UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF THE
<u>POST-TRIAL BRIEF OF THE UNITED STATES OF AMERICA</u>

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I. INTRODUCTION

The Post-Trial Brief of the United States of America clearly and comprehensively set out the law governing the United States' RICO and RICO conspiracy claims and the evidence establishing proof of each element of those claims. Defendants' response, contained in separate briefs filed by Joint Defendants and by Liggett, contains fundamental misstatements of law and relies on unsupported characterizations of the evidence before the Court. Defendants' incorrect legal arguments range from the outright omission of the second half of the definition of materiality in Neder v. United States, 527 U.S. 1 (1999), to a stubborn adherence to the argument that the D.C. Circuit's disgorgement decision eradicated the "prevent and restrain" language of 18 U.S.C. § 1964(a) and limited relief in Government civil RICO actions to little more than specifically defined prohibitory injunctions; from advocating a standard of proof for corporate intent that would allow the use of rube employees to escape corporate liability for fraud, to the erroneous contention that youth smoking reduction targets are a remedy at law requiring a jury trial. Defendants even rely on two cases that have been abrogated in support of their attempt to argue against their participation in a pattern of racketeering activity, without acknowledging the subsequent history impacting their "precedent," and cite a case involving Indiana state law negligence claims as authority for the imposition of equitable remedies under Section 1964(a). Their factual assertions are as just as unsupported.

As explained in the United States' opening brief and further addressed below, clear legal authority and overwhelming evidence supports the United States' RICO and RICO conspiracy claims. The evidentiary record is directly contrary to Defendants' assertion that they never formed a RICO enterprise, and Defendants' effort to deny participating in a multi-faceted scheme to defraud cannot withstand scrutiny, whether that scrutiny is directed to the activities of BATCo, Altria, Liggett or any other Defendant. The Court should also reject Defendants' assertion that

their false statements were immaterial and had no impact on the American public. Defendants' conduct has taken, and continues to take, a devastating toll on the health of this country's citizens, and cigarette smoking kills 440,000 Americans every year.

Legal precedent and a preponderance of the evidence make it equally clear that Defendants are reasonably likely to engage in future unlawful conduct. As demonstrated by both their past and more recent activities, Defendants' violations are part of a pattern of flagrant and deliberate misconduct, and their businesses will present innumerable opportunities to violate the law in the future. For these reasons, the Court should enter judgment for the United States, including every aspect of that relief identified by the United States in its opening brief: a finding of RICO liability on the part of all Defendants, entered without delay even if a remedies decision awaits action on the United States' July 18, 2005 Supreme Court certiorari petition, an award of costs to the United States,[1] and imposition of the remedies sought by the United States and contained in the Proposed Final Judgment and Order filed June 27, 2005. As a whole and within the enforcement framework proposed, these remedies provide an effective, efficient and legally permissible means of preventing and restraining future unlawful conduct by Defendants.

II. CLEAR LEGAL AUTHORITY AND OVERWHELMING EVIDENCE SUPPORTS THE UNITED STATES' RICO AND RICO CONSPIRACY CLAIMS

A. Defendants' Assertion That They Never Formed an Enterprise is Contradicted by the Facts

1. Defendants Formed an Ongoing Enterprise in 1953

Defendants make the bold, unsupportable assertion that there was no evidence adduced at trial to support the existence of a RICO enterprise at any point in time. Defendants also claim

[1] Defendants' briefs are silent on, and appear to concede, that the statutes, case law and Court order, cited in the United States' opening brief (US Br. at 268) entitle the United States to an award of costs should the United States prevail.

that "[t]he core of the Government's case – that the Defendants organized an illegal enterprise in late 1953 to create a 'myth of independent research' – was flatly disproven at trial," arguing that "there is no proof that the Defendants had any fraudulent intent when they made their 1953-54 statements about planned joint independent research." JD Br. at 5. Evidence contradicts Defendants' assertion.

TIRC was not created solely to perpetuate a myth of independent research. The facts adduced at trial unequivocally demonstrate that the emerging scientific research establishing smoking as a cause of lung cancer fundamentally shook Defendants to their very core. Paul Hahn's 1953 telegram to the heads of major cigarette manufacturers was a call to arms crying out for an "industry response" to the perceived threat. The meetings and actions by Defendants and their public relations counsel, Hill and Knowlton, vividly portray an industry in crisis. See, e.g., US 20190 (A) (Timothy Hartnett, President of B&W, stating that public relations "is basically a selling tool and the most astute selling may well be needed to get the industry out of this hole."); US 88192 (A) (Hill and Knowlton memo noting that it was asked to "develop suggestions for dealing with the public relations problem confronting the industry"). The creation of TIRC was a joint and calculated response and marked the birth of the enterprise.

Indeed, the issuance of the "Frank Statement to Cigarette Smokers" was a public relations act and an effective preemptive strategy.[2] By promising the public that the industry was

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[2] In the face of the foregoing evidence (which is more fully detailed in the United States' Findings), Defendants maintain that "the evidence indisputably shows the absence of an intent to use CTR or any other 'association' to defraud." JD Br. at 30. Notably, expert historian Dr. Allan Brandt, testified to the **presence**, rather than the absence, of intent to use TIRC/CTR to defraud. And when asked if any of the documents he was shown during his cross-examination contained the express statement, "Let's keep this whole matter secret," Dr. Brandt's response was that, while the documents did not contain **those words**, the decision of the tobacco industry to employ Hill & Knowlton and develop a public relations program for TIRC was in itself evidence of the secretive nature of Defendants' conduct. Brandt TT, 9/27/04, 752: 7-11. Defendants' emphasis

(continued...)

absolutely committed to their good health, the Frank Statement allayed the public's concerns about smoking and health, reassured smokers, and provided them with an effective rationale for continuing to smoke. Brandt WD, 54:20-55:7; US 21408 (A); US 87224 (A). TIRC/CTR also provided an effective mechanism for Defendants to coordinate their collective activity and maintain their open question position. See US FF § I.B. Defendants participated in frequent meetings at TIRC/CTR, planned jointly-funded research goals (including CTR contract research and CTR Special Projects), and coordinated their public relations efforts. To further bolster their public relations effort, Defendants utilized the Tobacco Institute to coordinate joint action in furtherance of the goals of the enterprise by maintaining unified positions on smoking and health and marketing issues. See US FF § I.C.

It is clear that the enterprise adapted and its activities expanded to emerging threats. For example, as scientific evidence of the health effects of exposure to secondhand smoke emerged in the 1970s and 1980s, Defendants addressed the issue first informally, through the ETS Advisory Group, and then more formally through CIAR, which was established in 1988 to carry out industry-funded research related to passive smoking. See US FF §§ I.G, III.A(2). In addition, international organizations provided mechanisms for the Enterprise to achieve its goals.

The evidence clearly demonstrates that Defendants **did** form an enterprise – one that was designed from its inception to address the multiple threats to the industry, be it from scientific evidence linking cigarette smoking and exposure to secondhand smoke and disease, to misrepresentations about marketing to youth, to denying that cigarette smoking was addictive, to fighting against restrictions on smoking world-wide – from 1953 onward to the present day.

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[2](...continued)
on responses to limited cross-examination questions of Dr. Brandt in particular ignores the entirety of his well-reasoned, meticulously supported testimony and the substance of the evidence on which it was based, including numerous internal documents from Defendants.

2. The Evidence Fully Satisfies All of the Legal Elements for the Establishment of a RICO Enterprise

Defendants further assert that the United States failed to prove the existence of a criminal enterprise at any time because of alleged legal inadequacies with the elements necessary to prove the existence of an enterprise. But an examination of the evidence in the record before the Court shows each of the elements – common purpose, organization and continuity – are satisfied. The United States detailed the legal requirements for proof of the elements in its opening brief and summarized the evidence that soundly supports that evidence. US Br. at 5-13. The counter-arguments raised by Defendants are specious.

Specifically, Defendants first argue that they did not share a common purpose about various aspects of the enterprise because false statements about addiction, nicotine manipulation, disease consequences of exposure to secondhand smoke and youth marketing were not discussed by the members of the enterprise at the time of its formation in 1953. JD Br. at 31. There is no legal requirement, however, that at the time of formation of the enterprise, all common purposes must be discussed or future fraudulent activity agreed upon. United States v. Perholz, 842 F.2d 343, 355 (D.C. Cir. 1988). United States v. Rastilli, 870 F.2d 822, 828 (2d Cr. 1989). And there is no support for Defendants' alternative, factual assertion that the record is devoid of proof of common purpose related to these fraudulent activities when they were undertaken. JD Br. at 31. The enormous body of evidence shows that the enterprise was designed to facilitate responses to emerging threats to Defendants, and did so, is detailed in the United States' Findings and is directly contrary to Defendants' unsupported assertion. See, e.g., US FF § I.

Defendants also seek to sidestep evidence of the common purpose of the enterprise by arguing that competing companies could not benefit from working together. JD Br. at 31. But evidence shows that Defendants concluded that a united response to public health authorities,

public interest groups, and the smoking and non-smoking public itself was essential to their continued existence. See US FF § I.B. The record is replete with Defendants' ongoing recognition that joint action was essential to their profit-maximizing goals – that competitive practices on health issues would harm Defendants both publicly and in litigation. In the end, there is simply no legal or evidentiary support for Defendants' assertion that they lacked a common purpose.

As to the second element – organization – Defendants' arguments are equally flawed. In Perholtz, 842 F.2d at 362-63, the D.C. Circuit explained that RICO's organizational requirement is flexible: "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; see also JD Br. at 5-6. In this case, evidence documents **both the formal and informal** "spiderweb-like" structure through which Defendants pursued the objectives of the enterprise, which more than satisfies the legal requirement for organization of a RICO enterprise. See US FF § I. In addition, each separate pillar of Defendants' overarching fraudulent scheme is supported by extensive evidence of the means by which Defendants functioned and operated in a coordinated manner in pursuit of their common purpose. See generally US FF § III.

Finally, as to continuity, Defendants' argument that the United States has somehow failed to allege a certain core of personnel sufficient to satisfy RICO's continuity requirement ignores entirely the evidence in this lawsuit.[3] The United States has repeatedly pointed to a core group of

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[3] For example, a sampling of the specific individual members of the Enterprise, with whom the Court is by now very familiar, include: Sheldon Sommers, CTR Research Director and SAB Member, 22 years; Harmon McAllister, CTR Research Director and SAB member, 21 years; Lorraine Pollice, CTR Corporate Secretary and Treasurer, 29 years; Brennan Dawson, TI Vice President of Public Relations, 11 years and current RJ Reynolds American Senior VP of

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individuals who are members of the enterprise. The activities of the core group of individuals satisfy Perlholtz. See US Br. at 98-127.[4]

The Court should also reject Defendants' incorrect assertion that, as a matter of law, an association-in-fact enterprise may not consist of a group of corporations alone. See JD Br. at 33-34, n.12. As the Court previously held in this case, consistent with the law of this Circuit, a RICO enterprise may consist of "a group of individual[s], partnerships, and corporations associated in fact," United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152 (D.D.C. 2000) (quoting Perholtz, 842 F.2d at 351 n.2), and "the Government has adequately pleaded the enterprise element." Id. at 153. The evidence in the record after a nine-month trial establishes that the enterprise element pled by the United States has now been proven. Furthermore, contrary to Defendants' argument, in United States v. Turkette, 452 U.S. 576 (1981), the Supreme Court rejected a narrow interpretation of RICO's definition of Enterprise, explicitly

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[3](...continued)
Government Relations (with B&W prior to merger), 8 years, for a total combined employment of 19 years; Walker Merryman, TI Public Spokesperson, 22 years; Anne Duffin, TI Public Spokesperson, 21 years; Joseph Cullman, Philip Morris President, 31 years; Thomas Osdene, Philip Morris Director and Vice President of Research, 28 years; Wayne Juchatz, Senior VP and General Counsel, RJ Reynolds Tobacco Co, 14 years; Thomas Sandefur, Chairman and CEO, B&W, 32 years; J. Kendrick Wells, B&W in-house counsel, 29 years; Alexander Spears, Lorillard CEO, 40 years; Sharon Blackie Boyse, various positions including Director of Scientific Issues and Head of Strategic Research at BATCo and B&W, 14 years; and Steven Parrish, Shook, Hardy & Bacon, 15 years, Current Senior VP of Corporate Affairs for Altria, 15 years, for a total of 30 years.

[4] Defendants appear to argue that it is impossible to prove continuity of a 50-year enterprise. The legal reality, however, is that 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; US Br. at 6-7. 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, 697 F.2d 915, 922 (11th Cir. 1983), accord Rastilli, 870 F.2d at 827-28; US Br. At 6-7. Indeed, if Defendants' interpretation were the law, wrongdoers cwould escape RICO liability simply by lasting (and engaging in unlawful conduct) longer. Such a result would be nonsensical.

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." 452 U.S. at 580.

B. Defendants' Contentions Regarding the Separate Pillars of Their Overarching Scheme to Defraud Fail to Find Support in the Evidentiary Record Before the Court

In their effort to address the evidence of their scheme to defraud, Defendants initially offer the mistaken assertion that each pillar, or part, of that scheme "must be viewed on its own terms." JD Br. at 56. Defendants cite no authority in support of their argument, but instead merely refer to two words in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), that offer no support for their position. Defendants' unsupported position is contrary to fact and the Court's specific holding that:

> The Government's theory is that the component sub-schemes . . . collectively served the goal of sustaining and expanding the market for Defendants' cigarettes and maximizing their profits by defrauding consumers of the purchase price of cigarettes. The youth marketing sub-scheme can only be meaningfully assessed in the context of the entirety of the Defendants' alleged conduct.

United States v. Philip Morris USA, 304 F. Supp. 2d 60, 66 (D.D.C. 2004).

Moreover, Defendants' assertion that the separate pillars alleged by the United States are "discrete" or "contradictory" is not borne out by the evidence. Rather, the evidence shows that Defendants' participated in an overarching scheme to defraud focused on a single primary objective: maximizing profits through fraud. The conduct that defines the seven components of the overall scheme proven by the United States is closely related to the overall objective, and each pillar complements others to aid Defendants' pursuit of their objective by fraudulent means. Accordingly, Defendants' effort to isolate the seven pillars from the overarching scheme fails. Moreover, for the reasons set out in the United States' opening brief and further explained below, Defendants' effort to deny the evidence within each pillar also fails, both factually and legally.

1. Defendants Engaged in a Massive Fraudulent Public Relations Campaign to Deny and Distort the Disease Risks of Cigarette Smoking and Exposure to Secondhand Smoke

a. Defendants' public statements were false and their public relations campaign was fraudulent

Defendants seek to exonerate themselves from 50 years of fraudulent public relations by claiming that their false statements should be viewed in three time periods: A first one, before 1964, where they assert that their statements were true; a second period, 1964-1984, in which Defendants argue that their public attacks on universally accepted scientific conclusions were "[m]ere disagreement with an emerging scientific consensus"; and a final period, 1984-present, when Defendants claim that they only made false statements "responsively" and therefore cannot have had a specific intent to deprive smokers of money or property. JD Br. at 69-71. None of Defendants' arguments are credible.[5]

Defendants attempt to excuse statements denying that smoking was a cause of lung cancer and other diseases by asserting that a "debate centered on whether experimental proof was required to confirm a causal relationship." JD Br. at 70. But Defendants' argument is nothing more than semantic obfuscation and it cannot succeed. Defendants did not engage in a public debate about whether "experimental proof" was required before scientists could conclude that smoking was a cause of lung cancer and other diseases.[6] Instead, their fraudulent campaign

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[5] In their effort to justify their false denials of the scientific evidence showing smoking to be a cause of numerous deadly diseases, Defendants stretch so far as to claim that the United States "concedes" that Defendants' public statements on smoking and disease "may not have been literally false" before 1964. JD Br. at 70. The sentence that Defendants quote, however, specifically identifies the **absence** of scientific support for Defendants' pre-1964 causation denials. US Br. at 33. Defendants' misstatement of the United States' argument is emblematic of the lengths to which Defendants go in their attempt to manufacture justification for their fraudulent action.

[6] As set out in the United States' Findings and opening brief, epidemiology has been well-
(continued...)

began with the Frank Statement's assertion that "there is no proof that cigarette smoking is one of the causes of lung cancer." US 21418 (A). Evidence establishes that the statement was false when made,[7] as were the countless public statements that followed, denying, distorting and attacking mainstream scientific investigation, both before and after 1964. See US FF § III.A(1).

As to their proffered post-1964 defenses, while Defendants assert that they merely "disagreed with an emerging scientific consensus," they point to no evidence to support their argument, and Defendants are silent about their own employees' admissions that scientists and executives agreed internally that smoking was a cause of lung cancer and other diseases.[8] And while Defendants assert that all of their false public statements after 1984 were "responsive," they offer no explanation for the affirmative assertions by their spokespersons who voluntarily appeared on nationally-broadcast television programs on Defendants' behalf and intended people to believe their assertions. And even if the claim could be supported factually, it would still fail legally. The law does not support the view that manufacturers can escape liability for fraud by making false statements about the health consequences of a product only when asked questions about it, nor do Defendants even attempt to argue that the law endorses such an absurd safe-

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[6](...continued)
established as a means of identifying causes of disease for centuries, having led to the discovery of causes or cures of diseases such as scurvy, pellagra, cholera, smallpox, and polio. See US FF § III.A.(1). Defendants offered no evidence to the contrary.

[7] For example, Defendants offered no testimony to contradict the expert opinions of Dr. Brandt and Dr. Burns on the formation of scientific consensus. And at trial, Lorillard CEO Martin Orlowsky admitted that the Frank Statement was false, conceding that after the publication of epidemiological studies by Doll, Hill, Wynder, Graham and others in the early 1950s, it was false to state that there was no evidence that smoking caused disease. Orlowsky TT, 10/13/05, 2310:23-2311:6.

[8] Defendants proffer the further argument that "the fact that some employees . . . did not share the 'not proven' viewpoint, is irrelevant to the issue of specific intent in the absence of proof that those responsible for expressing 'not proven' viewpoints did not believe the statements." JD Br. at 72. As explained in Section II.C, infra, Defendants are wrong.

haven for fraudulent actors.

b. Defendants' false statements were material and are actionable under the mail and wire fraud statutes

Defendants' discussion of materiality (JD Br. at 23-24) must be readily rejected because it – like all of Defendants' previous submissions on this issue – misstates the law. Defendants ignore the second half of the definition of materiality set out by the Supreme Court in Neder v. United States, 527 U.S. 1 (1999) – that "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." 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977)).[9] Defendants also rely on out-of-circuit decisions, not even attempting to distinguish the decisions from this Circuit cited by the United States that make clear that liability for a scheme to defraud does **not** depend upon the reasonableness or prudence of the intended victim. See US Br. at 93-94. The United States has introduced evidence – including testimonial admissions from Defendants' executives – proving that Defendants' fraudulent statements satisfy the standard for materiality articulated in Neder. See, e.g., US Br. at 47 n.23, 53, 91-94.

Equally erroneous, in their post-trial brief, Defendants make the same claim about the "money or property" portion of the mail and wire fraud statutes that they made both in prior filings and during interim summation at trial. Defendants assert that misrepresentations must concern the "quality or nature of the goods being sold" in order to sustain a finding of liability. JD Br. at 25. Defendants are wrong. Defendants continue to rely on two cases from the Second

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[9] In citing to United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996), for their partial definition of materiality (JD Br. at 23), Defendants misleadingly suggest that the quotation was an affirmative statement of law by the Court of Appeals. In fact, the quoted passage is simply a part of a trial court's jury instruction that the Court of Appeals quoted without evaluation. In any event, Winstead predated the Supreme Court's Neder decision by three years.

Circuit, United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), and United States v. Starr, 816 F.2d 94 (2d Cir. 1987), that predate Neder, the Supreme Court case that reaffirmed that the mail fraud statute encompasses "'**everything designed to defraud by representations** as to the past or present, or suggestions and promises as to the future.'" Neder, 527 U.S. at 24 (quoting Durland v. United States, 161 U.S. 306, 313 (1896)) (emphasis added). The Second Circuit's view in Regent Office Supply and Start has not been adopted by this Circuit, and in light of our Court of Appeals' recognition that "[t]he only issue is whether there is a plan, scheme or artifice intended to defraud," Maxwell, 920 F.2d at 1036, Defendants' effort to unduly narrow the reach of the mail fraud statute in this case must be rejected.

Defendants' factual objections to the materiality of their statements also fail. Specifically, the evidence does not support Defendants' assertion that "Dr. Viscusi's testimony is unrebutted that smokers have long since reached 'saturation' levels of awareness of the hazards of smoking, and that the public universally disbelieved the opinions Defendants expressed about causation." JD Br. at 74. Instead, the record shows that individuals do not adequately understand the risks to which they are exposing themselves at the point of smoking initiation. See US FF § III.B.

In order to adequately assess the issue of individuals' perception of smoking risks and the relationship of that perception to the conduct of the Defendants, it is important to understand the entire landscape. At the same time that Defendants were denying the existence of a causal relationship between smoking and disease and the addictive nature of nicotine, they were coordinating multi-million dollar advertising and promotional campaigns designed to associate positive imagery and positive affect with the act of smoking. Slovic WD, 38:16-22. The public was therefore more likely to develop positive feelings associated with smoking and have a

decreased perception of smoking risks.[10]

c. Defendants' parallel efforts to deny and distort the health consequences of exposure to secondhand smoke violate RICO

Defendants' determined efforts to deny and distort the scientific evidence establishing exposure to secondhand smoke as a cause of lung cancer and other diseases involved a variety of initiatives, including public relations campaigns, recruitment and "education" of industry-friendly scientists who were paid to write and speak without attribution, and outright falsification of research results. Rather than address the evidence of the myriad ways that they pursued their objective of stemming the threat to profits posed by the legitimate scientific evidence of the harms of passive exposure, Defendants elect to raise two issues that are only tangentially relevant to this fraud. First, Defendants claim that they, their employees, and their consultants had a "good faith" belief in the statements relating to passive smoking, whether the statements were deceptive or not. JD Br. at 75. Second, Defendants argue that the United States has not proven that the statements were "material to the purchasing decisions of smokers." Id. at 77. For the reasons set out in the United States' opening brief, as supported by the United States' Findings, the Court should find that Defendants' ETS-related activities were undertaken in furtherance of their fraudulent scheme. And for the reasons set out below, the Court should reject the tangential arguments raised by Defendants in opposition to the evidence of their fraud.

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[10] Internal documents reveal that Defendants recognized and exploited this phenomena. Defendants admitted: "Oddly enough, such hazards are literally ignored by starters. . . . The hazards of smoking aren't like the hazards of, say, riding a motorcycle on an icy road while blindfolded. That would be so obvious and palpably immediate a danger that not even the most foolish teen would not try it. The smoking of a cigarette isn't like that at all." US 20938 at 7751 (A). See also US FF § III.A.(4)(c)(iii) (providing further examples of industry documents detailing Defendants' understanding of risk perception).

1) Defendants did not hold a "good faith" belief in the truth of their passive smoking statements

Defendants' claim of "good faith"[11] is contradicted by the record evidence demonstrating that Defendants' public statements about passive smoking were deceptive or, in most instances, outright falsehoods, made with the singular intent to maintain profits in reckless disregard of the mounting scientific evidence as to the health hazards of secondhand smoke. See US FF ¶¶ 488-506. There simply is no evidence that Defendants sought to communicate truthful information to the public in "good faith." That is, Defendants did not act to undertake a comprehensive review of scientific evidence to arrive at scientific conclusions about the disease consequences of passive exposure; instead, they recognized a major threat to profits and adopted an industry position denying the scientific evidence without regard to its validity. Defendants' actions – from public relations campaigns to the development of a roster of highly paid ETS consultants to the establishment of CIAR to the promotion of ventilation through HBI – were undertaken to promote and adhere to a position determined by the corporate bottom line, not by any "good faith" scientific opinion, and that position was false.[12]

The "good faith" argument not only ignores Defendants' **conduct** altogether, it also

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[11] Defendants' first argument appears to concede the weakness of their evidence disputing the known health effects of passive smoking; indeed, Defendants now assert that the Court should simply bypass the credibility of Dr. Bradley, the sole non-employee witness offered by Defendants to question the validity of the association between passive smoking and disease. JD Br. at 75-76.

[12] Additionally, even if the Court were to believe that Defendants were merely "question[ing] whether ETS causes disease in nonsmokers" (JD Br. at 76), Defendants' purported "good faith" is belied by the evidence showing that the companies knew passive exposure to tobacco smoke posed a health risk to adults and children, but nonetheless maintained the "party line" because of the threat to profits. For example, we now know that the companies knew that secondhand smoke contained high concentrations of carcinogens and other harmful agents; we also now know that internal research funded by Defendants – most notably Philip Morris's INBIFO studies – confirmed the public health authorities' warnings that passive exposure to cigarette smoke was a health hazard. See US FF ¶¶ 507-584.

ignores the majority of their public statements. As detailed below, Defendants did not confine their statements to merely "question[ing] whether ETS causes disease in nonsmokers"(JD Br. at 76); instead, the bulk of their statements denied the scientific consensus, distorted scientific conclusions, promised "independent research," and stated that seemingly independent scientists, scientific groups, and scientific conferences had concluded that ETS had not been shown to cause disease and other adverse health effects. These statements, along with Defendants' conduct, were employed in furtherance of Defendants' overarching fraudulent scheme. See US FF § III.A(2)(c) and (d) (Defendants' denials in the context of the scientific evidence); § III.A(2)(g)(v) (creation of CIAR to "independently" fund "Applied Projects"); § III.A(2)(h) (global ETS consultancy program); § III.A(2)(i) (management and funding of ETS "symposia"); § III.A(2)(j) (ghostwriting of scientific papers); § III.A(2)(k) (management of fraudulent scientific projects).

2) Defendants' materiality argument fails as a matter of fact and law

Defendants ignore their conduct altogether, asserting instead that their statements about ETS were not "material" to smokers' decisions to purchase cigarettes. According to Defendants, their ETS statements were only material "to decisions about the manner and place where [smokers] will smoke," and were only intended "to forestall private and Government restrictions against public smoking." JD Br. at 7, 77. Therefore, Defendants urge the Court to find that even if their statements had been deliberately deceptive, they cannot serve as bases for mail and wire fraud allegations. JD Br. at 78.

Defendants' argument is flawed for many reasons. Principally, Defendants' statements and conduct had a very real impact on sales and consumption of cigarettes, that is, Defendants were successful in their scheme to protect their profits. Dr. David Burns testified:

> Internal tobacco industry documents demonstrate that the tobacco industry studied the response of smokers when [] ordinances were

> implemented and understood that smokers who worked in environments where smoking was restricted smoked fewer cigarettes per day and were more likely to be successful when they quit smoking (two changes in smoking behavior that will clearly reduce the risk of smoking related disease). In response, the tobacco industry lobbied aggressively against these ordinances wherever proposed, conducted media and public relations campaigns to dispute the scientific evidence, set up front groups to oppose these ordinances at the local level, funded research to confuse the science on this issue and threatened financial retribution for companies who voluntarily implemented these regulations. One result of these actions is a substantial delay in the implementation of protections for nonsmokers and a corresponding higher cigarette consumption and lower rate of successful cessation among smokers.

Burns WD, 70:21-71:12.

Further, many of Defendants' statements were aimed at the public and were intended to deceive the public. For example, a 1987 series of Philip Morris advertisements featured smokers "talking" to the reader and asserting, "Please don't tell me my cigarette smoke is harmful to you. There's just no convincing proof that it is"; and "I know there's no proof my smoke can hurt you." US 20554 (O). Similarly, a 1988 TI brochure declared: "No scientific case against environmental tobacco smoke." US 51276 (O). These statements to smokers are not surprising given what Defendants identified as the ETS "problem" in 1987 at Operation Downunder – ETS "threatens number of smokers and numbers of cigarettes they smoke" – and the solution – "to alter public perception that ETS is damaging." US 20346 (A). Even prior to 1987, Defendants knew that the health effects of passive smoking had a major impact on the "social acceptability" of smoking, and that continuing decreases in the "social acceptability" of smoking would result in the continued loss of sales. US 88583 (O); US FF ¶¶ 502; 617-635; 674. Defendants made their statements with the intent to deceive the public and influence decisions to purchase cigarettes. See US FF § III.A.(2)(e), ¶¶ 488-506.

2. Defendants' Falsely Promised to Pursue Independent Research in Order to Further Their Public Relations Objections

The arguments raised by Defendants in opposition to the evidence of their false promises to conduct independent research and share the results with the American public suffer from equally fatal flaws to those concerning their false denials of the adverse health effects of smoking. Defendants' argument is straightforward: They assert that because they funded some research that was performed by independent scientists who published the results, they fulfilled their public promises and cannot be liable under RICO. The argument should be rejected.

As a preliminary matter, the promise that began with the Frank Statement's assurance that "we are pledging aid and assistance to the research effort into all phases of tobacco use and health" was accompanied by the further promise that Defendants "accept[ed] an interest in people's health as a basic responsibility, paramount to every other consideration in our business" and "always have and always will cooperate closely with those whose task it is to safeguard the public health." US 21418 (A). These false promises were reiterated for decades as part of Defendants' fraudulent public relations campaign. Contrary to the naked assertion in Defendants' brief, evidence establishes that: (1) Defendants intended the establishment of TIRC/CTR, with attendant public promises, to further their fraudulent public relations objectives; and (2) the promise to fund independent research into all phases of tobacco use and health was false.

When Defendants established TIRC, they did not act out of any desire to assist scientific investigation into smoking and health questions. Instead, they sought to develop a strategy to "free millions of Americans from the guilty fear that is going to arise deep in their biological depths – regardless of any pooh-poohing logic – every time they light a cigarette." US 21179 at 0495 (O). Based on this objective, and contrary to Defendants' assertion that "the Government

was unable to produce at trial any evidence of an intent to deceive on the part of the tobacco companies during the meetings leading up to the publication of the Frank Statement" JD Br. at 59, Defendants agreed during the December 1953 Plaza Hotel meetings that they needed to "lose no time in making it completely clear to the American people that it is not unmindful of the public health." US 88194 at 1564 (A). But Defendants' statements to the American people were knowingly false.

That Defendants failed to fulfill their promises is shown in several ways. First, TIRC/CTR did not act as an organization dedicated solely to funding independent research. Rather, its predominant role was as a tool for Defendants' public relations and litigation positions. Internally, Defendants emphasized that "all the resources, all the knowledge, all the help that CTR can give, should be available to the lawyers, to the Tobacco Institute, and to any other of the troops in the field." US 86005 at 4731 (A). To this end, CTR Special Projects were results-driven research initiatives selected by Defendants' lawyers to achieve specific public relations objectives. And the Tobacco Institute served as a public relations vehicle and often publicly touted the amount of money spent by CTR as evidence of Defendants' commitment to finding answers to smoking and health questions. Given these and the additional facts shown by the evidence detailed in the United States' Findings, Defendants cannot credibly contend that their many promises to provide aid and assistance "to the research effort into all phases of tobacco use and health" were rendered non-fraudulent by the fact that some of the research they funded was undertaken independently by reputable scientists or produced "good science."

Moreover, Defendants themselves admitted that the CTR research program failed to do what Defendants promised. TIRC's first Scientific Director Clarence Cook Little candidly admitted, "In the selection of a Scientific Advisory Board and in the acceptance of the nomination by the Board of a Scientific Director, it was clearly shown that the attitude of the

TIRC was to pick scientists interested broadly in the origin and nature of the diseases implicated." US 85993 at 2041 (A). Little's assessment of the manner in which SAB members were selected is consistent with the observation of Brown & Williamson's General Counsel Addison Yeaman that, "We have deliberately isolated the SAB from those areas of research which they might consider were of a controversial or adversary nature and I see no reason why that isolation cannot and should not be maintained." US 20591 at 8054 (A). The admissions by Little and Yeaman directly contradict Defendants' assertion that "[a]ny criticism of the direction of CTR-funded research . . . is a criticism of the collective scientific judgment of the SAB – not the tobacco companies." JD Br. at 61.

Moreover, as Dr. Allan Brandt explained:

> The TIRC never developed an approach to carcinogenesis and tobacco that could resolve the question of the harms induced by cigarette smoking. . . . Most research projects funded through its Scientific Advisory Board were irrelevant to the immediate questions of the harms of tobacco. At the same time, the TIRC used truisms such as the "need for more research," and "how much more there is to learn" to deflect attention away from what was known.

Brandt WD, 85:17-86:3. Significantly, contrary to Defendants' assertion that the United States "presented no scientists who had assessed the research that had been funded by CTR" (JD Br. at 60), Dr. Brandt's opinion is consistent the sworn testimony of SAB member John Craighead:

> I joined the council with the view that I might in some way contribute to an understanding of the way that tobacco contributes to the development of disease and possibly to some resolution of the problems, preventive or otherwise, and it soon became apparent to me that the grant applications that were being funded and those that were being reviewed, while they might be relevant to the general science in the area of the – general science of the area of pulmonary disease, cardiovascular disease, neuropsychiatric disease problems, they did not address the specific problem of the health effects of tobacco.

Craighead PD, Butler v. Philip Morris, 11/13/96, 84:24-85:16. The research funded by CTR

failed completely to fulfill Defendants' public promises.[13]

3. Statements Falsely Denying Addiction and Nicotine Manipulation Are Not Entitled to Constitutional Protection[14]

In claiming that the First Amendment provides an absolute shield to liability for their public statements on numerous smoking and health issues, including addiction and nicotine manipulation, Defendants entirely ignore the well-established legal principle that defeats their claim of blanket constitutional protection: the First Amendment does not shield fraud.[15] Defendants do not mention – let alone distinguish – the many Supreme Court and lower court decisions cited by the United States that have consistently affirmed this principle over the last sixty years, including cases decided based on the mail and wire fraud statutes at issue in this case.

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[13] Additional evidence, set out in the United States' Findings, further demonstrates the falsity of Defendants' public promises and the fraudulent purposes for which TIRC and CTR were employed. Evidence cited in the United States' Findings also shows the futility of Defendants' effort to excuse their actions related to the suspension of research by Dr. Gary Huber and Microbiological Associations. That evidence includes numerous admissions by Defendants' senior executives.

[14] The remainder of Defendants' arguments on addiction and nicotine manipulation do not require an additional response within the page constraints of this reply brief. The evidence set out in the United States' Findings, as further explained in the United States' opening brief, demonstrates the frivolity of Defendants' efforts to explain their denial.

[15] Relying on the same cases they have cited numerous times in prior submissions, Defendants claim that their public statements were opinions genuinely held, and that they therefore are not actionable in fraud. JD Br. at 18. The United States has previously discussed how these cases are legally and/or factually distinguishable. See US PCL (Vol. II) at 54 n.38. As the Supreme Court has noted, "expressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (rejecting notion that allegedly defamatory statements couched as statements of opinion warrant particular First Amendment consideration); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516 (1991) (rejecting "any special test for falsity for quotations" in libel context). The Second Circuit's recognition that "[i]t would be destructive of the law of libel if a writer could escape liability . . . simply by using, explicitly or implicitly, the words 'I think'," is equally applicable to the law of mail and wire fraud. See Cianci v. New Times Publ'g Co., 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.).

See US Br. at 127-129.[16] Nor do Defendants attempt to address this Court's prior correct statement that "[i]f the Government successfully establishes that the Defendants disseminated their advertising in furtherance of an overall scheme to defraud, the First Amendment will not present an obstacle to appropriate injunctive and equitable relief to remedy the fraud." United States v. Philip Morris USA, 304 F. Supp. 2d 60, 71 (D.D.C. 2004 (citing United States v. Carson, 52 F.3d 1173, 1185 (2d Cir. 1993)).[17]

Moreover, even assuming arguendo that certain of Defendants' statements implicate the Noerr-Pennington doctrine, the Supreme Court has made clear that the Noerr-Pennington doctrine is not an exception to the well-established doctrine that "false statements are not immunized by the First Amendment." See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983); see also In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1448 (D. Ariz. 1992) ("A rule of law which excused misrepresentations when it is the truth of the information which is fundamentally at issue would undermine the fabric of both systems. Whatever the ultimate breadth of Noerr-Pennington, it is not a shield for fraud."). And in Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), the Supreme Court rejected the contention that "the Noerr doctrine immunizes every concerted effort that is genuinely intended

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[16] The United States has previously addressed this issue and the relevant body of caselaw in more comprehensive fashion. See US PCL (Vol. II) at 42-54.

[17] The evidence demonstrates that a core part of Defendants' multifaceted, wide-ranging scheme to defraud was their denial that smoking is addictive. Essential to that aspect of that denial was their denial that there is a component of cigarettes – i.e., nicotine – that is responsible for smoking addiction and over which Defendants exercise full control. Defendants elected, therefore, to issue public denials in all appropriate fora. As but one example, Philip Morris published a statement in the New York Times aimed at explicitly at "Smokers and Non-Smokers" in April 1994 titled "Facts You Should Know" (US 65446) (A) that denied that Philip Morris manipulated nicotine and that smoking is addictive because "people can and do quit smoking all the time." The evidence shows both these statements to be false, misleading, or otherwise fraudulent. See, e.g., Farone WD, 86:1-88:14, 98:19-100:3; see also US Br. at 48-49.

to influence governmental action." 486 U.S. at 503.[18] Rather, the Supreme Court stated that the scope of Noerr-Pennington immunity depends on the activity's "impact . . . [and] on the context and nature of the activity." Id. at 504. As the United States previously explained (see, e.g., US PCL (Vol. II) at 85-87) – and has now shown through evidence adduced at trial – the enormous impact of Defendants' conduct, undertaken in the context of and in furtherance of a massive, decades-long scheme to defraud, precludes broad reliance on Noerr-Pennington to escape liability in this case.[19]

Defendants also reiterate their contention that the United States must establish its claims in this case not by a preponderance of the evidence – the standard that courts have uniformly held governs civil RICO enforcement actions by the United States – but by the higher "clear and convincing" standard. See JD Br. at 26-27. As an initial matter, Defendants' argument depends upon on the incorrect factual premise that Defendants' fraudulent statements were opinions "in the context of a robust policy debate." Id. at 27. The evidence in the court record is overwhelmingly to the contrary; in fact, Defendants' public statements were made in execution and in furtherance of a scheme to defraud.[20]

However, even assuming arguendo that Defendants' statements were found to implicate the First Amendment, Defendants are still wrong as a matter of law as to the standard of proof that is constitutionally required in this case. The United States has previously explained why the

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[18] For the more comprehensive review of the law showing the inapplicability of Noerr-Pennington as a defense to liability in this case, see US PCL (Vol. II) at 79-91.

[19] Were Defendants' unduly expansive interpretation of the Noerr-Pennington doctrine accepted, wrongdoers would be able to easily immunize their schemes to defraud the public simply by coupling such fraud schemes with efforts to influence governmental bodies regarding related legislation or enforcement activities.

[20] Indeed, even if the "clear and convincing" standard did apply, the evidence proving Defendants' fraud satisfies that standard.

preponderance standard applies here, and why none of the cases cited by Defendants constitutionally mandates a heightened standard of proof in actions to enforce anti-fraud provisions of federal statutes, including this one.[21] Indeed, this Court confirmed that in Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003), the Supreme Court did not hold that the clear and convincing standard is constitutionally required in a fraud action involving speech. See Order #624, Mem. Op. at 3.[22]

4. Misleading Advertising of Low Tar Cigarettes Was a Critical Element of Defendants' Scheme to Defraud

Contrary to Defendants' claims, the record shows extensive joint activity among Defendants regarding their marketing of low tar and filtered cigarettes, including, for example: (1) Defendants' shared aim of intercepting quitters (US 21866 at 6008) (A); (2) Defendants' joint covert research establishing the grave limitations of the FTC Method for predicting smoker intake (US 20162 at 7731) (O); (US 85068 at 8319) (A); (3) Defendants' joint submission to the FTC in 1998 that smokers not be informed about compensation (in jointly submitted statements that falsely denied that Defendants possessed non-public information about whether consumers view low tar cigarettes as less harmful) (US 88618 at 89) (A); (US87919) (A); and (4)

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[21] See U.S. Mot. to Strike Or, Alternatively, To Amend One Conclusion of Law in the Mem. Op. Accompanying Order #588 (R. 3444; July 13, 2004); U.S. Reply in Support (R. 3524; Aug. 2, 2004), granted by Order #624..

[22] Ignoring the United States' citation to Sedima, SPRL, v. Imrex Co., 473 U.S. 479 (1985), a civil RICO action based on mail and wire fraud violations in which the Supreme Court found the preponderance standard to govern, see US Br. at 130, Defendants complain that the D.C. Circuit case that the United States cited, Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995), did not consider or discuss a required standard of proof. See JD Br. at 27 n.9. In fact, the Whelan court's silence as to a heightened standard of proof undercuts Defendants' argument, because in that case the Court of Appeals concluded that the full burden of proof borne by the plaintiff, including proof of deliberate falsity, **by itself** eliminated any constitutional issue. Whelan therefore suggests that the clear and convincing standard is **not** a constitutional requirement. See Whelan, 48 F.3d at 1254. In this case, just as in Whelan, the United States must prove that Defendants' have undertaken their scheme with intent to defraud.

Defendants' uniform concealment of their superior knowledge regarding smoker compensation, including concealment from the drafters of the 1981 Surgeon General's Report (US 85127 at 3799) (O); Burns WD, 55:17-56:13. Toeing the line set by the 1958 direction of C.C. Little, Defendants' joint characterization of their low tar marketing as a mere response to public demand remains Defendants' public position today. US 20138 at 7480 (O). And while Defendants claim that the purportedly "diverse nature of Defendants' recent actions regarding low-tar cigarettes" evidences a lack of joint activity, JD Br. 105-06, Defendants' actions are in lock-step on the core facet of their low-tar fraud: no Defendant has publicly admitted the crucial role of nicotine addiction in causing compensation.[23]

a. Defendants' statements about low-tar cigarette are fraudulent

Defendants claim, contrary to the extensive record evidence, that their statements were not false, because low tar cigarettes are, in fact, less harmful. JD Br. 106-08. Defendants' fall-back position hearkens back to their decades-long stance on causation and addiction: that whether lower tar cigarettes provide any significant health benefit is still an "open question" that remains "uncertain." Defendants' assertion is contradicted by the **conclusions of every major scientific body that has recently studied this issue** and examined all the relevant evidence. US FF § III.D.(4)(a), ¶¶ 3524-3533. Having failed to proffer the testimony of a single

[23] Incredibly, Defendants claim that they did not participate in joint fraudulent activity, because in the Barclay court proceeding, which was **closed** and **non-public**, Philip Morris and RJR raised issues relating to the inaccuracy of the FTC Method **as to a single brand of B&W/BATCo cigarette**. However, the fact that Defendants never raised these issues publicly in the United States shows that their collusive enterprise held even in intra-Defendant litigation. Indeed, when Philip Morris threatened to **publicly** expose the deceptiveness of Barclay's FTC yields, BATCo threatened retaliation with its "Armageddon option" of going public with "the true scientific position" that **all** low tar cigarettes produce deceptively low FTC yields. US 85081 at 5832 (O); US 85062 at 5689 (A). Faced with the threat of disclosure, Defendants agreed to keep each other's secrets, having never provided "the true scientific position" to the American public; these actions illustrate Defendants' coordinated fraudulent activity. US FF § III.D.(4)(c)(i), ¶¶ 3810-3825.

epidemiologist, Defendants ask the Court to ignore the conclusions of these eminent scientific bodies and rely instead on **Defendants' interpretation** of the epidemiological evidence – unsupported by testimony from any qualified expert – to find a reduction in lung cancer risk.[24]

Defendants resort to several contortions and misstatements of the evidence in an attempt to support their assertion that the United States' recitation of the evidence on this issue "ignores" significant facts.[25] Moreover, contrary to Defendants' claims, the FTC, "an agency primarily of lawyers and economists . . . . has never taken an official position on whether low tar cigarettes are less harmful." Mulholland WD, 5:16-18; 17:3-10. Defendants also make several misleading or flatly incorrect[26] statements regarding cigarette elasticity that careful review identifies as simply wrong.[27] Moreover, contrary to Defendants' assertions, voluminous evidence in the

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[24] Dr. Samet, epidemiologist and coauthor of Monograph 13 Chapter 4, testified he agrees with Monograph 13's conclusions, adding: "The evidence is clear. We have tracked the risk of lung cancer closely and not seen a fall in relative risks to smokers." Samet WD, 169:14-16.

[25] For example, Defendants cite to their claim "that [Dr. Burns's] opinion that there had been no meaningful reduction in risk due to reduced-yield cigarettes was his own personal belief and *not* scientific consensus" in attempted support of their assertion that lower tar cigarettes are less harmful. JD Br. 107. This is a mischaracterization for two reasons. First, Dr. Burns disagreed with Defendants' characterization, responding: "No, I don't believe that's a fair statement of at least what I was trying to communicate. Would you like me to restate it?" Burns TT, 2/15/05, 13393:17-25. Second, Dr. Burns clearly testified that the conclusions presented in Monograph 13 and reflected in all other major examinations of this issue since that time – that lower tar cigarettes provide no significant health benefit – "represent the **consensus view of the scientific community on this issue**." Burns WD, 31:6-19 (emphasis added).

[26] Defendants' claims that no United States witness testified about the effect of Defendants' design for elasticity of delivery, or that it had any meaningful effect on either compensation or harmful health effects, are preposterous. JD Br. 109-10 n.49. The record is replete with evidence establishing Defendants' design for elasticity achieved its intended effect of substantially increased deliveries to smokers, thereby negating any potential significant health benefits of these cigarettes. See, e.g., US FF §§ III.D.(4)(b) & (c), ¶¶ 3731, 3733, 3734, 3738, 3742, 3769-71, 3775-77, 3780-81, 3784-88, 91, 3793, 3797, 3805, 3851-52, 3869, 3871-72.

[27] Defendants' assertion that no cigarette design exists that would completely prevent a smoker from compensating is irrelevant for several reasons. First, Defendants made no effort to

(continued...)

record demonstrates that Defendants concealed their superior knowledge of smoker compensation. See, e.g., US FF §§ III.D.(4)(b) & (c) ¶¶ 3649, 3665-67, 3849, 3893-95.

b. Evidence establishes that Defendants intended to deceive

Faced with overwhelming evidence that clearly shows Defendants intended to defraud smokers regarding low tar cigarettes, Defendants attempt to mis-characterize the standard for intent, wrongly suggesting that the United States is required to prove that Defendants specifically intended to develop cigarettes that were not less harmful. JD Br. 111-14. Instead, the United States was required to – and did – prove that Defendants knew that the cigarettes they designed allowed smokers to consistently achieve tar yields above those measured by the FTC test, and that smokers' pursuit of daily nicotine intake levels would cause them to do so. And at the same time, Defendants marketed those cigarettes with implied health messages.

In suggesting that "Defendants' employees lacked a specific intent to defraud," JD Br. 111, Defendants ignore the overwhelming evidence proving Defendants' intent to defraud. The United States has highlighted hundreds[28] of Defendants' own internal documents in nearly 400

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[27](...continued)
design a cigarette to be compensation-proof. See, e.g., US 21579 at 3263 (A); US FF § III.D.(4)(c), ¶ 3866. Second, the fraud alleged and amply proved by the United States is that Defendants designed their cigarettes to **enable and promote** compensation. US FF § III.D.(4)(c). Next, Defendants claim that the design features they used to construct cigarettes with elasticity of delivery were not secret; however, Defendants kept secret that they were using these design features to provide elasticity and the methods by which they did so, for example, by obtaining "elasticity through non-obvious design features." (US 20230) (A). Similarly, while Defendants laud their statements to the FTC that, if people smoke cigarettes differently, they will receive different yields, this tellingly ignores what Defendants have long known and purposefully concealed: that smokers' nicotine addiction would drive them to compensate when smoking lower tar cigarettes, and that Defendants designed their cigarettes to promote compensation.

[28] Defendants' assertion that "[t]he Government seizes upon a lone document" stating that "[t]he illusion of filtration is as important as the fact of filtration" (JD Br. at 111) is an abject misrepresentation of the evidence offered by the United States at trial. The Johnston memorandum (US 20123 (A)) is merely one illustrative example of Defendants' state of mind.
(continued...)

pages of Proposed Findings of Fact that demonstrate Defendants' intent to deter smokers from quitting by communicating health reassurance and Defendants' awareness that their health reassurance communications were false and misleading. See US Br. at 62; US FF § III.D. Defendants' internal documents show that Defendants have known for decades that low tar cigarettes offer no reduction in cancer risk, that smokers obtain comparable amounts of nicotine and tar regardless of whether they smoke regular or purportedly low tar cigarettes, and that Defendants intentionally design their low tar cigarettes to facilitate smoker compensation. US Br. at 65-66; US FF §§ III.D.(4)(a)-(c).

In a failed attempt to demonstrate a lack of intent to defraud, Defendants claim that their "development and marketing of reduced yield cigarettes was a response to the changing regulatory environment in which they were **forced** to compete." JD Br. at 111 (emphasis added). This claim is false and contradicted by the record. As the United States demonstrated, US Br. at 69, there is **no evidence** in the record of any internal industry documents where Defendants stated that they were designing and marketing low tar cigarettes because the mainstream scientific community or the FTC had asked them to.[29]

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[28](...continued)
As the Court is well aware, documents stating and striving toward the same principle were featured extensively in the United States' third interim summation (April 21, 2005) and closing argument (June 7, 2005).

[29] Defendants' claim that they put forth "precisely the message the Government and public health authorities conveyed to smokers for decades: Quit, but if you will not, switch" (JD Br. at 113), is false and disingenuous. As the United States demonstrated, US Br. 68-70, Defendants intended to **prevent** smokers from quitting, US FF §§ III.D.2, in contravention of the Surgeon General's primary advice to smokers to quit smoking entirely. Defendants' internal documents show that, in direct opposition to the Government and public health community, Defendants' true intent is to maximize their profits by keeping Americans smoking. US FF §§ III.D.2.-3.

c. Defendants' reliance on Watson is misplaced

Defendants rely heavily upon a recently issued decision, Watson v. Philip Morris Companies, Inc., 420 F.3d 852, 2005 WL 2036292 (8th Cir. Aug. 25, 2005), to reiterate a claim that this Court has previously rejected in this case: that the FTC's regulatory conduct under its statutory authority bears on this enforcement action under the entirely distinct federal statutes – RICO and the mail and wire fraud statutes. Defendants' reliance on Watson is misplaced for several reasons.

First, the Court has already rejected Defendants' claim that the United States seeks to impose liability for Defendants' "adherence to FTC mandates' regarding the disclosure of tar and nicotine yields," holding that "[t]he specific advertisements which the Government claims were intentionally misleading, and which are the subject of these Motions, were certainly not mandated by the FTC." See United States v. Philip Morris, 263 F. Supp. 72, 81 (D.D.C. 2003) (citation to Defendants' brief omitted).[30]

Second, this Court's prior holding is supported by the great weight of the evidence presented at trial in this case. Watson concerned a motion by the plaintiffs to remand to state court a case that had been removed to federal court.[31] Thus, the preliminary procedural posture

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[30] To the extent that Defendants suggest that Watson supports their contention that they are not liable or that relief should be denied because of equitable doctrines such as equitable estoppel, unclean hands, or in pari delicto, the Court properly dismissed these affirmative defenses in 2004. United States v. Philip Morris USA, 300 F. Supp. 2d 61 (D.D.C. 2004); see also U.S. Br. in Opp'on to Post-Trial Brief of Joint Defendants on Affirmative Defenses (filed on same date as Sept. 19, 2005) (demonstrating inapplicability of equitable defenses to relief in this case).

[31] Removal to federal court in Watson was based on 28 U.S.C. § 1442(a), which in relevant part allows removal to federal court by any federal "officer (or any person acting under that officer)." Every other court to consider Philip Morris's claim for removal under this provision has rejected it. See Watson, 2005 WL 2036292, at *3 (citing Virden v. Altria Group, Inc., 304 F. Supp. 2d 832 (N.D. W.Va. 2004); Paldrmic v. Altria Corp. Servs., 327 F. Supp. 2d

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in that case differs significantly from the case at bar, in which the Court received extensive evidence on this subject during a nine-month trial. In this case, for example, Defendants called as a witness Joseph Mulholland, a longtime FTC employee, who **rejected** Defendants' claim that the FTC has given special focus to cigarette advertising:

> [T]he Commission is charged by Congress with identifying deceptive and unfair acts and practices in **all** areas of intrastate [sic] commerce. Over the past approximately 60 years, the Commission has, at various times, conducted investigations and brought enforcement actions concerning the tobacco industry. **The tobacco industry is simply one of the numerous types of commerce that the FTC has looked at over this period of time. To the best of my knowledge, the agency has never focused, nor at any given time have more than a handful of staff focused, on cigarette-related issues**.

Mulholland WD, 5:7-18 (emphasis added). Moreover, in response to Defendants' own questioning about the FTC's approach to brand descriptors such as "light" and "lowered tar," Mulholland confirmed that "**the FTC has never taken an official position on the use of descriptors and has never defined or recognized the descriptors used by cigarette manufacturers in their advertisements**." Id. at 26:22-27:3 (emphasis added).[32]

In short, Defendants' citation to Watson warrants no legal or evidentiary weight in this case.

5. Defendants Cannot Separate Their Youth Marketing from the Overarching Scheme to Defraud

As set out in the United States' opening brief, the Court has already recognized that the

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[31](...continued)
959 (E.D. Wis. 2004); Tremblay v. Philip Morris, 231 F. Supp. 2d 411 (D.N.H. 2002)).

[32] See also, e.g., JD 005450 at 5189 (A) (1969 FTC Report concluding that 3 separate FTC studies "**amply demonstrate the futility in relying upon voluntary regulation of cigarette advertising to achieve any significant changes in the content and meaning of cigarettes advertising**.") (emphasis added).

youth marketing sub-scheme is alleged to have "served the goal of sustaining and expanding the market for Defendants' cigarettes and maximizing their profits by defrauding consumers of the purchase price of cigarettes" and "can only be meaningfully assessed in the context of the entirety of the Defendants' alleged conduct." United States v. Philip Morris USA, 304 F. Supp. 2d 60, 66 (D.D.C. 2004). Defendants complain, however, that "youth marketing . . . does not constitute mail or wire fraud or a RICO violation" and argue that the United States "cannot transform a practice it does not like into a RICO violation merely by asserting that, when confronted with allegations they engaged in the practice, Defendants denied them." JD Br. at 99. Defendants' contention rests on their assertion that youth-appealing advertisements identified as predicate acts "did nothing to further the fraud alleged." Id.[33] The contention ignores the evidence of the critical role that Defendants' ability to engage in unimpeded marketing to teenagers played in their ability to "sustain[] and expand[] the market for Defendants cigarettes and maximiz[e] their profits by defrauding consumers of the purchase price of cigarettes." Philip Morris USA, 304 F. Supp. 2d at 66. That critical role, Defendants' acknowledgment of it, and the joint actions undertaken by Defendants to fraudulently protect their ability to market to youth through false public statements are detailed in the United States' Findings and opening brief.

Defendants remaining arguments concerning youth marketing are readily refuted by record evidence. For example, Defendants cite to the testimony of Dr. Dolan regarding the "target" of specific marketing plans in an effort to narrow the analysis of their marketing to a small subset of marketing documents that fail to reflect the substance of Defendants' marketing initiatives. In particular, Defendants would have the Court ignore the innumerable other internal

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[33] Defendants appear to have wisely abandoned the argument that alleged predicate acts must contain false statements to satisfy the mail and wire fraud statutes. As set out extensively in prior briefing by the United States, it is only necessary that the predicate acts be mailed or sent by interstate wire transmission in order to further the scheme to defraud.

marketing documents explicitly referencing individuals under 18. For instance, as the Court is well aware, Defendants' internal documents reveal that they collected tracking data on the brand preference of individuals under 18. Defendants have offered no credible explanation why they have spent so much time and money studying the brand preference of individuals under the age of 18 if they did not market to this age group. Furthermore, beginning in the 1980's, Defendants' marketing employees were explicitly instructed not to include references to individuals under 18 when they drafted marketing documents. See US FF § III.E(4)(iii)(b). In the end, Defendants' effort to attribute an admission to Dr. Dolan is directly contrary to the sum and substance of his testimony in this case. See generally, Dolan WD.

Defendants further assert that "[t]he Government offers no proof to contradict the sincerity of" public statements denying marketing to youth or expressing a commitment to reducing a underage consumption of cigarettes. JD Br. at 103. The extensive evidence at trial regarding Defendants' ongoing marketing activities belies the sincerity of their public statements denying marketing to youth. For example, despite receiving numerous complaints from public officials about the youth appeal of their Camel flavored cigarettes, R.J. Reynolds Chairman Andrew Schindler testified that the company had no plans to stop marketing flavored cigarettes. Schindler TT, 1/24/04, 10830:17-10834:6; 10845:16-10846:17. More generally, Defendants have not reduced the amount of money they devote to marketing their products – recent expenditures on cigarette advertising and promotion increased dramatically and have been directed to the development of new ways to reach mass audiences with the same youth appealing imagery that has been a part of industry advertising and marketing for decades. US FF § III.E.(7)(a). This has included increased retail level promotion, a dramatic expansion in the use of direct mail, and continued sponsorship of events like motor sports racing series. Notably, the increased expenditures have promoted many of the campaigns – including Newport Pleasure and

the Marlboro cowboy – that vaulted these cigarette brands to the pinnacle of teenage popularity.

For these and other reasons set out at length in the United States' Findings, the Court should reject Defendants' arguments concerning their past and ongoing marketing practices.

6. Defendants Suppressed Information in Order to Further Their Scheme to Defraud

Defendants' response to the United States' evidence establishing decades of suppression of research and destruction of documents is essentially a series of technical objections to the Court's consideration of the evidence. While attacking very little of the evidence itself, Defendants instead claim that the United States failed to prove that the suppression of research and destruction of documents was ever done pursuant to an agreement between the companies, that the multitude of acts are only "disconnected and unrelated individual company acts" that do not form a "pattern of racketeering activity," and that certain acts of suppression and destruction did not have a sufficient impact on the United States. JD Br. at 94-95, 97.

The acts of suppression and destruction, whether assessed collectively or individually, are plainly relevant to Defendants' overarching scheme to deceive the public with respect to the health effects of cigarettes. Legally, it is sufficient that the acts of suppression and destruction were undertaken in furtherance of the common objectives of the Enterprise, namely to deny health effects and addiction and to protect against liability judgments. See United States v. Elliot, 571 F.2d 880, 902-03 (5th Cir. 1978) ("Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.") So, for example, David Hardy warned B&W in 1970 "a plaintiff would be greatly benefitted by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should removed, or that

smoking causes a particular disease." US 30935 (O). Such evidence would not only entitle a plaintiff to compensatory damages, wrote Hardy, "but could well be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages," and would be "devastating to the defendant." Id. Similarly, Tom Osdene voiced his concerns in 1977 with the direction of certain CTR nicotine research, writing that with "the progress that has been claimed, we are in the process of digging our own grave," adding that he feared that "the direction of the work being taken is totally detrimental to our position and undermines the public posture we have taken to outsiders." US 36865 (O). These and similar joint concerns, expressed in Defendants' internal documents, drove suppression efforts in furtherance of the scheme to defraud.

Moreover, as the United States described in the Post-Trial Brief, many of the acts of suppression and destruction were carried out collectively, making use of industry law firms. See US FF § III.F(2)(a). Similarly, much of the conduct of B&W to hide documents and suppress research was closely coordinated with BATCo. See US FF §§ III.F(2)(d) and (3)(b). Other suppression was directed by industry groups. See, e.g., US FF § III.A.(2)(f), ¶ 536.

Defendants next assert that many of the incidents of suppression and destruction took place in foreign countries, and that these incidents did not impact the United States. JD Br. at 95. Yet there is no requirement that the all acts in furtherance of the RICO conspiracy take place in the United States, and Defendants' citations to cases do not support their argument. Indeed, none of the cases cited by Defendants stands for the bizarre proposition that **each and every foreign act** carried out in furtherance of a RICO conspiracy must have "direct or substantial effects" in this country in order to be admissible. JD Br. at 98.

Finally, Defendants' comment that the testimony of Frederick Gulson and John Welch is "dubious" and "unreliable" (JD Br. at 95-96) ignores the documentary evidence and absence of

bias detailed in the United States' Findings of Fact and Post-Trial Brief. See US FF ¶¶ 5054-5105; US Br. at 88-89. The only witness whom Defendants quote to dispute portions of Gulson's testimony is former BATCo legal head Nicholas Cannar, a witness who refused to answer numerous questions about BATCo document destruction policies on grounds of self-incrimination. US Br. at 89-91. As the United States explained, the court should draw an adverse inference due to Cannar's refusal to answer questions. Id. The United States does not dispute that Australian law governed whether Cannar was permitted to invoke self-incrimination privilege (New South Wales Evidence Act § 128); but the significance of that assertion, and the inference this Court should draw from his doing so, are governed by U.S. law. See U.S. Reply to BATCo Opp. to U.S. Oral Mot. for Adverse Inferences (R. 5352).

Defendants' only substantive argument with respect to Mr. Welch is that his recollection of a "document retention policy" in effect when he served as the CEO of the Tobacco Institute of Australia may be inaccurate. JD Br. at 96. Id. Defendants' speculation in this regard was not borne out on cross-examination. Defendants claim that his testimony is contradicted by documents suggesting that a "document retention policy" was under discussion during his tenure, and that therefore "there was no document retention policy in effect during his tenure there." The documents referred to in Defendants' brief were not only internally inconsistent (for example, the attachment seized upon by Defendants was dated weeks after the cover memorandum), but at most suggested an initiative to update or formalize the existing TIA policy near the end of Mr. Welch's tenure. Moreover, Mr. Welch's testimony is consistent with that of Mr. Gulson, and confirmed by events recited in the McCabe decision, the publicly available portions of the Foyle memorandum, and other documents. See US FF ¶¶ 5054-5105. Moreover, Defendants did not offer a single witness to contradict his recollection of the policy and its terms.

C. Defendants Misstate the Law on Corporate Intent, Including the Law As It Applies to Predicate Acts of Mail and Wire Fraud, and Misapply the Facts of this Case to the Collective Knowledge/Collective Intent Distinction in Bank of New England

Defendants' attempt to refute the United States' legal and factual demonstration that they possessed the specific intent to defraud, see JD Br. at 19-23, is replete with mis-readings of the cases on which they rely, and mischaracterizations of the evidentiary examples proving fraudulent intent cited in the United States' Post-Trial Brief. Most importantly, Defendants incorrectly state the law of this Circuit on corporate intent, claiming that intent "must be determined by focusing on a particular predicate act related to a misrepresentation and focusing on a person responsible for the misrepresentation and his/her state of mind." JD Br. at 20. Defendants offer no citation for this statement.[34] It is incorrect for several reasons.

First, it ignores extensive case law recognizing that corporations conduct business through the collective, compartmentalized actions of individuals, and that such delegation of responsibility cannot be exploited to avoid corporate liability for wrongdoing. See, e.g., United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987). In Bank of New England, the First Circuit separately upheld "collective knowledge" and "collective intent" instructions. Defendants do not contest that they are charged with the collective knowledge of their employees and agents. The instruction on intent in Bank of New England stated in part: "The bank is deemed to have acted willfully if one of its employees in the scope of his

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[34] Indeed, the first case Defendants **do** cite for the incorrect claim that "specific intent must be proven with respect to specific predicate acts" does not support Defendants' crabbed view of the mail fraud statute. In Gentry v. Resolution Trust Corp., 937 F.2d 899, 908 (3d Cir. 1991), the court correctly stated that in a RICO case premised on mail fraud violations, the mens rea standard is met if the defendants "have knowledge of the illicit objectives of the fraudulent scheme and willfully intend that those larger objectives be achieved." 937 F.2d at 908-909 (citing United States v. Pearlstein, 576 F.2d 531, 541 (3d Cir. 1978)); see also United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996) ("fraudulent intent is essential to a scheme to defraud") (internal quotation marks and citation omitted).

employment acted willfully." Id. at 855. Defendants inexplicably interpret the statement in the parenthetical to be a **rejection** of the concept of collective intent. JD Br. at 21. Defendants ignore that this part of the instruction by the trial court in Bank of New England was exactly parallel to a part of the "collective knowledge" instruction that stated, "If you find that an employee within the scope of his employment knew that CTRs had to be filed . . . the bank is deemed to know it"; and that the trial court also told the jury "There is a similar double business with respect to the concept of willfulness with respect to the bank." Bank of New England, 821 F.2d at 855. Thus, as long as the United States proves that at least one of each Defendant's employees or agents acted with specific intent to defraud – and it has done so, as reflected in nonexclusive examples described in its Post-Trial Brief – then Defendants as corporations possess such intent.[35]

Second, an act of mail or wire fraud – i.e., a particular use of the mails or wires intended to be in furtherance of a scheme to defraud – need not itself contain any misrepresentation or other fraudulent statement.[36] Rather, Defendants need only intend to cause a mailing or wire transmission to further the scheme to defraud. Therefore, it is simply wrong to contend, as Defendants do, that specific fraudulent intent must be shown for each predicate act.

Third, Defendants are likewise incorrect that the Court must focus on the state of mind of the individual responsible for the fraudulent misrepresentation. None of the cases cited by

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[35] As shown in the United States' Post-Trial Brief and Post-Trial Proposed Findings of Fact, the evidence proving unlawful intent in this case is incomparably more compelling and voluminous than that found sufficient in Bank of New England. Id. at 857.

[36] Defendants concede this point later in their brief. See JD Br. at 26. However, Defendants again assert, without any legal support, that "a scheme to defraud cannot rest upon truthful statements; instead it requires statements that are false or deceptive." Id. at 18. As shown in the United States' opening brief, Defendants are flatly incorrect on this point. See US Br. at 94-95 & n.51.

Defendants support the proposition that in a case involving mail or wire fraud by a corporation, the individual making a fraudulent statement must **personally** be proven to possess fraudulent intent. For example, Dana Corp. v. Blue Cross & Blue Shield Mutual of Northern Ohio, 900 F.2d 882, 886 n.2 (6th Cir. 1990), does **not** state that the same employee who caused the mailing, or who made a fraudulent statement, must be the one proven to have fraudulent intent. See also United States v. L.B.S. Bank-New York, Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) ("[I]n order for the verdict against LBS to stand, there must be evidence from which a jury could reasonably determine that **at least one agent** of LBS had the specific intent to join the conspiracy to defraud the government.") (emphasis added).[37] Indeed, the rule Defendants urge would allow corporations to escape liability by segregating knowledge and dividing up duties to ensure that fraudulent statements and other acts were issued by ignorant rubes – a rule forcefully rejected in two Courts of Appeals cases that Defendants do not distinguish, United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1986) and United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 919 (4th Cir. 2003).

Fourth, for the reasons described in the United States' opening brief, Defendants' claim that Saba v. Compagnie Nationale Air France, 78 F.3d 664 (D.C. Cir. 1996), is an express rejection of "collective intent" fails. See US Br. at 101-102. The Saba court noted that individual acts of negligence by employees, "**without more**," cannot be combined to satisfy a wrongful intent standard – a recognition that negligence and specific wrongful intent are different states of mind, but that evidence of negligence, along with other evidence, **can** contribute to a

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[37] Defendants quote from two cases arising under the heightened pleading provision of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b). See Southland Securities v. Inspire Ins. Solutions, 365 F.3d 353 (5th Cir. 2004); Higginbotham v. Baxter, Int'l, No. 04C 4909, 2005 WL 127221 (N.D. Ill. May 26, 2005). Those decisions turn on interpretation of particular statutory language in the PSLRA, and thus have no applicability to this RICO case.

finding of wrongful intent. See Saba, 78 F.3d at 670 n.6. This latter point – reflecting the well-established principle that intent is proven through indirect and circumstantial evidence, see US Br. at 104 (citing cases) – is ignored by Defendants. The totality of the evidence in the record, including the knowledge possessed by Defendants' employees and agents, is therefore relevant to the determination that individuals at each Defendant possessed the requisite intent.

More fundamentally, the United States has introduced a great volume of probative evidence that in its totality compels a finding that employees and agents of Defendants possessed the requisite fraudulent intent. Defendants' opposition mis-characterizes the value and purpose of the evidentiary examples that the United States cited in its Post-Trial Brief. US Br. at 104-27. The examples – both for the particular employee at issue and the evidence cited – offer probative information about particular employees' fraudulent intent, either directly or indirectly through proof of activities they were involved in or aware of that were closely linked to Defendants' scheme to defraud. Thus, the cited examples are circumstantial evidence of the requisite state of mind.[38] Moreover, as the United States' opening brief explained, the Post-Trial Proposed Findings of Fact identify many more individuals who were employed or retained by Defendants who have undertaken purposeful, conscious actions to execute and further the scheme to defraud. Additionally, while the United States' brief focused on employees, the evidence shows that numerous agents of Defendants – including lawyers like John Rupp of Covington & Burling – were conscious and purposeful participants in, and at times architects of, Defendants' fraudulent

[38] Indeed, Defendants do not specifically challenge the evidence showing fraudulent intent for several of the employees the United States used as examples: B&W's Thomas Sandefur, J. Kendrick Wells, and Ernest Pepples; BATCo's Sharon Boyse-Blackie; and Liggett's Joseph Greer.

scheme.[39]

D. Defendants Offer an Erroneous Interpretation of the Proof Required to Satisfy the "Operation or Management" Test in Reves, and the Court Should Reject Their Attempt to Deny Participation in a Pattern of Racketeering Activity

Unable to address the mountain of evidence in the record establishing that the RICO requirements have been amply satisfied, US FF § 1, US Br. 2-91, Defendants resort to misrepresentation of the standards for RICO liability; citation to cases that were abrogated or rejected by the Courts of Appeal[40]; falsities concerning the legal authority cited by the United States; nonsensical reference to irrelevant portions of their pleadings[41]; and various other

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[39] Defendants' warnings about "chilling appropriate advocacy" by in-house counsel – or any other lawyer – bears little heeding in light of the evidence adduced in this case and presented in the United States' Post-Trial Findings of Fact. From the earliest days of Defendants' enterprise, lawyers both inside and outside the companies crossed the bounds of appropriate advocacy and played a central role in maintaining and executing numerous aspects of the fraudulent scheme.

[40] Defendants cite Schmidt v. Fleet Bank, 16 F. Supp. 2d 340 (S.D.N.Y. 1998) in sole support of their claim that "[t]he Government is plainly wrong in contending that mere participation in the enterprise satisfies Reves" (JD Br. at 116) without informing the Court that the analysis in Schmidt was rejected by the Court of Appeals in that jurisdiction for being too restrictive. Schmidt, 16 F. Supp. 2d 340, disagreed with by Pavlov v. Bank of New York Co., 25 Fed.Appx. 70, 71 (2d Cir. 2002). Defendants also cite Yellow Bus Lines, Inc. v. Drivers Local Union, 913 F.2d 948 (D.C. Cir. 1990), without indicating that the Supreme Court expressly disagreed with the "operation/management" standard set in that case. Reves, 507 U.S. at 179 n.4. utilizing a RICO standard for participating in the RICO enterprise that required a greater showing of supervisory authority than was called for under the RICO statute. Finally, Defendants cite United States v. Viola, 35 F.3d 37 (2d Cir. 1994) without noting that this case was abrogated. United States v. Zichettello, 208 F.3d 72, 99 (2d Cir. 2000) (noting that Reves ruled only that, to be found liable "under Section 1962c, the defendant must have taken **some part in** directing the enterprise's affairs" (emphasis added)).

[41] Defendants cite to Chapter 13, Paragraph 24 of Joint Defendants' Findings of Fact in support of their mistaken claim that "the Government has failed to show the identity of the individuals who formed the structure and provided the continuity of personnel of the alleged "enterprise." JD Opp'n Br. 117. Defendants' purported requirement does not exist, and even if it did, it would be amply satisfied by the evidence. Moreover, Defendants' citation to Chapter 13, Paragraph 24 of their Findings of Fact is irrelevant to – and fails to support – Defendants' claims regarding the RICO enterprise.

attempts at obfuscation.

First, Defendants wrongly suggest that the United States alleges seven different schemes to defraud, and wrongly argue – with no support whatsoever – that "no Defendant can be liable unless it committed at least two predicate acts associated with a particular scheme." JD Br. at 114-15. This is plainly wrong. As noted above and as this Court has recognized, the United States has always alleged **a single overarching scheme to defraud**. See, e.g., United States v. Philip Morris, USA, 337 F.Supp.2d 15, 22-23 (D.D.C. 2004). The United States must prove – as it has done – that each Defendant committed at least two racketeering acts in furtherance of the overarching scheme to defraud, not two acts for each component of that scheme. See US Br. 131-143; H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989).

There is no dispute that the United States must satisfy the requirements of 18 U.S.C. § 1962(c) as to each Defendant. JD Br. at 115. However, as the United States demonstrated in its opening brief (US Br. at 142-43), in determining whether or not the requisite continuity has been proven to establish a pattern of racketeering, the Court is not confined to the isolated examination of specific racketeering acts charged against each Defendant standing alone. Rather, the requisite continuity may be established by the nature of the enterprise and other unlawful activities of the enterprise and its members considered in their entirety, including uncharged unlawful activities. H.J. Inc., 492 U.S. at 242-43; United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999).[42] Overwhelming evidence demonstrates a pattern of racketeering activity by each Defendant, US Br. at 140-143, and Defendants' argument to the contrary should be rejected.

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[42] Defendants' assertion that Richardson is inapplicable because it involved only the conspiracy provisions of 18 U.S.C. § 1962(d) is plainly wrong, as the opinion expressly states: "The indictment charged Richardson with RICO, 18 U.S.C. § 1962(c) (1994), RICO conspiracy, id. § 1962(d)." Richardson, 167 F.3d at 623.

In addition, Defendants wholly fail to address the record evidence establishing that "each Defendant was . . . a significant participant in the making and implementation of decisions in furtherance of the Enterprise's affairs" (US Br. at 22; US FF § I), thus satisfying the operation/management test established in Reves v. Ernst & Young, 507 U.S. 170 (1993). Instead, Defendants devolve into misrepresentations of the legal standard and bald claims that it has not been met. Defendants ignore the statements in Reves establishing that significant control is not required to satisfy the operation/management test: "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 (internal quotations omitted). Defendants also feign ignorance of the numerous Court of Appeals cases the United States presented setting forth the prevailing legal standard and the overwhelming evidence the United States has adduced satisfying it. US Br. 21-27; see also US PCL (Vol. 1) at 45-52 (setting out standard more extensively). In sum, Defendants' arguments on these issues lack factual and legal support, and must be rejected.

E. The RICO Liability of BATCo and Altria is Demonstrated by Their Participation in the Affairs of the Enterprise

1. There Is Substantial Evidence That, Short of Court Intervention, BATCo Will Continue to Act in Furtherance of the RICO Enterprise

Defendants argue that the United States has failed to prove that BATCo "is reasonably likely to act [in violation of RICO] in the United States, going forward." JD Br. at 126. Defendants' claims should be rejected, because evidence supports the finding that BATCo is reasonably likely to engage in wrongful activities in the future based on its long and extensive history of participation in the RICO enterprise. In addition, BATCo's actions since the initiation of this case – including its present positions on smoking and health issues – demonstrate that it is

likely to continue to commit RICO violations in the future.

a. Defendants' past acts are sufficient to infer that BATCo will continue to commit wrongful acts in the future

As this Court has ruled and the overwhelming case law demonstrates, a pattern of unlawful conduct is sufficient, by itself, to establish the reasonable likelihood of future violations. See United States v. Philip Morris USA, 316 F. Supp. 2d 6, 10 n.3 (D.D.C. 2004) (collecting cases); US Br. at 151-156. Moreover, each defendant remains liable for the continuation of events it conspired with its co-defendants to set in motion.[43] BATCo's own conduct provides an ample basis for a finding of liability and the imposition of remedies. For decades BATCo has participated in international organizations formed to facilitate the objectives of the enterprise by bolstering illegitimate claims that smoking's deleterious effects were unproven and that nicotine was not addictive. Far from supporting BATCo's claims that it will not engage in RICO violations "going forward," BATCo's current participation in such organizations demonstrates that BATCo is participating and will likely continue to participate in the enterprise.[44] Moreover, BATCo has for decades played an active role in Defendants' efforts to suppress and conceal information regarding the true health consequences of smoking and the addictiveness of nicotine. See US Br. at 82-91; US FF § III.F.(2)(d), ¶¶ 4974-5127.

Legally, Defendants fail to present a single case that would suggest that the Court should only consider actions taken by BATCo within the United States when assessing the company's

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[43] See, e.g., United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377 (2d Cir. 1993); United States v. Local 30, United Slate, Tile & Composition Workers, 871 F.2d 401, 408-09 (3d Cir. 1989); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 319-26 (D.N.J. 1984), aff'd 780 F.2d 269, 292-94 (3d Cir. 1986).

[44] For example, BATCo continues to support the operation of the enterprise through its participation in TAC (formerly TSMC and then TRC), CORESTA, and the TDC (formerly ICOSI and then INFOTAB). See US FF § I.H.

RICO liability. Indeed, Defendants concede, in their second argument discussed infra., that actions outside the United States are sufficient.

b. BATCo's current actions demonstrate that it is likely to commit future RICO violations

BATCo's actions during the pendency of this lawsuit demonstrate the reasonable likelihood of future wrongdoing by the company. In fact, the Court found BATCo's conduct during this lawsuit so egregious that it twice issued findings of civil contempt against BATCo. In both instances, the contempt findings were based upon BATCo's continued efforts to suppress information which should have been produced in the normal course of discovery. See US Br. at 160. Regarding the contempt findings, the thrust of Defendants' argument is that all of the findings should be ignored because "the Court erred" in reaching the numerous findings of contempt. See JD Br. at 130 nn.68-69. Having provided no basis to support the repeated assertion of Court error, this argument must fail. Defendants' second argument is no more persuasive. Defendants state that "the conduct that led to the contempt orders of the Court – failure to produce documents of BATCo's sister affiliates in Australia, and the failure to produce a 30(b)(6) witness with personal knowledge of the privileged Foyle Memorandum – is most unlikely to ever occur in future U.S. litigation." JD Br. at 129-30. Defendants offer no facts to support this bald assertion.

c. Continued ties to the United States and fear of international repercussions provide BATCo with a continued incentive to participate in and support the enterprise

In a futile effort to demonstrate that it will not continue to violate RICO in the United States in the future, BATCo argues that it conducts no business in the United States and that it is unlikely to have anything more than "incidental" contact with tobacco manufacturers in the United States. JD Br. at 126-127. In addition to the fact that future action within the United

States is not required, each of these assertions is inaccurate. First, BATCo conducts business in the United States through an agreement with Lane Limited (which is now owned by Reynolds American, Inc.), which sells and markets millions of BATCo's State Express 555 brand cigarettes in the United States. JD FF Chap. 12, § IV.F.1. ¶¶470-471; US 77453 (O). Second, BATCo continues to participate with other Defendants in international organizations that play an important role in the operation of the enterprise. In addition, BATCo remains closely affiliated with Reynolds American, Inc., the parent company of R.J. Reynolds Tobacco Company and Brown & Williamson Tobacco Corp., see JD FF Chap. 12, § IV.D.1. ¶¶ 338, 343, 345, and BATCo continues to have an economic incentive to support Reynolds's pursuit of the goals of the scheme to defraud.

Finally, even putting BATCo's interest in the success of Reynolds American aside, BATCo generally continues to have a strong interest in the success of the ongoing RICO enterprise. As reported following a meeting which included high-ranking BATCo executives, the tobacco industry was interested in forming a "defensive smoking and health strategy, to avoid our countries and/or companies being picked off one by one, with a resultant domino effect." US 22980* (O). BATCo's interest in avoiding the "domino effect" remains strong today.

d. BATCo's extraterritorial actions have a direct effect on the United States

Defendants also argue that despite the admitted impact of BATCo's past actions on the United States, its future actions will have no such direct impact. According to Defendants, "the evidence proves that the only conduct BATCo is reasonably likely to engage in, going forward, will occur outside of the territorial bounds of the United States." JD Br. at 130. There is no evidence in the record to support this assertion. To the contrary, the evidence adduced at trial demonstrates that BATCo's actions to suppress information and research around the world,

including actions in this very case, have had and are reasonably likely to continue to have an impact on the availability of information in the United States.

2. Altria Was and Is an Active Participant in the Enterprise

Defendants' arguments against a finding of RICO liability on the part of Altria must be rejected, for they are based on a mistaken interpretation of the United States' claims. Specifically, Defendants' citations to case law concerning the requirements for a "plaintiff to pierce the corporate veil" (JD Br. at 135) are wholly misplaced in post-trial briefing, Altria's RICO liability is not based on a claim that Altria "so dominates [Philip Morris USA] that it is necessary to treat [Philip Morris USA] as an agent of [Altria]." Id.[45] Instead, evidence unequivocally establishes that Altria acted as a distinct member of the RICO enterprise.

The testimony of Altria's Senior Vice President of Corporate Affairs, Steven Parrish, provides a view of Altria's participation in the Enterprise that **on its own** refutes Defendants' assertion that the company should be absolved of liability.[46] Parrish admitted, inter alia, that

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[45] That the two Defendants – Altria and Philip Morris USA – work closely together is beyond legitimate dispute. It is similarly undisputed that Altria controls many of the activities and public positions of Philip Morris USA and other subsidiaries, including certain research and research funding and positions on smoking and health issues. See US Br. at 23-26, 124-27. But Altria's direct participation in the enterprise is the primary basis for its liability.

[46] Defendants' assertion that the United States "for the first time singles out Charles Wall, Altria's current General Counsel and a lawyer at the company since 1990, as **the** Altria employee who allegedly 'direct[ed] and participate[d] in activities and projects designed to protect and further Defendants' fraudulent scheme" (JD Br. at 138 (emphasis added)) misstates the United States' arguments on intent and on Altria's participation in the enterprise. First, as Defendants are well aware, the United States offered substantial evidence of Wall's involvement in activities designed to further the goals of the enterprise during trial, and the United States' Post-Trial Brief did not mark "the first time" that Wall was identified as a significant participant in conduct furthering Defendants' fraudulent scheme. See, e.g., Parrish WD; Parrish TT, 1/27/05; Keane WD, 10:11-11:4, 25:12-14. Second, the United States does not allege that just one Altria employee or officer furthered the goal of the enterprise – there were many, including Parrish and others cited in the United States' Findings – and Defendants are well aware that the employees identified in the United States' opening brief were merely cited as examples of

(continued...)

officers and members of the board of directors of Altria were involved in activities of CTR and the Tobacco Institute. Parrish TT, 1/27/05, 11349:8-11. Altria's General Counsel Murray Bring and William Murray, who served as President and COO of Altria and, later, Chairman of its Board of Directors, were members of the Board of Directors of CTR and attended its meetings. Id. at 11350:6-12; US 32606 (A); US 32608 (A); US 32610 (A). Another attorney in the legal department at Altria, Alexander Holtzman, was equally active in the activities of CTR. Id.

The participation extended to the Tobacco Institute. Parrish continued to attend meetings of the Tobacco Institute Executive Committee after leaving his position as General Counsel of Philip Morris USA to join the corporate affairs department at Altria. Parrish TT, 1/27/05, 11352:24-11353:24; US 62461 (A). And Altria's Vice-President of Government Affairs served as a Class A Director of the Tobacco Institute, because "the head of Government Affairs always sat on the TI Executive Committee." Parrish TT, 1/27/05, 11353:25-11354:25; US 88252 (A); US 88308 (A).

Just as significantly for purposes of assessing Altria's participation in Defendants' fraudulent scheme, Parrish admitted that Altria had approval authority for CTR Special Projects in the late 1980s and early 1990s. Parrish TT, 1/27/05, 11351:20-11352:2. Moreover, Altria (operating as Philip Morris Companies) issued checks to fund Special Projects, which were dictated by the Tobacco Institute's Committee of Counsel. Id. at 11352:3-23; US 87508 (A). Holtzman approved certain of the Special Projects payments, id., as did Chuck Wall, who specifically wrote to Shook, Hardy & Bacon attorney Bernard O'Neill to provide Special Project funding for Theodore Sterling, a researcher who received millions of dollars from Defendants to

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[46](...continued)
persons with intent to defraud. Third, Altria's participation in the affairs of the enterprise went well beyond Wall's actions.

provide favorable research and public editorial comment over a period of decades. Parrish TT, 1/27/05, 11355:4-17; US 20384 (A); Ward TT, 11/3/04, 5002:5-5008:2 (confirming that Defendants paid Sterling $2.5 million between 1981 and 1988 alone for activities that included editorials and efforts to refute research on the health effects of exposure to secondhand smoke by Repace and Lowery); US 85757 (A); US 24751(A).

Defendants' arguments against Altria's liability are directly contrary to the foregoing evidence showing Altria's participation in the conduct and affairs of the Enterprise, as well as the extensive evidence cited in the United States' Findings.

F. The Evidence Does Not Support Liggett's Claim of Withdrawal

In its post-trial brief, Liggett argues that to the extent there is any evidence of its participation in the alleged RICO conspiracy and enterprise, it affirmatively withdrew from those RICO activities by the mid-1990s.[47] Liggett Br. at 8. Liggett's claim of withdrawal fails for three reasons. First, a withdrawal defense does not preclude Liggett's liability in this litigation as a matter of law because it involves a government suit for equitable relief based upon a pattern of mail and wire fraud offenses to which the statute of limitations does not attach. Second, assuming that the defense of withdrawal applies in this case, Liggett has not established the requisite elements of a withdrawal defense – that Liggett took affirmative action to disavow or defeat the conspiracy and enterprise which was communicated in a manner reasonably calculated to reach co-conspirators, or that it disclosed the unlawful scheme to the authorities. Finally, the United States has offered substantial evidence at trial to rebut the evidence offered by Liggett in support of its withdrawal defense.

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[47] Despite Liggett's claims to the contrary, the United States has submitted substantial evidence and legal authority demonstrating that Liggett has indeed been an important participant in the alleged RICO conspiracy and enterprise.

1. The Defense of Withdrawal Does Not Eliminate Liggett's Liability

Despite Liggett's arguments to the contrary, the defense of withdrawal has no application in this case. Withdrawal typically, but not exclusively, applies in criminal conspiracy prosecutions where a defendant claims its prosecution in time-barred because it withdrew from the conspiracy before the commencement of the applicable statute of limitations period.[48] This case, however, involves a civil suit brought by the United States to obtain equitable relief to which a statute of limitations does not apply. Therefore, Liggett cannot escape liability for equitable relief even if it withdrew from the conspiracy before this action was filed. See United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994).

Furthermore, withdrawal does not preclude liability even in criminal prosecutions involving **substantive** mail and wire fraud offenses. For example, in United States v. Read, 658 F.2d 1225 (7th Cir. 1981), the Seventh Circuit explained the differences between the application of the withdrawal defense to substantive, as opposed to conspiracy, offenses. In holding that withdrawal was not a defense to substantive mail and securities fraud offenses, the court explained, "A party's 'withdrawal' from a scheme is [] no defense to the crime because membership in the scheme is not an element of the offense. [The defendant] is liable for mail fraud as a principal or as an aider and abettor, not a conspirator." Id. at 1240; accord United States v. Waldrop, 786 F.Supp. 1194, 1201 (E.D. Pa. 1991) ("withdrawal is no defense to mail fraud"), aff'd, 983 F.2d 1054 (3d Cir. 1992) (Table). Accordingly, Liggett's alleged withdrawal from the RICO conspiracy and enterprise does not preclude its liability for the substantive mail and wire fraud offenses that underlie the civil RICO lawsuit for equitable relief brought by the

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

United States.

2. Liggett Has Failed to Present Sufficient Evidence to Support its Withdrawal Defense

Even assuming arguendo that the defense of withdrawal applies in this case, Liggett has not offered sufficient evidence to support its claim. To establish withdrawal, it is necessary to prove more than the mere cessation of unlawful activities. The defendant asserting the defense must also prove either that: (1) he took "affirmative action . . . to disavow or defeat the purpose" of the conspiracy which is communicated in a manner reasonably calculated to reach co-conspirators, or (2) he disclosed the unlawful scheme to the authorities. See Hyde v. United States, 225 U.S. 347, 369 (1912). Liggett cannot establish either requirement.

In its brief, Liggett claims that "undisputed" evidence establishes that it withdrew from the alleged RICO conspiracy and Enterprise by the mid-1990s. Liggett Br. at 9. But the evidence cited by Liggett does not satisfy its burden of proving its withdrawal:

With respect to the first reason cited by Liggett – cooperation with the States Attorneys General – Liggett claims that it was motivated by altruistic considerations. See LeBow TT, 4/4/05, 17556:7-16. While controlling shareholder Bennett LeBow may have asserted that cooperating and settling was "the right thing to do," it is clear that financial considerations were **the** major contributing factor to Liggett's decision to settle

- As LeBow admitted at trial, Liggett was in financial difficulty at the time it began to cooperate in 1996 and had in fact filed a statement with the SEC that as of December 31, 1996, there was substantial doubt as to whether Liggett could stay in business as a growing concern. See LeBow TT, 2/7/05, 12293:25-12294:10.

- LeBow also admitted that the cooperation and settlements were entered into to avoid a devastating judgment which could lead to bankruptcy. LeBow TT, 4/4/05, 17555:25-17556:6; see also LeBow TT, 2/7/05, 12298:19-12299:1.

- Describing his motives for cooperation and settlement to the White House Task Force on the Global Tobacco Proposal (1997), LeBow stated: "In 1995, realizing Liggett's weak and precarious financial and market positions and that big tobacco's litigation strategy

was seriously flawed, I decided to settle our litigation and to negotiate, if possible, preferential financial treatment for Liggett." LeBow TT, 4/4/05, 17565:17-17566:1; US 93298 (A).

Aside from questions of motive regarding its cooperation with the States' Attorneys General, Liggett did not reveal the means and motives of the conspiracy to the authorities. Liggett alleges that its voluntary waiver of privilege over certain internal documents relevant to smoking and health issues was a key element in the States Attorneys General reaching important settlements with other major tobacco companies. See Liggett FF § IX, ¶ 47. Liggett fails to acknowledge, however, that:

- Many of these documents had been ordered released over Liggett's objection well before Liggett's alleged "cooperation." For example, in Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D. N.J. 1992), vacated on procedural grounds, 975 F.2d 81 (3d Cir. 1992), the district court ordered 1,500 Liggett documents disclosed to plaintiffs over Liggett's objections under the crime-fraud exception to the attorney-client privilege. Id. at 689.

- Many of the documents Liggett initially sought to protect from disclosure were never privileged in the first instance.[49]

Liggett also continues to assert privilege over documents that it agreed to disclose but did not, and has been sanctioned in this action for logging hundreds of documents over which it asserted various privileges in a materially misleading fashion. See Order #360 (adopting R&R #111); Order #410 (adopting in part and modifying in part R&R #127); see also US 93271 (A). This type of conduct can hardly be seen as defeating the purpose of the conspiracy and enterprise, nor can it be described as an attempt to fully disclose the unlawful scheme to authorities.

Moreover, Liggett continues to this day to assert that there was never a RICO conspiracy and enterprise as alleged by the United States, or that it never participated in them. Liggett's denial of a RICO conspiracy and enterprise demonstrates its failure to fully disclose the unlawful

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[49]See Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 362-64 (E.D.N.Y. 1997) (attempt by defendants, including Liggett, to designate CTR Special Project documents as privileged was without merit).

scheme. See e.g., United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998) (defendant's limited confession to the authorities and subsequent denials of culpability did not constitute "a full confession to the authorities" as required to establish withdrawal). Instead of representing acts to defeat the conspiracy, Liggett's denials indicate self-serving efforts to minimize its liability in the face of numerous lawsuits. See United States v. Maloney, 71 F.3d 645, 655 (7th Cir. 1995). Similarly, Liggett's so-called "historic statements" concerning the health and addiction risks of smoking fail to defeat the purpose of the conspiracy and enterprise. Beyond publishing a sole press release regarding these admissions in accordance with its settlement agreements, Liggett has done nothing to educate the public that smoking causes cancer or that nicotine is addictive. And more recently, LeBow equivocated on the question of whether smoking causes lung cancer when he appeared at trial, despite touting Liggett's supposed admissions concerning the health consequences of smoking in an effort to secure favorable financial consideration in litigation and regulation over nearly a decade. LeBow TT, 2/7/05, 12246:11-14; 4/4/05, 17565:17-17567:17. Equally important is Liggett's failure to admit the dangers of ETS. None of the settlement agreements entered into by Liggett addressed the health effects of exposure to ETS. See LeBow TT, 4/4/05, 17577:8-17, 175879:22-17580:6.

3. Substantial Evidence Rebuts Liggett's Withdrawal Defense

The United States has offered substantial evidence at trial demonstrating that despite its alleged cooperation with the authorities and its partial statements concerning the health and addiction risks of smoking, Liggett continues to this day to engage in activities that support the goals of the alleged RICO conspiracy and enterprise. As one example, with respect to light cigarettes, despite its knowledge of smoker "compensation" and the absence of any basis to dispute the conclusions of Monograph 13 and the 2004 Surgeon General's Report, Liggett continues to market "low tar" brands with "light" descriptors. See LeBow TT, 4/4/05, 17596:18-

17597:5. LeBow testified that Liggett does not remove the misleading "light" and "low tar" descriptors because if Liggett were the only tobacco company to stop using descriptors, Liggett would be placed at a competitive disadvantage with the potential loss of business in that market in comparison with other tobacco companies: "Liggett can't just step up and stop selling light cigarettes and stay in business." LeBow TT, 4/4/05, 17598:11-16.

In addition, Liggett continues to this day to derive substantial proceeds from its joint participation with the other Defendants in the RICO conspiracy and Enterprise since Liggett continues to profit from addicted smokers who are the victims of that scheme to defraud. Therefore, Liggett's financial stake in the continuing success of the conspiracy and the scheme to defraud and its continuing receipt of the fruits thereof rebut its withdrawal defense. See e.g., United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000) ("even if the defendant completely severs his or her ties with the Enterprise, the defendant still may remain a part of the conspiracy if he or she continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations"); United States v. Tsai, 14 Fed. Appx. 834, 837 (9th Cir. 2001) ("One may still be considered part of the conspiracy when receiving profits from the conspiracy").

The foregoing evidence clearly demonstrates that Liggett continues to engage in activities that further the goals of the RICO conspiracy and enterprise and therefore conclusively rebuts Liggett's claim of withdrawal.

G. The Dissolution of CTR and the Tobacco Institute Does Not Defeat the United States' RICO Claims

Although CTR and the Tobacco Institute pursued voluntary dissolution, neither Defendant has undertaken affirmative action to disavow or defeat the purpose of the RICO enterprise or conspiracy and neither has made a full disclosure of its unlawful scheme to the

authorities. Indeed, the companies continue to withhold documents from public view, whether based on objections to production in litigation or through privilege assertions. And the fraudulent conduct of the enterprise has continued to this day by CTR's and the Tobacco Institute's co-conspirators and named Defendants in this action.

It is well-established that the existence of a RICO enterprise and conspiracy and a defendant's participation in both are not vitiated merely because a defendant's participation in them ceases. As the D.C. Circuit has stated, "[I]t is not essential that each and every person named in the indictment [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to have been members at any time." United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988). Likewise, it is well established that proof of a conspiracy is not defeated merely because membership in the conspiracy changes and some defendants cease to participate in it. See, e.g., United States v. Sepulvedam, 15 F.3d 1161, 1191 (1st Cir. 1993) ("in a unitary conspiracy it is not necessary that the membership remain static") (citing Perholtz, 842 F.2d at 364). In addition, each co-conspirator is liable for the acts of all other co-conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy even if the conspirator did not participate in, or was unaware of, such acts.[50] Liability remains even if the defendant has ceased participation in the conspiracy.[51]

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[50] 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. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

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

(continued...)

Under the foregoing authority, it is clear that mere dissolution and cessation of business activities of Defendants CTR and the Tobacco Institute does not affect their liability for their participation in the RICO enterprise and conspiracy and its extensive scheme to defraud. Just as importantly, the dissolution of CTR and the Tobacco Institute does not affect the liability of the other seven Defendants for their participation in the RICO enterprise and conspiracy and scheme to defraud, nor does the dissolution lessen the need for the Court to fashion remedies to prevent and restrain future unlawful conduct. Similarly, the dissolution and cessation of operations of CTR and the Tobacco Institute does not preclude injunctive relief against them. Defendants CTR and the Tobacco Institute remain liable for the acts and statements of their co-conspirators undertaken in furtherance of the RICO Enterprise or conspiracy. Moreover, New York law, which determines the capacity of CTR and the Tobacco Institute to be sued and the scope of their liability, conclusively establishes that dissolution and cessation of operations does not preclude injunctive relief; rather New York law expressly permits injunctive relief. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 307-09 (1897).

It is clear that the dissolution of CTR and the Tobacco Institute does not preclude their RICO liability and equitable relief against them, nor does it preclude RICO liability and equitable relief against the other Defendants to this action.

H. Defendants Caused the Mailings and Wire Transmissions That Constitute Predicate Acts

Ignoring the record evidence and resorting to a twisted construction of aiding and abetting liability, Defendants posture that there is insufficient evidence of their mailings and wire transmissions. See JD Br. at 119-122. Yet the evidence that Defendants, whether individually or

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[51](...continued)
Cir. 1987); United States v. Read, 658 F.2d 1225, 1239-40 (7th Cir. 1981).

collectively, caused the mailings and wire transmissions, as shown below, is overwhelming. Hence, the United States has proven Defendants' mailings and wire transmissions to satisfy proof of predicate acts for RICO liability.

1. Individual Defendant Transmissions

a. Stipulations and admissions

Individual Defendants have stipulated and/or admitted to causing 51 mailings and wire transmissions. See US FF § IV, ¶¶ 2-5.[52]

b. Evidence of interstate mailings

In addition to proving sufficiently Defendants' above-listed 51 transmissions, the United States has sufficiently proven that 34 other Racketeering Acts were mailed, interstate or overseas. See US FF § IV, ¶¶ 6-9.[53] From the face of each document underlying the Racketeering Acts mailed interstate and abroad, it is apparent that Philip Morris and Altria caused to be transmitted almost half of the interstate Racketeering Acts.[54]

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[52] **BATCo**: RA 11 (1966); RA 30 (1972); RA 50 (1981); RA 51 (1981); RA 53 (1982); RA 54 (1982); RA 57 (1983); RA 60 (1984); RA 63 (1984); RA 103 (1963); RA 106 (1976). **B&W**: RA 8 (1964); RA 11 (1966); RA 17 (1968); RA 30 (1972); RA 31 (1973); RA 32 (1973); RA 38 (1976); RA 44 (1979); RA 45 (1979); RA 50 (1981); RA 51 (1981); RA 52 (1982); RA 53 (1982), RA 54 (1982); RA 57 (1983); RA 60 (1984); RA 63 (1984); RA 66 (1986); RA 67 (1986); RA 70 (1986); RA 77 (1988); RA 90 (1990); RA 98 (1993); RA 103 (1963); RA 106 (1976); RA 115 (1995); RA 116 (1999); RA 118 (1964); RA 124 (1977); RA 125 (1979); RA 127 (1979); RA 129 (1983); RA 144 (2001). **RJR**: RA 26 (1971); RA 31 (1973); RA 66 (1986); RA 67 (1986); RA 68 (1986); RA 73 (1986); RA 77 (1988); RA 82 (1988); RA 86 (1990); RA 88 (1990); RA 89 (1990); RA 94 (1992); RA 96 (1992); RA 98 (1993). **Tobacco Institute**: RA 5 (1961), RA 42 (1977), RA 87 (1990). **Philip Morris**: RA 114 (1994), RA 145 (2001). **CTR**: RA 25 (1971). **Lorillard**: RA 143 (2001) .

[53] The documents underlying RAs 2-3, 6-7, 9-10, 12-16, 19-22, 27-28, 33, 40-41, 58, 62, 69, 71-72, 74-75, 79-81, 85, 117, and 132-133 were offered or admitted into evidence and state in their respective addresses the interstate or overseas destination of the document.

[54] Philip Morris's mailings overseas are RA 19 (1969); RA 20 (1969), RA 41 (1977); its interstate mailings are of RA 16 (1968), RA 28 (1971), RA 40 (1977), and RA 58 (1983).

(continued...)

c. Other evidence of mailings

Offering nothing to contradict the location and retrieval of 54 documents underlying Racketeering Acts as contained in the offered Declarations of the United States' newspaper and magazine research consultants, Patricia Tobin and Carlotta Figliulo, Defendants fail to discredit what the consultants found. Ironically, Defendants have supported the reliability of Ms. Tobin's and Ms. Figliulo's findings. For instance, RJR's President and CEO, Lynn Beasley, testified that RA 146 (US 76633, which Ms. Tobin retrieved) was from RJR's website. Beasley TT, 3/31/05, 17352:20-17353:9. In addition, Ms. Beasley identified RJR's ads in three magazines (all retrieved by Ms. Figliulo), underlying RA 83 (US 76784), RA 84 (US 76785), and RA 97 (US 76786). See Beasley TT, 3/31/05, 17360:15-17362:18. Finally, the three magazines' covers contain **mailing labels**.

2. Defendants Are Liable for Aiding and Abetting the Commission of Racketeering Acts

Defendants claim that "[t]he Government attempts to sidestep the requirement of proving that each defendant committed the requisite two predicate acts by asserting that the Defendants 'aided and abetted' violations by others." JD Br. at 120. This rings hollow – as the United States noted previously, all Defendants participated in the creation of, funding, or activities of CTR and TI. See US FF §§ I.B & C and II; US Br. at 134. Further, all Defendants except BATCo formed, funded, and staffed CTR and TI for the purposes of furthering a joint venture. US Br. at 134. Moreover, the domestic Cigarette Company Defendants and Altria provided directors and officers of CTR and TI; reviewed, approved, or recommended approval of research proposals and

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[54](...continued)
Altria's overseas: RA 92 (1991); and interstate: RA 69 (1986), 71 (1986), 72 (1986); 74 (1986), 75 (1986), 78 (1988), 80 (1988), and 95 (1992). Other individual Defendants who caused mailing interstate: CTR: RA 9 (1965); Reynolds: RA 85 (1990); Liggett: RA 126 (1979).

public statements; and provided assistance which enabled and encouraged the mailings and wire transmissions at issue. See US FF §§ I.B & C and II; US Br. at 135. Defendants' essential purpose in forming CTR and TI was to use them to issue advertisements, press releases, and research reports that are the gravamen of many of the mailings and wire transmissions at issue. US Br. at 135. When a defendant is proven to be a participant in a joint venture, and a document is transmitted via the mails or wires in furtherance of that joint venture, he may be liable for aiding and abetting, even if he did not know about the mailing or wire transmission, provided he in some way associated himself with the venture and assisted it. Id. at n.90 and accompanying text. The United States has satisfied proof of the two act requirement, not "sidestepped" it.

Defendants also claim that RICO does not permit aiding and abetting, relying mainly on three cases[55] which were addressed previously by the United States (US Br. at 137-138). This case is not a private action for damages, but rather a RICO action for injunctive relief brought by the United States. The Third Circuit and other courts have held that in such government civil RICO suits, liability for predicate acts may be established by aiding and abetting under18 U.S.C. § 2.[56] Defendants' assertion that "[t]he only aiding and abetting statute cited by the Government is the **criminal** aiding and abetting statute (18 U.S.C. § 2(b)), which has no application to this **civil** RICO proceeding," JD Br. at 121 (emphasis in original), is therefore misguided. Further, Defendants' claim that "the cases relied upon by the Government are all criminal cases and are thus irrelevant," id. at 121 n.59, is likewise incorrect. As the court stated in United States v.

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[55] See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994); Pa. Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839 (3d Cir. 2000); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000).

[56] See United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 283-89 (3d Cir. 1985).

Local 1804-1, International Longshoremen's Association, 812 F. Supp. 1303, 1347 (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), "[i]n a civil RICO suit, the Court applies the criminal standard in determining aiding and abetting liability." See also US Br. at 138; accord Local 560, 780 F.2d at 284.

I. The Application of Legal Precedent to Record Evidence Is Contrary to Defendants' Assertion That There Is No Current Enterprise or Threat of Future Wrongdoing

This Court has repeatedly recognized that "the district court should determine the propensity for future violations based on the totality of circumstances." SEC v. First City Fin. Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989), quoted in United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 148 (D.D.C. 2000). As shown in the United States' Proposed Findings of Fact and opening brief, the totality of the evidence demonstrates a 50-year pattern of fraud that continues to this day, and thus shows that absent Court intervention, future RICO violations are reasonably likely to continue. US FF § V.A, ¶¶ 1-115; US Br. at 151-67. Defendants urge the Court to reach a contrary conclusion, JD Br. at 37-52, but their claims wither under scrutiny; and when considered against the totality of the evidence, give this Court no assurance that future violations are unlikely.

1. Defendants' Misconduct is Driven by Money, and Their RICO Violations Will Continue Unless the Court Intervenes

The driving force behind Defendants' past and continuing fraudulent conduct is money. Their internal documents show, for example, that they market low-tar cigarettes precisely because "health concerned smokers" with "internal pressures" buy them in the belief that they are healthier – and that Defendants' profits depend upon selling to smokers who wish to quit: "Let us hope . . . that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to the bank." US 75975* (A). Indeed, Defendants' internal

documents postulate that, compared to other industries, "the high profits additionally associated with the tobacco industry are **directly related** to the fact that the customer is dependent upon the product." US 21530 (A) (emphasis added); see generally id., ¶¶ 101-115. As Dr. Bazerman testified, "absent Court intervention, there is no reason to assume that these fraudulent behaviors will cease to be profitable for defendants in the future and as a result, defendants will experience incentives to engage in them." Bazerman WD, 20:7-15.

The United States' opening brief demonstrated that past misconduct is sufficient for a court to find a reasonable likelihood of future misconduct, and thus to issue a RICO injunction. US Br. at 152-53 & n.111, 155 & n.114, and cases cited therein. According to Defendants, this statement of established law "asks the Court to indulge a conclusive presumption that the Defendants are likely to violate RICO in the future simply because, in its view, they have done so in the past." JD Br. at 35-36 (emphasis added); see also id. at 37, 52. Defendants' rhetoric ignores well-settled law: It is this Court's obligation to determine, by the totality of the evidence, whether future violations are reasonably likely. First City, 890 F.2d at 1228.

Defendants focus wholly on peripheral issues and ignore the heart of the United States' detailed explanations of how their long history of misconduct demonstrates that comprehensive equitable remedies are required to prevent future misconduct. US FF § V.A.(2)-(4); US Br. at 151-67. For example

- Defendants formulated and publicized the Advertising Code of 1964 and its enforcing Code Administrator due to **"uncertainty over the course of future legislative and regulatory action,"** but began withdrawing from the Code Administrator provision just two years later (and completely eliminated it by 1970), on the ground that "the circumstances which led to the establishment of the Code administration have now significantly changed." US 21385 (O) (emphasis added); see also US FF § III.E.(3)(a); § V.A.(2)(a).

- Likewise, Joseph Cullman III – then chairman of TI's Executive Committee, as well as of Philip Morris – testified in 1969 that Defendants would comply with a prohibition on television and radio advertising (which eventually became the 1971 Broadcast Ban), in

order to reduce young people's involuntarily exposure to such marketing. US 22345 (A). But within a year, Defendants **quintupled** their spending on billboard (outdoor) marketing, increased their magazine and newspaper advertising two-and-a-half-fold, and moved huge resources into sponsoring events attended in person and seen on television by large numbers of youth.

- In November 1998, Defendants agreed to accept the MSA's ban on billboard marketing (and in fact recited that "the Participating Manufacturers are committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products," MSA § I at 2 (JD-045158) (A)); and then increased their expenditures on price promotions **seven-fold** just from 1998 to 2003 (from $2.9 billion in 1998 for all promotions combined to $10.8 billion in 2003 for price discounts alone) — even though they are well aware that youth are particularly vulnerable to this form of marketing. US FF § III.E.(7)(a); § V.A.(2)(c)(i), ¶¶ 32-34, § V.K.(2), ¶¶ 450-473; FTC, Cigarette Report for 2003 (2005) at tbls. 2B & 2C; US Br. at 80-81, 173.

This lengthy and continuing pattern of conduct demonstrates that even though Defendants piously assert that – for now – they have changed "their corporate cultures [and] their advertising and marketing practices," JD Br. at 51, they have a decades-long record of eliminating voluntary measures as soon as they believe the danger of legally binding restrictions is over; and of evading, sidestepping, undermining, and circumventing legally binding measures by shifting and increasing things like mass marketing resources. Defendants' only response to their massively increasing their price promotions following the 1998 MSA is to rationalize that price promotions per se "are not prohibited by (and do not violate) either the MSA or RICO." JD Br. at 49. But these same companies have calculated precisely how many **billion** dollars they can make per year by marketing to youth under 21.[57] Their past history gives every reason to believe that, absent Court intervention, they are reasonably likely to continue their past misconduct.

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[57] The answer, according to RJR, is **"over $2.1 billion in aggregate incremental profit"** per year. US 20007 (O) (emphasis in original). After signing the MSA in November 1998, RJR refused to change its magazine advertising policies until the very day that it was sued in March 2001, and it "'studiously avoided' measuring its advertising exposure to youth, probably because [it] 'knew the likely result of such analysis.'" People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr.3d 317, 322-23, 323 n.3, 327 (Cal. Ct. App. 2004) (quoting trial court; remanding for determination of how many million dollars RJR should be sanctioned).

2. Defendants' Recent Conduct Confirms that Future Wrongdoing is Likely

Defendants urge the Court to disregard this exceptionally significant aspect of the totality of the circumstances and to focus solely on their recent conduct, which, they claim, will show that they have mended their errant ways forever and will not return. JD Br. at 39-45. The Court is required to treat any such claim skeptically: "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952). Indeed, this Court has previously recognized that "mere cessation of the alleged violations 'is no bar to the issuance of an injunction.'" United States v. Philip Morris USA, 316 F. Supp. 2d 6, 11-12 (D.D.C. 2004) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944)). In any event, as noted above, "the government need not . . . demonstrate a new RICO violation to justify issuance of the injunction." United States v. Local 560, Int'l Bhd. of Teamsters, 974 F.2d 315, 325 n.5 (3d Cir. 1992).[58]

Defendants' "protestations of repentance and reform," Or. State Med. Soc'y, 343 U.S. at 333, ring hollow from the very outset, when they claim that "any conceivable allegations of misconduct regarding the principal matter alleged – i.e., the causal link between smoking and disease – are now artifacts of distant history." JD Br. at 39. To the contrary, to this day, RJR refuses to state that smoking causes disease without hedges and caveats. The trial testimony of Andrew Schindler, then executive chairman of RJR's parent Reynolds American, and RJR's

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[58] Courts must set discovery cutoffs in any complex lawsuit; as a result of the discovery cutoffs set in this case, the United States had no opportunity to conduct systematic discovery concerning post-2000 conduct. US Br. at 156 n.115. Defendants make no response. Moreover, many of the documents that Defendants cite concerning their recent conduct are post-2000 documents written after the discovery cutoff, pursuant to a provision of Order #470 (opposed by the United States) that allowed "voluntary" document productions of post-2000 documents, without any discovery to learn their full context and circumstances.

current website, use the same caveats to hedge their grudging half-concession: Smoking **"may contribute** to certain diseases **in some people,"** Schindler TT, 1/24/05, 10810:9-21 (emphases added); "smoking, **in combination with other factors**, causes disease **in some individuals**," (JD-068012) (A) (page 54 of 569) (emphases added); both quoted in US Br. at 157.

Likewise, although Defendants recently began to admit that smoking is addictive, no Defendant publicly informs consumers that **nicotine** is addictive, much less that smoking is a nicotine-driven addiction; and after purchasing or assuming marketing responsibility for cigarette brands from other, non-Defendant companies in 1999 and 2001, Philip Morris and B&W both **removed** voluntary statements about addiction. US FF § III.C.(1)(d), ¶¶ 2322-2345; § V.E, ¶¶ 253-255; US Br. at 46-47 & n.23, 51-55. Defendants minimize the issue as a "quibble over the precise wording of the addictiveness of **smoking**." JD Br. at 39 (emphasis added). To the contrary, the issue is Defendants' refusal to admit publicly that **nicotine** is addictive and that smoking is a **nicotine-driven** addiction. As Dr. Jack Henningfield testified, "Not acknowledging the role of nicotine is leaving out vital information to consumers." Henningfield WD, 106:1-2; see also Eriksen TT, 5/16/05, 21248:20-21249:15. At trial, the General Counsel for Philip Morris, Denise Keane, admitted that the "Smoking is Addictive" statement that Philip Morris removed from cigarette packs after buying three Liggett cigarette brands in 1999 was both correct and material; and agreed that it is material for people to know that Philip Morris agrees that the nicotine delivered in cigarette smoking is addictive, but Philip Morris does not say so publicly. Keane TT, 1/18/05, 10458:6-17, cited in US Br. at 47 n.23; US FF § III.C.(1)(d), ¶ 2342. The deliberate omission of admittedly material information about nicotine addiction is not a "quibble"; it is fraud.[59] Defendants have made clear they are unwilling on their own to admit

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[59] Langford v. Rite Aid of Ala., Inc., 231 F.3d 1308, 1312-13 (11th Cir. 2000); Emery v. (continued...)

publicly that nicotine is addictive and that smoking is addictive due to nicotine. They are more than reasonably likely to continue their RICO violations absent Court intervention.

Defendants similarly attempt to defend their current statements concerning low-tar cigarettes, JD Br. at 44-45, but fail to address the fact that in 1998, Philip Morris, RJR, B&W, and Lorillard jointly stated to the FTC that compensation was so "weakly documented" that the FTC should not require disclosure warnings to alert consumers, and that they were "unaware of evidence" that consumers viewed low-tar cigarettes as safer, other than as presented in Monograph 7. US 88618 at 43, 89 (A), discussed in US FF § III.D(3), ¶¶ 3487-88, § III.D.(4), ¶ 3893; US Br. at 66-67. Defendants are well aware from their own research (which, contrary to their 1998 statements to the FTC, are not included in Monograph 7) that a majority of smokers believe that low-tar cigarettes are healthier. Nonetheless, to this day, Defendants still refuse to admit on their websites and in their other public statements that (as Monograph 13 found) low-tar cigarettes are just as dangerous as full-flavor cigarettes; and refuse to make such public statements even though, as acknowledged by, among others, Bennett LeBow, Liggett's controlling shareholder, they have no reason to dispute Monograph 13's findings. LeBow TT, 4/4/05, 17596:2-17597:17; see generally US FF § III.D.(4)(a), ¶ 3523.

Finally, concerning the health risks of passive exposure, Philip Morris, BATCo, B&W, Lorillard, and RJR all deny in this lawsuit that ETS causes disease in nonsmokers, contrary to the definitive scientific evidence; and to this day, RJR's website asserts that it believes "that there are still legitimate scientific questions concerning the reported risks of secondhand smoke." (US

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[59](...continued)
Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) (collecting cases); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977); see also United States v. Espy, 23 F. Supp. 2d 1, 6 (D.D.C. 1998) (following earlier remand, refusing to dismiss mail fraud charge against public official for alleged failure to disclose gifts as required).

92012) (A); US FF § III.A.(3)(m)(i), ¶¶ 1150-1151. Absent Court intervention, such denials and distortions of material health information and scientific evidence are likely to continue.

3. The MSA's Existence Does Not Bar this Court from Imposing Equitable Relief; Indeed, Defendants' Violations of the MSA's Letter and Spirit Further Confirm the Need for Additional Equitable Relief

a. As a matter of law, the MSA's existence does not bar this Court from imposing equitable relief

Defendants contend that, as a matter of law, the existence of the MSA prohibits this federal court from issuing an injunction to prevent and restrain future violations of the federal RICO statute, since some (but not all) of them signed the MSA and it covers some (but not all) of the relief sought here. JD Br. at 46-47, 161. The case Defendants discuss at greatest length, Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004), discussed in JD Br. at 47, held that where the EPA had reached consent decrees with industrial polluters under the federal Clean Air Act (CAA), private plaintiffs could not obtain an injunction for the same relief from the same court under the same statute (unless the EPA was not enforcing the consent decrees). Id., 390 F.3d at 476. But Defendants omit that this ruling was because "[t]he parties **agree** that the [EPA's CAA] decrees **cover the same types of fugitive-dust claims** covered by the injunction." Id. (emphases added). Here, as this Court has previously ruled, "the Government seeks significant relief **not** covered by the MSA," and therefore, "the MSA does not preclude the equitable relief sought by the Government in this lawsuit." Philip Morris USA, 316 F. Supp. 2d at 11, 12 (emphasis added); see also US FF § V.A.(3)(c) & (d), ¶¶ 73-81; US Br. at 166-67. The Ellis court also overturned the Clean Air Act injunction in part because "[t]he federal Clean Air Act is a model of cooperative federalism," but the private plaintiffs did not give the notice required before bringing a private citizen suit. Id. at 467, 475-76. By contrast, RICO is not subject to "cooperative federalism"; instead, as this Court has stated, "Congress has given the obligation to

enforce RICO to the federal government not to the States. . . . [Federal] enforcement responsibilities under RICO may parallel the efforts of the States under the MSA but certainly can not be preempted by them." Philip Morris USA, 316 F. Supp. 2d at 11. Ellis makes clear that a court may issue additional injunctive relief to prevent future violations not addressed by an existing injunction; notwithstanding the EPA's existing consent decrees under the federal Clean Air Act, the court expressly upheld granting the private plaintiffs a separate injunction under state law, "[t]o prevent future . . . state-law nuisance violations." Ellis, 390 F.3d at 469, 472.

Defendants' argument also falters through the omission of any acknowledgment that several of their cases rest on the plaintiffs' ability to enforce an existing injunction. In National Farmers' Organization v. Associated Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988), which Defendants quote three times, a farmers' organization had the right to seek enforcement of existing consent decrees (which were entered by the same court under the same statute). The relevant sentence from the decision states, "In short, **provided the provisions of the consent decrees can be reasonably enforced by NFO,** there is nothing to be gained by entering an injunction that substantially duplicates the relief already available." Id., 850 F.2d at 1309 (emphasis added), quoted in part in JD Br. at 46, 160, 212. Defendants omit the "provided" clause every time they quote the sentence. Their repeated omission is strategic: The MSA may be enforced only by parties, MSA § XVIII(b) at 137 (JD 045158) (A), but the United States is not a party to the MSA and is therefore barred from enforcing it.

Likewise, Defendants describe Harthman v. Witty, 480 F.2d 337, 340 (3d Cir. 1973), as "reversing grant of second injunction as unnecessary because another injunction already prohibited further polluting activity." JD Br. at 47. But Defendants omit that the first injunction was issued by the same court under the same statute in the same case; and omit that the reason for the holding was that the trial court could order the necessary additional injunctive relief by

modifying its initial injunction (and therefore it had no need to issue a new injunction). Harthman, 480 F.2d at 339-40. Even if the United States had been a party to the MSA, this Court obviously has no authority to expand or modify the MSA's terms.[60]

b. The MSA has not materially altered defendants' conduct

Contrary to Defendants' assertions, they have violated both the letter and spirit of the MSA, and the MSA lacks adequate enforcement mechanisms. In addition, Defendants ask the Court to ignore that it has already ruled that the MSA cannot preclude relief in this action because it does not apply to all Defendants.

First, even if MSA compliance might be sufficient to preclude additional injunctive relief in this lawsuit, it would be Defendants' burden to demonstrate compliance. Marshall v. Local Union No. 639, Int'l Bhd. of Teamsters, 593 F.2d 1297, 1300 (D.C. Cir. 1979). Defendants cannot sustain their burden; they have violated the MSA in both letter and spirit.[61] Most notably,

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[60] Defendants' other cases are inapposite. Pre-existing injunctions are not even mentioned in a case that Defendants cite four times on the topic. SEC v. Am. Bd, of Trade, Inc., 751 F.2d 529, 538 (2d Cir. 1984), cited in JD Br. at 46, 160, 206, 212. Contrary to Defendants, JD Br. at 46, the Citadel's consent decree with the United States in United States v. Jones, 136 F.3d 342, 348 (4th Cir. 1998), was not entered until nine months **after** an injunction issued in favor of a private plaintiff (indeed, while the injunction was on appeal). Jones, 136 F.3d at 347. Finally, in Comfort Lake Association v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998), cited in JD Br. at 46-47, a state agency's settlement agreement with a contractor barred the same court from granting an injunction to a private citizens' group under the same statute against the same violations; but only because the construction had already finished and the settlement recited that "there is no likelihood that [Clean Water Act] violations will recur." Id, 138 F.3d at 354, 355. The MSA has no similar recital; to the contrary, NAAG's amicus brief in this case observes that Defendants continue to engage in many forms of marketing "not specifically addressed in the MSA, that result in large and continuing exposure of youth to cigarette advertising," and urges this Court to impose additional equitable relief. Br. of Amicus Curiae States Arkansas, et al. at 4 (R. 5670; docketed as of 9/16/05).

[61] Defendants suggest, JD Br. at 48-49, that the Court should overlook their many activities which may violate the spirit, even if not the letter, of the MSA, such as their increasing price promotions more than seven-fold after signing the MSA, Lorillard's failing to change its marketing for its "Pleasure" campaign following the MSA, Philip Morris's seeking to sponsor

(continued...)

RJR has been determined a serial violator of the MSA. US FF § V.A.(2)(c)(iii), ¶ 43; § V.A.(3)(a), ¶ 59; US Br. at 162-63. For example, People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317, 343, 345 (Cal. Ct. App. 2004), found that RJR intentionally violated the MSA by refusing to change to its magazine placement policies from the day it signed the MSA in 1998 until the day it was sued in March 2001 and by studiously avoiding researching the effect of its marketing policies on youth exposure.[62] Philip Morris alone has been the subject of over forty formal inquiries from the states. US FF § V.A.(3)(a), ¶ 54. Liggett partially broke with the other Defendants in March 1997 by agreeing with the states to waive privilege over internal Liggett-only documents; but Liggett violated that agreement in this very case, by refusing to produce precisely the same documents on grounds of privilege. US FF § V.A.(3)(b)(i), ¶¶ 66-67; § V.A(4); US Br. at 244-45. Liggett gives the Court no explanation for its conduct, much less asserts that the Court should have any confidence that it will live up to this or any other

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[61](...continued)
race-cars in multiple leagues in 2001, Defendants' selling youth-attractive flavored cigarettes, and so on. US FF §§ V.A.(2)(c) & V.A.(3)(a), ¶¶ 30-60; US Br. at 162-63. Contrary to Defendants' suggestion, "It should be obvious to all that [defendants subject to an injunction] are bound and expected to obey not only the letter but also the spirit of the injunction." Pridgen v. Andresen, 891 F. Supp. 733, 740 (D. Conn. 1995); accord, Drywall Tapers Local 1974 v. Local 530, Operative Plasterers' Int'l Ass'n, No. 93-CV-0154 (JG), 2002 WL 31641597, at *8 (E.D.N.Y. Nov. 19, 2002); Nat'l Res. Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979). The issue for this Court is not whether a state court could find Defendants in contempt for violating the spirit of the MSA, but whether this Court finds Defendants' recent conduct, considered as part of the totality of the evidence, sufficient assurance that they are not reasonably likely to engage in future RICO violations.

[62] As Lockyer found, RJR **intentionally** violated the MSA, and the decision affirmed RJR's being sanctioned for its intentional misconduct (although it remanded for redetermination of the $20 million sanction imposed by the lower court). Lockyer, 11 Cal. Rptr. 3d at 345-46 & n.21. The Court flatly rejected RJR's claim of "legitimate, good-faith disagreement," id., binding RJR by collateral estoppel. Nonetheless, RJR and its co-Defendants now repeat RJR's discredited argument, mischaracterizing Lockyer and other findings of RJR's MSA violations as "legitimate disagreements," rather than intentional violations. JD Br. at 48.

commitment it made to the states.[63]

Second, the Court cannot be confident of the MSA's enforcement. Defendants point to time-consuming MSA inquiries, complaints, and meetings with the states as evidence of the MSA's effectiveness. JD Br. at 49-50. This is comparable to a parolee solemnly telling the Court that although his parole officer has caught him violating the terms of his parole over forty times, this simply demonstrates how effective and dedicated his parole officer is, and therefore his parole should not be revoked. Such an argument from a parolee facing revocation would be laughable, and is no more acceptable when these Defendants make it.

In their proposed findings of fact, Defendants twice cited the states' authority to inspect their books under the MSA as evidence that the states are able to enforce the MSA effectively; but, as the United States showed, this authority begins to expire next year. US Br. at 164. Defendants now strain the Court's credulity by claiming that this shortly-expiring authority to inspect books on demand is not important, because the states may still go to court and petition for authority to issue subpoenas instead. JD Br. at 49-50 n.21. Defendants assert that the MSA's time-consuming and exceptionally cumbersome enforcement provisions sometimes "le[a]d to negotiated resolutions," JD Br. at 50-51 n.22, but overlook Ohio and California cases that

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[63] Instead, Liggett actually seeks to mislead the Court, stating, "After searching the entire record, plaintiff's **only** example of Liggett's purported current misconduct is this Court's findings of certain **inadequacies in privilege logs** that Liggett served." Liggett Br. at 10 (emphases added); see also US FF § V.A.(4), ¶ 94. Liggett's asserting privilege in this lawsuit over internal Liggett-only documents for which it promised it would waive privilege in 1997 was the topic of testimony by Mr. LeBow at trial in 2005, US FF § V.A.(3)(b)(i), ¶¶ 66-67, and is wholly distinct from the gross deficiencies in Liggett's privilege logs identified in 2003 that it now claims are its only examples of recent misconduct. (In any event, Liggett downplays the seriousness of its abusive privilege logs; it refers to "certain inadequacies," but in reality, it was sanctioned with waiver for over 500 documents; its misconduct was "particularly egregious," R&R #127 at 11, adopted in relevant part by Order #410, "quite disturbing[,]. . . seriously undermin[ing] the entire system for privilege challenges, and threaten[ing] the integrity of the process," R&R #11 at 11, adopted by Order #360.)

consumed fifteen months in mandatory "informal discussions" and took over four-and-a-half years to reach the end of appeals. US FF § V.A.(3)(b)(i), ¶¶ 64-65, discussed in US Br. at 164-65. In addition, Defendants make no attempt to defend inconsistent MSA state court decisions. Id., § V.A.(3)(b)(ii), ¶ 69, discussed in US Br. at 165.

Third, Defendants ignore that this Court has previously recognized that "the MSA **cannot** preclude relief in this RICO action because two of the Defendants, BATCo and Altria, are not even signatories to that Agreement." Philip Morris USA, 316 F. Supp. 2d at 12 (emphasis added), quoted in US Br. at 167.[64] Finally, as discussed in sub-section II.H.3(a), immediately supra, the Court has previously found that the MSA does not grant all of the relief sought here.

4. Defendants' Remaining Arguments are Frivolous

Defendants assert that they have changed their "corporate cultures." JD Br. at 51. However, as Dr. Bazerman observed, "Unfortunately, for many firms, mission statements are PR documents that do not seriously guide the behavior of employees," and he explained in detail how Defendants' mission statements are not borne out by their conduct. Bazerman WD, 68:15-16; US FF § V.G.(3), ¶ 337. Defendants' claims of new corporate cultures are as illusory as the emperor's claimed new clothing; they do not even attempt, for example, to reconcile their alleged new clothing with the "reckless disregard and gross indifference displayed by Philip Morris and Altria Group toward their discovery and document preservation obligations." United States v. Philip Morris USA, 327 F. Supp. 2d 21, 26 (D.D.C. 2004).

Defendants claim that in determining whether they are reasonably likely to violate their

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[64] Liggett misleadingly asserts that it is a "signatory to the Master Settlement Agreement and bound by its terms." Liggett Br. at 11 (citing Liggett FOF ¶ 86 (in turn citing LeBow WD at 8)). However, it is not an "original participating manufacturer" under the MSA. On cross-examination, Mr. LeBow conceded that Liggett is not subject to the MSA's document website requirements, one of several that apply only to original participating manufacturers. LeBow TT, 4/4/05, 17570:14-17572:4, cited in US FF § V.A.(3)(c), ¶ 72, in turn cited in US Br. at 167.

legal obligations in the future, this Court should wholly ignore BATCo's, Liggett's, Philip Morris's, and Altria's violations of this Court's previous orders, sanctions, and contempt of Court. JD Br. at 54-55. To the contrary, little is more indicative of a defendant's likelihood of future violations than its demonstrated willingness to engage in misconduct while under Court scrutiny. As the Court stated in Order #904, Mem.-Op. at 4, "It would appear from BATCo's egregious lack of candor regarding compliance with Order #341 that BATCo does not seem to have learned any lesson" from its previous sanctions for misconduct. Far from Defendants' claims that to consider their misconduct in this action would wrongly punish them again, JD Br. at 55, the Court is obliged to consider their misconduct during this litigation when it assesses the "totality of the circumstances." First City, 890 F.2d at 1228. It is entirely appropriate for the Court to consider "the degree to which the defendants acknowledge the wrongfulness of their misdeeds" in determining the likelihood of future misconduct. SEC v. Globus Group, Inc., 117 F. Supp. 2d 1345, 1347 (S.D. Fla. 2000).

III. THE NEED FOR COMPREHENSIVE EQUITABLE REMEDIES IS WELL-SUPPORTED BY LAW

A. Defendants Continue to Promote an Erroneous Interpretation of Section 1964

1. The Court Should Reject Defendants' Attempt to Expand the D.C. Circuit's Disgorgement Ruling Well Beyond Plausible Interpretation

In their post-trial brief, Defendants concede that a court is not "strictly limited to injunctions that prohibit specific conduct." JD Br. at 144. Defendants are also forced to concede that the D.C. Circuit did not hold that any remedy that deters future racketeering activity is unavailable under the law as defined in United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005), pet. for cert. filed, No. 05-92 (U.S. July 18, 2005).[65] But Defendants

[65] As discussed in Section III.D.1, infra, Defendants' concession is impossible to square (continued...)

incorrectly assert that the only remedies beyond specific injunctions that are permissible to "prevent and restrain" misconduct are those that deprive "Defendants of the **means** of committing future RICO violations" and argue that "such remedies are rare . . . because they often run afoul of other legal, equitable and constitutional constraints." JD Br. at 149 (emphasis in original). Defendants' effort to restrict the remedies available in civil RICO actions is not supported by the RICO statute or by case law and, if adopted, would render RICO a toothless and wholly ineffective law.

Indeed, the D.C. Circuit explicitly held that 18 U.S.C. § 1964 permits forward looking remedies that are aimed at future violations. Philip Morris USA, 396 F.3d at 1198. In accordance with the Circuit's opinion and the statutory authorization for the Court to "prevent and restrain violations of [RICO] by issuing appropriate orders," 18 U.S.C. § 1964(a), the United States proposed a comprehensive set of remedies that, imposed as a whole, will prevent and restrain future racketeering activity by Defendants. As set out at length in the United States' opening brief, the evidentiary record before the Court supports the need to impose all of the remedies sought, not merely a selected portion of them.

2. The Arguments Proffered by Defendants Against the Imposition of Remedies Are Frivolous or Irrelevant

A review of the "legal, equitable and constitutional constraints" that, in Defendants' view, make remedies beyond prohibitory injunctions "rare" in civil RICO actions, JD Br. at 149, shows them to be largely frivolous or irrelevant. As a whole, the "basic principles of equity jurisprudence," supposed constitutional constraints, and "procedural and evidentiary requirements" identified by Defendants, JD Br. at 145, are either general assertions that are

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[65](...continued)
with their continued assertion that cessation and counter-marketing funding are "categorically barred" by 18 U.S.C. § 1964(a).

irrelevant to the questions confronting the Court (or completely lacking in evidentiary applicability), or products of Defendants' misinterpretation or misapplication of statutory or case law to the remedies sought by the United States.

In the former category, general assertions that are irrelevant to issues before the Court or lacking any evidentiary applicability:

- Defendants' assertion that remedies must be directed at preventing and restraining acts similar or closely related to the activities of the enterprise (JD Br. at 149) is misplaced, for every remedy identified by the United States is directly related to the conduct proven to comprise the seven pillars of Defendants' fraudulent scheme;

- Defendants' argument that principles of equity "prohibit injunctions that unnecessarily burden lawful activity or enjoin the commission of unlawful acts not related to the unlawful activity currently before the court" (JD Br. at 151) is irrelevant here, because the remedies sought by the United States seek to enjoin unlawful activity directly related to the threat of future racketeering activity by Defendants;

- There is no evidence to support the assertion that any of the remedies identified by the United States will endanger the rights of "individuals who become involved in business plans with 'racketeers' without suspecting the unlawful source of funds or the unlawful nature of the enterprise's activities" (see JD Br. at 152, quoting Ashland Oil, Inc. v. Gleve, 540 F. Supp. 81, 85 (W.D.N.Y. 1982);

- None of the remedies identified by the United States is "uncertain in terms" or merely "describe[s] by reference to the Complaint" the act or acts sought to be enjoined (see JD Br. at 152);

- None of the remedies identified by the United States requires a Defendant to do something beyond its control (see JD Br. at 153); and

- The United States seeks only to enjoin necessary and appropriate parties (see JD Br. at 159);

- The United States seeks to enjoin and regulate conduct that has a direct and substantial effect in the United States (see JD Br. at 160).

In the latter category, misinterpretations or misapplication of statutory or case law:

- Defendants wrongly contend that they have not received timely notice and an adequate opportunity to address the remedies sought by the United States (JD Br. at 146, addressed in Section III.B, infra);

- Defendants seek to restrict the remedies available in Government civil RICO actions in a way that would render the RICO statute toothless and ineffective (JD Br. at 147, addressed in Section III.A.1, supra, and III.D.1, infra);

- Defendants erroneously assert that the enforcement scheme proposed by the United States is not "judicially manageable" or violates separation of powers principles (JD Br. at 152 and 157, addressed in Section III.C, infra);

- The equitable remedies in this action are not subject to affirmative, equitable defenses, and Defendants' contrary contentions fail as a matter of fact and law (JD Br. at 154, address in the United States' separate opposition thereto);

- None of the remedies identified by the United States interfere with or displace regulatory authority (JD Br. at 155, addressed in Section III.D.3, infra) or violate Defendants' First Amendment rights (JD Br. at 158, addressed in Section III.D.5, infra);

- There is no support for Defendants' assertion that existing judicial bars to certain conduct prohibit the imposition of injunctive relief in this action (JD Br. at 161, addressed in Section II.H.2, supra); and

- As set out in the United States' Findings and further explained in the United States' opening brief, the effectiveness of the remedies identified by the United States is supported by the evidentiary record before the Court.[66]

In the end, Defendants' assertion that the United States has ignored "most of the constraints on the Court's remedial authority," JD Br. at 145, is incorrect. To the contrary, the remedies sought by the United States are squarely within the constraints of the law, as dictated by the evidence adduced at trial. That evidence demonstrated convincingly that in the absence of comprehensive equitable relief that is subject to tight oversight of Defendants' activities with

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[66] In support of their assertion that "to comply with Section 1964(a)" a remedy must be demonstrated to be effective at "preventing and restraining" violations "through reliable, empirical evidence," Defendants rely on **an opinion from the Northern District of Indiana in a case involving state law negligence claims** by employees who were exposed to pesticides when the defendant pesticide applicator fogged the room where the employees were located. JD Br. at 161-162, citing Bradley v. Brown, 852 F. Supp. 690, 700 (N.D. Ind. 1994), aff'd, 42 F.3d 434 (7th Cir. 1994). There, the court held that the employees failed to establish the etiology of multiple chemical sensitivities was sufficiently known or tested to allow testimony of clinical ecology experts as to causation, but nevertheless found that the pesticide applicator's negligence in exposing the employees to pesticides caused their illnesses on the day of exposure. Bradley, 852 F. Supp. at 698, 701. This case simply has no application here.

vigorous enforcement, Defendants will continue to violate the law as they have for over five decades. And the evidence of Defendants' past and ongoing conduct, particularly conduct driven by threats to Defendants' profits, market opportunities and the need to circumvent regulatory, legislative, judicial or agreed to restrictions on conduct, establishes that the particular remedies sought by the United States are precisely tailored to the threat of future unlawful activity.

B. Defendants Received Fair and Timely Notice and an Adequate Opportunity to Present Evidence Pertaining to the United States' Proposed Remedies

Under the pretext of United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), Defendants continue to complain that many of the remedies proposed by the United States cannot be ordered by the Court. By incorrectly labeling certain aspects of the United States' proposed remedies as "new," Defendants contend that they were not afforded a full and fair opportunity to respond to the United States' proposed remedies, in contravention of Microsoft. JD Br. at 146. Defendants' contention is baseless for two reasons. First, it is inappropriate to apply Microsoft to this case, where Defendants had the opportunity to present evidence and challenge the United States' proposed remedies in a five week long remedies phase of trial. Second, all issues underlying the relief requested by the United States have been fully litigated during the nearly nine months of trial, and the extensive evidentiary record supports the United States' proposed remedies.

1. Defendants' Reliance on Microsoft Is Misplaced

As the United States noted in its opening brief, the Microsoft case relied upon by Defendants stands for the proposition that, when there are factual disputes about the remedies proposed by the parties, it is an abuse of discretion for a district court to receive remedies evidence from only one party to a case and order a remedy without affording the other party any opportunity to challenge that evidence and present its own. The Court in Microsoft failed to hold

any remedies-specific hearing. Microsoft, 253 F.3d at 103. In their response brief, Defendants cite additional cases to support the notion that due process requires an evidentiary hearing when there are material facts in dispute. JD Br. at 146-147. Defendants argue that their due process rights were violated, because they did not receive "fair notice of the specific relief" requested by the United States, and therefore the factual issues raised by the proposed relief were not fully and fairly litigated. Id. at 147. Remarkably, Defendants ignore the fact that the parties fully briefed issues related to the remedies that the United States seeks, deposed witnesses and produced documents specifically related to remedies issues in discovery ordered by the Court, and had a **full trial** on the issues underlying the United States' proposed remedies in this case. As such, Defendants' reliance on Microsoft is misplaced: The Court entertained evidence from both sides; Defendants **voluntarily** narrowed their remedies witness list; and Defendants were even permitted additional discovery of the United States' remedies witnesses, to address their claims of fairness and "due process."

Defendants further contend that the United States' Proposed Final Judgment and Order, as well as its opening brief, contain "new" bases for several of the proposed remedies, thus depriving Defendants of fair notice and an evidentiary hearing on those issues. As discussed in more detail below, Defendants ignore the fact that the rationale for each of the proposed remedies has remained constant and the underlying factual evidence in support of those remedies is evidence that was adduced during a highly contested trial. This Court has discretion to fashion a remedial order that is supported by the evidentiary record and factual findings made by the Court. See Int'l Salt Co. v. United States, 332 U.S. 392, 400-401 (1947) ("[District courts] are invested with large discretion to model their judgments to fit the exigencies of the particular case.").[67]

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[67] Based on governing law, the Court is not bound by the specific requests for relief made (continued...)

2. The Evidence Supports the Need for the Proposed Remedies

Defendants argue that aspects of several of the United States' proposed remedies are "new," and therefore adoption of these remedies **as a whole** would violate Defendants' due process rights. Defendants' assertions are without merit. The United States' remedies are not "new," and Defendants certainly had notice of these proposed remedies throughout the course of the remedies phase of trial. Furthermore, the United States presented evidence to support the need for each of the proposed remedies and set forth the record evidence underlying the proposed remedies in its post-trial filings. See US FF §V; US Br. at 151-268. Defendants had adequate notice and an opportunity at trial to challenge the evidence that the United States presented, as well as present their own evidence:[68]

- The remedy of a smoking cessation plan is certainly no surprise to Defendants, as it was included in the United States' Complaint in this case.[69] Nonetheless, Defendants erroneously claim that the United States "injected a new factual issue" and an "irrebuttable presumption" into this case, in violation of Defendants' due process rights. JD Br. at 164-66. The United States has already refuted precisely these erroneous arguments by Defendants, US Br. at 203-207; a refutation not acknowledged in Defendants' brief.

- Defendants claim that the United States' proposed Order "specifies for the first time that

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[67](...continued)
by either party or by the intervenors in this case. In fact, it is not uncommon for courts sitting in equity to reject aspects of requested relief and fashion appropriate remedies based on the evidence. See, e.g., New York v. Microsoft Corp., 224 F. Supp. 2d 76, 147, 157 (D.D.C. 2002) (remedies hearing of states who opted out of settlement resulting from remand of United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001)); United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, 686 F. Supp. 1139, 1167-68 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1989).

[68] Defendants' Offer of Proof, filed with the response brief, is a recitation of evidence that Defendants had every opportunity to present at trial, but failed to proffer. Defendants' failure to develop the record adequately does not equate to a deprivation of their due process rights. They were denied nothing, and their Offer of Proof is fatally defective for this and other reasons set out in the United States' response thereto, filed simultaneously with this reply brief.

[69] Amended Complaint, VII.B.2.i.

the amount of funding requested for such programs is $4 billion over a ten-year period." JD Br. at 186 (citing Remedies Order § IV.C.). This assertion is not valid, as trial evidence clearly supports a factual finding and adoption of this remedy. See, e.g., US 64316 (A) (2000 Surgeon General's Report); US 88621 (A) (2004 Surgeon General's Report); Eriksen WD, 5/9/05, 10:15-23; US FF § V.C.1.; Healton WD, 10:2-19, 34:13-35:10, 61:5-15 (testimony of Dr. Cheryl Healton, which established the need for a further $100 million per year, in addition to the $300 million per year funding of the American Legacy Foundation provided by the MSA (which ceased after five years)).

- Since the time of the filing of the Complaint in this case, Defendants have been on notice that the United States seeks a remedy requiring Defendants to publish corrective communications. The specific content of these corrective communications requested by the United States is based on evidence offered by the United States at trial. See, e.g., Samet WD, Burns WD, Henningfield WD, Benowitz WD, Slovic WD.

- Defendants cross-examined Dr. Eriksen on his opinion that Defendants should disclose disaggregated marketing data. Eriksen TT, 5/16/05, 21131:20-21136:14.[70] Morever, the need for this proposed remedy is supported by the evidence adduced at trial. See US FF § V.F.3.

- Contrary to Defendants' contention, JD Br. at 214-215, the need for court-appointed officers is supported by evidence too voluminous to recount here. See US FF § V.G. (providing examples); US Br. at 252-255. Furthermore, the powers of the IO and IHO about which Defendants complain, such as the standard of review for IHO decisions and "the authority to monitor Defendants' compliance with every aspect of the Remedies Order," JD Br. at 215, are **legal questions** regarding the scope of power that may be vested in court-appointed monitors.

In sum, Defendants conflate the issue of whether the evidence supports the United States' proposed remedies with procedural due process issues. Based on the adequate notice and full evidentiary hearing afforded Defendants on issues related to the remedies proposed by the United States, Defendants' application of Microsoft and assertions of due process violations must fail. The proposed remedies are well-supported by the evidence and should be adopted by the Court.

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[70] At no time during the cross-examination did Defendants explore the timing of the disclosure. If immediate or "short lag time" in disclosing the data were truly a concern for Defendants, they should have explored the issue with Dr. Eriksen and presented their own evidence to support their position at trial. They did not do so. Importantly, as noted in the United States' opening brief, Defendants do disclose aspects of their disaggregated marketing data within short periods of time when it suits their needs. See US Br. at 247 (discussing Victor Lindsley's testimony in March 2005, which disclosed 2004 data).

C. The Use of Court-Appointed Monitors is Legally Permissible and Judicially Manageable and Enforceable

As the United States demonstrated in its opening brief, the appointment of the court officers and agents in this case is not only legally permissible, but specifically warranted.[71] Nevertheless, on several different fronts Defendants challenge: (1) the authority of the Court to appoint officers as the IO and IHO in this case, and (2) the powers granted to the IO and IHO in the United States' Proposed Order. Defendants' many attacks on the IO and IHO are hollow and unpersuasive.[72]

1. Defendants Mis-characterize the Authorities and Tasks of the IO and IHO

Defendants misconstrue and exaggerate many of the authorities and tasks assigned to the IO and IHO in the United States' Proposed Order. It is important to place the proposed authorities of the IO and IHO in proper context. To be clear, the United States' Proposed Order does not contemplate the IO and IHO operating Defendants' companies, as Defendants suggest. See e.g., JD Br. at 218-219 (wrongly asserting that IO has "extensive authority to command Defendants' business and employment operations"). All of the authorities and tasks assigned to the IO and IHO are designed to prevent and restrain Defendants from engaging in future RICO violations by insuring Defendants' compliance with this Court's remedial order and by insuring that the funding required by the order is productive utilized.

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[71] "Court-appointed officers" refer to the IO and IHO, which are distinguishable from the proposed internal compliance officers for each of the still-operating Defendants. The internal compliance officers are to be selected by Defendants, not the Court. Proposed Order, §VI.J.

[72] In their Reply filed in support of their Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c), Defendants acknowledge that the appointment of a court liaison officer to implement a remedial decree, "fall[s] within the realm of known RICO jurisprudence." Defs' Reply Mem. at 10 (discussing 871 F.2d 401).

2. The Use of Court-Appointed Officers Is Proper in this Case

Defendants claim that the civil RICO case law cited by the United States in support of its position on court-appointed officers is inapplicable to private corporations,[73] arguing that the case sub judice is distinguishable from one in which a court appoints officers to oversee a labor union infiltrated by organized crime. JD Br. at 216-217. The United States addressed this issue in its opening brief and made clear that the rationale for the use of court-appointed officers is the same in each context. See US Br. at 181-191.

In addition, Defendants assert that the proposed review of Defendants' business practices and the proposed authorities vested in the IO and IHO are not "judicially manageable" because "the Government has deliberately sought to create a shadow Government over which this Court has virtually no managerial power." JD Br. at 218-219. Defendants' outlandish argument is based on an erroneous characterization of the proposed remedy. The IO and IHO simply are not tasked with running Defendants' companies (US Br. at 188), and Defendants offer no legal basis for the Court to conclude that the proposed remedy is not judicially manageable.

While Defendants cite no authority to support their accusation that the IO and IHO are not "judicially manageable," they argue in a footnote that the authorities and procedures outlined in the Proposed Order are not narrowly tailored to the remedy and are more burdensome than necessary to provide complete relief. JD Br. at 220 n.121. The argument is also unsound. The duties and authority of the IO and IHO, set forth in the Proposed Order, are reasonably tailored to prevent future RICO violations in that they specifically address the behavior and practices that

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[73] The law does not prohibit appointment of court monitors in the context of private corporations. In fact, Defendants place weight on a recent Sixth Circuit decision that upheld the issuance of a permanent injunction against two private corporations which "assigned a court-appointed expert to monitor [the companies'] compliance with the injunction." Ellis v. Gallatin Steel Co., 390 F.3d 461, 469 (6th Cir. 2004), cited in JD Br. at 47, and discussed supra.

have led to the Defendants' pervasive fraud and are no more intrusive than necessary to effectuate the remedial purpose of the Proposed Order, namely, to prevent Defendants from continuing their decades-long scheme to defraud the public. See United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 995 F.2d 375, 376-77 (2d Cir. 1993) (upholding scope of injunction curtailing defendants' First Amendment associational rights in civil RICO case where compelling evidence warranted "enjoining violators from activities that might lead to future violations").

3. The Authority Granted to the IO and IHO Does Not Violate Fed. R. Civ. P. 65(d)

Defendants contend that the authority of the IO and IHO to issue certain orders enforcing the Court's remedial decree contravenes Rule 65(d)'s requirement that the form and scope of an injunction or restraining order be specific in its terms. The purpose of Rule 65(d) is to provide enjoined parties with fair notice of the **nature** of the prohibited activity. See Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 926-927 (D.C. Cir. 1982). In Common Cause, although the D.C. Circuit struck down the vague injunction, the Court recognized that "the fair notice requirement of Rule 65(d) must be applied 'in the light of the circumstances surrounding [the injunction's] entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent.'" Id. at 927, citing United States v. Christie Industries, Inc., 465 F.2d 1002, 1007 (3d Cir. 1972). The Court also indicated that, based on the context of the litigation and the subjective knowledge of the enjoined party, "an injunction's language might be sufficiently specific to notify the parties of the acts the court seeks to restrain." Common Cause, 674 F.2d at 927.

Here, the Proposed Order enumerates **specific** instances where the IO is authorized to bring complaints and issue orders for violations of the Court's remedial Order. See, e.g.,

Proposed Order at 39-40. Through the Court's Final Judgment and Order, Defendants will have notice of the specific prohibited practices. Any enforcement orders issued by the IO and IHO will be based upon those prohibited practices. Thus, having fair notice of the **nature** of the prohibited activity upon which the IO and IHO orders are based, Defendants' claim that these orders fail under Rule 65(d) is unpersuasive.[74]

4. The Proposed Appointment of the IO and IHO Does Not Violate the District Court's Powers under Article III or Rule 53

Defendants also claim that the proposed appointment of the IO and IHO contravenes Article III and Fed. R. Civ. P. 53. JD Br. at 222. Defendants are wrong: The use of court-appointed officers in this case is legally permissible. See US Br. at 193-197. In further response to Defendants' arguments, the United States addresses Defendants' erroneous reading of the cases they cite in support of their position:

- Relying on Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) ("Cobell I"), Defendants assert that the district court does not have the inherent authority to appoint a monitor with the duties assigned to the monitor in that case. Importantly, as the United States already pointed out, the D.C. Circuit cautioned that this holding was "a narrow one, tethered to the peculiar facts" of the particular case. Cobell I, 334 F.3d at 1141. The D.C. Circuit further explained that inherent authority of a court "must either be documented by historical practice . . . or supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught." 334 F.3d at 1141 (citations omitted). The United States recounted the historical practice of courts using appointed agents and officers to implement and enforce remedial decrees. See US Br. at 180-186.

- Citing Cobell I's concern for separation of powers, Defendants further misconstrue the law in arguing that, in the case at bar, the appointment of the IO and IHO treads on Executive powers. See JD Br. at 157-158, citing, Cobell I, 334 F.3d at 1143. This premise is incorrect. The D.C. Circuit's separation of powers concern in Cobell I was directed toward the appointment of a judicial monitor to oversee the affairs of the Executive branch of government. Such concern is absent from this case where the

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[74] Importantly, the Proposed Order provides certain procedural safeguards with respect to any orders issued by the IO and IHO. Specifically, Defendants have an opportunity to challenge, before this Court, any of the orders issued by the IO and IHO. The Court will also have an opportunity to monitor the orders of the IO and IHO through the quarterly reports submitted by the IO. See Proposed Order at 43-49.

monitors would oversee private entities.

- In support of their argument that the proposed appointment of the IO and IHO violates Fed. R. Civ. P. 53, Defendants rely on United States v. Microsoft, 147 F.3d 935 (D.C. Cir. 1998), which dealt with the appointment of a special master under Rule 53. As the United States pointed out in its opening brief, the Proposed Order does not contemplate the appointment of a Rule 53 master. US Br. at 195, n.121. Nevertheless, Microsoft was decided prior to the 2003 amendment to Rule 53. As the Advisory Committee Notes to this amendment explained, "Rule 53 is revised extensively to reflect changing practices using masters." Fed. R. Civ. P. 53, Advisory Comm. Notes (2003 amendments). Such changes contemplate the use of masters "to assist in framing and enforcing complex decrees," which includes "investigations or administration of an organization." Id. In light of the 2003 amendment to Rule 53, Defendant's staunch reliance on the 1998 Microsoft decision is misplaced.

5. The Hearing Procedures Proposed for the IHO Are Constitutionally Valid

Defendants raise several constitutional objections to the hearing procedures set forth in the United States' Proposed Order. Nothing in the Proposed Order purports to change the law governing contempt proceedings or the District Court's authority in this area, however, and the Court has discretion to alter any precise procedures in the Proposed Order with which it dissatisfied; and Defendants offer no valid reason to preclude the appointment of the IO and IHO.

Defendants contend that the IHO procedures violate their claimed right to a jury trial. As Defendants assert, this is only available if there is a "'serious' criminal contempt sanction" imposed. JD Br. at 227 (citing Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 819, 837 (1994)). The sanctions involved in the IHO procedures are civil in nature, not criminal. While Defendants take issue with two particular sanctions,[75] the Proposed Order contemplates a **range** of sanctions – all of which are civil in nature, because they are used in **compelling compliance** with the Court's Order. See Cobell I, 334 F.3d at 1145 (noting that "[c]ivil contempt is

[75] Defendants' brief discusses only two "sanctions": (1) the decision to extend Defendants' obligation to fund the National Smoking Cessation Quitline Network will be extended, and (2) the financial assessments imposed if Defendants fail to meet the targeted reductions in youth smoking.

ordinarily used to compel compliance with an order of the court . . . . By contrast, criminal contempt is used to punish, that is, to 'vindicate the authority of the court'.") (citation omitted).

Defendants further contend that the IHO procedures deprive Defendants of their Sixth Amendment right to confront witnesses. There is no per se right to confront witnesses implicated by the Proposed Order. See United States v. Int'l Bhd. of Teamsters, 156 F.3d 354, 364 (2d Cir. 1998) (noting that "it is not the case that any investigation and factfinding that is not conducted adversarially is per se inadequate or capricious") (citations omitted). Further, Sixth Amendment confrontation rights only arise in criminal cases. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI. The protections afforded by this Amendment are "specifically limited to 'criminal prosecutions.' " Hannah v. Larche, 363 U.S. 420, 440, n. 16 (1960); see also Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974) (prisoners in disciplinary cases have no Sixth Amendment right to confront witnesses against them). The hearings conducted by the IHO are not criminal prosecutions.

Defendants also complain that they are denied fair notice and an opportunity to be heard because the Proposed Order suggests the possibility that some matters may be decided by "summary disposition on written or oral argument from the parties." Proposed Order at 48.[76] Despite Defendants' complaints, there is no denial of an opportunity to be heard. As set forth in §VI.E. of the Proposed Order, the Defendant, Covered Person, or Entity subject to the IHO proceeding receives not only notice of a complaint, but also **pre-filing notice** of an alleged violation. See Proposed Order, at 43-45. Moreover, if the IO files a complaint, the IHO must

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[76] "Due process of law does not require a hearing 'in every conceivable case of government impairment of private interest." Stanley v. Illinois, 405 US 645, 650-51 (1972) (citation omitted). The cardinal principle of due process is that it is flexible and takes into account the totality of the circumstances, beginning with "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

conduct a "fair and impartial hearing" should the person or entity desire one. Id. at 47.

Finally, Defendants contend that the IHO procedures violate the Eighth Amendment's prohibition on imposing excessive fines, because there is a possibility (1) that Defendants' obligation to fund the National Smoking Cessation Quitline Network will be extended, and (2) that Defendants may not meet the reduction in targets of youth smoking. A "fine" within the meaning of the Eighth Amendment is understood to be "punishment for some offense." United States v. Bajakajian, 524 U.S. 321, 327 (1998). Put simply, the extension of the Defendants' obligation to fund additional cessation services and any financial assessments imposed for missing targeted reductions in youth smoking do not constitute "fines" because they are not punitive in nature. Instead, they are equitable remedies used to compel compliance with this Court's remedial order. See Philip Morris USA, Inc., 396 F.3d at 1203 (concurring opinion approvingly citing possibility of "draconian contempt penalties" as remedy).

Assuming arguendo that these financial obligations and assessments are considered "fines," they are not excessive.[77] A fine is not "excessive" in its contemplation – only in its imposition. See United States v. Fleetwood Enters., 689 F.Supp. 389, 392 (D. Del. 1988) (challenge to Eighth Amendment constitutionality of potential fines under Manufactured Housing Act not ripe for adjudication where defendant had been charged under the Act but fines had not yet been imposed); cf. Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759-60 (11th Cir. 1991) (ripeness generally a concern in anticipatory attack on a statute, ordinance, regulation or policy).

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[77] What constitutes "excessive" is a matter of interpretation and context based on the specific facts of the particular case. The Supreme Court "has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of $10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to jury trial." Bagwell, 512 U.S. at 837 n.5. (citations omitted).

D. Defendants' Other Legal Arguments Concerning Remedies Are Either Wrong or Misplaced

1. Requiring Defendants to Fund Smoking Cessation and Counter-marketing Programs Is Legally Permissible and Aimed at Preventing and Restraining Future Violations

Defendants adhere to the untenable position that requiring funding for smoking cessation and counter-marketing is "categorically barred" by the D.C. Circuit's opinion in United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005). They do so by asserting that, while remedies that deter future wrongdoing are permitted in civil RICO actions, "deterrent incentives are insufficient to satisfy the statutory prevent and restrain requirement." Defs. Rule 52(c) Reply at 13. Defendants are wrong. The D.C. Circuit's opinion addressed the remedy of disgorgement, holding that the mere fact that disgorgement of past proceeds might deter future wrongdoing did not convert a backward-looking calculation into one aimed at future violations. It does not follow, and nothing in the D.C. Circuit's opinion supports the view, that because disgorgement is "backward-looking," any remedy that deters future unlawful conduct is also backward-looking.

Defendants' view is not only unsupported by Judge Sentelle's opinion, but it is directly at odds with the concurring opinion from Judge Williams, which identifies the criminal's future risk-reward calculation as the most powerful force affecting future criminal activity: "But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught)." Philip Morris USA, 396 F.3d at 1203. The observation from Judge Williams applies to both cessation and counter-marketing, and, combined with the additional reasons set out in the United States' opening brief, illustrates Defendants' "categorical bar" argument to be incorrect.

Defendants' other arguments against cessation and counter-marketing funding are equally

unavailing. Defendants' primary objection to the cessation funding requested by the United States is their complaint that the United States asks the Court to "remedy or undo the effects of past violations or, alternatively, to **undo** hypothetical effects of **future** violations." JD Br. at 163 (emphasis in original). As they did in their Rule 52(c) motion and reply, Defendants again argue that the United States' cessation "proposal flatly violates the 'prevent and restrain' requirement, inasmuch as undoing a violation after it occurs is a far cry from preventing and restraining the violation." Id.

Defendants' argument rests on a fundamental misunderstanding or mischaracterization of the smoking cessation remedy. Indeed, in their zeal to extend the D.C. Circuit's disgorgement opinion to smoking cessation funding, Defendants offer the flatly incorrect statement that the cessation remedy requires that "the Court would today order Defendants to **disgorge future profits from anticipated future RICO violations**, even though it plainly could not impose that remedy for proven prior RICO violation." Id. (emphasis added). Under Defendants' reasoning, the requirement that Defendants fund a program to allow smokers approximately equal in number to the victims of their inexorable future conduct to quit smoking is a "retrospective remedy." Id. But requiring Defendants to fund smoking cessation is nothing like disgorgement – indeed, the remedy does not require that Defendants "disgorge future profits," as they contend. Instead, it is based entirely on a reasonable approximation of the cost of facilitating cessation for the number of persons who will initiate smoking and switch to lower tar cigarettes in the first year following judgment, at a time when certain of the other remedies identified by the United States are not yet fully effective. This key point – the implementation time for a comprehensive remedial order – is not addressed by Defendants in either their Rule 52(c) reply or their post-trial brief.

Implementation time is clearly an appropriate consideration for a court imposing remedies in the RICO action. As the United States noted in its opening brief, in United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1986), the Court held that an imposed trusteeship would continue "for such time as is necessary to foster the conditions under which reasonably free supervised elections can be held, **presumptively for eighteen months**." 581 F. Supp. at 337 (emphasis added). Similarly here, the Court should conclude, based on Defendants' past and ongoing conduct (particularly marketing to youth and promoting low tar cigarettes),[78] that unlawful activity will continue in the future and should impose remedies that address continuing conduct. In fact, more generally, inferences of future wrongdoing based on past conduct alone are an accepted and necessary of RICO decisions. See, e.g., United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377 (2d Cir. 1993); United States v. Local 30, 871 F.2d at 408-09; United States v. Local 1804-1, Int'l Longshoremens Ass'n, 831 F. Supp. 177, 191 (S.D.N.Y. 1993); United States v. Local 295, Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19-22 (E.D.N.Y. 1992) ("Institutional practices and

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[78] Defendants' assertion that the smoking cessation remedy "bears no causal relation to activities that the government alleges to be illegal" (JD Br. at 165) should be summarily rejected by the Court. The evidence shows that Defendants have devoted decades to fraudulently promoting low tar cigarettes as "health reassurance" brands. Equally unpersuasive, Defendants' assertion that the remedy is not narrowly tailored (JD Br. at 167) ignores the evidence showing that a total of 19.25 million smokers of low tar cigarettes hold the mistaken belief that they are taking a step for their health or toward quitting. US FF, § V, ¶ 120. This is a far greater number than the 2.3 million on which the United States asks the Court to base calculation of the smoking cessation funding requirement, although evidence would support the conclusion that a substantial portion of the 19.25 million would continue to be deceived by Defendants' low tar marketing for at least the first post-judgment year, before the comprehensive set of remedies advocated by the United States are fully in place. Addressing Defendants' remaining contentions, (1) the assertion that this equitable remedy is "a social welfare program" and "[a]s such, it lies within the exclusive province of Congress" (JD Br. at 169) is frivolous; and (2) the necessary funding levels, on a per smoker basis, were unchallenged on cross-examination. Moreover, Defendants' citation, once again, to Dr. Fiore's testimony that he did not undertake a "prevent and restrain" analysis, is irrelevant where the evidentiary record before the Court provides solid factual support for the legal requirements for remedies imposed under 18 U.S.C. § 1964.

traditions tend to endure long after specific individuals are gone").

Defendants' arguments against public education and counter-marketing are similarly unpersuasive. As the Court is aware, notwithstanding Defendants' efforts to attribute unwarranted substance to their cross-examination of witnesses like Dr. Michael Eriksen, evidence supporting the effectiveness of public education and counter-marketing is extensive and strong. See generally, Carmona WD; Eriksen WD; Healton WD.[79] Defendants are therefore left to make many of the same arguments they made in briefing on their Rule 52(c) motion, arguing incorrectly that a remedy that prevents and restrains by removing the incentive to engage in future wrongful conduct is "inherently remedial." JD Br. at 183. For the reasons set out above and explained in detail in the United States' opening brief, Defendants' arguments are not supported by the D.C. Circuit's opinion and are contrary to the statutory authority granted to the Court by 18 U.S.C. § 1964(a).

Moreover, Defendants' further assertion that "one might just as easily argue that a public education and counter-marketing campaign would make the Defendants **redouble** their advertising efforts to maintain market share" (JD Br. at 183 (emphasis added)) provides **support** for the imposition of a **comprehensive remedial scheme**, where specific prohibitions are coupled with programs that alter Defendants' risk-reward calculation for future fraud. Specifically, the Court is well aware that Defendants have consistently found ways to circumvent proscriptions on their business activities to take advantage of profit-making opportunities, even where violations of law, regulations, court orders or agreements carry potential penalties. See

[79] Defendants go so far as to ask the Court to ignore the prior, out of court admissions of senior executives like Philip Morris USA Michael Szymanczyk regarding the effectiveness of the American Legacy Foundation in favor of the litigation position of their counsel, denying "that [the Foundation] has been proven to be effective at reducing tobacco use generally and youth smoking in particular." JD Br. at 189 n.94.

generally, US FF § V. Defendants' past conduct instructs us that the Court can prevent and restrain future wrongdoing only by eliminating or severely reducing the likelihood that Defendants will profit from their circumvention efforts, so that Defendants are faced not only with potential penalties for violation of prohibitory injunctive provisions, but the calculation of the reward for assuming such risk weighs in favor of compliance with the law. Cf. In re Salomon Analyst AT&T Litigation., 350 F.Supp.2d 455, 459 (S.D.N.Y. 2004) ("the carrot of additional compensation . . . provided the motivation for SSB analysts to falsify their research reports to make them more favorable than their honestly-held opinions").

2. Youth Smoking Reduction Targets Are an Appropriate Equitable Remedy, and Defendants Are Not Entitled to a Jury Trial

Contrary to Defendants' assertions, youth smoking reduction targets are an equitable remedy that is properly before the Court. Further, Defendants have waived any claim to a jury trial on this remedy.

a. The youth smoking reduction remedy is an equitable remedy

Dr. Gruber's youth smoking reduction remedy is well within this Court's equitable powers. Like the other remedies sought by the United States, the youth smoking reduction targets arise from the equitable powers contained in Section 1964(a). The targets constitute injunctive relief, requiring Defendants to reduce youth smoking to specified levels over time. If youth smoking is reduced to those levels, Defendants pay nothing. It is only if Defendants fail to reduce youth smoking to a specified level that they are assessed $3,000 for each individual in excess of that level.

Defendants incorrectly assert that the $3,000 assessment is a punishment, and thus can only be imposed by a jury. JD Br. at 179. As Dr. Gruber testified, the assessment level was set at $3,000 not to punish, but to "ensure that no defendant would earn proceeds from making their

brands appealing to young people." Gruber WD at 23:13-16. See also Gruber WD at 22:5-7. Thus, unlike the legal remedy in Tull v. United States, 481 U.S. 412, 422 (1987), which was "intended to punish culpable individuals" and did not "direct that the 'civil penalty' imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute," the assessment amount in this case is based entirely on equitable determinations of the proceeds amount a defendant could earn from the sale of cigarettes.

As Defendants concede and this Court has recognized, monetary relief is appropriately awarded at equity where it is (1) restitutionary or (2) incidental to or intertwined with injunctive relief. Order #182, Mem. Op. at 10; JD Br. at 178. In this case, the remedy's requirement to reduce youth smoking to specified levels is injunctive relief authorized by section 1964(a)'s grant of authority to prevent and restrain RICO violations by "issuing appropriate orders." The financial assessments contemplated by the remedy are intertwined with the injunctive relief as they are imposed only if Defendants fail to reduce youth smoking to those levels. See Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 748 (D.C. Cir. 1995) ("the status of a claim as 'intertwined' or 'incidental' with injunctive relief depends on the remedial structure of the statutory scheme").[80]

b. Defendants have waived any claim for a jury trial

The youth smoking reduction remedy is equitable. Moreover, Defendants have waived any claim at this late date that the remedy is subject to a jury trial. Since March, Defendants have been on notice that the United States would seek this remedy. Defendants conducted extensive

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[80] Defendants' claim that any financial assessment will not be incidental to the injunctive relief because of the potential amount of the assessment is unavailing. JD Br. at 180. Initially, such a claim is premature, as no assessments are imposed if Defendants meet the targeted reductions. Further, unlike the "modest equitable relief" at issue in Tull, this case involves a comprehensive scheme of equitable relief affecting many facets of Defendants' operations, as well as the amount of youth smoking in this country. Any assessment imposed under this remedy would be incidental to such equitable relief.

discovery, objected to the entirety of Dr. Gruber's written testimony on relevance grounds (but failed to object that the remedy could only be heard by a jury), and engaged in thorough cross-examination of Dr. Gruber. Yet not until now, three months after the close of trial, do Defendants raise this issue.

Not surprisingly, the case law does not countenance Defendants' tactics. Instead, even after denial of their prior motion to enforce their jury demand, Defendants' participation in this bench trial without objecting to the Court's determination of the youth smoking reduction remedy results in the waiver of any claim to a jury trial for this remedy. Wool v. Real Estate Exchange, 179 F.2d 62, 63 (D.C. Cir. 1949). See also Royal American Managers, Inc. v. IRC Holdings Corp., 885 F.2d 1011 (2nd Cir. 1989) (despite initial plea for jury trial, plaintiff waived right when he failed to object when the judge stated his intention to determine claim); United States v. 1966 Beechcraft Aircraft Model King Air A90, 777 F.2d 947, 951 (4th Cir. 1985) (despite making an early jury demand, defendants waived right to jury trial as they "fully and vigorously participated in the bench trial," and failed "to in any way remind the district court of their early demand for a jury trial").

3. Corrective Communications Do Not Conflict with FCLAA or FTC Jurisdiction

Defendants incorrectly argue that a remedy directing Defendants to make corrective communications on package onserts would conflict with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq. ("FCLAA"). JD Br. at 193-94. This proposed remedy, as part of a comprehensive remedial scheme, will prevent and restrain Defendants from continuing to make statements on smoking and health that are misleading or contain material omissions. Such an order is well within the scope of the Court's equitable powers granted under Section 1964. It does not implicate FCLAA's preemption provision at all because Section 5(a)

of FCLAA (15 U.S.C. § 1334(a))[81] merely prohibits "**state and federal rulemaking bodies** from mandating particular cautionary statements" on cigarette packages. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (emphasis added); Lorillard v. Reilly, 533 U.S. 525, 543 (2001).[82] The Court is not a rulemaking body.

Additionally, an onsert – a separate sheet of paper affixed to the pack – is not a "package" as defined by FCLAA.[83] This is confirmed not only by the statutory definition, but also by Philip Morris's own approach to statements about smoking and health and its use of onserts. At different points in this case, Philip Morris claimed that it does not – as a matter of corporate policy – include any smoking and health statements on the cigarette package **other** than those required by FCLAA. See, e.g., Keane TT, 1/18/05, 10457:4-10458:23 (removing statement that "Smoking is Addictive" from packages of cigarette brands Philip Morris purchased from Liggett in 1999 was "the right decision" because of the "regulatory and statutory regime"); Bible PD, United States v. Philip Morris, 8/22/02, 112:12-113:17 (Philip Morris and Altria policy not to voluntarily provide additional information beyond mandated warnings on cigarette packages). Yet Philip Morris has trumpeted to this Court its onserts, pointing out the information about individual smoker variation, "light cigarettes," and other smoking and health topics these onserts allegedly provide to smokers. Accordingly, Philip Morris plainly does not consider these onserts

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[81] Section 5(a) of FCLAA states: "No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package." 15 U.S.C. 1334(a).

[82] Cf. United States v. Philip Morris, 263 F. Supp. 2d 72, 79 n.10 (D.D.C. 2003) ("[t]here is reason to think that FCLAA does not preempt" RICO claims).

[83] Under FCLAA, a "package" is "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." 15 U.S.C. § 1332(4). Defendants do not provide provide any authority for the proposition that an onsert is a "package" as defined by 15 U.S.C. § 1332(4).

to be part of the cigarette package; otherwise, the onserts would contravene the company policy described under oath by the Altria CEO.

Accordingly, as this Court has previously recognized, an order duly issued pursuant to the Court's authority to address Defendants' violations of RICO simply does not impinge upon, let alone disrupt, the role or authority of the FTC under FCLAA. See Philip Morris, 263 U.S. 72.

4. Document Disclosure is Integral to Preventing and Restraining Future Unlawful Conduct

Judge Williams's concurrence in Philip Morris USA pointedly observed that to "'prevent and restrain' future violations," § 1964(a) empowers the courts to **"impose transparency requirements so that future violations will be quickly and easily identified."** Philip Morris USA, 396 F.3d at 1203 (Williams, J., concurring) (emphasis added). As discussed in the United States' opening brief, multiple cases hold that **"disclosure requirements deter actual corruption and avoid the appearance of corruption."** Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) (emphasis added); see generally US Br. at 238-40 & nn. 144-45.[84]

During trial, Defendants repeatedly told this Court that document disclosure obligations impose transparency and ensure accountability. Their own attorneys emphasized that current (but shortly expiring) document websites achieve transparency, "so that people can monitor what the tobacco companies are doing." US FF § V.F, ¶ 280 (quoting Webb opening statement). Michael Szymanczyk, President and CEO of Philip Morris, emphasized that document disclosure

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[84] Defendants ignore this extensive authority, and suggest instead that expert evidence is required, but lacking, to show that disclosure obligations will prevent and restrain them from engaging in future misconduct. JD Br. at 209-12. Even assuming evidence were required, the record is more than ample. Defendants own expert witness, Dr. James Heckman, testified at trial that "hav[ing] [disaggregated marketing data] **in the public domain"** was of central importance. US FF § V.F.(4), ¶ 306 (emphasis added); see also id. § V.F, ¶¶ 283-85, 291, 307-08 (expert testimony from Dr. Allan Brandt, Dr. Michael Eriksen, and Dr. Max Bazerman on the importance of mandatory and ongoing document disclosures).

requirements "ensure that the information known by the tobacco companies is available and readily accessible to the public." Id. ¶ 282, cited in US Br. at 241 n.146. Defendants now ignore their own words, and ask this Court not to impose disclosure obligations on the ground that some (but not all) of them are currently subject to some disclosure requirements. JD Br. at 212-13. But in addition to ignoring the transparency and accountability that such requirements impose, Defendants also ignore that these existing requirements will shortly expire, beginning in May 2008. US FF § V.F, ¶¶ 290, 294, 296, cited in US Br. at 241.

Defendants object that ongoing disclosure requirements do not prevent and restrain future RICO violations by threatening them with punishment after they engage in such violations. JD Br. at 209, 211. But punishment for future violations is only one method to prevent and restrain future violations; the Court is "empowered under § 1964(a) . . . [to] **impose transparency requirements** so that future violations will be quickly and easily identified." Philip Morris USA, 396 F.3d at 1203 (Williams, J., concurring) (emphasis added). The purpose of ongoing disclosures is not to punish future violations, but to **prevent** future violations. SEC v. Cap. Gains Res. Bureau, Inc., 375 U.S. 180, 191-92 (1963).

Defendants complain that preventing and restraining future RICO violations by requiring them to disclose disaggregated marketing and sales data, and (under § V.3.c of the United States' proposed remedies order) information about health and safety risks, would wrongly invade their trade secrets. JD Br. at 208-09. Contrary to Defendants' assertion, manufacturers may not keep the health and safety risks of their products secret from consumers under the guise of protecting "trade secrets." The value of a trade secret is an edge over the competition; any profits that are lost when a manufacturer reveals its product's "harmful side effects . . . cannot constitute the taking of a trade secret," since the profits are lost because the product is less valuable to

consumers, rather than losing an edge to competitors. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 n.15 (1984). As to disaggregated data, Defendants offer no response to the United States' detailed showing that they strategically release selected disaggregated data when they believe it is to their benefit, such as Philip Morris's providing information about its magazine advertising levels to support its asserted "responsible marketing," even though this particular disaggregated category represents only 1% of the industry's overall marketing expenditures. US FF § V.F.(4), ¶¶ 304; US Br. at 245-47. The cases that Defendants cite address the contours of trade secret information in general, and do not address what a court may order to prevent and restrain future violations of the law. The caselaw shows that, to "assist in preventing fraud," organizations can be required to disclose how they spend their funds. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-38 (1980), cited in US Br. at 239. Moreover, once an organization has been found to have engaged in past violations, the courts can order ongoing disclosures of otherwise protected trade secret information to avoid future violations of the law. Mass. v. Microsoft Corp., 373 F.3d 1199, 1215-17 (D.C. Cir. 2004) (affirming "forward-looking" provisions requiring Microsoft to disclose proprietary computer code to prevent future anticompetitive behavior).

5. The Remedies Proposed by the United States Do Not Infringe on First Amendment Rights

Defendants complain that several of the equitable remedies sought by the United States would violate the First Amendment if imposed.[85] Defendants are wrong.

As an general matter, just as extensive authority establishes that Defendants' receive no protection from **liability** under the First Amendment for fraud, numerous courts, including this

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[85] See JD Br. at 158-59, 175 (Gruber remedy), 188 (counter-marketing and public education remedy), 192-93 (affirmative communications remedy), 197 (prohibitory injunction), 199-200 (restriction on use of brand descriptors), 203-04 (youth marketing restrictions).

one, have confirmed that in civil RICO enforcement actions by the United States, **remedies** designed to prevent and restrain parties from continuing to engage in conduct that has been proven unlawful do not violate the First Amendment. See, e.g., Philip Morris USA, 304 F. Supp. 2d at 71; United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991). The Supreme Court affirmed this principle in National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), recognizing that because the Society had been found to have violated the law,

> the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and eliminate its consequences. . . . While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade."

Id. at 697 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). The Supreme Court also held that while the Court of Appeals' injunction went "beyond a simple proscription against the precise conduct previously pursued **that is entirely appropriate**." Id. at 698 (emphasis added). As the RICO cases cited above confirm, the Supreme Court's recognition of the district court's flexibility, in the antitrust area, to fashion remedies to restrain a **proven wrongdoer** from future violations – including remedies that might implicate the First Amendment if applied against a party not found to have acted unlawfully – applies with equal force to the antifraud laws, including RICO violations predicated on mail and wire fraud.

One of Defendants' complaints is that the counter-marketing/public education and affirmative communications remedies are overbroad under the First Amendment. This complaint is misplaced. The United States has proven that Defendants have, in the past and up to the present, made and continue to make statements that are false, misleading, contain material

omissions, or are otherwise fraudulent on smoking and health issues central to this case. Accordingly, the Court is authorized under RICO to order relief that will prevent and restrain Defendants' conduct related to the **entire** scheme to defraud, not just the particular subject matters of the public statements that Defendants consider to be their most recent. Cf. JD Br. at 192 (arguing corrective communications remedy is overbroad because it is not limited to disease causation, addiction, and "light" cigarettes).[86]

Defendants also claim that the proposed provision precluding Defendants from "[m]aking, or causing to be made in any way, any material false, misleading or deceptive statement or representation, or engaging in any public relations or marketing endeavor that misrepresents or suppresses information concerning cigarettes that is disseminated to the United States public," US Prop. Ord. § V.3, potentially violates the First Amendment as an overly vague prior restraint. JD Br. at 159. It does not. The Supreme Court has held repeatedly that an injunction against speech will not be considered an unconstitutional prior restraint if it is issued after the finder of fact has evaluated the speech in question and determined that it is not constitutionally protected or that a substantial governmental interest exists for restraining it. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel., 413 U.S. 376, 390 (1973); see also SEC v. Wall Street Publ'g Inst., 851 F.2d 365, 370 (D.C. Cir. 1988). The order in this case

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[86] The first case that Defendants cite (JD. Br. at 158) for their overly narrow contention that a prohibition on certain future conduct must be "no broader than necessary to prevent repetition of the specific false statements giving rise to liability," Standard Oil of Cal. v. FTC, 577 F.2d 653, 662 (9th Cir. 1978), bears little relation to this case. In that case, the Ninth Circuit found overbroad an "all-products" FTC order that applied not just to the product that was the subject of three misleading advertisements, but to **any** of Standard's thousands of products. 577 F.2d at 660-61 & n.3. Thus, the court found the FTC order went well beyond "what in fairness could be deemed necessary to deter future unlawful conduct." Id. at 662. The proposed order in this case is tailored to prevent and restrain Defendants' continued or future conduct for the particular conduct, subject matters, and product (cigarettes) that the evidence has shown to be part of Defendants' scheme to defraud, and is thus nothing like the order in Standard Oil of Cal.

would be entered after a nine-month trial (following four years of discovery), during which the Court received voluminous evidence proving Defendants' decades-long unlawful scheme that rested on fraudulent public statements about cigarettes. As the injunctive provision in Section V.3 of the Proposed Order is aimed at preventing the continuation of conduct proven at trial to be unlawful, it does not constitute an impermissible prior restraint on speech.[87]

The Supreme Court's decision in National Society of Professional Engineers addresses Defendants' erroneous claim that portions of the Proposed Order will preclude expression protected by the First Amendment. In that case, the Supreme Court rejected the Society's claim that the portion of the injunction upheld by the Court of Appeals was a prior restraint on constitutionally protected expression. 435 U.S. at 698-699. The Supreme Court stated that "the answer to these fears is, as the Court held in International Salt [Co. v. United States, 332 U.S. 392 (1947)], that **the burden is upon the proved transgressor 'to bring any proper claims for relief to the court's attention**.'" Id. Accordingly, as the actual text of the United States' proposed order and relevant caselaw make clear, Defendants' challenge fails both as a matter of fact and law.

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[87] Even if analyzed as a restriction on speech, the proposed order would address speech that has been an integral part of Defendants' scheme to defraud, and therefore undeserving of First Amendment protection. See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 564 (1980); United States v. Carson, 52 F.3d 1173, 1183-84 (2d Cir. 1993) (noting that the RICO statute specifically authorizes reasonable restrictions on the future activities of violators, including activities that would otherwise enjoy First Amendment protection, and that "[i]n general 'a district court has broad discretion to enjoin possible future violations of law where past violations have been shown.'" (citation omitted)).

The sole case upon which Defendants rely, Metropolitan Opera Ass'n v. Local 100, Hotel Employees and Restaurant Employees Int'l Union, 239 F.3d 172 (2d Cir. 2000), is not to the contrary. First, the order in that case was a temporary restraining order that was converted into a temporary injunction, **not** an order entered after "full merits consideration" as occurred at trial in this case. See 239 F.3d at 173-74. Second, the language of the restrictive injunction in Metropolitan Opera was broader than that in the Proposed Remedies Order. Defendants ignore the full text of Section V.3, which provides additional, specific guidance about the type of misrepresentations and fraudulent statements that are covered by the provision.

Another claim advanced by Defendants is that the counter-marketing/public education and affirmative communications remedies compel speech in violation of the First Amendment. Again, Defendants are incorrect. Neither of these remedies would impermissibly require compelled speech in this case (counter-marketing/public education compels no speech whatsoever on the part of Defendants). Defendants rely heavily on National Soc. of Prof'l Engineers, 555 F.2d 978, for the proposition that compelled speech violates the First Amendment. In that case, the Court of Appeals upheld part of the district court's order that compelled the engineers' society to affirmatively disclose certain factual information. 555 F.2d at 984. The Court invalidated the requirement that the Society "state affirmatively that it does not consider competitive bidding to be unethical." Id. (forcing the Society "to express **as its own opinion** judicially dictated ideas" encroaches on protected First Amendment rights) (emphasis added). That is not the case here, because the order as structured by the United States does not force Defendants to communicate that the affirmative statements on smoking and health matters ordered by the Court **as their own views**.

Defendants also erroneously claim that certain of the remedies – the Gruber remedy, the ban on brand descriptors, and restrictions on youth marketing – would unconstitutionally limit Defendants' commercial speech. Contrary to Defendants' contention:

- The Gruber remedy is not intended to control speech; rather, it is intended to control Defendants' **conduct** in marketing to youth. Indeed, the Gruber provision expressly does **not** force Defendants to limit their commercial activity. Rather, it gives Defendants flexibility to determine how best to meet the targets set forth in the Gruber remedy. As but one example, Defendants could potentially comply with the Gruber provision by raising cigarette prices, an action that would not involve any curtailment of speech.

- As to brand descriptors, assuming arguendo that the United States' proposed restriction on use of brand descriptors warrants consideration as a restriction on commercial speech, rather than a remedy to prevent and restrain fraud, the United States has proven that Defendants' use of brand descriptors is knowingly misleading and has been part of Defendants' scheme to defraud. Accordingly, as described by the United States in its

opening brief (US Br. at 129), brand descriptors fail the first prong of the Supreme Court's test by which to evaluate commercial speech restrictions and thus do not receive First Amendment protection. See Central Hudson, 447 U.S. at 563-64.

- Defendants' contention that the proposed youth appealing marketing restriction run afoul of Central Hudson is also incorrect. See JD Br. at 203-04. Defendants claim that the restrictions "fail" the first prong of the Central Hudson test because Defendants' marketing is "lawful" and not "inherently misleading." As with the case of brand descriptors, the evidence shows that Defendants' youth-related marketing activity relates to their fraudulent course of conduct. See US Br. at 71-82; US FF § III.E. Assuming arguendo the Court considers Defendants' activity to be commercial speech, the Court should find that such marketing activity is "commercial speech related to illegal activity" that is **not** protected by the First Amendment. See Central Hudson, 447 U.S. at 563-564. Moreover, contrary to Defendants' contention, commercial speech concerning a lawful activity can promote unlawful activity, and consequently lawfully may be restricted. See Pittsburgh Press, 413 U.S. at 388 (striking down newspaper's categorization system for otherwise lawful employment advertisements because the system promoted unlawful discrimination in hiring). Further, Defendants again mis-characterize the United States' claims in suggesting that the alleged RICO violation sought to be prevented is a "fraudulent denial that Defendants market cigarettes to youth." JD Br. at 204. As this Court has previously recognized, Defendants' attempts to artificially isolate particular components from the overarching scheme to defraud, without consideration of the entire scheme and the totality of the evidence supporting it, are misplaced and must be rejected. See Philip Morris, 304 F. Supp. 2d at 66-67, 69 n.4.

IV. CONCLUSION

Nearly six years ago to the day, the United States filed this civil RICO action. As this Court noted in Order #230, expeditious resolution is warranted. The positions of the parties have been tested "in the time honored fashion: a public trial where the positions of both sides [were] tested in the glare of cross-examination and public scrutiny." Order #230 at 6. The United States respectfully requests that the Court find defendants liable and render, immediately, a decision on liability, making factual findings, including credibility findings, that the Court enter the United States' Proposed Final Judgment and Order, and that the Court award the United States its costs.

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