fact that the beginning smoker will tolerate the unpleasantness, we must invoke a psychosocial motive. Smoking for the beginner is a symbolic act. The smoker is telling the world, "This is the kind of person I am. . . ."

As the force from the psychosocial symbolism subsides, the pharmacological effect takes over to sustain the habit

Similarly, R. J. Reynolds researcher Claude Teague acknowledged in an internal 1972 report, "Thus a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form. Our industry is then based upon design, manufacture and sale of attractive dosage forms of nicotine."

Nevertheless, just as Defendants long denied, contrary to fact, that smoking causes disease, Defendants consistently and publicly denied that smoking is addictive. Defendants intentionally maintained and coordinated their fraudulent position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous. In this way, Defendants' have kept more smokers smoking, recruited more new smokers, and maintained or increased profits. Additionally, defendants have sought to discredit proof of addiction in order to preserve their "smoking is a free choice"

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arguments in smoking and health litigation. As with Defendants' statements designed to undermine the scientific evidence of smoking's harms, the statements denying addiction were knowingly false and misleading when made, and intended to avoid product regulation, to bolster the industry's defenses in smoking and health litigation, and to minimize consumers' concerns about smoking.

Defendants' awareness of the critical importance of nicotine to the cigarette smoker, and thus to the continued profits of the industry, was such that the Defendants dedicated extraordinary resources to the study of nicotine and its effects on the smoker. The evidence shows that Defendants have long had the ability to modify and manipulate the amount of nicotine that their products deliver, and have studied extensively how every characteristic of every component of cigarettes – including the tobacco blend, the paper, the filter, and the manufacturing process – impacts nicotine delivery. Indeed, Defendants' internal documents indicate that, in light of Defendants' recognition that “no one has ever become a cigarette smoker by smoking cigarettes without nicotine,” Cigarette Company Defendants have designed their cigarettes with a central overriding objective – to ensure that smokers can obtain enough nicotine to create and sustain addiction. Notwithstanding the substantial evidence that Defendants designed their products to deliver doses of nicotine sufficient to create and sustain addiction, Defendants have publicly and fraudulently denied that they manipulate nicotine. Defendants have sought to mislead the public about their manipulation of nicotine by publicly and fraudulently maintaining that the level of nicotine in a cigarette is inextricably linked to the cigarette's tar level and that nicotine delivery levels follow tar delivery levels in cigarette smoke.

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Through these and other false statements, Defendants have furthered their common efforts to deceive the public regarding their use and manipulation of nicotine.

Light and Low Tar Cigarettes

The understanding of nicotine's primary role in keeping people smoking and Cigarette Company Defendants' desire to capitalize on smokers' growing desire for a less hazardous cigarette in the face of growing evidence of the health effects of smoking, underlie another central component of the scheme to defraud – the design and marketing of so-called “low tar/low nicotine” cigarettes. As awareness and concern about the adverse health risks associated with smoking began to grow in the early 1950s, Defendants began developing cigarettes they internally referred to as "health reassurance" brands in an effort to keep smokers in the market. Initially, Defendants explicitly marketed and promoted these brands as safer as the result of an added filter which purportedly protected smokers from the harmful tar in cigarette smoke. Having established the link in the minds of consumers between low tar/filtration and reduced harm through use of explicit health claims, Defendants' later advertisements contained implied health claims that built on their earlier advertisements in an effort to avoid suggesting to consumers that any cigarettes were harmful. For several decades, Defendants have marketed and promoted their so-called "low tar/nicotine" cigarettes using brand descriptors like "Light," "Ultralight," "Mild" and "Medium" and claims of "low tar and nicotine" to suggest to consumers that these products are safer than regular, full flavor cigarettes.

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Defendants made, and continue to make, health benefit claims regarding filtered and low tar cigarettes when they either lacked evidence to substantiate the claims or knew that they were false. Internal industry research documents show that Defendants never had adequate support for their claims of reduced health risk from low tar cigarettes, but rather confirm Defendants' awareness by the late 1960s – early 1970s that low tar cigarettes were unlikely to provide any health benefit to smokers compared to full flavor cigarettes. In fact, the public health and scientific communities now recognize what Defendants have long known internally: there is no meaningful reduction in disease risk in smoking low tar cigarettes as opposed to smoking regular cigarettes.

In addition, Defendants have known for decades that their low tar cigarettes, as designed, do not actually deliver the low reported and advertised levels of tar and nicotine – which are derived from a standardized machine test originally developed by Defendants and adopted by the Federal Trade Commission in 1967 (“FTC Method”) – to human smokers. Defendants have long known that to obtain an amount of nicotine sufficient to satisfy their addiction, smokers of low tar cigarettes modify their smoking behavior, or “compensate,” for the reduced yields by inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes. As a result of this nicotine-driven smoker behavior, smokers of light cigarettes concurrently boost their intake of tar, thus negating what Defendants have long promoted as a primary health-related benefit of light cigarettes: lower tar intake.

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For decades, Defendants have affirmatively exploited their understanding of compensation by deliberately designing low tar cigarettes that register low tar yields on the standardized FTC Method, but that also facilitate a smoker's ability to compensate to ensure adequate delivery of nicotine to create and sustain addiction. Even as they designed low tar cigarettes to facilitate compensation, and despite having evidence that low tar cigarettes provide no health benefits and may in fact deter people from quitting, Defendants have withheld and suppressed such evidence from public dissemination. Extensive evidence shows that Defendants used terms such as "Light" and "Low Tar" intentionally to convey their false "health reassurance" message rather than just a "taste" message, because their research showed that people smoked low tar products despite, not because of, the taste. Accordingly, Defendants' marketing themes repeatedly tried to convince smokers that their brands could provide the main claimed benefit of light cigarettes – increased safety – without sacrificing "taste." Further, Defendants used both verbal and non-verbal communications to convey their health reassurance message, employing colors and imagery that their research indicated people associated with healthier products.

Defendants' campaign of deception has impacted Americans' decisions to smoke. The availability of low yield cigarettes and the messages conveyed by Defendants' advertising, marketing, and public statements regarding low tar cigarettes, has caused many smokers to perceive them as an acceptable alternative to quitting smoking. As a result of Defendants' conduct, health concerned smokers have switched from regular cigarettes to those with lower reported tar yields rather than quitting smoking altogether. Smokers of "light" and "ultra light" cigarettes are less likely to quit smoking than are smokers of regular cigarettes. Additionally, as

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a result of Defendants' fraudulent marketing and deceptive design of "light" and "ultra light" cigarettes, many smokers of these cigarettes consume more cigarettes than do smokers of regular cigarettes. Defendants' conduct relating to low tar cigarettes furthers the aims of the Enterprise and the scheme to defraud by providing a false sense of reassurance to smokers that weakens their resolve to quit smoking, and serves to draw ex-smokers back into the market. In short, Defendants' concerted campaign of deception regarding low tar cigarettes has been a calculated – and extremely successful – scheme to increase their profits at the expense of the health of the American public.

Youth Marketing

Cigarette smoking, particularly that begun by young people, continues to be the leading cause of preventable disease and premature mortality in the United States. Of children and adolescents who are regular smokers, one out of three will die of smoking-related disease. As part of the scheme to defraud, Defendants have intentionally marketed cigarettes to youth under the legal smoking age while falsely denying that they have done and continue to do so. As is evident from Defendants' own documents, Defendants have long recognized that the continued profitability of the industry depends upon new smokers entering the "franchise" as current smokers die from smoking-related diseases or quit. Defendants have similarly known that an overwhelming majority of regular smokers begin smoking before age eighteen. In 1966, Defendants, in the face of threatened federal advertising restrictions, adopted a voluntary advertising code in which they pledged to refrain from marketing activity likely to attract youth. Thereafter, Defendants continued unabated their efforts to capture as much of the youth market

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as possible, effectively ignoring the voluntary advertising code and designing advertising themes, marketing campaigns, and promotional activities known to resonate with adolescents.

Defendants' internal documents indicate their awareness that the majority of smokers began smoking as youths and develop brand loyalty as youths, that youths were highly susceptible to advertising, and that persons who began smoking when they were teenagers were very likely to remain lifetime smokers. For example:

A March 31, 1981 report conducted by the Philip Morris Research Center entitled "Young Smokers Prevalence, Trends, Implications, and Related Demographic Trends" stated that "Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens . . . it is during the teenage years that the initial brand choice is made."

A September 22, 1989 report prepared for Philip Morris by its main advertising agency, Leo Burnett U.S.A., described Philip Morris's marketing's target audience as a "moving target in transition from adolescence to young adulthood."

An August 30, 1978 Lorillard memorandum stated: "The success of NEWPORT has been fantastic during the past few years. . . . [T]he base of our business is the high school student. Newport in the 1970s is turning into the Marlboro of the 1960s and 1970s."

A July 9, 1984 report circulated to the heads of B&W's Marketing and Research Development departments stated "[o]ur future business depends on the size of [the] starter population."

In a November 26, 1974 memorandum entitled "R.J. Reynolds Tobacco Company Domestic Operating Goals, R.J. Reynolds stated its "[p]rimary goal in 1975 and ensuing years is to reestablish R.J. Reynolds's share of growth in the domestic cigarette industry," by targeting the "14-24 age group" who, "[a]s they mature, will account for key share of cigarette volume for next 25 years. Winston has 14% of this franchise, while Marlboro has 33%. - SALEM has 9%--Kool has 17%." The memorandum indicated that R.J. Reynolds "will direct advertising appeal to this young adult group without alienating the brand's current franchise."

A September 27, 1982 memorandum written by Diane Burrows, R.J. Reynolds Market Research Department, and circulated to L.W. Hall, Jr. Vice President of

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R.J. Reynolds Marketing Department, stated: "The loss of younger adult males and teenagers is more important to the long term, drying up the supply of new smokers to replace the old. This is not a fixed loss to the industry: its importance increases with time. In ten years, increased rate per day would have been expected to raise this group's consumption by more than 50%."

Defendants targeted young people with their marketing efforts, their selection of which marketing activities to pursue and to shape the themes and images of those activities, and allocated substantial resources researching the habits and preferences of the youth market, including these research efforts. For instance:

An October 7, 1953 letter from George Weissman, Vice President of Philip Morris, discussed an August 1953 Elmo Roper report on a study of young smokers commissioned by Philip Morris, stating that "industry figures indicate that 47% of the population, 15 years and older, smokes cigarettes" and that "we have our greatest strength in the 15-24 age group."

The "1969 Survey of Cigarette Smoking Behavior and Attitudes" performed by Eastman Chemical Products for Philip Morris contained detailed analysis of beginning smokers, including interviews with 12-14 year olds.

A 1976 Brown & Williamson document containing information drawn from a study of smokers stated that "[t]he 16-25 age group has consistently accounted for the highest level of starters."

In 1958 and 1959, R.J. Reynolds commissioned a series of studies of high school and college students, interviewing in sum almost 20,000 students as young as high school freshmen regarding their smoking habits and brand preferences.

In 1980, the R.J. Reynolds Marketing Development Department issued a series of internal reports entitled "Teenage Smokers (14-17) and New Adult Smokers and Quitters" which surveyed the smoking habits of fourteen to seventeen year olds.

Knowing that advertising and promotion stimulated the demand for cigarettes, the Cigarette Company Defendants used their knowledge of young people's vulnerabilities gained in this research in order to create marketing campaigns (including advertising, promotion, and

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couponing) that would and did appeal to youth, in order to foster youth smoking initiation and ensure that young smokers would choose their brands. These campaigns have intentionally exploited adolescents' vulnerability to imagery utilizing themes that are, to this day, the same as they have been for decades: independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness and being "cool."

The Cigarette Company Defendants continue to advertise in youth-oriented publications; employ imagery and messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youths will frequent such as convenience stores; engage in strategic pricing to attract youths; increase their marketing at point-of-sale locations with promotions, self-service displays, and other materials; sponsor sporting and entertainment events, many of which are televised or otherwise broadcast and draw large youth audiences; and engage in a host of other activities which are designed to attract youths to begin and continue smoking. And yet, to this day, in the face of evidence of their explicit recognition of the importance of the youth market, research into the best ways to obtain the youth market, and development of advertising campaigns designed to capture it that have remained largely unchanged for more than thirty years, the Defendants publicly deny their efforts to appeal to the youth.

Independent scientific studies published in reputable scientific journals and in official government reports, have confirmed Defendants' knowledge, as set out in their internal documents, that their marketing contributes to the primary demand for and continuing use of

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cigarettes. Over the past ten years, there have been a number of comprehensive reviews of the scientific evidence concerning the effects of cigarette marketing, including advertising and promotion, on smoking decisions by young people. From these reviews it is clear that the weight of all available evidence, including survey data, scientific studies and experiments, behavioral studies and econometric studies, supports the conclusion that cigarette marketing is a substantial contributing factor in the smoking behavior of young people, including the decision to begin smoking and the decision to continue smoking.

Concealment and Suppression of Information

From at least 1954 to the present, Defendants engaged in parallel efforts to destroy and conceal documents and information in furtherance of the Enterprise's goals of (1) preventing the public from learning the truth about smoking's adverse impact on health; (2) preventing the public from learning the truth about the addictiveness of nicotine; (3) avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation; and (4) avoiding statutory and regulatory limitations on the cigarette industry, including limitations on advertising. These activities occurred despite the promises of Defendants that (a) they did not conceal, suppress or destroy evidence, and that (b) they shared with the American people all pertinent information regarding the true health effects of smoking, including research findings related to smoking and health. Indeed, as recently as 1996, Martin Broughton, Chief Executive of BAT Industries, the then ultimate parent company of BATCo and Brown & Williamson, made a statement to the *Wall Street Journal* denying that BAT Industries and its subsidiaries had concealed research linking smoking and disease. Broughton stated: "We haven't concealed, we do not conceal and

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we will never conceal. We have no internal research which proves that smoking causes lung cancer or other diseases or, indeed, that smoking is addictive."

* * * * *

In short, Defendants' scheme to defraud permeated and influenced all facets of Defendants' conduct – research, product development, advertising, marketing, legal, public relations, and communications – in a manner that has resulted in extraordinary profits for the past half-century, but has had devastating consequences for the public's health. The purpose of Defendants' overarching scheme was to defraud consumers of the purchase price of cigarettes to sustain and expand the market for cigarettes and to maximize their individual profits. Defendants executed this scheme in different but interrelated ways, including by enticing consumers to begin and to continue smoking, falsely denying the addictiveness and adverse health effects of smoking, and misrepresenting that such matters were “an open question.” Thus, Defendants undertook activities specifically intended to obfuscate the public's understanding of the actual dangers posed by smoking at the same time that they were engaging in marketing efforts designed to attract them, all with the intention to sell more cigarettes and make more money.

As the Final Proposed Findings of Fact demonstrate, the United States is entitled to the equitable relief sought under RICO, including disgorgement of proceeds at least in the amount of \$280 billion. The United States has produced substantial evidence that the Defendants' scheme to defraud had damaging and wide-ranging implications, including influence on initiation and continued smoking for people of all ages. All of Defendants' sales of cigarettes to all consumers

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from 1954 to 2001 were inextricably intertwined with this massive scheme to defraud the public. As a result, the United States would be justified in seeking disgorgement of the proceeds from all sales to people of all ages from 1954 into the future. The United States has, however, limited its request for disgorgement to proceeds from the sale of cigarettes only to the Youth Addicted Population (those youth who smoked daily when under the age of 21 and those adults who were smoking more than five cigarettes a day when they turned 21 years old), and only from the date of passage of the RICO statute in 1971.