[ORAL ARGUMENT NOT YET SCHEDULED]

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

TOBACCO FREE KIDS ACTION FUND, et al.,
Intervenors,

v.

PHILIP MORRIS USA INC., et al.,
Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROOF BRIEF FOR THE UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties And Amici. The United States of America is the plaintiff-cross-appellant. Appellants are defendants British American Tobacco (Investments) Ltd.; R.J. Reynolds Tobacco Co; Philip Morris USA Inc.; Altria Group, Inc; Brown & Williamson Holdings, Inc.; Lorillard Tobacco Co.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute, Inc. Also appealing are the following intervenors in the district court: 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.

The following defendant has not appealed: Liggett Group, Inc.

The following entities have been granted leave to participate as amici in this Court: U.S. Chamber of Commerce; Washington Legal Foundation; National Association of Manufacturers; National Association of Convenience Stores.

The following additional entities have moved for leave to participate as amici in this Court: Public Citizen, Inc.; American College of Preventive Medicine; The American Public Health Association; Association of Maternal Child Health Programs; National Association of Local Boards of Health; and Oncology

Nursing Society.

The following additional entities intervened in the district court: Elan Corporation, PLC; Impax Laboratories, Inc.; Novartis Consumer Health Inc.; Pharmacia Corp.; Pfizer, Inc.; Smithkline Beecham Corp. and GlaxoSmithlkine Consumer Healthcare, L.P.; British American Tobacco Australia Services Ltd.

The following additional entities appeared as amici in the district court: Tobacco Control Legal Consortium; Regents of the University of California; Citizens' Commission to Protect the Truth; the States of Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia; Essential Action; City and County of San Francisco; Asian-Pacific Islander American Health Forum; San Francisco African American Tobacco Free Project; and the Black Network in Children's Emotional Health.

B. Rulings Under Review. The ruling under review is the final judgment and remedial order entered by the district court (Kessler, J.) on August 17, 2006, as amended by the district court's orders dated September 20, 2006, and March 16, 2007. The final judgment and order appear as Order #1015 on the district court's docket, and the orders amending the judgment appear as Order #1021 and Order #1028. The final opinion is published at 449 F. Supp. 2d 1 (D.D.C. 2006).

C. Related Cases. Aspects of this case have come before this Court in several previous appeals. See United States v. British Am. Tobacco Australia Servs. Ltd., 437 F.3d 1235 (D.C. Cir. 2006) (Nos. 05-5129 & 04-5358); United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005) (No. 04-5252); United States v. British Am. Tobacco (Invs.), Ltd., 387 F.3d 884 (D.C. Cir. 2004) (Nos. 04-5207 & 04-5208); United States v. Philip Morris Inc., 347 F.3d 951 (D.C. Cir. 2003) (No. 02-5210); United States v. Philip Morris Inc., 314 F.3d 612 (D.C. Cir. 2003) (No. 02-5210). There are no other related cases of which we are aware.

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Alisa B. Klein

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GLOSSARY[1]

Altria	Altria Group, Inc. (formerly Philip Morris Companies, Inc.)
American	American Tobacco Co.
ARIA	Association for Research on Indoor Air
B&W	Brown & Williamson Tobacco Co.
BAT Industries	British American Tobacco Industries p.l.c.
BATCo	British American Tobacco (Investments) Ltd.
BWH	Brown & Williamson Holdings, Inc.
CIAR	Center for Indoor Air Research
CORESTA	Cooperation Centre for Scientific Research Relative to Tobacco
CTR	The Council for Tobacco Research – U.S.A., Inc.
DN	Docket Number
EPA	Environmental Protection Agency
ETS	Environmental Tobacco Smoke

[1] Additional identifying information can be found in the factual memoranda filed in district court by the parties, which identified the trial witnesses (Table 1); other individuals discussed at trial (Table 2); the cigarette manufacturers discussed at trial and the brands they have manufactured since 1950 (Table 3); and the organizations discussed at trial (Table 4). See DN3571 (US Factual Memorandum); DN3574 (Defendants' Factual Memorandum).

FCLAA	Federal Cigarette Labeling and Advertising Act
FDA	Food and Drug Administration
FF	Finding of Fact
FTC	Federal Trade Commission
HBI	Healthy Buildings International
IAI	Indoor Air International
ICOSI	International Committee on Smoking Issues
IEMC	International ETS Management Committee
INBIFO	Institut Fur Biologische Forschung (Institute for Biological Research)
INFOTAB	International Tobacco Information Center
ISO	International Standards Organisation
JD Br.	Brief for the Joint Defendants
Labeling Act	Federal Cigarette Labeling and Advertising Act
Liggett	Liggett Group, Inc.
Lorillard	Lorillard Tobacco Company
MSA	Master Settlement Agreement
NCI	National Cancer Institute
NIDA	National Institute on Drug Abuse
OCCA	Organized Crime Control Act

Philip Morris	Philip Morris, Inc., now Philip Morris USA, Inc.
RICO	Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. §§ 1961 et seq.
RJR	R.J. Reynolds Tobacco Co., now Reynolds American
TAC	Tobacco Advisory Council
TDC	Tobacco Documentation Centre
TI	The Tobacco Institute, Inc.
TIRC	Tobacco Industry Research Committee
TITL	Tobacco Institute Testing Lab
TMA	Tobacco Manufacturers Association

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 1964(a) & (b) and 28 U.S.C. §§ 1331, 1345 & 2201. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 over the timely appeals of defendants, the government, and intervenors.

STATEMENT OF THE ISSUES[2]

In this action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. (RICO), the district court found that defendants have for decades operated an illegal racketeering enterprise in violation of 18 U.S.C. § 1962(c) and conspired to do so in violation of 18 U.S.C. § 1962(d). The principal issues presented are:

1. Whether defendants participated in the operation or management of a RICO enterprise, and conspired to do so, through a pattern of racketeering acts, with the specific intent to deceive consumers about the toxicity and addictiveness of cigarettes.

2. Whether the district court acted within its discretion in ordering equitable relief under 18 U.S.C. § 1964(a).

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[2] For the Court's convenience, attached as an addendum to this brief is a copy of defendants' table of contents, annotated to provide the page numbers of this brief responsive to defendants' arguments.

3. Whether this Court's 2005 interlocutory decision foreclosed certain equitable remedies that the district court found would "unquestionably serve the public interest."

STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to the Brief for the Joint Defendants-Appellants (JD Br.).

STATEMENT OF THE CASE

The United States brought this suit in 1999 against nine manufacturers of cigarettes and two tobacco-related trade organizations, alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) & (d), and seeking equitable relief pursuant 18 U.S.C. § 1964(a). The government alleged that defendants were engaged in a decades long conspiracy to deceive the American public about the toxicity and addictiveness of cigarettes, and that they did so to retain and extend the mass market for their product.[3]

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[3] The eleven original defendants were: Philip Morris, Inc., now Philip Morris USA, Inc. (Philip Morris); R.J. Reynolds Tobacco Co., now Reynolds American (RJR or Reynolds); Brown & Williamson Tobacco Co., which merged with Reynolds American in 2004 (B&W); Lorillard Tobacco Company (Lorillard); The Liggett Group, Inc. (Liggett); American Tobacco Co., which merged with B&W in 1995 (American); Philip Morris Cos., now Altria (Altria); British American Tobacco (Investments) Ltd. (BATCo); B.A.T. Industries p.l.c. ("BAT Industries"), now part of BATCo; The Council for Tobacco Research – U.S.A., Inc. (CTR), and The Tobacco Institute, Inc. (TI). Op.10 n.5. The district court

After years of pretrial proceedings, the district court conducted a nine-month bench trial. On August 17, 2006, the court entered final judgment against defendants. The court made 4088 factual findings, citing "overwhelming evidence" that defendants have maintained and conspired to maintain a racketeering enterprise in violation of 18 U.S.C. § 1962(c) & (d). Op.2, 1498, 1596. The court found that, absent injunctive relief, the manufacturer defendants other than Liggett are likely to commit additional violations of RICO in the future. Op.1601-1620. Accordingly, to prevent and restrain future RICO violations, the court granted some but not all of the equitable relief sought by the government. Op.1621-1651; Final Judgment and Remedial Order (DN5733). The court clarified the scope of relief on reconsideration motions filed by the parties. DN5765; DN5800.[4]

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dismissed the claims against BAT Industries for lack of personal jurisdiction. See 116 F. Supp.2d 116 (2000); 130 F. Supp.2d 96 (2001). All defendants but Liggett joined together in a common defense. Op.10 n.5. The corporate relationships are described in DN3571 (Table 4).

[4] The court found that Liggett, TI, and CTR are not likely to commit future RICO violations and excluded them from the final remedial order. Op.1613-1620. Those rulings are not challenged on appeal.

Defendants appealed. The government filed a cross-appeal. Public health groups that intervened to urge particular remedies also appealed. This Court entered a stay of the final remedial order pending appeal.

STATEMENT OF FACTS

I. PROCEDURAL BACKGROUND

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq., makes it unlawful

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

18 U.S.C. § 1962(c). In addition to this substantive offense, the Act makes it unlawful to conspire to violate this provision. Id. § 1962(d).

The United States filed this action in 1999 pursuant 18 U.S.C. § 1964(a), which authorizes the Attorney General to institute proceedings for equitable civil remedies. The complaint named as defendants two tobacco-related trade organizations and nine manufacturers of cigarettes who collectively control more than 85 percent of the market for cigarettes in the United States. Finding of Fact (FF) 4075.

The government alleged that defendants were engaged in a decades long conspiracy "to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, 'light' cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction." Op.1. As part of this pattern of racketeering activity, defendants issued deceptive press releases, published false and misleading articles, and destroyed and concealed documents demonstrating a correlation between smoking and disease. Op.12 (citing Amended Complaint ¶36). The amended complaint cited 116 violations of federal statutes prohibiting mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, and the government subsequently identified an additional 32 racketeering acts. DN2968_1-2.

In addition to seeking equitable relief under RICO, the complaint also sought damages under the Medical Care Recovery Act and the Medicare Secondary Payer Act to recover healthcare costs incurred by the government as a result of defendants' tortious conduct. The district court dismissed these counts, 116 F. Supp.2d 131 (2000), which are not at issue on appeal.

Before trial, the parties conducted years of discovery, and the district court ruled on 18 summary judgment motions. The court rejected a variety of

affirmative defenses including contentions that the Federal Trade Commission (FTC) has exclusive authority over defendants' marketing activities (263 F. Supp.2d 72 (2003)) and that suit was barred under various equitable doctrines including estoppel and laches (300 F. Supp.2d 61 (2004)). The court rejected a number of constitutional defenses, including defenses under the First Amendment (337 F. Supp.2d 15 (2004)); the Eighth Amendment and the Ex Post Facto Clause (310 F. Supp.2d 58 (2004)); the separation of powers (310 F. Supp.2d 68 (2004)); and the Tenth Amendment (316 F. Supp.2d 19 (2004)).

In October 2003, the government moved for partial summary judgment regarding proof of mail and wire transmissions. The motion referred to 650 racketeering acts in addition to the 148 previously identified. On defendants' motion, the district court held that because the government had failed to supplement its interrogatory responses in a timely fashion, it could not rely on the 650 additional acts to show that each defendant had committed two or more racketeering acts within a ten-year period. DN2968_5-6. However, the court denied defendants' request for a "much more severe sanction, namely, exclusion of all evidentiary materials relating to the 650 Racketeering Acts." DN2968_6. The court held that evidence of "uncharged, unlawful conduct" (including the 650 acts) could be used to establish the continuity and pattern of the racketeering activity,

the existence of an enterprise or conspiracy, defendants' participation in the enterprise or conspiracy, and defendants' likelihood of future violations. DN2968_6-7, 10. Defendants have not challenged that ruling on appeal.

A nine-month trial commenced in September 2004. The district court heard live testimony of 84 witnesses and received written testimony from 162 witnesses. Nearly 14,000 exhibits were admitted into evidence.

During the trial, a divided panel of this Court, on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), held that disgorgement is not a permissible remedy in civil RICO cases. 396 F.3d 1190 (2005). In response to the district court's interpretation of that ruling, Order #886, the government reformulated its proposed remedies. After the liability phase of the trial concluded, the parties put on evidence pertaining to the remedies sought by the government. Op.13-14. At the conclusion of the remedies phase, the court granted motions to intervene by several groups seeking to assert their interests in the proposed relief. Op.14.

II. THE DISTRICT COURT'S FINDINGS OF FACT

On August 17, 2006, the district court entered final judgment against defendants. The court issued a 1652-page opinion, finding "overwhelming evidence" that defendants have maintained, and continue to maintain, an illegal racketeering enterprise, and that each defendant has "participated in the conduct,

management, and operation of the Enterprise," in violation of 18 U.S.C. § 1962(c). Op.2, 1498. The court further found that defendants violated RICO's conspiracy provision, 18 U.S.C. § 1962(d), "because they both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c)." Op.1596; Op.1587-1598.

The district court's opinion reveals a decades-long coordinated campaign to deceive American consumers about the toxicity and addictiveness of cigarettes. In comprehensive findings of fact, the court detailed defendants' efforts to deceive consumers about the dangers that cigarettes pose to the health of smokers, Op.219-332, and the hazards that cigarettes pose to nonsmokers exposed to environmental tobacco smoke (ETS), Op.1210-1407. The court recounted defendants' deceptions regarding the addictiveness of nicotine and cigarette smoking, Op.332-514, even as defendants manipulated nicotine levels to create and sustain addiction in smokers, Op.515-654. These deceptions were epitomized in the misleading marketing of "health assurance" cigarettes, such as "light" and "low tar" products, which defendants knew to be as hazardous and addictive as conventional cigarettes. Op.740-971. Defendants further magnified the effects of their fraud by targeting smokers under the age of 21, a population particularly susceptible to their deceptive messages. Op.972-1209. And in furtherance of the conspiracy,

defendants suppressed, concealed and destroyed information and documents to advance the goals of the enterprise. Op.1407-1478.

The following summary does not recite all relevant factual findings, but provides the core narrative of defendants' enterprise to defraud consumers about the toxicity and addictiveness of cigarettes. Additional facts, particularly with regard to the structure and organization of the enterprise, are discussed in the body of the argument. The summary below highlights the district court's findings on five principal aspects of defendants' scheme to defraud: (A) misrepresenting health consequences to smokers; (B) misrepresenting health consequences of environmental tobacco smoke; (C) misrepresenting nicotine addiction; (D) misrepresenting the health benefits of "light" cigarettes; and (E) targeting youth in furtherance of the scheme.

A. "An Open Scientific Controversy": Misrepresenting Health Consequences To Smokers

1. Formation of the Enterprise

In December 1953, defendants concluded that joint action was required to respond to growing public concern about the health risks of smoking. Accordingly, the presidents of Philip Morris, Reynolds, B&W, Lorillard, and

American convened at the Plaza Hotel to strategize, retaining the public relations firm, Hill & Knowlton, to help guide their efforts. FF6; US21175_5, 6.

Hill & Knowlton immediately sought to develop an understanding that none of the manufacturers would "seek a competitive advantage by inferring to its public that its product is less risky than others." FF09 (quoting US87224_8). Coyly, it was explained that this meant "[n]o claims that special filters or toasting, or expert selection of tobacco, or extra length in the butt, or anything else, makes a given brand less likely to cause **you-know-what**." FF09 (quoting US87224_8-9) (emphasis added).

Acting on Hill & Knowlton's advice, the participants at the Plaza meeting jointly issued "A Frank Statement to Cigarette Smokers," published as a full-page advertisement in newspapers across the country on January 4, 1954. FF16 (quoting US21418) (Racketeering Act #1). "The Frank Statement set forth the industry's 'open question' position that it would maintain for more than forty years – that cigarette smoking was not a proven cause of lung cancer; that cigarettes were not injurious to health; and that more research on smoking and health issues was needed." FF18. Sounding the keynote to the "open question" campaign, the Frank Statement declared **"[w]e believe the products we make are not injurious to health"** and stated:

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.

2. That there is no agreement among the authorities regarding what the cause is.

3. That there is no proof that cigarette smoking is one of the causes.

4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

FF19 (emphasis added).

2. Defendants' Knowledge Of Health Risks To Smokers

Even as they issued the "Frank Statement," defendants had already "documented a large number of known carcinogens contained in cigarette smoke." FF595; FF598; FF596. Although they may have harbored hopes that additional research would substantiate their claims, US21411_3, in the years following the assurances of the Frank Statement their scientists amassed new evidence of their product's toxicity and ascertained the adverse consequences of smoking with increasing specificity.

In 1956, scientists at RJR concluded that cigarette smoke contained "highly carcinogenic" chemicals, explaining that their study's methodology "nullifed" the

"major criticisms of past research." FF601 (quoting US20667_14). The RJR research described the isolation in tobacco condensate of several compounds "including the **highly carcinogenic** 3,4-benzpyrene." Ibid. (emphasis added). The scientists warned that "[s]ince **it is now well established that cigarette smoke does contain** several polycyclic aromatic hydrocarbons, and considering the potential and **actual carcinogenic activity** of a number of these compounds, a method of either complete removal or almost complete removal of these compounds from cigarette smoke is required." Ibid. (quoting US20667_39) (emphasis added).

By 1962, an internal report from RJR scientists concluded that "the amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming," and that "[t]he evidence challenging this indictment is scant." FF603 (quoting US20735_4). Two years later, a RJR research report stated that "**[c]igarette smoke from any tobacco type or tobacco blend contains carcinogenic components**," noting that "[n]one of the chemical data acquired in our studies or in studies conducted elsewhere is inconsistent with reported biological, pathological, or statistical data indicting cigarette smoke as health hazard." FF666 (quoting US20736_61, 62) (emphasis added).

Philip Morris's research director acknowledged in a 1958 internal memorandum that "the evidence ... is building up that heavy cigarette smoking contributes to lung cancer." FF606 (quoting US20090_1). In 1966, the director of Philip Morris's program investigating the biological impact of tobacco smoke concluded — in a report marked "[n]ot to be taken from this room" — that "**gross lung pathology can be induced by smoking cigarettes**." FF668 (quoting US20095_1, 6) (emphasis added). In 1969, a senior company scientist informed Philip Morris executives that "[n]ow we have a study of the effect of smoking in pregnancy which supports previous conclusions that smoking mothers produce smaller babies," and that the medical field recognized that "smaller babies suffer detrimental effects all through life," including "lower intelligence test scores at age 10." FF670 (quoting US20080_1).

The internal understanding that smoking causes disease was pervasive. Dr. William Farone, a government witness who served as Philip Morris's Director of Applied Research from 1977 to 1984, FF936, testified that he "never talked with a scientist at Philip Morris who said that smoking doesn't cause disease." FF704 (quoting Farone_WD_66).

3. Defendants' Deceptive Public Statements

Even as their internal research proclaimed that the link between cigarettes and disease was "well established," US20667_39, defendants intensified the level of their deceptions, systematically making public statements flatly at odds with the results of their own research.

Defendants' campaign relied on the "open question" strategy adopted in the Frank Statement. The strategy reflected defendants' recognition that, to meet their objectives, it was only necessary to create enough public uncertainty to reassure smokers and potential smokers that the connection between "smoking and disease" was "an open scientific controversy, not a closed case." FF776 (quoting (US20733_3) (1984 RJR press release). As a senior Philip Morris executive explained, by convincing consumers that "more research was necessary" or that there are "contradictions" and "discrepancies" in the scientific record, the industry would "give smokers a psychological crutch and a self-rationale to continue smoking." FF636 (quoting US20189_1, 2). As B&W observed in 1967: "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public." FF726 (quoting US21040_4).

As discussed in detail at Argument (Liability) Point II, to implement their strategy, defendants relied in part on a series of jointly-created entities, prominent

among which was the Tobacco Institute (TI), which would serve for four decades as "the leading public voice of the Defendants." FF151.[5] TI summarized the "open question" strategy succinctly: "The most important type of story is that which casts doubt on the cause and effect theory of disease and smoking.... [T]he headline should strongly call out the point - **Controversy! Contradiction! Other factors! Unknowns!**" FF721 (quoting US21302_2) (emphasis added).

A handful of the many deceptive statements found by the district court typify TI's implementation of this strategy.

In 1970, TI published a Washington Post advertisement headlined: "After millions of dollars and over 20 years of research: The question about smoking and health is still a question." FF142 (quoting US21305) (Racketeering Act #23). A 1971 TI press release claimed that "hysteria about smoking results from the tenacity of the cancer mystery" and stated that "many eminent scientists" believe that "the question of smoking and health is still very much a question." US21337_2 (Racketeering Act #24); FF738.

[5] As discussed in Argument (Liability) Point II, the chief executive officers of Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett served on the Tobacco Institute's Executive Committee. FF116. From 1958 through 1999, their companies' payments to TI totaled more than $600 million. FF121.

A 1978 TI publication entitled "The Smoking Controversy: A Perspective," declared that society was on the "brink of paranoia" regarding smoking; that "[n]o one really knows whether this personalized warfare against tens of millions of Americans will prevent a single case of lung cancer"; that "**[n]o one really knows the root or causes of cancer**"; and that the "wars" against disease that were being "waged by the government and voluntary health agencies" were "beyond the realm of science." FF756 (quoting US21499_TIMN0129596-597) (emphasis added). See also, e.g., FF750; US21424 (1977 TI press release) (Racketeering Act #42);

A 1990 joint publication entitled "Children & Smoking – The Balanced View," insisted that "scientific evidence has not conclusively established cigarette smoking as a causative agent in the development of disease," claiming that only "inconsistent findings" existed "on the association, if any" of smoking in pregnancy and low birth weight, birth defects and delayed physical and mental development in infancy. US87151_3-4; FF431.

Statements issued by the individual manufacturers mirrored those issued through their joint organizations.

In 1967, nine years after Philip Morris recognized that "the evidence ... is building up that heavy cigarette smoking contributes to lung cancer," US20090_1, its Vice President and General Counsel declared that "[**n]obody has yet been able**

to find any ingredient as found in tobacco or smoke that causes human disease." FF717 (quoting US20337_10) (emphasis added). In 1997, Altria's CEO declared that smoking had not been shown to cause lung cancer and asserted that if any such connection were shown, he would "probably ... shut [the] company down instantly to get a better hold of things." FF806 (quoting Bible_PD, 8/21/97 at 27). In 2002, Altria's CEO expressed doubt that Philip Morris cigarettes had ever caused disease in any individual smoker. FF807 (citing Bible_PD, 8/22/02, 63-65).

In 1984, 28 years after RJR scientists declared that the presence of carcinogenic compounds in cigarettes was "now well established," US20667_39, an RJR press release declared the connection between smoking and disease "an open controversy." FF778 (US50268) (Racketeering Act #64); see also FF776 (quoting US20733_3); FF781 (US20741) (Racketeering Act #62) (form letter to children denying link between smoking and disease). In 2004, RJR's website adopted more nuanced language that nevertheless fails to acknowledge the long established evidence that smoking causes disease. Instead, the website declares: "We produce a product that has significant and inherent health risks for a number of serious diseases and may contribute to causing these diseases in some individuals." FF814 (quoting Schindler_TT_1/24/05_10814). At trial, RJR's

former chairman was asked about this language: "So you say it's possible, it's likely, but you don't say it does, do I have that right?" Ibid. RJR's chairman responded, "Yes." Ibid. (quoting Schindler_TT_1/24/05_10812).

In 1969, 17 years after it had identified carcinogens in tobacco smoke, FF596 (quoting US21388_8, 9), B&W prepared a document declaring that "the question of smoking and health remains an open, not a closed, issue," that "[t]he cause of cancer in humans, including the cause of cancer of the lung, is unknown," and that "[t]he concept that cigarette smoking is the cause of the increase in lung cancer and emphysema is a colossal blunder." FF727 (quoting US20947_650332833, -835, -836). Perpetuating the "doubt is our product" strategy, the B&W website informed visitors in 2000: "We know of no way to verify that smoking is a cause of any particular person's adverse health or why smoking may have adverse health effects on some people and not others." FF821 (quoting JD12645_2).

4. Propagation of Biased Science

Defendants made abundant use of biased research they funded. Their "Frank Statement" had pledged to fund "disinterested" research through the Tobacco Industry Research Committee (TIRC), later renamed the Council for Tobacco Research (CTR). FF19; FF29. In reality, "CTR Special Projects" were research

programs directed by defendants' lawyers and calculated to yield results favorable to the industry. FF238-271; FF279. See Argument (Liability) Point II(B)(3). TIRC/CTR's "dual functions" of public relations and scientific research "were intertwined, with the scientific program ... always subservient to the goal of public relations." FF60; FF60-107. As a 1970 Philip Morris memorandum declared: "Let's face it. We are interested in evidence which we believe denies the allegation that cigarette smoking causes disease." FF62 (quoting US20085_1). Thus, TIRC/CTR provided a "sophisticated public relations vehicle – based on the premise of conducting independent scientific research – to deny the harms of smoking and reassure the public." FF21.

A few examples illustrate how defendants relied on purportedly independent research to mislead the public. A 1968 Tobacco Institute pamphlet, "The Cigarette Controversy: An Examination of the Facts by the Tobacco Institute – The Tobacco Industry's Contribution to Health Research," declared that for "the past thirteen years, the industry has supported over 300 independent health studies through the industry's Council for Tobacco Research – U.S.A." FF708. Ibid. (quoting US87056_TINY0006535). It asked: "**Do cigarettes cause disease? In spite of all the debate – in spite of all the research – that question is still unanswered.**" Ibid. (quoting US87056_TINY0006536) (emphasis added). TI published

additional versions of the "Cigarette Controversy," and by the end of 1974 over a million copies of the pamphlet were in print. FF716.

In 1969, CTR ran advertisements in major newspapers under the headline: "How much is known about smoking and health?" FF724 (quoting US20222_1005132848). Citing the conclusions of the "scientist who has been associated with more research in tobacco and health than any other person" – CTR's executive director – the advertisements declared that "there is **no demonstrated causal relationship between smoking and any disease.**" FF723 (quoting US21867_670307882) (emphasis added). The following year, a CTR press release claimed that the "deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists." FF732 (quoting US47748) (Racketeering Act #120).

A 1972 TI press release declared that "the cigarette industry has committed $40 million for smoking and health research" and that "despite this effort the answers to the critical questions about smoking and health are still unknown." US21321_2; FF742 (Racketeering Act #29).

5. Deceptive Attacks on Surgeon General Findings

As the district court concluded, "Defendants' efforts to deny and distort the scientific evidence of smoking's harms are demonstrated by not only decades of

press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but also by evidence of their concerted efforts to attack and undermine the studies in mainstream scientific publications such as the Reports of the Surgeon General." Op.1506.

These attacks began well before the Surgeon General's landmark 1964 Report. For example, in 1957, defendants, through TIRC, challenged the Surgeon General's report that benzypyrene had been found in cigarette smoke. FF615 (citing US20280) (Racketeering Act #2). The press release declared that "[s]cientists have not actually succeeded in isolating the substance from tobacco smoke" and stated that "if benzypyrene is actually present in cigarette smoke, it occurs in such minute quantities it could not even account for such biologic activity as has been reported for tobacco smoke in some experiments on sensitive mouse skin." US20280_1. In fact, the previous year, RJR scientists had "isolated and identified" benzypyrene in cigarette smoke. US20667_1, 36-37. Their report described benzypyrene as "highly carcinogenic" and concluded that the "major criticisms of past research are now nullified." US20667_14.

In 1959, TI publicly declared that the Surgeon General had ignored "the balanced evidence against the tobacco-smoking theories of lung cancer" and

attacked his conclusions as "extreme and unwarranted[.]" US21319; FF622 (Racketeering Act #3).

The Surgeon General's 1964 Report on Smoking and Health, regarded by historians as one of the most significant public health documents in the twentieth century, FF660, was released on January 11, 1964. The following day, the TI Executive Committee met to discuss the implications of the report. The Committee agreed that it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." FF187 (quoting US22682_1).

Internally, Philip Morris admitted there was "little basis for disputing the findings" of the Surgeon General's Report. FF665 (quoting US22986_1, 2). Nevertheless, defendants did vigorously dispute the Report's findings "with a campaign of proactive and reactive responses to scientific evidence that was designed to mislead the public about the health consequences of smoking." FF706; FF707-757 (citing press releases and other public statements).

As public health officials expanded their knowledge, defendants' attacks became fiercer. For example, a 1972 Tobacco Institute press release asserted that the 1972 Surgeon General's Report on the Health Consequences of Smoking

"insults the scientific community," and declared that the Report was "another example of 'press conference science' – an absolute masterpiece of bureaucratic obfuscation." FF743 (quoting US21322_1). With supreme irony, the press release declared that "the number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public." Ibid.

A 1971 TI press release charged the Surgeon General with "endeavoring to scare pregnant women." FF740 (quoting US21687_1) (Racketeering Act #27). In a nationally televised interview the same year, the Chairman of Philip Morris declared that "babies born from women who smoke are smaller, but they are just as healthy as the babies born to women who do not smoke," and asserted that "[s]ome women would prefer having smaller babies." FF736 (quoting US35622_15-16) (Racketeering Act #105). Two years earlier, the company's Vice President for Research and Development had reported that "smaller babies suffer detrimental effects all through life." FF670 (quoting US20080_1).

At no point do defendants appear to have considered a policy of cooperation or even neutrality toward the efforts of public health officials. To the contrary, they strategized far in advance of each new Surgeon General Report, assigning public relations personnel to rebut anticipated scientific findings. For example:

- A year before the release of the 1979 Surgeon General's Report on Smoking and Health, defendants established a task force to rebut its anticipated conclusions. FF758. The industry's own consultant described the published rebuttal document as "misleading" and observed that it was "so highly selective in what material is presented that one almost gets the false impression that there is hardly any case to answer at all." US21515_17.

- The ad campaign attacking the 1982 Surgeon General's Report was "targeted to reach eight out of 10 Americans 25 years or older," "appearing in publications including Newsweek, People, Sports Illustrated, Time, TV Guide, U.S. News & World Report." FF3797 (quoting US85358_3). It was accompanied by a press release stating that "[m]illions of research dollars and decades of investigation have failed to establish a causal link between cancer and cigarette smoke." US21341_1 (cited in FF770).

- In response to the 1984 Surgeon General's Report, TI published "Cigarette Smoking and Chronic Obstructive Lung Diseases: The Major Gaps in Knowledge," asserting that no causal relationship had been established between smoking and either chronic bronchitis or emphysema. FF779 (citing US62409).

- In 1989, the Surgeon General published a review of developments in the 25 years since the 1964 report. In anticipation, TI launched an "Enough is Enough" campaign, "distributing materials and information to some 2,500 reporters, conducting a private briefing for the Washington, D.C. press corps, and distributing both television and radio satellite press releases," with the aim of publicly discrediting the forthcoming Report. FF164 (citing US62252_TI09911601).

B. "The Most Dangerous Development": Misrepresenting The Health Consequences Of Environmental Tobacco Smoke

Defendants' campaign of disinformation with regard to "second hand" or environmental tobacco smoke (ETS) parallels their misrepresentations about the health consequences to smokers themselves.

1. Defendants' Internal Knowledge

Internally, defendants "recognized that secondhand smoke contained high concentrations of carcinogens and other harmful agents." FF3362; FF3362-3412. Indeed, as early as 1961, a Philip Morris scientist demonstrated that more than 80% of the smoke generated by a burning cigarette is released into the environment, and that this so-called "sidestream" smoke contains carcinogens. FF3363 (citing US22891_2024947175). By 1982, B&W's in-house counsel recognized "'the overwhelming weight of scientific literature pointing toward [the] toxicity' of tobacco smoke." FF3408 (quoting US21001_ 680546752).

Philip Morris conducted extensive research into the health effects of ETS. To do so, however, it acquired a German research facility, INBIFO, in 1970. As Philip Morris's CEO stated in an internal memo, "[t]he possibility of getting answers to certain problems on a contractual basis in Europe appeals to me and I feel presents an opportunity that is relatively lacking in risk and unattractive

repercussions in this country." FF3366 (quoting US35183_1000216742); FF3365-3369.

The results made clear that ETS is toxic. In 1982, the company's INBIFO representative reported that "[t]he results from the first side stream smoke experiment ... confirm[ed] the previous observation that this smoke" was "more irritating and/or toxic" than mainstream smoke, explaining that the "histology demonstrates more advanced lesions in the nasal epithelium and hyper and metaplasia in areas which are not affected by main stream smoke." FF3372 (quoting US89174_1000081782). Another 1982 study found that rats exposed to sidestream smoke "reacted more vigorously than" rats exposed to mainstream smoke. FF3375; US89331.

The INBIFO scientists concluded that the toxic effect on the rats from ETS exposure was equivalent to <u>three times</u> as much mainstream smoke. FF3376. The "systemic toxicity of mainstream and sidestream smoke impaired the body temperature, food and water uptake, body weight development and increased mortality... [b]ut the reaction to mainstream was much less pronounced than to sidestream exposure." FF3376 (quoting US89331). The introduction to the report noted, moreover, that sidestream smoke condensate had "higher tumorigenic activity than mainstream condensate," FF3377, a conclusion that was confirmed in

subsequent INBIFO studies. FF3378 (citing US89335); see also FF3379 (quoting US89330_1) (1985 report noting that "the irritative activity of SS [sidestream smoke] was nearly 4 times higher than that of mainstream smoke").

Defendants were keenly aware that public knowledge of these risks could jeopardize their sales. A 1978 industry-sponsored report proclaimed that ETS represents "**the most dangerous development to the viability of the tobacco industry that has yet occurred.**" FF3417 (quoting US88582_5) (emphasis added). The report warned that "[a]s the anti-smoking forces succeed in their efforts to convince non-smokers that their health is at stake too, the pressure for segregated facilities will change from a ripple to a tide as we see it." Ibid. Covington & Burling's John Rupp warned the Tobacco Institute's ETS Advisory Group in 1986 that ETS was the "Achilles heel of the industry." FF3394 (quoting US75440_TIBU28845). The same year, TI's Senior Vice President concluded that ETS "is our biggest public/political issue and deserves top-level navigation." FF3420 (quoting US62270_TI1019-1293).[6]

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[6] See also FF3426 (Philip Morris report from the 1990s stating: "Without a doubt, the social acceptability of smoking practices is the most critical issue that our industry is facing today .... Attacks on acceptability are almost exclusively based on claims that ETS can cause diseases in the exposed population.") (quoting US88583_202626012); FF3422 (BATCo 1986 "ETS Action Plan" stating: "The world tobacco industry sees the ETS issue as the most serious threat to our whole business.") (quoting US89556_1).

2. Defendants' Deceptive Statements

The enterprise addressed this "most dangerous development" with all the tools at its command. Defendants have consistently denied the connection between ETS and disease. See, e.g., FF750 (1977 TI press release declaring that "[t]obacco smoke does not imperil normal nonsmokers") (quoting US21424_2) (Racketeering Act #42); FF3794 (1979 TI brochure entitled "Fact or Fancy?" attacking studies demonstrating that women who smoke jeopardize the health of their children) (citing US21280_ 18) (Racketeering Act #46).

In 1987, TI published a booklet, titled "Smoking Restrictions: The Hidden Threat to Public Health," declaring that ETS had not been shown to be a health hazard to nonsmokers and that more research was needed. FF3705 (quoting US21246_TI0534-0701, -702). Also in 1987, sixteen years after its scientists had demonstrated that ETS contains carcinogens, Philip Morris ran advertisements in which smokers pleaded with the viewer: "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." FF3804 (quoting US20554_2566146094).

In 1988, TI published a brochure on ETS that declared: "SCIENTIFIC CONSENSUS: No scientific case against environmental tobacco smoke." FF3805 (quoting US51276_507828096). Similarly, a 1990 joint publication entitled

"Children & Smoking – The Balanced View," insisted that "[e]xposure to ETS has not been scientifically proven to adversely affect the health of children and the reported 'dangers' may in fact be more likely due to other factors such as diet, quality of housing, fumes from indoor heating and cooking facilities and socio-economic status." US87151_4.

In 2004, Reynolds' website insisted that "there are still legitimate scientific questions concerning the reported risks of secondhand smoke," and that "it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults at the very low concentrations commonly encountered in their homes, offices and other places where smoking is allowed." FF3830 (quoting US92012_1, 2). It claimed that the threat faced even by persons subject to "to high concentrations of secondhand smoke" was only the possibility of "temporary irritation, such as teary eyes, and even coughs and wheezing in some adults." Ibid. (quoting US92012_2). B&W's website has variously claimed that "the scientific evidence is not sufficient to establish that environmental tobacco smoke is a cause of lung cancer, heart disease, or other chronic diseases" (2003), and that "there are legitimate scientific questions concerning the extent of the chronic health risks of ETS" (2004). FF3834 (quoting US76761, US89165).

Lorillard's general counsel testified at trial that his company has never admitted in any forum that ETS exposure causes disease, and that its position continues to be that ETS is not a proven health hazard. FF3832-3833 (citing Milstein_TT_ 1/7/05_9263-9264).

3. Propagating Biased Research

Defendants have not merely denied the health consequences of ETS. Consistent with their practice since the Frank Statement, they have repeatedly promised the public that they would fund new ETS research and disclose the results of that research. A 1982 TI advertisement disputing the link between ETS and lung cancer declared: "Like you, we seek answers.... **The researchers we fund are encouraged to publish whatever they find. Whatever the outcome**." FF3430 (quoting US85358_3) (emphasis added). A 1984 RJR advertisement that criticized existing ETS studies likewise promised: "No one wants to know the real answers more than R.J. Reynolds.... The funds are given at arms length to independent scientists who are free to publish whatever they find. We don't know where such research may lead. But this much we can promise: when we find the answers, you'll hear about it." FF3432 (quoting US50882); see FF3431, FF3433, FF3434.

In reality, defendants moved aggressively to ensure that the public would not learn the damaging results of their ETS research. Thus, although Philip Morris shared the results of its studies with other defendants, FF3387, only 4 of the 106 studies described in a 1994 status report were published. FF3393. These were "the few studies that produced industry-favorable results." Ibid. Likewise, RJR's in-house counsel recommended against funding the publication of a "damaging" 1990 study concluding that "[t]he weight of evidence is compatible with a positive association between residential exposure to environmental tobacco smoke (primarily from spousal smoking) and the risk of lung cancer." FF3410-3411 (quoting US92103_17, US51950_1).

Rather, for public consumption, defendants generated their own "marketable science." FF3637. For example, through an industry front group called the Center for Indoor Air Research (CIAR), defendants funded ostensibly independent studies designed "to portray ETS as only a minor indoor air pollutant in the context of overall air quality and to generate biased data to undermine epidemiological studies showing an association between spousal smoking and lung cancer in nonsmokers." FF3548. Defendants then pointed to the results of these "scientific" inquiries to demonstrate the asserted lack of a proven connection between ETS and disease. See, e.g., FF3698 (1984 TI publication claiming: "Three times since

March 1983, participating researchers and other medical experts have declared, forthrightly and independently, that no conclusion can be drawn about whether ETS has any chronic health effects on the nonsmoker" (quoting US85644_1)).

In 2003, BATCo's website declared "the claim that ETS exposure has been shown to be a cause of chronic disease is not supported by the science that has developed over the past 20 years or so." FF3835 (quoting US86747_1). The website asserted that "it has not been established that ETS exposure genuinely increases the risk of nonsmokers developing lung cancer, heart disease, or chronic obstructive pulmonary disease." Ibid.

4. Deceptive Attacks On Independent Research And EPA Findings

While publishing their own misleading "marketable science," defendants attacked the findings of independent researchers and public health officials that they knew to be consistent with their own internal research. For example, a 1981 epidemiological study of more than 90,000 nonsmoking Japanese women found that the wives of heavy smokers had "a higher risk of developing lung cancer." FF3395 (quoting US22963_183). Although TI issued a press release declaring that a mathematical error invalidated the study's conclusions, FF3396-3397, defendants' own consultant advised TI that the claim of a statistical error was

"wrong and that [the study] was right." FF3398 (quoting US88150_501622433). The scientific director of the German cigarette manufacturers' trade association likewise concluded that the study was "correct" and that TI was "wrong." FF3400 (quoting US22318_2). Nonetheless, TI published its press release as part of a campaign that reached more than 56 million people. FF3401 (citing US22332). RJR was running a similar advertisement as late as 1984. FF3401 (citing US50882).

Defendants similarly undertook to discredit studies by the Environmental Protection Agency (EPA) . In June 1990, on the day that EPA released a draft Risk Assessment regarding the dangers of ETS, TI issued a press release headlined: "DRAFT RISK ASSESSMENT DESCRIBED AS SPECULATION: Underlying scientific foundation inadequate." FF3809 (quoting US85586_8769759). The press release stated that the EPA draft "**assumes, contrary to fact, that ETS has been shown to be a cause of disease.**" US85586_87697659 (bold in original). The press release cited the conclusions of "a prestigious panel of scientists at an international symposium on ETS held at McGill University," US85586_87697660 – without disclosing that the industry had funded and managed the conference. FF3807, FF3809.

Industry consultants also prepared letters to the editor for publication in major newspapers attacking the EPA draft based upon the results of the McGill symposium. FF3811. The letters omitted industry attribution, and thus appeared to have been written by individuals with no industry connection. Ibid.

In December 1990, EPA's Scientific Advisory Board held a public meeting to discuss the draft Risk Assessment. FF3819. That morning, TI issued a press release claiming that "SCIENCE DOES NOT SUPPORT" the EPA draft. US85587_87697701. The press release cited the conclusions of an epidemiologist, a statistician, and a biostatistician, without revealing that these "key scientific experts," ibid., were paid industry consultants. FF3819. The press release was accompanied by 69 pages of background materials, including "an annotated list of scientific comments critical of the" EPA documents. FF3820 (quoting US85587_87697701). It thus "created and fostered the impression that a large number of scientists existed who, independent of the tobacco industry, opposed EPA's proposed Risk Assessment." FF3820. But of the 59 scientists on the list, "most if not all of the scientists commenting would have been retained by the industry." Ibid. (quoting Dawson_WD_142-143).

Defendants' public attack continued after the final EPA Risk Assessment was published in 1992. In 1993, Reynolds, Philip Morris, and BATCo helped fund

a paper titled "Pandora's Box: The Dangers of Politically Corrupted Science for Democratic Public Policy," which attacked the Risk Assessment. FF3822. Although Shook, Hardy & Bacon, a law firm retained by defendants, helped craft the author's response to peer review criticisms, ibid. (citing US37097, US89050), neither the funding nor the industry support was acknowledged in the paper. Ibid. And in 1999, B&W funded a book by the same author and another industry consultant. FF3823. The book, which did not acknowledge industry funding, was titled "Passive Smoke: The EPA's Betrayal of Science and Policy," and it "alleged scientific misconduct on the part of the EPA in conducting its Risk Assessment." Ibid. (citing JD067661).

Defendants' response to the Surgeon General's 1986 Report on environmental tobacco smoke, US63709, typifies their operations. In the wake of that report, the vice chairman of Altria convened a conference on Hilton Head Island, South Carolina, to launch "Operation Downunder." FF3481 (citing US85518). At the conference, John Rupp, the same Covington & Burling attorney who had warned TI that ETS was the "Achilles heel of the industry," FF3394 (quoting US75440_3), stressed the "watershed significance" and "tremendous credibility" of the 1986 Surgeon General's report. FF3484 (quoting US20346_ 5).

Rupp's advice epitomized the workings of the "open question" strategy. As notes of the conference indicate, he urged that the industry position should be that ETS was "**not shown** to be health hazard to non-smoker." US20346_5 (emphasis added). The purpose of this formulation, of course, was to imply that ETS might not be a health hazard, even though defendants knew that this implication was untrue. Rupp warned, however, that the industry should not tell the lie in plain terms: "We cannot say ETS is 'safe' and if we do, this is a 'dangerous' statement." Ibid.

C. "We are, then, in the business of selling nicotine": Misrepresenting Nicotine Addiction

1. Defendants' Internal Knowledge

Defendants have studied nicotine and its effects since the 1950s. In a 1959 memorandum, Philip Morris's Vice President for Research and Development recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system." FF889 (quoting US21657_2).

In the early 1960s, BATCo conducted sophisticated research demonstrating that "smokers are nicotine addicts." FF883 (quoting US20577_2). After reviewing the BATCo research in 1963, B&W's Vice President and General

Counsel summarized the matter in a confidential memorandum: "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." FF1082 (quoting US22034_4).

Internally, by 1969 Philip Morris "operated on the 'premise that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.'" FF883 (quoting US22848_2). RJR's lead nicotine researcher stated in 1972 that nicotine is the "sine qua non of smoking" and that the industry was based on the sale of "attractive dosage forms of nicotine." FF961 (quoting US20659_3).

Research funded by CTR in the 1970s provided additional medical evidence of nicotine's properties. In 1977, CTR's Associate Research Director stated that it "now seems evident that nicotine, like narcotics, influences the [central nervous system] in multiple ways involving effects related to most known neurotransmitters. Further, the dependence which develops to tobacco in humans (withdrawal symptoms during the cessation of smoking) and the degree of tolerance to nicotine which occurs in certain animal paradigms strongly suggest that nicotine is a habituating agent." FF1139 (quoting US20073_1).

Additional work of this kind underscored the discrepancy between defendants' knowledge and their public statements. After hearing a presentation by CTR's Associate Research Director, a Philip Morris scientist wrote to the

company's vice president for R&D that the "work being taken by CTR is totally detrimental to our position and undermines the public posture we have taken to outsiders." FF1141 (quoting US36865).

Indeed, a 1984 memorandum by an attorney at Shook, Hardy & Bacon, analyzing defendants' litigation risks, declared that "[t]hrough the years, CTR has funded psychopharmacological and neuropharmacological studies which emphasize and leave very clear the points that CTR views nicotine as a 'psychoactive' or 'psychotropic' drug (terms which CTR has used), and that the research approach most appropriate to studying smoking behavior involves the pharmacology of nicotine." FF1144 (quoting US20866_2). The memo explained that "[a]mong the undesirable research claims which appear in abstracts which acknowledge CTR support: The identification of specific central nervous system structures (nicotine receptors) at which nicotine acts; effects of nicotine on a variety of different purported neurotransmitters involved in learning, memory, etc.; various behavioral effects of nicotine from which can be inferred central nervous system effects, some of which might be used to support assertions regarding 'tolerance' and 'withdrawal.'" Ibid.

2. Nicotine Manipulation

Recognizing that they are "in the business of selling nicotine, an addictive drug," FF1082 (quoting US22034_4), defendants have deliberately designed their product to provide the most "attractive dosage forms of nicotine," FF883 (quoting US20659_3).

Nicotine manipulation is not synonymous with the "'spiking' of cigarettes by adding extraneous nicotine[.]" FF1509. An unsmoked cigarette contains much more nicotine than a smoker will inhale because not all of the nicotine present in tobacco is transferred to cigarette smoke, FF1509 (citing Farone_WD_85), and "delivery of large amounts of nicotine can make cigarettes harsh and unpalatable to the smoker." FF1509 (citing Farone_WD_85).

Changes in cigarette design, rather than a simple increase in raw nicotine quantity, lie at the heart of efforts to manipulate the uptake of nicotine by the human body. Dr. William Farone, who served as PM's Director of Applied Research from 1977 to 1984, explained that "nicotine manipulation deals with making specific changes in that design to make nicotine go where you want it to go as opposed to where it would go by itself without changing the design." FF1509 (quoting Farone_TT_10/7/04_2021). As Dr. Farone explained, while he worked at Philip Morris, researchers identified 57 different parameters that influence the

quality and content of smoke delivery by a burning cigarette. FF1510 (citing Farone_WD_48).

In designing cigarettes, defendants have controlled not only the amount of nicotine intake, but also the form of nicotine delivered. The nicotine in cigarette smoke is found in two chemical forms – bound and "free" (i.e., freebase). FF1599 (citing Farone_WD_93-94); FF1603. Free nicotine "is more volatile and more physiologically active" and "transfers more rapidly across the biological membranes of the mouth and lungs, and then to the brain, than bound nicotine." FF1601. The amount of free nicotine can be increased by raising the alkalinity (pH) of smoke. FF1599. Increasing the amount of free nicotine increases the drug's effect on the central nervous system and gives the smoker a heightened and more immediate impact. Ibid. Consequently, free nicotine – like the freebase forms of other addictive drugs, such as cocaine – is "more reinforcing and addicting than [its] non-freebase counterpart[]." FF1603. As BATCo's vice president for R&D explained in a 1964 memorandum to Lorillard's legal counsel, "[t]here seems no doubt that the 'kick' of a cigarette is due to the concentration of nicotine in the blood-stream which ... is a product of the quantity of nicotine in the smoke and the speed of transfer of that nicotine from the smoke to the blood-stream." FF1120 (quoting US20102_2).

Because "[e]ven 'small' increases in pH and free nicotine delivery ... significantly increase their ability to deliver an 'optimum' dose of nicotine," FF1615, defendants have incorporated a number of "design techniques ... to raise the pH of the smoke in their commercial products with the purpose and intent of creating cigarettes that would deliver a greater amount of free nicotine and faster absorption of nicotine than cigarettes with lower smoke pH." FF1613. Defendants have also employed alkaline chemicals, such as ammonia and ammonia-based compounds, to increase the proportion of free nicotine in the cigarette smoke. FF1606.

3. Defendants' Deceptive Statements

The scientific community did not, of course, have the benefit of defendants' research. Defendants possessed "from their own in-house and external research, information that led them to conclude, long before public health bodies did, that the primary reason people keep smoking cigarettes is to obtain the drug nicotine, which is addictive." FF1268. As the district court found, "[d]efendants intentionally withheld this data (including many of studies on the physiological effects of nicotine in animals and humans, and much of their research on the determinants of nicotine dosing in cigarettes) when there were major public efforts to review and synthesize all available information." Ibid.

Nevertheless, by 1982 the National Institute on Drug Abuse (NIDA) had concluded that scientific evidence demonstrated that nicotine is addictive, based on eight factors listed in the Controlled Substances Act. FF849.[7] By 1988, almost every major public health organization, including the Surgeon General, NIDA, the World Health Organization, the American Psychiatric Association, the Harvard School of Public Health, and others, had declared that smoking is an addiction driven by nicotine. FF864 (citing Benowitz_WD_26-36). Defendants' own expert, Dr. Rowell, agreed not only that nicotine plays an essential role in cigarette smoking, but also that "[t]here's clearly addiction for cigarette smoking." FF866 (quoting Rowell_TT_3/23/05_16625; Rowell_TT_3/24/05_16790).

Defendants have responded to scientific concerns about addiction in the same way as they have responded to scientific concerns about health hazards, seeking to create doubt by making assertions contrary to their own research. The

[7] NIDA concluded that smoking met the following criteria for nicotine drug dependency: (1) persistent regular use of a drug; (2) attempts to stop such use which lead to discomfort and often result in termination of the effort to stop; (3) continued drug use despite damaging physical and/or psychological problems; and (4) persistent drug-seeking behavior. NIDA also concluded that "not only has tolerance to some of the effects of smoking been demonstrated but metabolic tolerance to various components of cigarette smoke, including nicotine, has been documented." NIDA relied upon previously existing data as well as findings from its own Addiction Research Center showing that nicotine met key criteria as a reinforcing and euphoriant drug in animal and human studies. FF849.

Tobacco Institute, "on behalf of the cigarette company Defendants, publicly disseminated countless false, deceptive, or misleading statements denying the addictiveness of nicotine and cigarette smoking." FF1207.

In January 1992, two RJR employees published an article denying that nicotine is addictive – a publication that was, in turn, cited in industry submissions to Congress in 1994 and to the FDA in 1996. FF1168 (citing US88561_397). This article followed by 20 years the statement of RJR's lead nicotine researcher that nicotine is the "sine qua non of smoking" and that the industry is based on the sale of "attractive dosage forms of nicotine." US20659_3.

Similarly, although BATCo was aware in 1961 that "smokers are nicotine addicts," US20577_2, in a 1992 document titled "Smoking Issues; Claims and Responses," it denied that smoking is addictive and asserted that smokers "do not experience most of the symptoms of 'addiction.'" FF1187 (quoting US85345_601037853).

It has been key to defendants' strategy to urge that smoking is "addictive" only in the colloquial sense of the term – as a synonym for a "habit" or as an enthusiastic form of "desirable" – rather than in the pharmacological sense.

For example, a 1982 TI press release, quoting an industry-funded scientist, placed the "attachment" to smoking in the same category as "tennis, jogging,

candy, rock music, Coca-cola, members of the opposite sex and hamburgers." FF1210 (quoting US65625_TIMN0120730). The press release went on to claim that "removal of these activities, persons or objects can cause sleeplessness, irritation, depression and other uncomfortable symptoms, similar to those felt by some with abstinence from tobacco." Ibid. Another 1982 TI press release quoted the "past president of the American Psychological Association" as having "severely criticized a new U.S. Public Health Service pamphlet which calls smoking an 'addictive behavior,'" US21703_1 (Racketeering Act #56), without revealing that the scientist was funded by the industry. FF150.

A 1988 TI press release was issued under the headline "CLAIMS THAT CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE." FF1220 (quoting US21239) (Racketeering Act #132). The press release declared that "[t]he claim that cigarette smoking causes physical dependence is simply an unproven attempt to find some way to differentiate smoking from other behaviors." It stated that, "[i]n fact, any feelings persons might have upon giving up smoking are those that would be expected when one is frustrated by giving up any desired activity." Ibid.

Similarly, although Philip Morris had long "operated on the 'premise that the primary motivation for smoking is to obtain the pharmacological effect of

nicotine,'" FF883 (quoting US22848_2), its chairman insisted in 1997 that if cigarettes "are behaviorally addictive or habit forming, they are much more like ... Gummi Bears, and I eat Gummi Bears, and I don't like it when I don't eat my Gummi Bears, but I'm certainly not addicted to them." FF1161.

A series of 1994 appearances on nationally broadcast television programs by TI's vice president for public affairs underscored defendants' "Gummi Bears v. heroin" approach to nicotine addiction, emphasizing, falsely, the absence of any chemical aspect to nicotine addiction. TI's vice president urged viewers "to make a very important distinction" between the "two meanings" of addiction – the "everyday meaning – when we talk about being 'news junkies' or 'chocoholics'" and the meaning "in a drug sense, in the sense that we apply it to heroin or cocaine[.]" US89300_9-10 (cited in FF1237). She claimed that smoking is "addictive" only in the "everyday sense," id. at 9, and flatly denied that there is any chemical component to the attachment: "There is no chemical addiction"; "it's not a chemical dependency." US87155_9 (cited in FF1233). See FF1233-1238 (discussing TI appearances on "Crossfire" (US87155); "Face the Nation" (US89319); the "MacNeil/Lehrer Newshour" (US89300); and "Larry King Live" (US62778)) .

At trial, Lorillard's President urged essentially the same distinctions. He testified that Lorillard has recently "accepted" that cigarette smoking is addictive, but that "acceptance" is dependent on a loose definition that includes any "pleasurable activity that can be difficult to stop." FF1202 (quoting Orlowsky_WD_116). He claimed that Lorillard still does not know whether nicotine is addictive. FF1203 (citing Orlowsky_WD_121). B&W's website, as of the time of trial, stated that cigarette smoking is addictive "by modern day definitions of the term," but that "it is inappropriate to call cigarette smoking addictive in the same sense as heroin, cocaine or other hard drugs." US87175. The website declared that such a claim "defies common sense, and is contrary to much scientific research[.]" Ibid.; see also FF1250.

4. Defendants' Deceptive Attacks on Surgeon General Findings

As part of their campaign of deception, defendants attacked the findings of public health officials that they knew to be consistent with their own research.

In 1988, the Surgeon General published "Consequences of Smoking – Nicotine Addiction." A quarter-century had elapsed since B&W's vice president had concluded, after reviewing industry research, that "[w]e are, then, in the business of selling nicotine, an addictive drug effective in the release of stress

mechanisms." US22034_4. Nevertheless, the Tobacco Institute immediately countered with a press release headlined: "CLAIMS THAT CIGARETTES ARE ADDICTIVE IRRESPONSIBLE AND SCARE TACTICS." FF1221 (quoting 85366_1). The press release declared: "After years of well-funded research, it has not been established that cigarette smoking produces a physical dependence to nicotine. In fact, it has been impossible to establish that the feelings persons have upon giving up smoking are anything but that which would be expected when one is frustrated by giving up any desired habit." Ibid. The press release charged that the Surgeon General's report was "politically rather than scientifically motivated." Ibid.; see also FF1220 (quoting US21239) (1988 TI press release headlined "CLAIMS THAT CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE") (Racketeering Act #132).

Another TI press release issued two months later called the Surgeon General's report "an escalation of anti smoking rhetoric ... without medical or scientific foundation." FF1222 (quoting US77065) (Racketeering Act #133). The press release cited the conclusions of "two expert scientists," without revealing that they were paid industry consultants. FF1223-1225.

D. "Sacrificing Taste for a 'Longer Life'": Misrepresenting The Health Benefits Of "Light" Cigarettes

1. Defendants' Internal Knowledge

A primary aspect of defendants' campaign to provide smokers with health reassurances has been the marketing of cigarettes with descriptors such as "light," "ultra light," "mild," and "low tar" (collectively, "light"). Defendants fostered and continue to foster the illusion that "light" cigarettes lower health risks, provide an alternative to quitting, or represent a step in decreasing the smoker's level of dependence. This endeavor has been remarkably successful and a crucial part of defendants' ability to combat growing health concerns: the market share for "light" cigarettes rose from 2% in 1967 to 81.9% of total cigarette sales in 1998. FF2378.

This success reflects the accuracy of a 1975 report prepared for RJR, which explained that smokers of "low tar and nicotine brands" believe that those brands "are much safer and much less of a health hazard." FF2263 (quoting US22158_65). These smokers, the report declared, are "readily willing to sacrifice taste for a 'longer life.'" Ibid.

But the promise of "longer life" offered by "light" cigarettes rests on deception. As an RJR internal report had acknowledged three years earlier,

"regardless of which cigarette the smoker chooses, in obtaining his daily nicotine requirement he will receive about the same daily amount of 'tar,'" so that the "low tar, low nicotine" cigarette offered the smoker "zero advantage." US29473_7-8.

As defendants have long understood, the absence of health benefits is, in significant part, a consequence of nicotine addiction and the techniques of cigarette design. The story of "light" cigarettes is thus intertwined with issues of nicotine addiction and nicotine manipulation.

Defendants recognized from the outset that any attempt to create a "healthier" cigarette would be cabined by the need to satisfy nicotine addiction. If reducing tar meant reducing nicotine, the machinery of nicotine delivery might sputter to a halt. Recognizing "that a reduction in nicotine delivery levels which was no longer sufficient to sustain smokers' addiction could devastate their industry," defendants "therefore set out to design commercial cigarettes that were capable of delivering nicotine across a range of doses that would keep smokers addicted." FF1514 (citing Henningfield_WD_54-56, 66; Farone_WD_72, 86-89).

Defendants' nicotine manipulation has relied on a variety of design features that are crucial in facilitating smokers' ability to control the manner of their smoking to achieve their optimum nicotine intake. These features include filter design, paper selection and perforation, and ventilation holes. FF1585 (citing

Henningfield_WD_46; Farone_WD_42). Ventilation holes are small perforations in cigarette paper that dilute mainstream cigarette smoke with air during inhalation. Ibid. By covering the ventilation holes with their fingers or lips, smokers can increase their intake of nicotine. FF2026.

Because smokers must maintain a requisite nicotine intake, they make use of these design features when they smoke so-called "low tar and nicotine" cigarettes. This phenomenon, known as "compensation," effectively nullifies the purported health advantages of "light" cigarettes. As the district court found, "in order to obtain an amount of nicotine sufficient to satisfy their addiction, smokers of low tar cigarettes modify their smoking behavior, or 'compensate,' for the reduced nicotine yields by taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes." FF2026.

As Dr. Farone testified, because "light" cigarettes "generally permit easy compensation and employ levels of dilution that increase the mutagenicity of the tar [they] are not any less hazardous than their full flavor versions." FF2104 (quoting Farone_WD, 123-124). See also FF2104 (quoting Burns_WD_30) ("I have concluded that the changes in cigarettes that resulted in a lowering of the FTC tar and nicotine yields over the past 50 years have not resulted in a reduction in the

disease risks of smoking cigarettes for the smokers who use these cigarettes."); FF2104 (quoting Samet_WD_18) (the use of lower tar and lower nicotine cigarettes "has had no clear benefit on the health risks of active smoking"); FF2111 (citing US58700_9-10, 60) (conclusions of the National Cancer Institute in 2001); FF2113 (citing US88621_25, 324, 901) (conclusions of the 2004 Surgeon General's Report).

"In short, 'light and ultra-light cigarettes' do not, in actuality, 'reduce the risks of smoking.'" FF2074 (quoting Benowitz_WD_61).

Defendants' scientists had long since reached this conclusion. In a 1972 memorandum marked "RJR SECRET," an RJR scientist explained that "for the typical smoker nicotine satisfaction is the dominant desire, as opposed to flavor and other satisfactions." FF2201 (quoting US29473_3). Thus, given a so-called "low tar and nicotine" cigarette, a smoker "will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine (or, more likely, will change to a brand delivering his desired per cigarette level of nicotine)." Ibid. (quoting US29473_7). Accordingly, "regardless of which cigarette the smoker chooses, in obtaining his daily nicotine requirement he will receive about the same daily amount of 'tar.'" Ibid.

The 1972 RJR memorandum recognized that this process would eliminate purported health benefits. It observed that if the "hazard of smoking is directly related to the amount of 'tar' to which the smoker is exposed per day, and the smoker bases his consumption on nicotine, then a present 'low tar, low nicotine' cigarette **offers zero advantage to the smoker** over a 'regular' filter cigarette, but simply costs him more money and exposes him to substantially increased amounts of allegedly harmful gas phase components in obtaining his desired daily amount of nicotine." Ibid. (quoting US29473_7-8) (emphasis added).[8]

[8] See also, e.g., FF2192 (quoting US20348_2-3) (1975 Philip Morris study concluded that the smokers took "larger puffs" on Marlboro Lights than on conventional Marlboro cigarettes and thus "did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery"); FF2206 (quoting US21507_2) (minutes from 1974 B&W/BATCo conference) ("[W]hatever the characteristics of cigarettes as determined by smoking machines, the smoker adjusts his pattern to deliver his own nicotine requirements."); FF2209 (quoting US53429_25) (1980 BATCo report bearing the stamp "Brown & Williamson June 24, 1980 R&D Library") ("On the basis of the German studies, compensation would therefore be seen as a long-term tendency to permanently adjust toward some preferred (or minimum) level [of nicotine]."); FF2228 (quoting US20030_8) (1980 Lorillard memorandum) ("The evidence to date clearly indicates that smokers titrate or regulate their intake of nicotine."); FF2225 (quoting US87916_9) (American) (1976 report prepared for American) (explaining that focus group panelists reported having to "drag ... 'real' hard" on Now and Carlton cigarettes "to get any satisfaction out of it").

2. Deceptive Health Reassurances of The "Light" Cigarette Campaign

Despite their internal knowledge, defendants have determinedly sought to exploit the "opportunities [that] exist for filter and cigarette design which offer the image of 'health reassurance,'" FF2560 (quoting US20268_6) (1976 BATCo report), and smokers soon proved willing to "sacrifice taste for a 'longer life.'"

As a Philip Morris researcher explained in a 1988 memorandum, the company's goal was to introduce a "socially acceptable cigarette" that would "be a welcomed alternative to quitting, and might attract new smokers who would not otherwise choose to become product users." FF2303 (quoting US38763_11). The memorandum cautioned: "With the recent attrition rate of smokers, attaining 'new' smokers is no longer synonymous with capturing young smokers." Ibid. A 1978 advertising brief for Lorillard declared, "we wish to try and develop advertising for the Kent parent brands which clearly offers the smoker health reassurance." FF2603 (quoting US53620_6). B&W was similarly ambitious: "KOOL must move into the health reassurance segment so that 45% of KOOL business will be in the perceived product safety arena by 1982." FF2516 (quoting US54048_680559149). B&W acknowledged internally that "the appeal of the brands competing in this segment [enriched flavor ultra low tar] is **solely on the**

basis of implied health claims." FF2538 (quoting US53746*_670156327) (1977 B&W marketing plan) (emphasis added).

Defendants' marketing of their low tar/light brands has thus consistently sought to provide "health reassurance." For example, a 1990 advertisement for RJR's "Now" cigarettes announced: "THE LOWEST IN TAR & NICOTINE. Try Now. Surprisingly good taste." FF2269 (quoting US22172_2070717432). Another Now advertisement asked: "How can you get 67% less tar and nicotine and still get real cigarette taste? NOW is how." FF2269 (quoting US22172_2070717336).

In 1999, B&W began a promotional campaign emphasizing that Carlton cigarettes were "Ultra Ultra Light," including packaging statements that Carlton delivered only "1 mg." of tar. FF2525. B&W advertisements featured slogans such as "Isn't it time you started thinking about number one?"; "Carlton is the '1' for you"; and "It's the Least You Can Do." FF2525-2528 (quoting US9846_ADV0270782, US11362_ADV0450470, US9892_ADV0270925, US10678_ADV0320013, US85018_1; US22030_20). Focus groups conducted for B&W in 2000 understood the campaigns to convey that Carlton cigarettes were "healthier" and "better for you." FF2527- FF2528 (quoting US22031_10, US22170_12-14, US22030_14). The campaign echoed American's 1994

advertisements for Carlton, which featured purported testimonials of smokers claiming: "I switched to lowest tar." FF2589 (quoting US9285_ADV0260346). See also, e.g., FF2609 (quoting US21700) (1975 Lorillard advertisement) (Racketeering Act #37); FF2495 (quoting US48350) (1976 RJR advertisement) (Racketeering Act #38); FF2252 (quoting US21510) (1979 Philip Morris advertisement) (Racketeering Act #48).

A 1987 National Health Interview Survey showed that 44% of current smokers had, at some point, switched to low tar cigarettes to reduce their health risk, and another national survey showed that 58% of ultra light smokers and 39% of light smokers chose those cigarettes to reduce their health risks without having to quit. Furthermore, 49% of ultra light smokers and 30% of light smokers did so as a step toward quitting. FF2235 (citing Weinstein_WD_53-54).

3. Deceptive Denials of Nicotine Manipulation

Defendants have denied and continue to deny that they manipulate nicotine intake, a practice that, as discussed above, is central to the success of their "light" brands. Appearing on "Face the Nation" in 1994, the Tobacco Institute's Senior Vice President of Public Affairs, stated: "The industry does take the position that ... not only do they not add nicotine, but they don't manipulate nicotine. So

Congress has been told formally by every cigarette manufacturer in the United States that this claim is without foundation." FF1743 (quoting US77012_164).

As of 2004, Philip Morris, which began using ammonia to enhance nicotine impact in the 1950s, FF1617, continued to declare on its website: "[S]ome have alleged that the Company uses specific ingredients to affect nicotine delivery to smokers. That is simply not true." US88058_1 (quoted in FF1751). As of 2004, RJR's website continued to state, as it had for many years, that RJR "do[es] not add nicotine or any nicotinic compounds to any of our cigarettes, nor do we do anything to enhance the effects of nicotine on the smoker." FF1752 (quoting US86942_1). As of 2004, B&W's website stated: "Brown & Williamson does not in any way control the level or nature of nicotine in cigarettes to induce people to start smoking or to prevent people from quitting." FF1753 (quoting US86656_1).

E. Targeting The Most Vulnerable: Youth Marketing

Since the 1950s, defendants have marketed directly to youth because they need to attract "replacement" smokers, and youth are the easiest and most vulnerable target. As a 1972 RJR internal memorandum noted, "if a man has never smoked by age 18, the odds are three-to-one he never will. By age 21, the odds are twenty-to-one." FF2636 (quoting US20641_2); see FF2636 (Philip Morris vice

president "admitted that she was aware that over 80% of smokers start smoking before they turn eighteen"); Op.1518-19 (more examples). Defendants have consequently "spent enormous resources tracking the behaviors and preferences of youth under twenty-one, and especially those under eighteen." FF2717; FF2717-3023.

Defendants' targeting of youth is especially pernicious because the youth population is particularly apt to believe defendants' fraudulent messages about smoking and health. As the district court found, "most youth, at a time when they are deciding whether to start smoking, have a very inadequate understanding of the medical consequences, physical pain, and emotional suffering which results from smoking and the unlikelihood of their being able to quit smoking at some future time." FF2716 (citing Weinstein_WD_66-69). Young people in particular "do not adequately understand and appreciate the cumulative risk that smoking entails." FF2700 (citing Slovic_WD_29-30). "[B]ecause teenagers are focused on the present rather than the future and lack an understanding of the addictive properties of cigarettes, it is unlikely that the decisions by teenagers to initiate smoking are influenced by concerns about future harmful consequences." FF2701 (citing Slovic_WD_11-12); see FF2706-2715 (discussing surveys demonstrating that youth smokers underestimate the risks and addictiveness of smoking). Moreover,

"[t]he earlier a person starts smoking cigarettes, the more highly dependent they will be as an adult, and the more difficult it will be for them to quit." FF2705 (quoting Benowitz_WD_40).

In short, as defendants understood from their own extensive research, "youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive." FF3298. Accordingly, defendants have "used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts." FF3298.

Despite defendants' protestations to the contrary, FF3186-3302, the district court found "overwhelming evidence" that defendants "intentionally exploit adolescents' vulnerability to imagery by creating advertising that utilizes the themes of independence, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness, and being 'cool.'" FF2674; see also FF2647 (citing examples of youth-centered brands). Today defendants continue to advance marketing campaigns that "are clearly designed to target and entice youth." Op.1522.

Ironically, as the district court found, defendants have not merely denied that they market to youth, but have even sought to convince the public that advertisements are immaterial to the decision to take up smoking. When a 1994 Surgeon General Report reached a contrary conclusion, Philip Morris created responsive message points: "No study has ever been able to draw the conclusion that advertising can cause anyone – particularly kids – to smoke. All that cigarette advertising does is help smokers select a brand; it does not encourage nonsmokers or kids to smoke." FF3251 (quoting US20511_1).

III. THE ORDER OF INJUNCTIVE RELIEF

The district court found that, absent injunctive relief, the manufacturer defendants (other than Liggett) are likely to commit future RICO violations. Op.1601-1620. The court emphasized that "[t]he evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity." Op.1603. The court found, for example, that "all Defendants continue to fraudulently deny that they manipulate the nicotine delivery of their cigarettes in order to create and sustain addiction," that "all Defendants continue to market 'low tar' cigarettes to consumers seeking to reduce their health risks or quit," and that "most Defendants continue to fraudulently deny the adverse health effects of secondhand smoke which they recognize internally[.]" Ibid. The district court

further rejected the contention that the Master Settlement Agreement (MSA) prevents defendants from committing future RICO violations, Op.1609-1612, and found that defendants' ongoing conduct "continues to further the objectives of the overarching scheme to defraud[.]" Op.1604.

The district court therefore granted injunctive relief pursuant to 18 U.S.C. § 1964(a) to prevent and restrain defendants from committing further violations of the Act. The order bars defendants from committing further acts of racketeering relating to the manufacturing, marketing, promotion, health consequences or sale of cigarettes. Order_2. It bars defendants from reconstituting the form or function of the Tobacco Institute, the Council for Tobacco Research, or the Center for Indoor Air Research, id., and from making further false, misleading, or deceptive statements that are disseminated to the United States public and that misrepresent or suppress information concerning cigarettes, Order_3. The order also enjoins defendants from using "health descriptors" such as "low tar," "light," or "mild" in connection with their cigarette products. Id.

The district court also approved a series of information disclosure requirements to prevent future deceptive conduct by defendants and to minimize the effect of such conduct on the public. The order requires defendants to make court-approved corrective statements in the media, on their websites, on cigarette

packages onserts, and in retail point-of-sale displays. Order_4-9. It requires defendants for fifteen years to maintain document depositories and internet-accessible databases containing all documents and data produced during discovery in this case and in future smoking-related litigation, subject to protections for privileged and trade secret information. Order_10-16. Finally, the order requires defendants to disclose to the government, on a periodic basis for ten years from the date of the judgment, disaggregated data on defendants' marketing of cigarettes, subject to protective orders governing confidential information. Order_16-17.

The district court denied several of the government's requests for relief. In light of this Court's interlocutory decision, the court concluded that it could not grant disgorgement relief and, further, that this Court's ruling foreclosed it from ordering defendants to fund any form of public education or smoking cessation program. Op.1644-1645. The court also held that it lacked the power to require a monitoring scheme proposed by the government. Op.1647-1650.

On October 31, 2006, this Court granted defendants' motion to stay the injunction pending appeal.[9]

[9] On September 20, 2006, the district court granted the government's motion for reconsideration under Fed. R. Civ. P. 59(e), to correct a clerical error. DN5765. On March 16, 2007, the district court granted in part and denied in part defendants' Rule 59(e) motion. DN5800.

SUMMARY OF ARGUMENT

Section One: Liability

In comprehensive findings of fact, the district court found "overwhelming evidence" that defendants have maintained an ongoing illegal racketeering enterprise and that each of the defendants has "participated in the conduct, management, and operation of the Enterprise, in violation of 18 U.S.C. § 1962(c)." Op.2, 1498. The court also found that defendants "both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c)," and thus also violated RICO's conspiracy provision, 18 U.S.C. § 1962(d). Op.1596, 1587-1597. Based on voluminous factual findings, the court concluded that each of the defendants participated in the affairs of the enterprise by repeatedly making false and misleading statements on matters material to consumers, acting with specific intent to defraud, in violation of the mail and wire fraud statutes, 18 U.S.C. § 1341 and § 1343.

Defendants' brief barely makes reference to the district court's findings of fact and makes no attempt to show that they are clearly erroneous. Instead, defendants seek to frame various issues of law which, on inspection, depend on a deeply flawed account of the record that cannot be squared with the findings that they choose to ignore.

I. Formation of an Enterprise by Corporations

The only pure issue of law advanced in defendants' brief is the assertion that an association of corporations cannot constitute a RICO enterprise. JD Br. 32-39. This argument is foreclosed by United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) (per curiam), in which this Court – like the ten other courts of appeals to consider the issue – held that corporations can form or be part of an association-in-fact enterprise.

II. Purpose, Structure and Continuity of the Enterprise

Defendants make only the most cursory attempt to contest the district court's finding that their scheme has been characterized by the common purpose, organization and continuity that are the hallmarks of a RICO enterprise.

Defendants urge that their "common purpose" has been no more than a healthy desire to maximize profits. That is true only in the sense that all schemes to obtain money or property by fraud can be characterized as profit-maximization. As the court found, defendants formed and maintained their enterprise to deceive American consumers about the two defining characteristics of their product: its toxicity and its addictiveness. It is that purpose, not a generalized interest in making money, that underlies the enterprise.

Defendants' contentions regarding the organization and continuing nature of their enterprise are no more persuasive. Defendants' scheme has been characterized by a high degree of formal structure and a remarkable level of continuity among key members of the cast. Their attempt to cast their conduct as "parallel business conduct" similar to the competition between Coke and Pepsi, JD Br. 124, reflects a disciplined disregard of the record.

Through the Tobacco Institute, the Council for Tobacco Research, the Center for Indoor Air Research, and countless other jointly created entities, defendants' chief executives, general counsel, directors of research, and public relations specialists have joined together to shape the industry's public statements, its response to regulators, and the direction of industry research. Defendants announced their first joint entity, the Tobacco Industry Research Committee, in their 1954 "Frank Statement to Cigarette Smokers," and they have since created, disbanded, and re-created a "network of interlocking organizations" (FF3861) to facilitate their fraudulent purposes. For example, defendants created the International Committee on Smoking Issues, which was succeeded first by the International Tobacco Information Center, and then by the Tobacco Documentation Centre – which continues to operate today. FF404-440. The Tobacco Research Council became the Tobacco Advisory Council and is now the

Tobacco Manufacturers Association. FF403. The Indoor Society of the Built Environment exists today as successor to Indoor Air International. FF3662.

These institutions have provided frequent, confidential fora for defendants to coordinate, refine, and expand their scheme to defraud. They have also provided a mechanism for enforcing discipline among defendants and policing their allegiance to the common purposes of the enterprise.

III. Specific Intent, Materiality, and the Pattern of Racketeering Activity

As the district court found, defendants repeatedly made false and misleading statements on matters material to consumers, acting with specific intent to defraud, and each defendant furthered the scheme to defraud in violation of 18 U.S.C. § 1341 and § 1343.

Defendants pose as a controlling legal issue whether "a corporate defendant can have specific intent to defraud even though no agent or employee of the corporation had such intent." JD Br. 1 (Question 1); JD Br. 23-32. But the district court's decision raises no such issue. The court did not suggest that the intent of individuals was irrelevant to its inquiry. Defendants' highest officers have been directly involved in the enterprise throughout its history. Defendants do not suggest that their officers were unaware of the company's public statements. Nor is there any basis for concluding that they were unaware of the company's internal

research. To the contrary, the record demonstrates that they were repeatedly briefed on their research and its results. Based on its unchallenged findings of fact, the court rejected defendants' suggestion that their public statements were "simply statements of opinion held in good faith," Op.1502, finding that such claims "strain[] credulity." Op.1503.

Defendants' insistence that their deceptions were not material to the purchasing decisions of consumers (JD Br. 93-108) is without basis in the record or common sense, and reflects a misunderstanding of the principles that govern materiality.

As the district court further found, each defendant made repeated use of the mails and wires to further the scheme to defraud – violations of the mail and wire fraud statutes that formed a pattern of racketeering activity. Contrary to defendants' assertion (JD Br. 8), the district court did not restrict the government's proof to the 148 racketeering acts identified in the complaint and interrogatory responses for all purposes. The order that defendants cite expressly held that evidence of "uncharged, unlawful conduct" could be used to establish the continuity and pattern of the racketeering activity, the existence of an enterprise or conspiracy, defendants' participation in the enterprise or conspiracy, and defendants' likelihood of future violations. DN2968_6-7, 10.

IV. RICO Conspiracy

In addition to substantive RICO violations, the district court properly found a conspiracy to violate RICO in violation of 18 U.S.C. § 1962(d). The court stressed that defendants "worked together continuously, in many different venues and through many different entities, to disseminate their agreed upon deceptive public position," Op.1594, and advanced the goals of the enterprise "by concealing or suppressing information and documents which may have been detrimental to the interests of the members of the Enterprise." Ibid.

In their terse response to this holding, defendants assert that there can be no conspiracy because the court erred in finding substantive violations. JD Br. 127-128. Both premises are incorrect. First, the court did not err in finding substantive violations. Second, the Supreme Court held that there can be a RICO conspiracy absent a substantive violation in Salinas v. United States, 522 U.S. 52, 65 (1997), which defendants fail to cite.

V. Defendants' Regulatory and Constitutional Defenses

Defendants argue at length that various facets of their enterprise were authorized by law or protected by the First Amendment, JD Br. 65-119, arguments that misconceive both the facts and governing law.

Defendants urge, without basis, that their deceptions involving "light" cigarettes cannot be the basis of liability because they were authorized by the Federal Trade Commission. This argument is premised on their use of the "Cambridge Filter Method" to test for tar and nicotine. In 1966, the FTC notified the manufacturers that "a factual statement of tar and nicotine content (expressed in milligrams)" based on tests conducted in accordance with the Cambridge Filter Method would not be in violation of provisions of law administered by the FTC so long as "no collateral representations (other than factual statement of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards[.]" FF2048. This and other statements leave no room for the assertion that the FTC authorized defendants' various descriptors and health assurances. Indeed, in joint comments to the agency in 1998, defendants expressly acknowledged that the FTC has never regulated the descriptors that defendants use in marketing "light" cigarettes. Defendants' claim of immunity is particularly extraordinary because they knew, on the basis of their own undisclosed research, that the Cambridge Method did not reflect the compensation mechanisms that smokers use when smoking "light" cigarettes to obtain the desired nicotine dose.

Defendants' invocation of the First Amendment is similarly baseless. Fraud is not protected speech, and the government "may, and does, punish fraud directly." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). To the extent that defendants seek immunity for the stream of press releases, booklets, television appearances and advertisements aimed at the general public, their argument merely repeats the claim that the statements were not fraudulent and fails for the same reason that their statutory objections fail.

To the extent that defendants seek immunity for their false statements to federal regulators, "neither the Noerr-Pennington doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (citing Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995)). In any event, the evidence of defendants' RICO violations is overwhelming even if defendants' efforts to mislead federal regulators are not considered.

VI. Altria and BATCo

The separate attempts by Altria and BATCo to escape RICO liability are based on misunderstandings of the district court's holdings. The court did not find Altria liable on a "veil piercing" theory, and it did not base BATCo's liability on

foreign conduct without domestic effects. The court found that Altria and BATCo have actively participated in the management and operation of the enterprise, and that each committed multiple racketeering acts to advance the collective scheme to defraud American consumers. The findings and evidence thus establish substantive and conspiracy offenses by both defendants.

VII. Propriety Of Equitable Relief To Address Future Violations

The district court found that "[t]he evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity," and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past." Op.1603, Op.1605. Nevertheless, defendants urge that the court could not properly have found a reasonable likelihood of future violations, emphasizing provisions of the Master Settlement Agreement that resolved state-law litigation brought by state attorneys general. JD Br. 39-61.

These contentions are wrong as a matter of law and fact. The federal government has no power to enforce the MSA, and the agreement specifically bars states from punishing violations occurring outside their respective borders. MSA § VII(b), (c)(1). At best, therefore, the MSA provides a balkanized framework for the piecemeal prosecution of individual violations by individual defendants.

Congress enacted RICO precisely because it determined that such an approach provides inadequate tools to address the nationwide conduct of a racketeering enterprise. In addition, important provisions of the MSA are now expiring or will soon expire.

Moreover, notwithstanding claims that they have changed their ways, defendants have demonstrably violated the MSA – including by explicitly plotting to reconstitute the Center for Indoor Air Research, an organization that the agreement required them to dismantle – and have continued their campaign of misrepresentations about the toxicity and addictiveness of cigarettes notwithstanding the MSA's provisions.

Section Two: Remedies

Having found that "Defendants have not ceased engaging in unlawful activity," and a "reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past," the district court entered limited equitable relief to restrain defendants' ongoing enterprise and to prevent future RICO violations.

The grant of relief in no sense constitutes an abuse of the court's discretion. The court ordered defendants to cease using descriptors such as "light" and "low tar," which have played an integral role in defendants' misleading health

assurances. It also ordered corrective communications in the same media that defendants used in the execution of their fraud, including newspaper and television advertisements and informational "onserts" provided with cigarette packages. Given the magnitude of defendants' fraud, these measures are extraordinarily modest. Indeed, the district court believed that additional remedies would be appropriate, but mistakenly concluded that they were foreclosed by this Court's 2005 interlocutory decision on disgorgement.

I. Defendants' Remedies Appeal

A. Fair Notice

Defendants argue, without basis, that the injunction must be vacated for "lack of fair notice." JD Br. 134-137. As the district court explained in rejecting the same argument, defendants had months to study the government's proposals; they fully briefed and litigated a 14-day remedies trial (including cross-examination of live witnesses); and they filed voluminous post-trial arguments challenging the government's proposed remedies. Op.1626-1627.

B. Transparency Requirements

Defendants urge that the document disclosure and other transparency requirements imposed by the court are improperly "duplicative of existing disclosure obligations" under the MSA. JD Br. 136. The argument is wrong as a

matter of law and fact. The existence of disclosure provisions in a settlement agreement that is not enforceable by the United States does not preclude injunctive relief under RICO. Moreover, as defendants do not dispute, the "existing disclosure obligations" do not apply to all defendants, will begin to expire before these appeals are resolved, and will expire completely by 2010.

C. "Health Assurance" Descriptors

Based on its extensive and unchallenged findings of fact, the district court concluded that defendants had knowingly used of brand descriptors such as "light" and "low tar" to provide misleading health assurances to smokers and prospective customers, and accordingly enjoined defendants' use of such descriptors. It is difficult to understand how such targeted relief could conceivably constitute an abuse of discretion. Indeed, defendants identify no legitimate purpose served by their descriptors that might even arguably militate against the injunction.

D. Corrective Communications

The district court ordered defendants to make corrective statements about smoking and health in newspapers, on television, in magazines, on cigarette pack "onserts," and on websites – the same vehicles of mass communication that defendants have used to perpetrate the fraud. Op.1635. Contrary to defendants' arguments (JD Br. 128-137), this requirement is both forward-looking and

consistent with the First Amendment. Indeed, because fraud by its nature is ongoing until corrected, this Court has twice upheld corrective statements as remedies for fraudulent advertising. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977); Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000).

E. General Injunctive Provisions

In addition to these provisions, the court enjoined defendants from "committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States," Order_2, and from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." Order_3.

Defendants urge that these requirements should be deemed invalid as a "generalized injunction to obey the law," JD Br. 137-139, divorcing the order from its context. The court did not enjoin racketeering or fraudulent statements in the abstract; it barred defendants from perpetuating their illegal conduct in the manufacturing, promotion, or sale of cigarettes. The order thus closely tracks the conduct found by the court to violate RICO, which expressly authorizes district

courts to "prohibit[] any person from engaging in the same type of endeavor as the enterprise engaged in." 18 U.S.C. § 1964(a). Defendants cannot seriously contend that the district court's detailed opinion leaves them without guidance in interpreting the injunction.

F. Foreign Conduct and Subsidiaries

Defendants object that the district court made the injunction applicable to their overseas subsidiaries and to overseas conduct with domestic effects in the United States. JD Br. 90-93, 139-143. But as this Court has stressed, the regulation of conduct abroad that causes harmful effects in the United States "is not an extraterritorial assertion of jurisdiction." Laker Airways Ltd v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984) (emphasis in original). The court's factfindings document defendants' practice of using international organizations and projects to facilitate their scheme to defraud, and the court plainly did not abuse its discretion in prohibiting defendants from colluding abroad to defraud the American public.

II. The Government's Cross-Appeal

A. Public Education and Smoking Cessation

The government urged that the limited relief afforded by the required corrective statements should be supplemented by requiring defendants to fund

public education and smoking-cessation programs. The district court agreed that these proposed remedies would "unquestionably serve the public interest." Op.1645, 1651. As the court recognized, the educational program, like the corrective statements, would curb defendants' ongoing misrepresentations. Op.1651. The court likewise recognized that a smoking cessation program would undermine defendants' continued ability to profit from nicotine addiction resulting from defendants' fraudulent conduct both before and after entry of the injunction. Op.1644-1645.

The court mistakenly believed, however, that it was precluded from considering this relief by this Court's 2005 interlocutory decision on disgorgement. Order #886 (DN4906); Op.1645, Op.1651. That decision did not curtail the court's equitable authority in this manner. This Court held that disgorgement is not available because it is a "backward looking" remedy that is "duplicative" of RICO's damages and forfeiture provisions. 396 F.3d at 1198, 1201. The education and smoking cessation remedies cannot plausibly be thought to duplicate those provisions, and can only be predicated on the court's equitable authority.

Nor are there other reasons to conclude that Congress precluded consideration of such remedies as a matter of law. Even if defendants were to cease using fraudulent descriptors immediately, defendants' future advertising will

not operate in isolation from decades of misleading assurances. In the absence of effective public education, future advertisements will build upon the past deceptions to ensnare future customers. In such circumstances, "advertising which fails to rebut the prior claims ... inevitably builds upon those claims" and "continues the deception, albeit implicitly rather than explicitly." Warner-Lambert Co. v. FTC, 562 F.2d 749, 769 (D.C. Cir. 1977).

Moreover, an educational campaign is uniquely appropriate to address the "open question" strategy that defendants have employed so effectively for so long. An educational campaign would finally provide consumers with the disinterested scientific knowledge about health risks and addiction that defendants promised and failed to provide.

The proposed smoking cessation remedy is integrally linked to the education remedy. It would give smokers the key to the chemical handcuffs of nicotine addiction and preclude future profits resulting from defendants' past and ongoing misrepresentations. The nicotine dependence that defendants have cultivated is not merely a consequence of defendants' past misdeeds; it is an ongoing harm, and a virtual guarantee of future racketeering profits. RICO does not preclude the district court from considering whether and how to order this forward-looking remedy. And at a minimum, the Court's disgorgement ruling

plainly does not foreclose the narrower smoker cessation program proposed by the government after the district court instructed the government to revise its remedies.

B. Monitoring

The use of court-appointed monitors is commonplace in RICO cases and is incontestably a forward-looking remedy designed to prevent and restrain future violations. The district court concluded that it could not appoint a monitor, focusing on concerns it identified with respect to one plan proposed by the government. Assuming that the court did not abuse its discretion in concluding that plan was outside its authority, it should nevertheless consider the extent to which alternative monitoring schemes may be essential to supervise defendants' future conduct and ensure compliance with the injunction.

STANDARD OF REVIEW

The district court's findings of fact, "'whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'" SEC v. Washington Investment Network, 475 F.3d 392, 399 (D.C. Cir. 2007) (fraud case) (quoting Fed. R. Civ. P. 52(a)). "To satisfy this standard the district court's findings need only be plausible." Ibid.

Contrary to defendants' assertions (JD Br. 20-22), the "clearly erroneous" standard applies to findings of deceptive advertising even when First Amendment challenges are raised, Novartis Corp. v. FTC, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000), and "even when the trial judge adopts proposed findings of fact verbatim." Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985).

Conclusions of law are subject to de novo review. Washington Investment, 475 F.3d at 399. The decision to issue an injunction is reviewed for abuse of discretion. Id. at 399, 407.

The standard of proof in civil RICO actions is preponderance of the evidence. Sedima, SPRL v. Imrex Co., 473 U.S. 479, 491 (1985); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1990) (collecting cases). Although defendants dispute this point (JD Br. 22), the dispute is immaterial, as the district court found that "[t]he Government's evidence is sufficient to satisfy both a preponderance of the evidence standard and a clear and convincing evidence standard." Op.1564-1566 & n.33.

ARGUMENT

SECTION ONE: LIABILITY

I. CORPORATIONS CAN FORM OR BE PART OF A RICO ENTERPRISE

A. RICO "broadly defines 'enterprise' in § 1961(4) to 'includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" National Organization for Women v. Scheidler, 510 U.S. 249, 257 (1994) (quoting 18 U.S.C. § 1961(4)). Defendants urge that, as a matter of law, a syndicate of corporations cannot constitute a RICO enterprise regardless of organization, continuity, and purpose. JD Br. 32-39. Because § 1961(4) does not specifically reference a de facto association of corporations, they urge, such an association-in-fact cannot be an enterprise.

Their argument is foreclosed by this Court's decision in United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) (per curiam), which – like the ten other courts of appeals to consider the issue – rejected the contention that § 1961(4) provides an exhaustive list and held that corporations can form or be part of an association-in-fact enterprise.

In Perholtz, this Court reviewed an indictment that "charged an association-in-fact composed of individuals, corporations, and partnerships," 842 F.2d at 352, and rejected the contention that the indictment was fatally flawed because it charged a type of association-in-fact not expressly described in § 1964(1). The Court explained: "The statute defines 'enterprise' as including the various entities specified; the list is not meant to be exhaustive." 842 F.2d at 353.

As the Court noted, "'[t]here is no restriction upon the associations embraced by the definition.'" Ibid. (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)). "On the contrary, Congress has instructed [the courts] to construe RICO 'liberally ... to effectuate its remedial purposes.'" Ibid. (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947, and citing Turkette, 452 U.S. at 587, and Sedima, SPRL v. Imrex Co., 473 U.S. 479, 497-98 (1985)). This Court stressed that the "restrictive interpretation of the definition of enterprise would contravene this principle of statutory construction." Ibid.

The Court further explained that the "exhaustive" reading of § 1961(4) "would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." Ibid. The Court concluded that "[t]his interpretation hardly accords with Congress' remedial

purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." Ibid.

Accordingly, this Court "follow[ed] those courts that have held that individuals, corporations, and other entities may constitute an association-in-fact." Ibid. (citing United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir. Unit B 1982); United States v. Navarro-Ordas, 770 F.2d 959, 969 n. 19 (11th Cir. 1985); McCullough v. Suter, 757 F.2d 142, 143-44 (7th Cir. 1985); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979)).

In the nearly two decades since Perholtz issued, the courts of appeals have continued to hold uniformly that "legal entities can form or be part of an association-in-fact RICO enterprise." United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (noting that "the Perholtz panel explained why rather well"); accord United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993) ("a group or union consisting solely of corporations or other legal entities can constitute an 'associated in fact' enterprise"); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991) (the argument that an association-in-fact may consist only of individuals "has repeatedly and we think correctly been rejected")

(following Perholtz); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 995 & n.7 (8th Cir. 1989) ("We now join other circuits in holding that corporations may be considered associations in fact for purposes of RICO") (following Perholtz).[10]

Against the backdrop of this uniform judicial construction of the statute, Congress has amended other provisions of § 1961 – repeatedly expanding the list of predicate offenses in § 1961(1) – but has left § 1961(4) untouched. See, e.g., Pub. L. No. 101-73, § 968 (1989) (adding bank fraud); Pub. L. No. 104-153, § 3 (1996) (adding criminal infringement of copyright and trafficking in counterfeit labels for computer programs, movies, and music); Pub. L. No. 108-458, § 6802(e) (2004) (adding offenses relating to biological, chemical and nuclear weapons).

B. Defendants now urge this Court to reject its own precedent, which reflects the uniform views of the courts of appeals, and hold that § 1961(4) provides the "exhaustive" list of associations that may constitute a RICO enterprise. JD Br. 34.

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[10] See also, e.g., Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-64 (2nd Cir. 1995); United States v. Najjar, 300 F.3d 466, 484-85 (4th Cir. 2002); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir. 1982) ; Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 749 (5th Cir. 1989); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991); United States v. Feldman, 853 F.2d 648, 656-57 (9th Cir. 1988); United States v. Goldin Industries, Inc., 219 F.3d 1271, 1275-76 & n.6 (11th Cir. 2000).

For support, defendants advance policy arguments repeatedly rejected by the Supreme Court. They urge, for example, that Congress was concerned with traditional "organized crime," which, they contend, "acts through loose associations of individuals rather than the corporate form." JD Br. 36. But as the Supreme Court has stressed, while the "'occasion for Congress' action was the perceived need to combat organized crime,'" "'Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.'" National Organization for Women v. Scheidler, 510 U.S. at 260 (quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 248 (1989)).

"Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes," H.J. Inc., 492 U.S. at 245, and the statute's history "shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime." Id. at 246. "Opponents criticized" the Organized Crime Control Act of 1970, (OCCA), of which RICO is Title IX, "precisely because it failed to limit the statute's reach to organized crime." Ibid. "In response, the statute's sponsors made evident that the omission of this limit was no accident, but a reflection of OCCA's intended breadth." Ibid. As the Supreme Court has cautioned, the fact

that RICO "is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued." Sedima, 473 U.S. at 499. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Ibid. (quotation marks and citation omitted).[11]

Defendants' reliance on the oral argument transcript in Mohawk Industries, Inc. v. Williams, No. 05-465 (S. Ct.), underscores the absence of authority for their position. Oral argument questions cannot provide a basis for overruling precedent, and the Supreme Court's disposition in Mohawk hardly makes defendants' reliance on the colloquy less anomalous. The Mohawk petitioner sought to raise in its merits brief the question whether corporations may be members of an association-in-fact enterprise, even though it had not raised the issue in the lower courts or in the petition for a writ of certiorari. As Justice Scalia observed at argument, the Supreme Court would have been "unlikely to accept cert" on that issue even if it

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[11] See also Turkette, 452 U.S. at 585 ("There is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises."); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 164-65 (2001) ("RICO both protects a legitimate 'enterprise' from those who would use unlawful acts to victimize it ... and also protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful ... activity is committed.'") (quoting Scheidler, 510 U.S. at 259).

had been raised, given the unanimous holdings of the courts of appeals. Tr. 6. The Court then dismissed the writ as improvidently granted. See 126 S. Ct. 2016 (2006). More recently, the Court denied a petition for certiorari that expressly presented the question. Microsoft Corp. v. Odom, __ S. Ct. __, 2007 WL 2982493 (2007).[12]

Defendants' reliance on Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001), is similarly wide of the mark. King held that a person is legally "distinct" from a corporate "enterprise" even if he is the president and sole shareholder of the corporation. Id. at 160. Whether an individual is distinct from the corporation he controls was not at issue in Perholtz, where the indictment "charged an association-in-fact composed of individuals, corporations, and partnerships." 842 F.2d at 352. The "distinctiveness" issue does not turn on the same analysis.

C. Alternatively, defendants urge the Court to "limit Perholtz to its facts[.]" JD Br. 38. They accept that in Perholtz the "individual defendants joined with each other and formed the corporations to further their common objectives," 842

[12] Defendants miss the point of Perholtz when they note that the government's amicus brief in Mohawk "conceded that a corporation is not an 'individual' within the meaning of § 1961(4)." JD Br. 33. Perholtz held that the list of entities in section 1961(4) "is not meant to be exhaustive." 842 F.2d at 353.

F.3d at 354, but they insist that a different result should be reached if the enterprise is composed solely of corporations rather than individuals and corporations. JD Br. 38.

The fallback does not advance defendants' position, since the enterprise here included individuals as well as corporations (which cannot conspire except through individual agents). As discussed below, the enterprise was orchestrated by defendants' high level officers, and the cast of individual actors has demonstrated remarkable continuity. See, e.g., FF4078 (discussing tenure of Philip Morris executives); FF4080 (Lorillard); FF4081 (BATCo); FF4082 (RJR).[13] Although the

[13] See also DN5674_6 n.3; DN3571 Tables 1, 2 (discussing the tenure of various individuals including 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 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).

individuals are not named as defendants in this lawsuit, that has no bearing on whether individuals participated in the RICO enterprise.

In any event, defendants' fallback position is merely an invitation to overrule precedent in less obvious fashion. The issue before the Court in Perholtz was whether the introductory term "includes" in § 1961(4) signals an exhaustive list. The Court held that it does not. That analysis does not support a distinction between enterprises that consist of corporations and those that also include individuals. No court has recognized such a distinction, and, as noted above, Perholtz relied on decisions holding that a "group of corporations may constitute [an] association-in-fact," 842 F.2d at 353, a holding reached in subsequent cases as well. See, e.g., Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165-66 (3d Cir. 1989); River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1459, 1461 (9th Cir. 1992) (six corporations); Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio, 900 F.2d 882, 887 (6th Cir. 1990) (group of corporations); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d at 986, 995 & n.7 (8th Cir. 1989) (five corporations); United States v. Vogt, 910 F.2d 1184, 1193-94 (4th Cir. 1990) (five corporations).

As this Court stressed, RICO was designed to be "a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless," Perholtz,

842 F.2d at 353, and defendants here have benefitted from the most sophisticated advice – including advice that helped to determine their organizational form. As Hill & Knowlton observed at the enterprise's inception in 1953, the tobacco manufacturers elected, based on antitrust concerns, to form an informal association rather than "the incorporation of a formal association." US21411_1. Had they chosen to form an incorporated association, that group without question would have constituted an enterprise under § 1961(4), which expressly includes any "legal entity." To suggest that RICO liability should turn on this type of tactical decision is, indeed, "bizarre." Perholtz, 842 F.2d at 353.

II. DEFENDANTS MAINTAINED AN ENTERPRISE TO DECEIVE CONSUMERS ABOUT THE TOXICITY AND ADDICTIVENESS OF CIGARETTES

A. The Common Purpose To Deceive

A RICO enterprise is demonstrated by evidence of "(1) a common purpose among the participants, (2) organization, and (3) continuity." United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (citing Perholtz, 842 F.2d at 362).[14]

[14] This Court has held that the existence of an enterprise may be inferred from the proof of the pattern of racketeering activity alone, United States v. White, 116 F.3d 903, 924 (D.C. Cir. 1997), an issue on which the circuits are divided. See Odom v. Microsoft Corp., 486 F.3d 541, 549-552 (9th Cir.) (en banc) (citing cases), cert. denied, 2007 WL 2982493 (2007). The issue is irrelevant here

The common purpose of defendants' enterprise, as documented in hundreds of findings of fact, has been to attract and retain customers by deceiving them about the toxicity and addictiveness of cigarettes. Defendants have pursued that common purpose with uncommon zeal. As the Tobacco Institute observed in 1972: "For nearly twenty years, this industry has employed a single strategy to defend itself .... It has always been a holding strategy, consisting of creating doubt about the health charge without actually denying it," "advocating the public's right to smoke without actually urging them to take up the practice," and insisting on further research "as the only way to resolve the question of health hazard." FF155 (quoting US63585_1).

Defendants barely advert to the district court's findings, which chronicle the extent and purpose of their deceptions. Instead, attempting to craft a legal challenge, they argue that "the district court defined the enterprise's 'common purpose' at such a level of generality as to render it meaningless." JD Br. 122. Defendants urge that their common purpose was merely to maximize profits, which they argue cannot be a "common purpose" under RICO. "[U]nder the court's rationale," they contend, "any industry could be found to be a RICO 'enterprise'

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because the enterprise finding rested on evidence well beyond the pattern of racketeering activity.

since the participants in every industry aim to maximize their profits and engage in parallel business conduct." JD Br. 124.

Defendants can make this argument only by ignoring the district court's opinion. The district court did not define the purpose of defendants' enterprise as a mere interest in enhancing profits. The purpose of their enterprise has been to conceal and misrepresent the toxicity and addictiveness of their product, which, when used as intended, kills more than 400,000 Americans each year. FF510. The ultimate goal of the enterprise, of course, was to obtain money and property. That goal hardly distinguishes this enterprise from other RICO enterprises. See, e.g., Richardson, 167 F.3d at 625 ("to obtain money or other property by robbery"); Perholtz, 842 F.2d at 354 (common purpose to "obtain[] the proceeds of government contracts"). It is defendants, not the district court, who seek to define "common purpose" at "such a level of generality as to render it meaningless."

Defendants underscore the error of their analysis by observing that no one "contends that Coke and Pepsi market similar diet colas through a joint 'enterprise,'" JD Br. 124. But Coke and Pepsi have not been compelled to form a "Cola Institute" in order to spread misinformation about the dangers of their products. Nor have Coke and Pepsi conspired to market "light" products through knowingly false implied promises of health assurance, or suppressed internal

research demonstrating that their products are as addictive as cocaine and heroin. Defendants cannot seriously believe that their own collusive activities, often conducted through interlocking organizations, constitute mere "parallel business conduct." JD Br. 124.

Defendants get matters backwards when they urge that an association-in-fact enterprise must have a purpose distinct from that of its constituent members. Ibid. It is the common purpose of the participants, not their independent interests, that define the enterprise. Defendants understood from the start that their deception required a joint enterprise. Indeed, the effectiveness of their scheme to defraud would be undermined unless defendants adhered to the basic principles of the enterprise. That recognition provided the common purpose and, as discussed below, dictated the structure and continuity of the enterprise.

B. Defendants Have Executed Their Scheme To Defraud With The Organization And Continuity Characteristic Of A RICO Enterprise

Defendants seek to make a virtue of the breadth of their enterprise, suggesting that its resilience in responding to evolving "attacks" on the industry (US21411_2) precludes its categorization as a single enterprise. But what is remarkable is not the extent to which defendants' enterprise has evolved over time, but the extent to which it has remained the same. The precise composition of the

enterprise has varied as defendants created, dissolved, and re-created various organizations. But the requirement of "continuity" "does not mean that individuals cannot leave the group or that new members cannot join at a later time," even if "certain defendants are found by the jury not to have been members at any time." Perholtz, 842 F.2d at 354, 364 (quotation marks omitted). Rather, "the existence of a continuing core of personnel motivated by a common interest is sufficient to constitute the association-in-fact enterprise." Id. at 355; see also United States v. White, 116 F.3d 903, 925 n.7 (D.C. Cir. 1997); United States v. Mauro, 80 F.3d 73, 77 (2d Cir. 1996); United States v. Church, 955 F.2d 688, 698 (11th Cir. 1992).

When the heads of the defendant cigarette manufacturers "linked arms" (US21408_3) at the Plaza Hotel in 1953, they consciously embarked upon a "long-term, continuing program" (US21411_2) for the purpose of countering specific health charges "and other attacks that may be expected in the future." Ibid. The manufacturers who initiated the enterprise, and their corporate successors, have constituted a core "continuing unit," Turkette, 452 U.S. at 583, that has colluded for more than half a century to deceive American consumers about the toxicity and addictiveness of cigarettes, and thereby to preserve and expand the mass market for their product. In no sense can this ambitious undertaking be deemed a mere "sporadic and temporary criminal alliance." Perholtz, 842 F.2d at 363.

The precise nature of the "attacks" to be countered has varied over time, but the fundamental purpose and strategy of the enterprise has remained unaltered. In responding to "attacks" on the health consequences of their product, defendants have misrepresented the dangers of both mainstream and sidestream smoke, and have sought to allay consumer fears through their misleading marketing of "light" cigarettes. In the face of mounting concern that the toxicity of cigarette smoke is compounded by nicotine addiction, defendants have waged a campaign to convince would-be and existing smokers that their product is merely habit-forming, not addictive in any chemical sense. At the same time, defendants have exploited the design of their cigarettes to facilitate nicotine intake in "light" cigarettes, thus helping to negate any purported health benefits.

The participants in the enterprise recognized from the beginning that they could only accomplish their goals by means of coordinated action, and that structure would be necessary to perpetrate their deception and, when necessary, to enforce cooperation. Thus, as Hill & Knowlton warned at the establishment of the enterprise, competition with respect to health risks would undermine the efforts of the enterprise to persuade the public that the risks did not exist in the first place. Accordingly, a ground rule of the enterprise was that no manufacturer could "seek a competitive advantage by inferring to its public that <u>its</u> product is less risky than

others," and no member of the group would make any "claims that special filters or toasting, or expert selection of tobacco, or extra length in the butt, or anything else, makes a given brand less likely to cause you-know-what." US87224_8-9 (second emphasis added).

From the first, defendants' collusion has thus operated with a level of sophisticated structure that easily distinguishes defendants' enterprise "from a mere conspiracy." Richardson, 167 F.3d at 625. On this score alone, there can be no doubt that the enterprise has had "sufficient organization [so] that its members function and operate[] together in a coordinated manner in order to carry out the common purpose alleged." Perholtz, 842 F.2d at 364 (quotation marks omitted).

In any event, although a RICO enterprise need not have "any particular or formal structure," Perholtz, 842 F.2d at 364 (quotation marks omitted), defendants' enterprise has been characterized to an extraordinary extent by the use of formal as well as informal structures, including a "network of interlocking organizations" (FF3861) that defendants created to coordinate their public positions and, when necessary, to enforce compliance with the enterprise position.[15]

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[15] Implying that the district court ignored applicable legal standards, defendants emphasize that the court, in using the word "enterprise" in its factual findings, "expressly stated that 'these Findings [do] not imply that Defendants' activities meet the statutory definition' of that term." JD Br. 120 (quoting Op.15 n.9). But as the quoted footnote makes clear, the court was explaining that its use

1. Policing the "United Front"

The Tobacco Institute provided a ready means of collaboration and enforcement. As its Executive Committee stressed, it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." FF187 (quoting US22682_1). From 1958 through 1999, defendants' payments to the Tobacco Institute totaled more than $600 million.[16]

Through its governing committees, working groups, and annual meetings, TI provided frequent, confidential fora in which defendants could refine and coordinate strategy:

- The TI Executive Committee, which had the "final voice" on all TI matters, included the chief executive officers of Philip Morris, RJR, B&W, Lorillard, American, and Liggett. Op.1582; FF116-117, FF124, FF185.

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of the term "enterprise" in the fact findings did not prejudge the legal issue to be addressed in the "Conclusions of Law." Op.15 n.9; see Op.1528-1538 (enterprise analysis).

[16] Defendants' individual contributions to the Tobacco Institute were: Philip Morris – $250,102,413 (US75555_71-72); RJR – $219,279,449 (US89561_135); Lorillard – $58,341,680 (US89561_223-224); B&W – $56,440,240 (US89561_345); American – $28,126,174 (US89561_345-346); Liggett – $6,070,719 (US75925_54-56).

- The TI Committee of Counsel allowed defendants' general counsels to coordinate legal positions. Op.1582, FF173-184. Indeed, as the district court emphasized, Op.4, the role of attorneys in the enterprise can hardly be overstated. Covington & Burling, whose attorneys figured prominently in many enterprise activities, served as counsel for TI and the "industry." FF118, FF180. Shook, Hardy & Bacon, which served as counsel for Philip Morris, Altria, Lorillard, Reynolds and B&W, also had a close association with TI. FF119, FF181-183.

- The TI Communications Committee brought together the industry's public relations specialists and its lawyers to develop and approve advertisements, media plans, and public relations campaigns. FF189-192.

In addition, TI created the "College of Tobacco Knowledge," an educational program that was "extremely successful" (FF194) in training industry participants – including employees from all of the defendants – to adopt a consistent public message on matters of smoking and health. FF194-211. Lecturers at the College stressed the need to maintain a united front on matters of smoking and health. See FF208 (quoting US86172_16-17) ("what affects one affects all"; "keep us together, to keep us all aware"; "a united industry is our most potent public relations and legislative tool"). The College "Dean" would "roam the room with a microphone" asking questions about smoking and health and suggesting a better response. FF197; see also US86163 (curriculum for 1981 session).

2. Policing The "United Front" Abroad

Defendants were acutely aware that developments overseas could undermine their efforts in the United States, and their "policy with respect to combating anti-cigarette activity abroad" was "but an extension of the domestic policy." FF373 (quoting US29556_2). To ensure maintenance of unity and discipline, defendants created the International Committee on Smoking Issues (ICOSI) and its successor organizations, the International Tobacco Information Center (INFOTAB), and the Tobacco Documentation Centre (TDC). FF404-440.

ICOSI was formed in 1976 when the Chairman of Imperial Tobacco proposed that the heads of a number of major tobacco companies including Philip Morris, RJR, and BATCo "meet discreetly to develop a defense smoking and health strategy for major markets" including the United States. FF3456 (quoting US20407). The initial objective of the joint operation – termed "Operation Berkshire" – was "a voluntary agreement, that no concessions beyond a certain point would be voluntarily made by the members," FF3457 (quoting US20407), lest their "countries and/or companies" be "picked off one by one, with a resultant domino effect." FF3458 (quoting US22980_1).

As a contemporaneous BATCo document admitted, "[t]he aim of ICOSI is defensive research aimed at throwing up a smoke screen and to throw doubt on

smoking research findings which show smoke causes diseases." FF3468 (quoting US28544). Renamed INFOTAB in 1980, FF418, its members included Philip Morris, BATCo, RJR, Lorillard, Liggett, and TI, as well as foreign tobacco companies. FF419-421. Shook, Hardy & Bacon, "as counsel to [Philip Morris] and other international manufacturers, was instrumental in the founding of INFOTAB to help strengthen and coordinate the activities of the various national manufacturers associations." FF429 (quoting US20311_6).

Defendants relied on INFOTAB to ensure that no member deviated from the enterprise's public positions. For example, in 1983, Philip Morris Holland briefly broke ranks with defendants' position on the efficacy of "light" cigarettes, challenging the health claims of Barclay cigarettes, a "low tar and nicotine" brand marketed by members of the BAT Industries Group including B&W. US20235; US20236; US78984. Attacking Barclay's health claims, Philip Morris Holland ran advertisements declaring that "research in America has proved that smokers, who slightly compress the Barclay filter between their lips, will take six times as much nicotine and tar as stated on the packing." US20236_104576621.

This heresy prompted an immediate telex from the chairman of BAT Industries to the CEO of Philip Morris in New York, finding it "incomprehensible that Phillip Morris would weigh so heavily the short-term commercial advantage

from deprecating a competitor's brand while weighing so lightly the long-term adverse impact from an on-going anti-smoking programme" and charging that the conduct "made a mockery of industry co-operation on smoking and health issues." US78984_1; US20235_2. The same day, the BAT Industries chairman sent a telex to INFOTAB, announcing that, in light of the Philip Morris advertisement, "BAT has decided to withdraw from all co-operation with INFOTAB for the time being." US20235_2.

The crisis was diffused when the head of Philip Morris International assured the BATCo chairman that the "Holland activity was not PM company policy"; that it was "[e]ssential" that the industry "hang together"; and that he would be "[h]appy to say this to the INFOTAB Board and anything else [BATCo] would like stated." US46577_1. "For clarity," Philip Morris indicated that it would "instruct its No. 1's that they must not use anti-smoking activities, statements or programmes for competitive gain." Ibid.[17]

[17] In 2000, the district court dismissed the claims against BAT Industries for lack of personal jurisdiction, concluding that the 1983 telex and follow-up conversation were insufficient to establish personal jurisdiction over BAT Industries, a corporation distinct from BATCo and B&W. 116 F. Supp. 2d 116 (2000); 130 F. Supp.2d 96 (2001). In light of that ruling, the government voluntarily struck three racketeering acts pertaining to BAT Industries, including an act arising out of the 1983 telex. See RA55, RA59, RA101.

Despite this reassurance, another crisis over Barclay developed in 1987, when Philip Morris urged that the machine-testing method used by the International Standards Organisation (ISO) was "not suitable for testing channel ventilated cigarettes, i.e., 'Barclay.'" US85082_1; US85062_400015688. As discussed at (Liability) Point V(A) below, defendants were well aware that machine-testing methods for tar and nicotine did not take into account the compensatory techniques used by smokers to obtain a necessary dose of nicotine. At a high-level meeting in New York, representatives of the BAT Group, including BATCo and B&W, determined to bring the Philip Morris campaign to end with a compelling threat. Philip Morris had as much to lose as the BAT Group from revealing defendants' understanding of smoker compensation. If Philip Morris broke ranks, it would do so at its peril. A memorandum summarizing the BAT strategy recorded:

> We should explain to Philip Morris and to other members of the Industry involved in ISO that we are not prepared to stand by and see Barclay dealt with unfairly .... We should say that unless attacks on Barclay cease ... we will take whatever action is appropriate to make known to consumers the fact that machine figures do not provide an accurate guide to human uptake from all ventilated products.

US85062_400015689. As the vehicle for conveying that ultimatum, BAT turned again to INFOTAB. Ibid. ("This contact should be at a senior level and a possible

route could be through the Chairman of INFOTAB to those individuals who represent their companies at meetings of principals.").

The threats succeeded. At a 1989 meeting near London's Gatwick airport, Philip Morris and BAT Group representatives agreed to drop their public dispute over the testing of ventilated "low-tar" cigarettes and to pursue any adjustments to the testing method instead under the aegis of CORESTA – yet another tobacco industry organization in which all defendants were (and remain) members. US26783_1-2; see also FF441, FF443 (describing CORESTA).

Defendants also have established groups to coordinate industry positions on specific topics, such as environmental tobacco smoke. For example, in 1991, after an Australian court held TI liable for publishing advertisements that falsely denied the relationship between ETS and disease,[18] defendants created the International ETS Management Committee (IEMC) to reestablish a "common position for the industry on ETS." FF3577. Its members included Philip Morris, BATCo, RJR, American, and foreign tobacco companies. FF3571. IEMC retained Covington

[18] The TI advertisement, published in Australian newspapers, stated: "Lately, however, many non-smokers have been led to believe that cigarette smoke in the air can actually cause disease. There is little evidence, and nothing which proves scientifically that cigarette smoke causes disease in nonsmokers." FF3573. The Australian court held that the advertisement was deceptive, noting the "compelling scientific evidence that cigarette smoke cause[s] lung cancer in nonsmokers." FF3575.

& Burling to draft a unified ETS position on behalf of the industry. FF3577. Completed in 1992, the "ETS White Paper" elaborated defendants' knowingly false assertions that no evidence links ETS to adverse health effects in children or adults. US88467. All IEMC member companies approved the "White Paper," which became the basis for defendants' public statements in the United States and around the world. FF3580.

3. Creating Purportedly Independent Research

From the inception of the enterprise, defendants have formed a variety of organizations for the purpose of creating what they termed "marketable science." FF3637.

The first public pronouncement of the enterprise, the 1954 "Frank Statement," announced the formation of the Tobacco Industry Research Committee, "a sophisticated public relations vehicle – based on the premise of conducting independent scientific research – to deny the harms of smoking and reassure the public." FF21. Indeed, defendants later renamed TIRC the Council for Tobacco Research "because 'Tobacco Industry Research Committee' sounded too much like industry-directed, as distinct from independent, research." FF29 (quoting US87532_3).

CTR's "dual functions" of public relations and scientific research "were intertwined, with the scientific program ... always subservient to the goal of public relations." FF60; FF60-107. Although defendants publicly stressed the credentials of CTR's scientific advisory board, e.g., FF91, the board's activities were restricted "almost without exception [to] projects which are not related directly to smoking and lung cancer," FF67 (quoting US21369_5), so as to "create the appearance of ... devoting substantial resources to the problem without the risk of funding further 'contrary evidence.'" FF65 (quoting Harris_WD_105). Instead of "addressing the constituents in tobacco smoke and their demonstrated effect on the human body," the "majority of [CTR's] resources" went towards investigating "alternative theories of the origins of cancer centering on genetic factors and environmental risks." FF65. Defendants recognized that by funding such "basic research" into alternative hypotheses for smoking related diseases, they could keep "alive the Enterprise's open question argument of causation." FF70.

At the same time, through a secret arrangement that bypassed the advisory board, defendants pursued "CTR Special Projects" – research programs directed by defendants' lawyers and calculated to yield the results favorable to the industry. FF238-271; see also FF279 (listing scientists funded through CTR Special Projects). As a 1970 internal Philip Morris memo declared: "Let's face it. We are

interested in evidence which we believe denies the allegation that cigarette smoking causes disease." FF62 (quoting US20085_1).

From 1966 to 1990, defendants contributed more than $18 million to CTR Special Projects.[19] See, e.g., FF266 (US20310) (Racketeering Act #78); FF275 (US58613) (Racketeering Act #90); FF303 (US20887) (Racketeering Act #52). After CTR Special Project funding ended in 1990, FF272, Philip Morris, RJR, B&W, Lorillard, American and Liggett continued to jointly fund research projects through "Lawyers Special Accounts," ibid., which, as the name suggests, were directed and managed by industry lawyers. FF273-279; FF280-313; see FF282 (quoting US20796) (Racketeering Act #73). TI and other defendants regularly cited the conclusions of scientists funded through CTR Special Projects or Lawyers Special Accounts as the product of disinterested research – without revealing that the scientists had, in fact, been funded by the industry. See, e.g., FF150.

Defendants' joint efforts to combat public concerns about ETS included "Operation Downunder," which later gave rise to the "Whitecoat Project." As noted above, the vice chairman of Altria in 1987 convened a conference to

[19] Defendants' individual contributions to CTR Special Projects were: Philip Morris – $5,837,923; RJR – $6,029,255; B&W – $2,571,354; American – $2,049,354; Lorillard – $1,638,490. US75927_108. From 1966 to 1975, Liggett contributed approximately $144,000. Ibid.

formulate strategy on ETS, at the conclusion of which Philip Morris decided to bring in the rest of the industry "**at the highest level. CEO to CEO. Chairman to Chairman**." FF3490 (quoting US22950_6) (emphasis added). Thereafter, Covington & Burling attorney Rupp met with representatives of TI, Reynolds, Liggett, Philip Morris, and Hill & Knowlton and made a series of recommendations. FF3491 (citing US88587). Among other things, Rupp proposed that the industry establish "a task force under the auspices of the Tobacco Institute to refine a plan to deal with the ETS issue," with membership "restricted to individuals who are senior enough to speak for each company"; that the ETS issue be "separately budgeted within the Tobacco Institute"; and that the budgetary levels for ETS be "increased dramatically." US88587_6. He proposed that the industry "[r]ecruit, train and deploy double or triple the number of academic and business scientists and support them better," and engage in a "more aggressive media relations program[.]" Ibid.

In January 1988, TI's Executive Committee "approved the concept of Operation Downunder," FF3492 (quoting US65548_TIDN0002710), and the following month Covington attorney David Remes and Philip Morris met with representatives of BATCo and other European manufacturers in London to enlist their cooperation and financial support for Operation Downunder. FF3495 (citing

US20586). In a memorandum describing the London meeting, BATCo Scientific Director Sharon Blackie Boyse wrote that it "must be appreciated that Philip Morris [is] putting vast amounts of funding into these projects: not only in directly funding large numbers of research projects all over the world, but in **attempting to coordinate and pay so many scientists on an international basis to keep the ETS controversy alive**." US20586_321140949 (emphasis added).

As a result of these meetings, defendants implemented the "ETS Consultancy Program," also known as the "Whitecoat" project, FF3606, a worldwide network of purportedly independent researchers and academics recruited to attack the scientific evidence linking ETS exposure to disease and to "create the impression that a legitimate controversy existed among independent scientists." FF3635; FF3601; FF3645; see FF3601-3679. By 1989, this program was managed by 30 attorneys, featured 70 scientists ostensibly unconnected to the tobacco industry, and had already yielded more than 1100 media interviews, 43 papers, and three books published in seven languages. FF3645.

Defendants also created organizations that, to all appearances, had no connection to the industry, but were in fact designed to generate purportedly independent evidence for use as "ammunition" (FF3447) in manipulating public opinion. For example, the Center for Indoor Air Research (CIAR) held itself out as

"an independent, non-profit corporation" whose purpose was "to sponsor scientific and technical research" on indoor air-quality issues, including environmental tobacco smoke. FF3518 (quoting US20588_3). The organization recruited a panel of highly regarded outside scientists to serve on its "Scientific Advisory Board," which was ostensibly responsible for reviewing and approving all research proposals. FF3514, FF3517. CIAR emphasized the credentials of these scientists its public newsletters and publications, none of which disclosed the connection between CIAR and the tobacco industry. FF3521-3522.

In reality, CIAR was established as a successor to the Tobacco Institute's ETS advisory group. FF3498, FF3501.[20] The chairman of CIAR – a Philip Morris executive – privately described the purpose of the organization as providing scientific "ammunition" for the industry: "I think many of us have conceptualized the ETS issue as a battlefield in which ... the ammunition which is used happens to be science. It has been the purpose of CIAR as well as its precursor, the ETS Advisory Committee, to provide ammunition in this fight." FF3447 (quoting US20340_1). Thus, notwithstanding CIAR's eminent (and highly publicized) scientific advisory board, only the CIAR board of directors – composed of

[20] The charter members of CIAR were Philip Morris, Lorillard, and Reynolds; B&W joined as a voting member in 1995. FF3501, FF3502. BATCo, though not formally a member, contributed funding. FF3502.

defendants' representatives – had the authority to approve funding for CIAR projects. FF3516. Moreover, CIAR devoted more than one-third of its total funding to "Applied Projects" that were selected solely in response to the "needs" of the enterprise, bypassing the scientific advisory board entirely. FF3524, FF3529, FF3530, FF3531; see also FF3529 (examples of CIAR-funded research). The resulting scientific papers, while proclaiming CIAR's sponsorship, failed to disclose CIAR's relationship to the tobacco industry. E.g., FF3542, FF3543, FF3547, FF3552, FF3554, FF3556.

Defendants selected this structure, in the words of one CIAR board member, "**to 'hide' industry involvement**." FF3545 (quoting US22816) (emphasis added); see also, e.g., FF3533 (quoting US47526_400974599) (BATCo describing CIAR as a "buffer" for "scientific acceptability"); FF3546 (quoting US23007_14) (CIAR lawyer explaining that, because a proposed research project would be carried out by CIAR, "we expect the results will carry (however inappropriately) more weight with a variety of target audiences"). Indeed, in some instances defendants listed CIAR as the sponsor of research projects even when in fact the organization had not supplied any funding, solely to avoid acknowledging the defendants as the true sponsors. FF3554. As one CIAR representative bragged in 1991, "I am not aware of an instance in which our opponents have been able to dismiss the results of

CIAR-funded projects by attacking the funding source. That, it seems to me, is a very real and important achievement." FF3536 (quoting US23516_2).

Defendants pursued a similar tactic in establishing a group called Indoor Air International (IAI), FF3655, now named the International Society of the Built Environment. FF3662. Created in 1989 as an offshoot of another industry shell, see FF3650, FF3651, FF3655, IAI purported to serve as an international "learned scientific society" for researchers on indoor air quality issues. FF3655. In fact, the organization was founded by defendants' paid consultants in Europe, organized and run by Covington & Burling, and funded entirely by Philip Morris and BATCo. FF3656. Defendants positioned IAI as an "independent and accepted source of ideas and research regarding [indoor air quality] to the public." FF3655 (quoting US27901_5). Consequently, they directed their attorneys to avoid establishing "direct relationship[s]" with IAI members, recognizing that the members' "potential usefulness" to the industry would be "compromised" by any such link. FF3659 (quoting US22037_1-2). Under the guise of an independent professional association, IAI even began publishing its own scientific journal. Using a reputable Swiss scientific publishing house, defendants enlisted their paid consultants to contribute articles and serve on the journal's editorial board. FF3655, FF3661, FF3657.

Like CIAR publications, IAI's scientific journal and newsletters consistently omitted any reference to the tobacco industry, and instead characterized the organization as a "learned society" dedicated to "promoting indoor air quality." FF3658 (quoting US85560_2-3). Describing IAI's success in achieving credibility in the scientific community, a 1991 internal Philip Morris memorandum boasted: "In all, no other resource gives the industry any similar access to the scientific community, government and those who make decisions about [indoor air quality] issues and standards." FF3661 (quoting US23708_2).

In sum, defendants jointly established a myriad of entities both domestic and international to coordinate their public positions, enforce allegiance to the enterprise, and generate the purportedly "independent" research on which their scheme to defraud relied. Against this background, defendants cannot seriously contend that their fifty-year collusion was nothing more than a "sporadic and temporary criminal alliance." Perholtz, 842 F.2d at 363.[21]

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[21] The district court also found that each defendant was "associated" with the enterprise and that each "participate[d], directly or indirectly" in the conduct of its affairs. 18 U.S.C. § 1962(c). See Op. 1539-42 (association); Op.1542-48 (participation). Although defendants deny the existence of an enterprise, they do not (Altria aside) separately challenge the findings of association and participation. Nor could they plausibly do so, given the intimate involvement of each of the defendants in the various organizations and entities they created to serve the ends of the enterprise. See, e.g., United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002); United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992). It is also not

III. DEFENDANTS ACTED WITH SPECIFIC INTENT TO DEFRAUD CONSUMERS THROUGH A PATTERN OF MAIL AND WIRE FRAUD VIOLATIONS

A. The Mail And Wire Fraud Statutes

The district court correctly found that defendants acted with specific intent to defraud, that the fraud was material to the purchasing decisions of consumers, and that each defendant committed at least two racketeering acts as part of a pattern of racketeering activity.

The racketeering acts at issue here are violations of the mail fraud statute, 18 U.S.C. § 1341 and the wire fraud statute, 18 U.S.C. § 1343. Section 1341 provides in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, [mails or causes the mailing of any matter]" shall be subject to criminal penalties. The wire fraud statute, 18 U.S.C. § 1343, was patterned after the mail fraud statute, and its identical language has been construed in the same way as the mail fraud statute. Pasquantino v. United

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disputed that the enterprise was engaged in and affected "interstate or foreign commerce." 18 U.S.C. § 1962(c). See Op.1538; FF486-508.

States, 544 U.S. 349, 355 n.2 (2005); United States v. Lemire, 720 F.2d 1327, 1334-1335 n.6 (D.C. Cir. 1983).

To find a violation of these statutes, a court must determine that a defendant (1) knowingly devised or intended to devise any scheme to defraud a victim of money or property, or knowingly devised or intended to devise any scheme for obtaining money or property by means of material false or fraudulent, representations, pretenses, or promises; (2) mailed or caused the mailing of (or sent or caused to be sent by interstate wire transmission) any matter for the purpose of furthering the scheme; and (3) that the defendant acted with specific intent to defraud. Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Defries, 129 F.3d 1293, 1301 (D.C. Cir. 1997).

"Intent to defraud need not be shown through active misrepresentation – material omissions can be fraudulent if they are intended to create a false impression." Kemp v. AT&T, 393 F.3d 1354, 1359 (11th Cir. 2004) (quotation marks omitted). "A half truth, or what is usually the same thing, a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the

advantage of the misleader and the disadvantage of the misled." Emery v. American General Finance, Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) (Posner, J.).[22]

B. The District Court Correctly Inferred From The Totality Of The Circumstances That Defendants Acted With Specific Intent To Defraud

As defendants do not dispute, a corporation may be held liable for the wrongful acts of its agents or employees committed within the scope of their employment, as long as the acts were motivated in part to benefit the corporation. United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998) (wire fraud), aff'd, 526 U.S. 398 (1999); Op.1572-1573.[23]

Observing that "good faith" negates a specific intent to defraud, JD Br. 23, defendants raise as an ostensibly controlling legal issue whether "a corporate defendant can have specific intent to defraud even though no agent or employee of the corporation had such intent." JD Br. 1 (Question 1); JD Br. 23-32. They protest that it is "grossly improper, and a violation of due process and the First

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[22] See also, e.g., United States v. Gray, 405 F.3d 227, 235 (4th Cir. 2005); United States v. Autuori, 212 F.3d 105, 118 (2d Cir. 2000); United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000); United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997).

[23] "In a civil case, there may be no need to show that the agent acted to further the principal's interests – a showing of 'apparent authority' is often enough." Sun-Diamond, 138 F.3d at 970 n.9. In this case, the fraud was unquestionably intended to benefit the corporate defendants.

Amendment, to attribute to a public speaker the inconsistent views of another cherry-picked employee in order to create a fictional proscribed intent for which the corporation is liable." JD Br. 30. They urge that a "plaintiff will almost always be able to splice together statements by company personnel to create a conflict between the internal statements of one employee and the public statements of another[.]" JD Br. 31-32.

Defendants attack a straw man. The district court did not suggest that the intent of individuals was irrelevant in determining the specific intent of the corporation. To the contrary, the court made clear that specific intent requires proof that a person with authority to act on behalf of the corporation possessed the requisite wrongful intent, or acted with reckless disregard for or willful blindness to the truth. Op.1579, 1580 (citing, e.g., Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996)). Furthermore, the court expressly rejected the proposition that the "aggregation of different states of minds of various corporate actors is sufficient to demonstrate specific intent in cases where individuals within a corporation make fraudulent statements." Op.1579.

Based on its comprehensive evaluation of the evidence, the district court found that defendants' officers and agents acted with the specific intent to defraud. Indeed, "in light of the overwhelming evidence of what the Enterprise as a whole

and individual Defendants knew," the court found it "absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent." Op.1503. Defendants' suggestion that their public statements were "simply statements of opinion held in good faith," Op.1502, the court explained, "strains credulity." Op.1503.

The court's finding of specific intent has overwhelming support in the record. Indeed, it is difficult to imagine a case where the evidence of intent to defraud is more compelling. Contrary to defendants' assertions, the district court did not "splice together" the differing views of "cherry-picked" employees to establish an intent to defraud. JD Br. 30, 31. The court cited volumes of internal documents involving hundreds of employees, including the individuals at the helms of the defendant companies and the entities that they jointly created. As the court stressed, "[i]n the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including high level scientists – CEOs, Vice Presidents, Heads of Research & Development, not entry level employees – at each of the Defendant companies who would reasonably be expected to have knowledge of the company's internal research, public positions, and long term strategies." Op.1581-82.

At a minimum, the contrast between defendants' public statements and the results of their internal research would support the inference that their representatives acted with "reckless disregard for the truth of their public statements[.]" Op.1582. As defendants admit, such "reckless disregard" establishes the specific intent requirement. JD Br.30 (citing Southland Securities Corp. v. INSpire Ins. Solutions Inc., 365 F.3d 353, 366 (5th Cir. 2004)); accord United States v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000) ("reckless indifference to the truth or falsity of a statement satisfies the specific intent requirement in a mail fraud case").

Here, however, defendants do not even claim that their officers were ignorant of the conclusions reached by their company scientists regarding the health risks and addictiveness of smoking, conclusions that were reported at high levels. Nor do they identify an internal controversy on these issues that could have created a reasonable doubt in the minds of the executives who made or approved the public statements. Even absent the compelling evidence that defendants' high-level executives actively orchestrated the fraud, the persistent and profound contradictions between their public statements and their internal documents would alone justify the district court's inference of intent to deceive. As Judge Learned Hand observed in an analogous context, "the cumulation of instances, each

explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." United States v. White, 124 F.2d 181, 185 (2d Cir. 1941).

In any event, defendants' officers were active participants in the fraud, which was orchestrated at the highest levels of their companies. Defendants' chief executive officers served on the TI Executive Committee, Op.1582, which had the "final voice on TI matters." FF116, FF185. Their general counsel served on the TI Committee of Counsel and, along with their executives, played a central role in guiding defendants' disinformation campaign, directing both the substance of the public statements and the funding of "marketable science" (FF3637) to be used as "ammunition" (FF3447) in that campaign. "Time after time, Defendants' executives and policy-makers chose courses of action intended to preserve the chasm between internally recorded facts and knowledge and externally professed ignorance and denial." Op.1582.

Defendants' intent to deceive is also manifest in the "'modus operandi of the scheme,'" Op.1581 (quoting United States v. Reid, 533 F.2d 1255, 1264 (D.C. Cir. 1976)), which relied on secret high-level meetings and covert industry "operations." See, e.g., FF3456-3480 ("Operation Berkshire"); FF3481-3496 ("Operation Downunder"). As the district court found, defendants made massive

efforts to conceal both their damaging internal research, see FF3863-4035, and the industry's links to the scientists and consultants whose work defendants funded. See, e.g., FF150, FF167, FF3663-3668; FF3808-3823.

Philip Morris's acquisition of its German research facility, INBIFO, to avoid the "unattractive repercussions" of domestic research, FF3909, is illustrative. As the company vice president stressed in a 1977 letter to his Swiss counterpart: "We have gone to great pains to eliminate any written contact with INBIFO and I would like to maintain this structure." FF3911 (quoting US20295_1). The executive thus suggested that "a 'dummy' mailing address in Koln" could be used for receipt of samples, and advised that written analytical data must be routed through a third entity "if we are to avoid direct contact between INBIFO and Philip Morris U.S.A." Ibid. (Racketeering Act #41). The senior Philip Morris research official who acted as primary liaison with INBIFO advised that it was "OK to phone & telex (these will be destroyed)" but stated that "[i]f important letters have to be sent please send to home – I will act on them + destroy." FF3910 (quoting US34424).

In domestic research, Philip Morris scientists were barred from conducting biological research that might undermine the claim that "[w]e within the industry are ignorant of any relationship between smoking and disease." US34422_1 (1980 memorandum from the Philip Morris Principal Scientist to vice president (copied

to the INBIFO liaison)). Although company scientists were allowed to investigate the pharmacological effects of nicotine – an issue of great commercial significance – they "must not be visible about it" because the company's attorneys insisted "upon a clandestine effort in order to keep nicotine the drug in low profile." Id. at 1, 2 (quoted in FF3925). Other defendants issued similar internal directives designed to conceal damaging information.[24]

A BATCo episode illustrates the lengths to which defendants would go to hide the links between the industry and its paid scientists and other consultants. In 1992, BATCo scientist Sharon Blackie Boyse sent a fax to the manager of BATCo's Argentine company. FF3984. The fax included a price quote from Healthy Buildings International (HBI), a firm funded by CTR to conduct indoor air testing as part of the industry's campaign to dispute the link between secondhand

[24] See, e.g., FF3897 (B&W corporate counsel required BAT scientist to edit a paper before publication, stressing that a "concession by a cigarette manufacturer to the charge that cigarettes cause human disease or a statement which contradicts the concept of voluntary choice of smoking by the consumer could cripple or destroy B&W's defense to smoking and health lawsuits and opposition to legislative attacks," and that "[t]his would be true even though the statements were made by BAT") (quoting JD053700_2); FF3872 (RJR's lawyers "did not want anyone performing research that would appear to acknowledge that cigarettes or cigarette smoke contained harmful constituents or posed a health problem") (quoting US21922_30, 39); US20287 (discussed in FF3927) (Lorillard's future CEO directed a scientist to delete data relating to human smoking habits from a research paper, explaining: "I do not want Lorillard to report identifiable data on human smoking behavior.").

smoke and disease. FF3669-3679. Stressing that HBI was "under a considerable amount of investigation in the U.S. about their connections with the industry," Boyse explained in the fax cover sheet that "[a]ll references to the companies in the quote [have] therefore been removed." FF3984 (quoting US85632_304058260). Boyse directed the recipient: **"Please do not copy or circulate this in any way and please destroy this fax cover sheet after reading!"** Ibid. (bold in original). She recognized that "this sounds a little like James Bond," but stressed that "this is an extremely sensitive issue for HBI." Ibid.

Against this background, defendants' protestations of "good faith" are, as the district court concluded, "absurd." Op.1503. As the court stressed, the "overall scheme to defraud" and the "purposeful and conscious actions taken" by defendants reveal "a 'cumulative pattern' of decisions, actions, and inaction that is powerful circumstantial evidence of specific fraudulent intent." Op.1581.

As they do repeatedly throughout their brief, defendants present their arguments as if the findings of fact and the underlying evidence did not exist. Instead, they argue "[t]he government did not even attempt to prove that any agent or employee of defendants had such intent." JD Br. 24. It is not clear precisely what defendants mean by this. The government produced voluminous evidence, addressed in the findings of fact, from which the district court properly inferred the

fraudulent intent of defendants' top executives. The government was not required to make any additional showing.

In any event, the government's post-trial brief provided more than twenty pages of "examples of particular executives, employees and agents of Defendants who possessed the specific intent required under the mail and wire fraud laws," with citations to supporting evidence. DN5606_106-127. The brief identified officers or agents of each defendant who acted with a specific intent to defraud, ibid., and stressed that the examples were merely illustrative of the many additional examples contained in the government's proposed findings of fact. DN5606_106.

Defendants made no serious attempt to rebut this evidence. Instead, they urged that the proof was inadequate because the officers who made or approved the public statements might have "personally believed" that the public statements were true, DN5666_20, despite the wealth of contradictory evidence.[25]

But as the district court explained, a showing of specific intent does not require that individuals actually attest to their frame of mind. Under settled

[25] For example, their post-trial brief argued that the government "never proved that PM USA Chairman James Bowling personally believed that cigarette smoking was addictive (and intended to defraud consumers) when he stated that it was not 'addictive,'" urging that "[t]he fact that others employed by PM USA may have believed that smoking was addictive cannot substitute for proof of Mr. Bowling's specific intent." DN5666_20.

principles, fraudulent intent under the mail and wire fraud statutes may "be proven by inference from the totality of the circumstances, including by indirect or circumstantial evidence," Op.1581 (citing United States v. Alston, 609 F.2d 531, 538 (D.C. Cir. 1979)), and it "may be inferred from the modus operandi of the scheme.'" Op.1582 (quoting United States v. Reid, 533 F.2d 1255, 1264 (D.C. Cir. 1976)).

From the evidence amassed in this case, the inference of specific intent to defraud was inescapable. Certainly, the district court's finding of fraudulent intent was not clear error.

C. Defendants' Misrepresentations Were Material In Attracting And Retaining Customers

As the preceding discussion shows, defendants have engaged in a carefully orchestrated scheme to make knowing misrepresentations about the toxicity and addictiveness of their product. These are, incontrovertibly, matters of importance to the reasonable consumer. When, as here, "the alleged deception rises to 'a commonplace,' a court may itself find the deception 'self-evident'" without further evidence of consumer perceptions. FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41 (D.C. Cir. 1985) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-53 (1985)). Indeed, a court "must ... rely on its own experience and understanding of human nature in drawing reasonable inferences

about the reactions of consumers to the challenged advertising." Ibid.; see also Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (noting that the FTC presumes materiality for health and safety claims).

To rebut the district court's amply supported factfindings, defendants offer a variety of related arguments which fail singly and in combination.

1. Reliance on Defendants' Statements

Defendants assert that there is a "complete absence of evidence that any consumer anywhere actually took defendants' statements into account in deciding whether to purchase cigarettes." JD Br. 96. In other words, they urge that their decades of misrepresentation on matters crucial to consumer purchases have had no impact.

As an initial matter, defendants' "Who would believe us?" defense mistakes the relevant legal inquiry. Because "[t]he only issue is whether there is a plan, scheme or artifice intended to defraud," the mail and wire fraud statutes apply even where the putative victims would have been unreasonable in falling for defendants' scheme. United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). As this Court has recognized, "it makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright." Ibid. (quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980)); see also United States v.

Deaver, 155 F.2d 740, 744-45 (D.C. Cir. 1946) (holding that the "monumental credulity of the victim is no shield" to liability under the mail or wire fraud statutes); United States v. Amico, 486 F.3d 764, 780 (2d Cir. 2007) (noting that the "majority of circuits to address the issue" have rejected the argument that "mail fraud requires the government to prove that a reasonable person would have acted on the representations").

In any event, defendants' suggestion that their fraud was pointless rests on a neat, if unconvincing, sleight-of-hand. Defendants argue that before the public health community reached "consensus" on a particular issue, their public statements could not have been fraudulent. JD Br. 63-64, 95-96, 102-103, 106-107. After the public health community reached consensus, they urge, it would be "implausible" that "consumers would look to the financially motivated views of defendants, rather than the 'consensus' of the public health community." JD Br. 96.

This type of logic cannot persuade. As we have shown, defendants' understanding of the toxicity and addictiveness of cigarettes far outstripped the knowledge of the public health community. Their public statements were fraudulent not merely because they were inaccurate, but because they were

knowingly contrary to defendants' own research at the time the statements were made. Op.1503-1505.

Thus, defendants are wrong to say that "statements denying ETS's health effects only became fraudulent when a scientific consensus emerged in 1986" (JD Br. 63); that "denials of 'addiction'" only became fraudulent after 1988, when the Surgeon General described nicotine as an addictive drug (JD Br. 63); and that claims about the "relative health benefits of low tar cigarettes" only became fraudulent in 2001, when the National Cancer Institute concluded that low tar cigarettes are no less hazardous than other cigarettes (JD Br. 64). Defendants' 1981 campaign to discredit an epidemiological study of environmental tobacco smoke was fraudulent because defendants knew that their charge of statistical error was false. FF3395-3401. Their 1982 claim that smoking is no more addictive than "tennis, jogging, candy, [and] rock music," US65625_TIMN0120730 – made after the National Institute for Drug Abuse determined that nicotine met the standard criteria for a dependence-producing drug – was fraudulent because it was contrary to defendants' internal research at the time it was made. FF1208-1210; FF883. Defendants' marketing of "light" cigarettes as "health reassurance" brands was fraudulent well before 2001 because they have known since the 1970s that,

"regardless of which cigarette the smoker chooses, in obtaining his daily nicotine requirement he will receive about the same daily amount of 'tar.'" US29473_7.

Defendants, of course, have continued their misrepresentations well after the various Surgeon General reports that, they assert, mark various stages of progress in scientific consensus. However, they insist they could do so without fear of liability, on the theory that none of their misstatements could be material once the scientific consensus had crystalized. JD Br. 96.

This prong of defendants' Catch-22 is no more convincing than their first proposition. It is odd, to say the least, that defendants should insist that no reasonable consumer would believe their assertions. That was plainly not their view when they sought to discredit the reports of the Surgeon General and other public health officials, as when they attacked the Surgeon General's reports for "endeavoring to scare pregnant women," FF740 (quoting US21687), or for "insult[ing] the scientific community," FF743 (quoting US21322).[26] As the district court explained, defendants knew full well "just how badly ordinary smokers addicted to nicotine did not want to believe, in the early days, that smoking was

[26] Indeed, the Tobacco Institute publicly touted the consumer's "right to reject 'official' information," US85358 at 1, in a newsletter declaring that "Lung Cancer Remains A Mystery" (id. at 6); "Smoking/Pregnancy Charges Unproven" (ibid.); "Heart Disease Label 'Invalid'" (id. at 8); and "Smoking Said Not Addictive" (ibid.).

disastrous for their health[,] and then as the evidence mounted, wanted to believe that they could smoke low tar light cigarettes and not sacrifice their health." Op.1584. Indeed, that recognition formed the foundation of defendants' "open question" strategy that would, in the words of a Philip Morris senior executive, "give smokers a psychological crutch and a self-rationale to continue smoking." FF636 (quoting US20189_1).

Thus, as the district court found, "[t]here is no question that the Tobacco Institute intended the public to rely on the public statements the organization made on behalf of its cigarette manufacturer members." FF152. Two former spokespersons for TI admitted as much. Ibid. Moreover, defendants together spent more than $600 million to fund the Tobacco Institute, which spread their false messages to American consumers. FF121. As this Court observed, such a "vast expenditure of advertising dollars ... strongly supports public reliance because advertising expenditures presumptively have the effect intended." FTC v. Brown & Williamson, 778 F.2d at 42.

2. Nicotine Addiction

Although defendants now describe their public statements about addiction as a "semantic debate over whether cigarette smoking causes 'addiction' or 'dependence,'" JD Br. 100-101, the record shows that they publicly denied both

addiction and dependency. In no uncertain terms, their TI spokesperson told national television audiences in 1994 that "[t]here is no chemical addiction" involved in smoking; "it's not a chemical dependency." US87155_9.; see also US21239 (1988 TI press release denying that "cigarette smoking causes physical dependence").

And while defendants now insist that "addiction" is an "inherently ambiguous" term, JD Br. 108, their TI spokesperson urged their 1994 television audiences "to make a very important distinction" between the "two meanings" of addiction – the "everyday meaning – when we talk about being 'news junkies' or 'chocoholics'" and the meaning "in a drug sense, in the sense that we apply it to heroin or cocaine[.]" US89300_9-10. They publicly represented to American consumers that smoking is "addictive" only in the "everyday meaning," id. at 9, the "loose, jargony word" that "we've all somehow seemed to have adopted into our lexicon," and they likened the attachment to cigarettes to being "hooked on exercise." US89319_3.

Although defendants describe their public statements about nicotine manipulation as denying only that they spiked cigarettes with nicotine, JD Br. 98, the record shows that they denied manipulation of any kind – including their longstanding efforts to improve the uptake of nicotine in smokers' bodies by

manipulating blend ratios, FF1517-1525, chemical additives, FF1599-1615, particle sizes, FF1581-1584, ventilation and dilution, FF1585-1587, and myriad other factors, FF1510-1513. Appearing on "Face the Nation" in 1994, their TI spokesperson declared that "all six cigarette manufacturers in the United States" had provided statements to Congress indicating "that **not only do they not add nicotine, but they don't manipulate nicotine**. So Congress has been told formally by every cigarette manufacturer in the United States, that this claim is without foundation." US89319_2 (emphasis added) (cited in FF1236). On the "MacNeil/Lehrer Newshour" she declared that tobacco "has nicotine in it because the nicotine is in the plant"; that it "occurs naturally"; and that "[t]here's no manipulation done by the manufacturers." US89300_8-9 (cited in FF1237).

3. "Light" Cigarettes

Defendants do not dispute that their implied health claims about "light" cigarettes are material to consumers. As Philip Morris acknowledged in its 1992-1996 Strategic Plan, an "analysis of the cigarette market over the last 50 years suggests that there have been only two major influences on smokers buying patterns; namely, smokers seeking to address their perceived health concerns and smokers seeking price relief." FF2470 (quoting US85084_70). Underscoring these concerns, defendants' focus groups consistently reported that "light"

cigarettes were preferred because they were perceived as less harmful and less addictive than other cigarettes. See, e.g., FF2339 (quoting US22082_325239017) (2001 BATCo report on California marketing studies explained that smokers identified low tar and nicotine cigarettes as "less harmful" and "as a substitute for quitting"); FF2329 (2000 B&W marketing report); FF2310 (1996 Philip Morris consumer research study); FF2320 (1983 RJR report).

Defendants assert, however, that their health claims were not misleading, because "if an individual compensates by smoking more light cigarettes, such an individual cannot reasonably expect to obtain the same benefits that he or she would have otherwise obtained by not smoking more." JD Br. 85.

But as defendants have long known, compensatory smoking is a largely subconscious process that may involve "taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes." FF2026. This behavior is closely related to the addictiveness of nicotine, which is not, as defendants have asserted, analogous to the enjoyment of Gummi Bears.

Moreover, defendants have not suggested that smokers are aware of their compensatory mechanisms. Their position, to the contrary, has been that smokers should not be told about those mechanisms. Thus defendants have insisted to the

FTC that there is no need to warn smokers about "compensatory smoking" because it is not a "sufficiently common or documented phenomenon that consumers should be alerted to its existence[.]" US88618_89; id. at 82 (same for vent-blocking).

4. Environmental Tobacco Smoke

Defendants assert that their statements about ETS were directed at government regulators rather than at consumers. JD Br. 100. But defendants do not suggest, and did not believe, that consumers are indifferent to whether their smoke poisons their spouses and children. Unsurprisingly, therefore, defendants and their paid consultants bombarded the general public with pamphlets, newsletters and press releases denying that ETS exposure is harmful. See, e.g., FF3395-3401 (1981); FF3698 (1984), FF3705 (1987); FF3804 (1987); FF3805 (1988); FF3645 (1989); FF3809 (1990); FF3819-3820 (1990); FF3822 (1993); FF3823 (1999); FF3830 (2004 RJR website); FF3834 (2003 B&W website); FF3835 (2003 BATCo website).

5. Youth Marketing

Defendants' objections to the materiality of their youth marketing claims misapprehend the relevance of their marketing efforts. The district court did not enjoin youth marketing and did not require corrective statements regarding

defendants' youth marketing practices. Defendants' youth marketing is significant because the youth population is particularly susceptible to their fraudulent messages about smoking and health. As the district court found, "the research and expert testimony demonstrate that most youth, at a time when they are deciding whether to start smoking, have a very inadequate understanding of the medical consequences, physical pain, and emotional suffering which results from smoking and the unlikelihood of their being able to quit smoking at some future time." FF2716. Young people "do not adequately understand and appreciate the cumulative risk that smoking entails." FF2700; see FF2701-2716.

Defendants do not dispute that youth "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979). Their arguments about youth marketing underscore their broader failure to comprehend that the district court found a single scheme to defraud consumers about the toxicity and addictiveness of cigarettes, not multiple unrelated schemes. As the district court stressed, "[t]he individual components must be viewed not independently but in context of the entire scheme to defraud." Op.1502.

D. Each Defendant Committed Two Or More Predicate Acts In Furtherance Of The Scheme To Defraud

RICO makes illegal the "conduct of [an] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The RICO statute sets forth only "a minimum necessary condition" for a pattern of racketeering activity. H.J., Inc., 492 U.S. at 237, 239.

Each separate mailing or transmission in furtherance of a scheme to defraud constitutes an offense under the mail and wire fraud statutes, even where the mailings are in furtherance of a single scheme to defraud. Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965) (citing Badders v. United States, 240 U.S. 391, 394 (1916)); see also, e.g., United States v. Caldwell, 302 F.3d 399, 408 (5th Cir. 2002); Pizzo v. Bekin Van Lines Co., 258 F.3d 629, 632-33 (7th Cir. 2001).

The mailings "need not be an essential element of the scheme." Schmuck v. United States, 489 U.S. 705, 710 (1989). It is "not necessary that the individual mailing ... be shown to be in any way false or inaccurate." United States v. Reid,

533 F.2d 1255, 1263 (D.C. Cir. 1976). Rather it suffices if the mailing is simply "incident to an essential part of the scheme,' or 'a step in [the] plot.'" Schmuck, 489 U.S. at 710-11 (quoting Pereira v. United States, 347 U.S. 1, 8 (1954); Badders, 240 U.S. at 394).

Thus, in United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979), a mail fraud conviction was premised on the mailing of salary checks to congressional employees, who then returned a portion of their salaries to cover the expenses of the defendant, the U.S. Congressman. Id. at 998-99. Although it was not the defendant who had made the predicate mailing, and the mailing itself was not fraudulent, nonetheless a "sufficiently close nexus existed between the fraudulent scheme and the mailings of the checks" to warrant application of the mail fraud statute. Id. at 999; see also United States v. Reid, 533 F.2d 1255 (D.C. Cir. 1976).

As the following examples illustrate, the district court's findings leave no doubt that the government demonstrated that each defendant committed "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity."[27]

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[27] These examples are drawn from the original 148 racketeering acts alleged in the government's complaint. As discussed above in Point I of the Statement of Facts, the district court limited the government, as a discovery sanction, to the

(1) **Philip Morris**, **RJR**, **B&W**, **Lorillard** and **American** advertisements and press releases issued through the **Tobacco Institute:**

- **Racketeering Act #23 (US21305):** On or about December 1, 1970, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, and AMERICAN, through defendant TOBACCO INSTITUTE placed an advertisement in the Washington Post entitled "The question about smoking and health is still a question," which newspaper was then sent and delivered by the United States Mails to subscribers and others. In this advertisement, the Tobacco Institute discredited the causal link between smoking and disease, stated that "in the interest of absolute objectivity" defendants "ha[ve] supported totally independent research efforts with completely non-restrictive funding," and deliberately created the false impression that all research results have been freely published. See FF734.

- **Racketeering Act #24 (US21337):** On or about May 25, 1971, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, and AMERICAN, through defendant TOBACCO INSTITUTE, caused a press release to be sent through the mails. The press release claimed that "hysteria about smoking results from the tenacity of the cancer mystery" and stated that "many eminent scientists" believe that "the question of smoking and health is still very much a question." US21337; FF738.

- **Racketeering Act #132 (US21239):** On or about May 16, 1988, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, and AMERICAN, through defendant

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original 148 alleged racketeering acts for purposes of establishing that each defendant committed two or more predicate acts. DN2968_5-6. The court made clear, however, that evidence of "uncharged, unlawful conduct" could be used to establish other RICO elements, "for example, continuity and pattern of racketeering activity, the RICO enterprise or conspiracy, and the Defendants' participation therein" as well as "the likelihood of Defendants' future illegal activity." DN2968_6-7, 10.

TOBACCO INSTITUTE, caused a press release to be sent through the mails. The press release was entitled "CLAIMS THAT CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE" and was issued in response to the Surgeon General's Report on nicotine addiction. See FF1220.

- **Racketeering Act #133 (US77065):** On or about July 29, 1988, PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, and AMERICAN, through defendant TOBACCO INSTITUTE caused to be sent through the mails a press release stating that the Surgeon General's Report "undermines efforts to combat drug abuse," and stating that the Report calling cigarette smoking an addiction was "without medical or scientific foundation." See FF1222-1223, FF1225.

(2) Philip Morris, RJR, B&W, Lorillard, American, and Liggett mailings regarding funding of **CTR** Special Projects:

- **Racketeering Act #66 (US21809):** On or about February 18, 1986, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, LIGGETT, and AMERICAN, through defendant CTR, caused to be mailed letters recommending that the work of Dr. Theodor Sterling be funded for 1986-1988 as a CTR Special Project. Op.1554. Sterling was a longtime CTR Special Projects grantee and industry consultant. See FF272, FF279. He was described by Max Crohn of RJR as "one of our industry's most valuable outside assets." FF233. Sterling conducted epidemiological and other critiques "to cast doubt on the epidemiological studies showing an association between passive smoking and lung cancer." FF3450. Sterling's research was reviewed and used by the Tobacco Institute's ETS Advisory Group, of which Donald Hoel was a member. FF3453

- **Racketeering Act #73 (US20796):** On or about September 4, 1986, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, LIGGETT, and AMERICAN, through Shook, Hardy & Bacon, caused to be mailed letters

recommending funding of research by a former "Special Project" scientist through the "Shook, Hardy & Bacon Special Account." FF282.

- **Racketeering Act #88 (US21812):** On or about August 31, 1990, defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, LIGGETT, and AMERICAN, through defendant CTR, caused letters to be mailed recommending funding research of a scientist who generated favorable results. See Op.1554.

(3) Communications between **BATCo** and **B&W**:

- **Racketeering Act # 30 (US20993):** On May 19, 1972, Addison Yeaman, General Counsel for B&W, mailed a letter to A.D. McCormick, a lawyer at BATCo, in which he provided comments on a statement BATCo proposed to make in response to a government minister. The letter also referred to a cable gram sent by McCormick to Yeaman on May 17, 1972, and to a telephone conversation between McCormick and Yeaman on May 18, 1972. Yeaman's letter commented that the BATCo statement putting forward the industry's "open question" position regarding causal relationship between smoking and disease "is somewhat less affirmative in tone than would be welcome on this side." See Op.1554.

- **Racketeering Act #50 (US22976):** On November 9, 1981, BATCo mailed a letter to J. Kendrick Wells, III, corporate counsel at B&W, enclosing a copy of a "Parliamentary Brief" for review, to ensure that the Brief did not contain anything that could be construed as an admission regarding the health effects of smoking. See FF3902.

- **Racketeering Act #51 (US21382):** On December 17, 1981, defendant BATCo mailed another draft of the "Parliamentary Brief" to B&W and Shook, Hardy & Bacon for review. That brief incorporated the "open controversy" language urged by B&W. See Op.1554.

- **Racketeering Act #53 (US22763):** On or about April 7, 1982, BATCo mailed an internal report on smoking compensation to researches at B&W. See FF1056-1057; FF1396; FF1503. The report stressed the "sine qua non" role of nicotine in smoking. FF1056.

- **Racketeering Act #63 (US23024):** On August 28, 1984, Ernest Pepples, Senior Vice President and General Counsel of B&W, sent a letter to Ray Pritchard, Deputy Chairman of BATCo, seeking Pritchard's aid in suppressing a BAT employee's conclusions regarding the addictiveness of nicotine. The letter noted that the report seemed "to concede that many potential criteria for addiction identification are met by smoking behavior" and urged that such reports be "routinely vetted with BATCo. lawyers." See FF1331.

(4) Altria (formerly Philip Morris Companies) used the mails and wires on numerous occasions in service of the scheme, including to coordinate public positions among all the defendants and to approve and fund CTR research projects that were used to support the defendants' deceptive claims:

- **Racketeering Act ##71-72 (US22772; US44603):** On April 23, 1986, Altria assistant general counsel Eric Taussig mailed "threatening" letters to Drs. Paul Mele and Victor DeNoble based on their submission for publication of two research papers based on nicotine addiction research conducted while they were employed at Philip Morris. See FF1298; FF3923.

- **Racketeering Acts ##74-75 (US20380)**: On September 10, 1986, Altria assistant general counsel Eric Taussig again mailed "threatening" letters to Drs. Paul Mele and Victor DeNoble based on their submission for publication of two research papers based on nicotine addiction research conducted while they were employed at Philip Morris. See FF1299; FF3923.

- **Racketeering Act #78 (US20310):** On May 9, 1988, Helen Frustace of Altria mailed a letter to Bernard V. O'Neill, Jr. of Shook, Hardy &

Bacon indicating approval of a CTR Special Project funding request by Dr. Rodger L. Bick. See FF266.

- **Racketeering Act #80 (US23047):** On or about May 16, 1988, Altria caused to be mailed a letter to Donald K. Hoel, Esq. of Shook, Hardy & Bacon, indicating Philip Morris's approval to renew Dr. Carl Seltzer's CTR Special Project funding. See FF266; Op.1558. The research of Drs. Seltzer and Bick was used deceptively to dispute the connection between smoking and disease. See FF150 (US62384) (1984 review of medical/scientific testimony presented to Congress titled "The Cigarette Controversy: Why More Research Is Needed," quoting research by Bick and Seltzer). This letter is one of many examples of defendants' coordination of the funding of CTR Special Projects through Shook, Hardy & Bacon. See FF266 (citing May 16, 1988 letter and many others).

- **Racketeering Act #92 (US22725):** On June 4, 1991, the Vice President and Associate General Counsel of Altria mailed letters to BATCo and other international competitors discussing unified industry language to deny that smoking had been proven to "cause" lung cancer. See FF797.

As these examples indicate, the evidence readily demonstrates that each defendant committed at least two acts of mail and wire fraud within a ten-year period. 18 U.S.C. § 1961(5).[28]

[28] The defendants have wisely abandoned the claim raised below that the government had to demonstrate two or more racketeering acts for each separate aspect of the scheme to defraud. The district court correctly concluded that "[t]he requirement of two racketeering acts pertains to the pattern of racketeering activity, which in this case is the overall scheme to defraud itself." Op.1566.

E. The Racketeering Acts Formed A Pattern

Although defendants deny that they committed racketeering acts, they do not separately contest the conclusion that their racketeering acts formed a "pattern." As discussed above, the racketeering acts were not "widely separated and isolated criminal offenses." H.J., Inc., 492 U.S. at 239 (quotation marks and citation omitted), but part of a single and ongoing coordinated scheme to deceive consumers about the dangerous and addictive properties of their product.

IV. DEFENDANTS CONSPIRED TO VIOLATE RICO

Even aside from each defendant's substantive violations of RICO, the district court also correctly held that each defendant is "liable for conspiracy under 18 U.S.C. § 1962(d) of RICO." Op.1596.

A conspiracy under § 1962(d) requires the existence of an enterprise within the meaning of § 1962(c). Liability under § 1962(d) is not limited, however, to defendants who themselves "commit or agree to commit the two or more predicate acts requisite to the underlying offense." Salinas v. United States, 522 U.S. 52, 65 (1997). All that is necessary is that the defendant "adopt the goal of furthering or facilitating the criminal endeavor" – which a defendant may do "in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion." Ibid.

To establish a conspiracy, it is sufficient to show that each defendant "knew about and agreed to facilitate" the enterprise. Id. at 66. The RICO conspiracy provision is thus "even more comprehensive than the general conspiracy offense" under 18 U.S.C. § 371, because "[t]here is no requirement of some overt act or specific act" by the alleged conspirator. 522 U.S. at 63.

As the Third Circuit observed, "[t]he plain implication of the standard set forth in Salinas is that one who opts into or participates in a conspiracy is liable for the acts of his co-conspirators which violate section 1962(c) even if the defendant did not personally agree to do, or to conspire with respect to, any particular element." Smith v. Berg, 247 F.3d 532, 537 (3d Cir. 2001); see also United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995).

The record easily supports the finding that each defendant violated § 1962(d). As the district court explained, "[a]ll Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of the shared objective – to use mail and wire transmissions to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public." Op.1593. The court highlighted defendants' joint participation in and funding of entities such as CTR, CIAR, and the Tobacco Institute, stressing that defendants "worked together continuously, in

many different venues and through many different entities, to disseminate their agreed upon deceptive public position[.]" Op.1594. The court pointed to the frequent oral and written communications among the defendants, and emphasized the common strategies of deception that they employed. Op.1593. In addition, as the court found, each defendant worked to preserve the enterprise "by concealing or suppressing information and documents which may have been detrimental to the interests of the members of the Enterprise." Op.1594.

In sum, each defendant understood "the goals of the Enterprise, the general nature of the conspiracy, and that other members of the conspiracy would commit at least two Racketeering Acts in furtherance of the Enterprise's scheme to defraud." Op.1594. No more is necessary to establish a RICO conspiracy, which requires only that defendants "knew about and agreed to facilitate" the enterprise. Salinas, 522 U.S. at 66.

Defendants devote a single paragraph of their brief to the conspiracy offense, urging that the finding of a conspiracy must be overturned because no substantive RICO violation occurred. JD Br. 127-28. Even if the premise were accurate, the conclusion would not follow. As Salinas made clear, a substantive RICO violation is not a prerequisite to liability under § 1962(d). Although the petitioner in Salinas had been acquitted of violating § 1962(c), the Supreme Court

sustained the RICO conspiracy conviction because a co-conspirator had committed at least two racketeering acts and the petitioner "knew about and agreed to facilitate the scheme." 522 U.S. at 66.

As Salinas illustrates, a RICO conspiracy is an inchoate offense that requires no overt acts; even if defendants' scheme had never come to fruition, defendants would be liable under § 1962(d). "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." Id. at 65 (citing Callanan v. United States, 364 U.S. 587, 593 (1961)).

Indeed, defendants' conduct is the paradigm of the evils at which conspiracy laws are directed. As the Supreme Court has stressed: "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. .... In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." Callanan, 364 U.S. at 593-94.

In a footnote, defendants assert that the district court failed to find "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts." JD Br. 128 n.49 (quotation marks and citation omitted). But the district court expressly found these agreements. Op.1592 ("[E]ach Defendant agreed to participate in the conduct of the Enterprise with the knowledge and intent that other members of the conspiracy would also commit at least two predicate acts in furtherance of the Enterprise."); Op.1591 ("each Defendant individually agreed to commit at least two Racketeering Acts"); Op.1593 ("[e]ach Defendant agreed to commit a substantive RICO offense"). In any event, Salinas establishes that such findings are unnecessary. There is no need to prove that the defendant agreed to commit two predicate acts. Salinas, 522 U.S. at 63 (describing this view as "wrong"). And there is no need to prove an agreement to facilitate any other particular element of a substantive RICO offense. "One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense," id. at 65, and liability can attach even if the defendant "was incapable of committing the substantive offense." Id. at 64. All that is required is proof readily satisfied here, that the defendant "knew about and agreed to facilitate the scheme" that was the object of the enterprise. Id. at 66.

V. DEFENDANTS' CONDUCT WAS NOT AUTHORIZED BY LAW OR PROTECTED BY THE FIRST AMENDMENT

A. Defendants' Misrepresentations Regarding "Light" Cigarettes Were Not Authorized By The FTC

Defendants urge that their deceptive marketing of "light" cigarettes cannot constitute fraud as a matter of law because it was authorized by the FTC. This assertion would lack legal basis even if defendants had not withheld critical information from the FTC and other regulators.

As previously discussed, defendants' marketing of so-called "light" cigarettes is a principal weapon in their attempts to mislead the public regarding the health risks of smoking. As part of that campaign, defendants have jointly made knowingly false statements to the Surgeon General, the FTC, the FDA, and the National Cancer Institute.

Defendants' scientists, as discussed above, have understood since 1972 that "regardless of which cigarette the smoker chooses, in obtaining his daily nicotine requirement he will receive about the same daily amount of 'tar.'" US29473_7. Nevertheless, defendants' statements to public health officials have consistently called into question the existence, extent, and cause of compensation, without at any point disclosing the contrary results found in their decades of internal research. FF2346. "Despite evidence spanning multiple decades showing Defendants'

extensive knowledge of compensation, Defendants concealed that knowledge and disseminated false and misleading statements to downplay its existence and prevalence." FF2346.

1. Defendants Knew that FTC Testing Methods Did Not Reflect Smoker Compensation

Defendants' deceptions and material omissions to the FTC, which focused on the methods for testing tar and nicotine yield, have been particularly significant.

In the 1960s, the FTC developed the Cambridge Filter Method to determine the amount of tar and nicotine generated by cigarette smoke. The Cambridge Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 37 (D.C. Cir. 1985). "The tar and nicotine collected by the machine is then weighed and measured." Ibid.

When it developed the Cambridge Method, the FTC anticipated that "variation" among human smoking patterns could affect actual nicotine and tar intake. FF2348-2349; FF2062-2064; FF2078. The Cambridge Method was not designed "to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method." 62

Fed. Reg. 48158 (1997). "The purpose of the program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." Ibid.; FF2064.

Unlike defendants, however, the FTC did not understand the crucial role of nicotine dependency and did not understand, as defendants did, that a smoker "will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine[.]" FF2201 (quoting US29473_7); see also FF2077-2079; FF2193; FF2349. Whereas the FTC was unable to simulate actual human smoking behavior, Philip Morris developed a "Human Smoker Simulator" that allowed the company to "duplicate[] exactly the smoking behavior of a given individual with a given cigarette." FF2189 (quoting US85073_8); FF2190 (quoting US87080_2025986389) (1981 Philip Morris report noting that the system had "a mean accuracy reading of 96% ... for 70 experimental sessions").

A 1975 report based on a study conducted with Philip Morris's Human Smoker Simulator confirmed that smoke intake did not, in fact, vary between "light" and "full flavor" cigarettes. The report explained that the smokers took "larger puffs" on Marlboro Lights than on other Marlboro cigarettes and thus "did

not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery." FF2192 (quoting US20348_2, 3).

Likewise, a BATCo research scientist reported in 1978 that "[n]umerous experiments have been carried out in Hamburg, Montreal, and Southampton within the company, as well as many other experiments by research workers in independent organisations, that show that generally smokers do change their smoking patterns in response to changes in the machine smoked deliveries of cigarettes." FF2217 (quoting US34799_2). The minutes of a 1974 B&W/BATCo conference recognize that "whatever the characteristics of cigarettes as determined by smoking machines, the smoker adjusts his pattern to deliver his own nicotine requirements." FF2206 (quoting US21507_2).

As Dr. David Burns, an editor of the 1981 Surgeon General's Report, testified at trial, "had the information available to the tobacco industry ... been available to the scientists preparing the 1981 Surgeon General's Report, that Report would not have drawn the erroneous conclusion that lower tar cigarettes produced lower risk or have made the recommendation that smokers who could not quit were 'well advised to switch to cigarettes yielding less 'tar' and nicotine." FF2107 (quoting Burns_WD_55-56). Although the Report expressed a concern about compensatory smoking behavior, "at that time, the public health community

was not aware of the role of nicotine addiction in altering puffing behavior, the elasticity of delivery designed into cigarettes then on the market which facilitated compensation on the part of the smoker, or the observations made by the industry that showed compensation was essentially complete for some 'light' cigarettes." Burns_WD_56.

2. The FTC Approved Only Factual Statements of Tar and Nicotine Yield Expressed in Milligrams

Although the public health officials did not understand subconscious, nicotine-driven compensation in the same way as defendants, the FTC nonetheless took care to preclude claims based on the Cambridge Method beyond stating the numerical tar and nicotine yield derived by the tests. In 1966, the FTC sent identical letters to each of the nation's major cigarette manufacturers and to the Administrator of the Cigarette Advertising Code stating that "a factual statement of tar and nicotine content (expressed in milligrams)" based on tests conducted in accordance with the Cambridge Filter Method would not be in violation of provisions of law administered by the FTC "so long as (1) no collateral representations (other than factual statement of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards[.]" 6 Trade Regulation Reporter (CCH) ¶ 39,012.70, at 41,602 (Oct. 6, 2004); FF2048; JD004538.

In 1970, the FTC initiated formal rulemaking proceedings to require manufacturers to disclose the tar and nicotine yields as determined by the Cambridge Method. 35 Fed. Reg. 12671 (1970). The rulemaking process was suspended indefinitely a short time later, however, when eight cigarette manufacturers voluntarily agreed among themselves to disclose Cambridge Method test data in cigarette advertisements. 62 Fed. Reg. 48158 (1997); JD041337_1 (describing the "voluntary plan for the disclosure of tar and nicotine content in cigarette advertising"). That private agreement prompted the FTC to end rulemaking proceedings, which were never reopened. 36 Fed. Reg. 784 (1971); Good v. Altria, 501 F.3d 29, 32 (1st Cir. 2007).[29]

Criticism of the Cambridge Method mounted over time. Defendants, who were fully aware of its deficiencies, steadfastly opposed change. In 1994, a joint statement was filed with the National Cancer Institute (NCI) by Covington &

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[29] The FTC originally conducted Cambridge Method tests through its own laboratory. 62 Fed. Reg. 48158 (1997). An organization funded by the tobacco companies, the Tobacco Institute Testing Lab (TITL), also conducted Cambridge Method tests. After the FTC ceased conducting the tests in 1987, the TITL continued to conduct the tests. Id. at 48158 & n.5. Contrary to defendants' assertion (JD Br. 68 n.30), the FTC never "delegated" testing responsibility to TITL. See Watson v. Philip Morris Cos. Inc., 127 S. Ct. 2301, 2309 (2007) ("Although Philip Morris uses the word 'delegation' or variations many times throughout its brief, we have found no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf.").

Burling on behalf of American, B&W, Liggett, and Lorillard, opposing any change to the Cambridge Method. FF2352 (citing US22181). Although the industry had been aware of compensatory behavior for more than two decades, the joint statement declared: "Despite the rhetoric of the test method's critics, **evidence of compensatory behavior remains equivocal at best**." US22181_14 (emphasis added). It urged that the reported compensatory behavior "appears to be partial and short-term," id. at 2, and claimed that "there remains significant disagreement about why smokers may compensate," id. at 16. RJR's statement to the NCI claimed that "[o]n average, smokers absorb approximately the yield of nicotine predicted by the FTC method" and that "**the compensation phenomenon does not undermine the FTC method**." FF2355 (quoting US22190_304, 295) (emphasis added). These claims were flatly at odds with defendants' own research.

Defendants' misleading claims were echoed in a 1996 joint statement filed with the FDA by the Tobacco Institute, Philip Morris, RJR, B&W, Lorillard and Liggett. FF2356 (citing US23028). The statement charged that the literature on compensation is "limited and inconclusive." US23028_III-200. It asserted that "[t]he evidence shows that, to the extent compensation occurs at all, it is a limited and short-term phenomenon among a small group of smokers." Ibid. And it challenged the "assumption that smokers 'compensate' solely to obtain higher

yields of nicotine," suggesting that compensation may occur for "tar," not nicotine. Id. at III-190.

3. Defendants' 1998 Joint Comments to the FTC

In 1997, the FTC solicited public comment on whether changes should be made to the Cambridge Method. 62 Fed. Reg. 48158 (1997). Joint comments were submitted in 1998 on behalf of Philip Morris, RJR, B&W and Lorillard. FF2360-2363; FF2392-2399; US88618 ("Joint Comments"). They described "compensatory smoking" as a "hypothesized" and "weakly documented" phenomenon, US88618_43, 82; claimed that the "evidence in support of such a phenomenon ... is highly equivocal," id. at 44; and asserted that "current knowledge about [compensatory] behaviors is too sparse to be usable for modeling purposes," id. at 43. See also FF2358 (quoting US87919_3) (1996 claim of TI attorney to the FTC that "in many cases low-yield brands contain so much less tobacco than higher-yield brands that any compensation could not begin to erase the difference").

The FTC's solicitation asked a series of specific questions. Asked whether "a disclosure warning smokers about compensatory smoking behavior should be required in all ads," the Joint Comments stated:

> The manufacturers are not convinced that compensatory smoking behavior is a sufficiently common or

> documented phenomenon that consumers should be alerted to its existence[.]

US88618_89; FF2363.

The manufacturers' internal evidence, however, had long since established that compensatory smoking was close to universal and nullified the purported health benefits of "light" cigarettes. FF2026; FF2027-2028; FF2173-2229. Indeed, as early as 1967, Philip Morris's Vice President of Corporate Research and Development reported:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case.... In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human smoker who appears to adjust to the diluted smoke by taking a **larger puff** so that he still gets about the same amount of equivalent undiluted smoke.... The smoker is, thus, apparently **defeating the purpose** of dilution to give him less "smoke" per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appear to be **erroneous and misleading**.

FF2179 (quoting US35224_1-2) (first emphasis in original).

Defendants likewise "have long been aware that the use of ventilation holes accentuates the differences in tar and nicotine yields observed under standard FTC smoking conditions and human smoking conditions." FF1586 (citing

Henningfield_WD_61-62). "By diluting mainstream cigarette smoke with air, ventilation holes can reduce the concentration of tar and nicotine in the smoke and result in a decrease in the tar and nicotine ratings generated by FTC machine testing." Ibid. (citing Henningfield_WD_46). However, ventilation holes are generally placed on the cigarette filter at a location where they would not be covered by the orifice of the FTC smoking machine, but still would normally be blocked by a smoker's fingers or lips. Ibid. (citing Henningfield_WD_47). Philip Morris understood this phenomenon as early as 1967, when its Associate Principal Scientist reported that a study "established that lip contact with the tipping paper extended to 9.96 mm from the outer end of the tipping paper for the average smokers," and explained that "[s]ince the air dilution holes are located in a band from 8.0 to 9.7 mm from the outer end of the tipping paper, it follows that some of these holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis." FF2178 (quoting US88627_1). Nonetheless, asked by the FTC in 1997 what "the available evidence" demonstrates "about the prevalence of vent blocking," the Joint Comments stated: "The evidence that vent-blocking occurs is extremely limited and inconclusive." US88618_60. Asked "[w]hat kinds of consumer education messages should be created to inform smokers of the presence of filter

vents and of the importance of not blocking them with their fingers or lips," the Joint Comments replied: "The manufacturers are not convinced that vent-blocking is a sufficiently common or documented phenomenon that smokers should be alerted to the presence of filter vents and instructed not to block the vents." Id. at 82.

As particularly relevant here, the FTC sought comment on whether the industry's use of descriptors such as "light," "ultra light," "medium," and "low tar" should be regulated. 62 Fed. Reg. at 48163. The Commission explained that there were "no official definitions for these terms," ibid., and that the Ad Hoc Committee of the President's Cancer Panel had recommended that these terms be regulated. Ibid. The agency thus asked whether there was "a need for official guidance" with respect to the descriptors. Ibid.

In response, the Joint Comments declared:

> The manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes.

FF2395; US88618_94.

Asked what "data, evidence or other relevant information on consumer interpretation and understanding of terms such as 'ultra low tar,' 'low tar,' 'light,'

‘medium,’ ‘extra light’ and ‘ultima,’ as used in the context of cigarettes exists,” the Joint Comments stated:

> The manufacturers believe that consumers choose “light” or “ultra” products for a variety of reasons, including lighter flavor, lighter taste, less menthol (or other flavor) taste, and smoother smoking characteristics. Some consumers may choose such products for other reasons. The manufacturers do not intend the descriptors to convey any level of “safety” with regard to their products.

US88618_95; FF2396.

Asked what “available evidence exists concerning how consumers view cigarettes with relatively low tar and nicotine ratings and their perception of the relative risks of smoking such cigarettes rather than full flavor cigarettes,” the Joint Comments stated:

> The manufacturers are unaware of evidence concerning such consumer views and perceptions except to the extent that such evidence is presented in the Report of the NCI Expert Committee.

US88618_89; FF2397.

These comments were false. They did not “make any reference to the vast amounts of consumer research Defendants conducted, and had conducted for them by their numerous advertising and marketing consultants, that expressly found that

many consumers strongly disliked the taste of low tar cigarettes, but were smoking them because they believed they were healthier for them." FF2398.

4. Defendants' Arguments Are Without Basis in the FTC's Statements and Are Directly at Odds With Their Own Joint Comments

Against this background, defendants assert, with remarkable audacity, that their descriptors cannot be misleading, as a matter of law, because they received "specific authorization of the descriptors" from the FTC. JD Br. 66.

As an initial matter, defendants make no effort to reconcile this argument with their Joint Comments to the FTC which stated that the "manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." FF2395; US88618_94. Having insisted that these terms should not be subject to official guidance, defendants cannot now claim that they, in fact, received specific regulatory authorization to use these unregulated terms. Defendants deal with this paradox by declining to cite their Joint Comments. (In asking defendants whether they believed that official guidance was necessary, the FTC was, of course, acting consistently with its own understanding that it had never authorized the descriptors in the first place.)

Defendants also make no attempt to reconcile their argument with the rulemaking petition that Philip Morris filed with the FTC in 2002, urging the

agency "to promulgate rules governing ... the use of descriptors, such as 'light' and 'ultra light,'" JE48523_1.

In any event, it is evident that the FTC never provided "specific authorization of the descriptors." JD Br. 66. The FTC's 1966 letters to cigarette manufacturers stated that "a factual statement of tar and nicotine content (expressed in milligrams)" would not be in violation of provisions of law administered by the FTC. 6 Trade Reg. Rep. (CCH) ¶39,012.70, at 41,602 (2004); JD004538. As the First Circuit observed, "this advice did not extend to 'collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) ... expressly or by implication, as to the reduction or elimination of health hazards.'" Good, 501 F.3d at 32. Likewise, a 1967 letter cited by defendants, JD Br. 69-70, stated that "no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer.'" JD001493_3.

Nor can defendants find industry-wide authorization for descriptors in two FTC consent decrees. JD Br. 70. As the First Circuit explained, the decrees were binding only on the parties, Good, 501 F.3d at 53, and even for the parties, they did not purport to authorize health descriptors. Id. at 50-51 & n.24. The "only policy"

to emerge from these FTC enforcement actions "is that certain tar and nicotine claims consistent with the Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices." Good, 501 F.3d at 54; FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 37-39 (D.C. Cir. 1985). Likewise, although FTC reports to Congress have stated that the FTC "has not defined ... any term related to tar level except for 'low tar,' which the FTC defines as 15.0 mg or less 'tar,'" FTC Report to Congress 18 n.11 (1980), these statements do not establish official regulatory standards and could not be enforced against the industry, even with respect to the term "low tar." Good, 501 F.3d at 55.[30]

The claim that descriptors have received specific agency approval that "immunizes [them] from attack under a general statute," JD Br. 75, thus has no foundation. Defendants confuse descriptors with numerical statements of tar and nicotine content. The Cambridge Method was designed to provide only numerical

[30] Indeed, although the industry generally uses descriptors to reflect ranges of ratings obtained through machine testing, the practice is not consistent. As the former Director of Applied Research at Philip Morris explained, "there are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brand that have the same FTC tar rating." FF2382 (quoting Farone_WD_116). Philip Morris, for example, sells versions of Virginia Slims and Virginia Slims Lights that both deliver 15 milligrams of tar under the Cambridge Method. FF2382; see also FF2424-2428 (Cambridge Light and Cambridge Ultra Light brands had higher tar ratings than the original Cambridge brand).

data and was not designed to form the basis for descriptors or other explicit or implied health claims.

The distinction is significant because descriptors are far more influential than the numerical statements. As the National Cancer Institute explained in 2001, 95% of regular smokers in a national random survey conducted in 1994 could identify that they were "somewhat certain" or "very certain" that they smoked a regular, light, or ultra-light cigarette. US58700_193 (Monograph 13). "However, when asked how much tar their cigarettes contained, few smokers knew the answer to this question." Id. at 193-94. Only 3% could correctly state (within two milligrams) the amount of tar in their cigarettes. Id. at 194.

"In fact, few knew where to look to learn the tar content," id. at 194, and many believed – incorrectly – that this information can be found on the cigarette package itself. "Although 67% of smokers said that they would look on their cigarette package to find the tar content, only 6.3% of cigarettes sold have this information on the package." Ibid.

Although defendants invoke the Fifth Circuit's characterization of the descriptors as "FTC-approved," JD Br. 66, 77-78 (quoting Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383, 392 (5th Cir. 2007)), the issue was not in dispute in that case because the plaintiffs explicitly accepted the view that the

FTC had authorized the descriptors.[31] The Fifth Circuit did not discuss defendants' Joint Comments to the FTC and it is unclear whether they were called to the court's attention. The First Circuit later rejected the Fifth Circuit's reasoning, Good, 501 F.3d at 46, and explained that "those courts holding that the FTC has 'authorized' [the] 'light' and 'lower tar and nicotine' claims" "overlook the subtleties in the Commission's approach." Id. at 56.

Indeed, the current CEO of Reynolds American acknowledged in her testimony that, "while many smokers know they are buying a lights product, their actual understanding of what the specific delivery numbers are is quite limited. For example, consumers might know they are smoking a lights version of a brand, but they wouldn't know what the machine-measured tar yield was for that cigarette." FF2564 (quoting Ivey_WD_82). Likewise, a prior CEO of Philip Morris recognized that "the major influence in people's perceptions in the tar of a cigarette would have to come from the marketing position of a brand as opposed to people literally reading the FTC [tar and nicotine figures]." FF2403 (quoting Morgan_PD_11/25/74_174-175). As a BATCo document explained, "consumers

[31] See Consolidated Reply Brief, 06-30130, at 1-2 ("Plaintiffs also make the remarkable concession that the conduct challenged by their lawsuit – the use of 'the light descriptors based on the results of the machine testing' – was 'allow[ed]' by the FTC") (quoting Brief for Appellees, No. 06-30130, at 16).

– with the exception of 1MG [tar cigarette] smokers – are not able to quote correct tar/nic deliveries of the brand they are smoking currently. This means that the consumer does not segment the market in terms of deliveries but he uses colour coding and descriptors to distinguish [Full Flavor], Lights and Ultra Lights." FF2567 (quoting US22123_700767452) ("Barclay Business Review 1996").

5. The FTC's Jurisdiction to Address Deceptive Tobacco Advertising Is Not Exclusive

As a fallback position, defendants suggest that the FTC has exclusive jurisdiction to address deceptive tobacco advertising under the FTC Act, the FCLAA, or some combination of the two statutes, and that the agency's regulatory authority impliedly preempts other federal fraud actions or prosecutions that arise out of deceptive tobacco advertising. JD Br. 73-81. The district court properly rejected this argument, which finds no support in the governing law. 263 F. Supp. 2d 72, 78-79 (2003).

As this Court has held, although the FTC alone may bring suit to enforce the FTC Act, the statute has never been interpreted to give the agency exclusive jurisdiction over advertising or marketing conduct. "Congress did not intend for the Commission's regulations to 'occupy the field,'" and even state law prohibitions of unfair or deceptive trade practices are not preempted unless they conflict with FTC regulations. American Financial Servs. Ass'n v. FTC, 767 F.2d

957, 989-90 (D.C. Cir. 1985); see also Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973).

It is equally clear that the Federal Cigarette Labeling and Advertising Act (FCLAA or Labeling Act) does not preempt federal fraud actions or prosecutions against tobacco companies. When Congress amended the FCLAA preemption provision governing cigarette advertising in 1969, it expressly limited that provision "to prohibit only restrictions 'imposed under State law[.]'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515 (1992) (plurality); see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544 (2001) (explaining that "[t]he new subsection (b) did not pre-empt regulation by federal agencies"). By its terms, the provision does not prohibit restrictions imposed by the Executive Branch or by federal courts implementing federal law. See 15 U.S.C. § 1334(b) (titled "State regulations") ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.") (emphasis added).

Far from vesting exclusive jurisdiction in the FTC, the 1969 amendments provided that "[n]othing in this Act shall be construed to affirm or deny the [FTC's] holding that it has the authority to issue trade regulation rules" for

tobacco. 84 Stat. 89. Moreover, even with respect to state law claims, Congress did not intend the FCLAA "to insulate cigarette manufacturers from longstanding rules governing fraud." Cipollone, 505 U.S. at 529. Such claims are not predicated on a duty "based on smoking and health," 15 U.S.C. § 1334(b), but on a general duty – the duty not to deceive. Id. at 528-29; Good, 501 F.3d at 34-36.

The United States routinely brings mail and wire fraud prosecutions arising out of deceptive advertising or other marketing practices. See 263 F. Supp. 2d at 78 n.6 (citing cases); see also DN1458_3-4 n.2 (citing cases). Defendants cannot and do not question the government's authority to bring such prosecutions. In enacting the FTC Act, Congress expressly provided that nothing in the statute shall "be construed to alter, modify, or repeal" specified statutes including the Communications Act of 1934. 15 U.S.C. § 51. Accordingly, when Congress enacted the wire fraud statute as an amendment to the Communications Act of 1934, it stressed that the wire fraud statute would augment the remedies then available under the FTC Act and mail fraud statute. H.R. Rep. No. 82-388, at 2 (1951) (noting that the growth of interstate communications facilities has given rise to fraudulent activities "which are not within the reach of existing mail fraud laws" and that while the FTC Act "provides a criminal penalty for dissemination by radio of fraudulent advertising of foods, drugs, and medicines," that provision does not

have "a broad enough application to warrant a conclusion that the [wire fraud] bill is not necessary").

As the foregoing discussion makes clear, the cases that defendants cite to support their implied preemption argument are wholly inapposite. For example, Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1229 (D.C. Cir. 1991), held that a "private civil action, even couched in RICO terms, will not lie for an alleged breach of the [Service Contract Act,]" which is not a predicate RICO offense, does not provide a private right of action, and establishes an exclusive scheme for administrative relief. Tamburello v. Comm-Tract Corp., 67 F.3d 973, 978 (1st Cir. 1995), held that "RICO should be read as limited by the exclusive jurisdiction of the NLRA only when the Court would be forced to determine whether some portion of the defendant's conduct violated labor law before a RICO predicate act would be established." Sun City Taxpayers' Ass'n v. Citizens Utilities Co., 45 F.3d 58, 62 (2d Cir. 1995), held that the under the filed rate doctrine, "any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers," including a civil RICO action.

By contrast, this lawsuit does not impinge on any area of exclusive FTC jurisdiction and does not assail any regulatory determination of the FTC.

B. Defendants' Misrepresentations Were Not Protected By The First Amendment

It is blackletter law that fraud is not protected speech. The government "may, and does, punish fraud directly." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

Thus, this Court rejected a tobacco company's contention that its deceptive advertising falls within the ambit of First Amendment protection, stressing that "'[m]isleading advertising may be prohibited entirely.'" FTC v. Brown & Williamson Corp., 778 F.2d 35, 43 (D.C. Cir. 1985) (quoting In re R.M.J., 455 U.S. 191, 203 (1982)). Likewise, this Court rejected the argument that the First Amendment bars fraud claims premised on an organization's "statements of opinion" about the benefits of transcendental meditation, explaining that "[o]pinions or predictions based 'on facts that are unavailable to the listener either because he does not have access to them or because he is obviously incapable of interpreting them' may give rise to liability for fraud." Kropinski v. World Plan Executive Council-US, 853 F.2d 948, 953 (D.C. Cir. 1988) (quoting Day v. Avery, 548 F.2d 1018, 1026 (D.C. Cir. 1976)).

Defendants do not claim that fraud is protected by the First Amendment. Nonetheless, they assert First Amendment immunity for two categories of public statements. First, they urge that their statements aimed at the general public – i.e.,

the barrage of press releases, pamphlets, television appearances, and advertisements that defendants and their agents issued or approved – were not fraudulent. JD Br. 113. This argument simply restates in constitutional form the same materiality and intent-based objections that defendants raise to statutory liability, and it fails for the same reasons.

With respect to a narrow category of statements – those made to federal agencies – defendants claim protection under the "Noerr-Pennington doctrine," JD Br. 109, an antitrust doctrine with underpinnings in the First Amendment's petition clause. Whelan v. Abell, 48 F.3d 1247, 1253-1255 (D.C. Cir. 1995). Defendants assert that this doctrine, which protects "attempt[s] to persuade the legislature or the executive to take particular action," JD Br. 109 (quotation marks omitted), "immunizes even false statements from statutory sanction." Id. at 110.

Nothing turns on this contention, because there is more than enough evidence to support the district court's liability findings even if defendants' efforts to influence federal regulators are not considered. In any event, defendants' broad claim of immunity is at odds with settled precedent.

As this Court explained, "neither the Noerr-Pennington doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48

F.3d 1260, 1267 (D.C. Cir. 1995) (citing Whelan). "However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods." Whelan, 48 F.3d at 1255. As the Supreme Court has stressed, "[t]he Petition Clause ... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble ... and there is no sound basis for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions." McDonald v. Smith, 472 U.S. 479, 485 (1985). Thus, "petitions to the President that contain intentional and reckless falsehoods 'do not enjoy constitutional protection[.]'" Id. at 484 (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).

Defendants do not cite these cases, and they make no attempt to reconcile their position with the established penalties for making false statements to federal agencies and Congress. See, e.g., Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001) (explaining that federal law "amply empowers the FDA to punish and deter fraud against the Administration"); id. at 349 (noting the "general criminal proscription on making false statements to the Federal Government, 18 U.S.C. § 1001," and specific provisions that empower the FDA "to investigate suspected fraud" and to "respond to fraud by seeking injunctive relief," "civil penalties," and "criminal prosecutions"); United States v. Winstead, 74 F.3d 1313

(D.C. Cir. 1996) (sustaining convictions under § 1001 and the mail fraud statute for making false statements to a federal agency); United States v. Levalle, 751 F.2d 1266 (D.C. Cir. 1985) (sustaining convictions under § 1001 and 18 U.S.C. § 1505 arising out of false statements and testimony to Congress).

VI. THE DISTRICT COURT CORRECTLY FOUND THAT ALTRIA AND BATCO VIOLATED RICO

A. Altria's Status As A Holding Company Does Not Immunize Its Conduct Under RICO

Altria was formed in 1985 under the name Philip Morris Companies, Inc. In its separate brief, Altria argues that it cannot have violated RICO because it is a "holding company" that "does not manufacture, sell, or distribute cigarettes or any other product," Br.2, and the government did not introduce sufficient evidence to "pierc[e] the corporate veil," Br.3.

The argument misconceives the basis for Altria's liability, which was premised on Altria's direct participation in the enterprise. As the district court found, "Altria participated directly in the operation and management of the Enterprise," including "by joining many of the Enterprise's organizations and by supporting its objective." Op.1545; Op.1547 n.22; Op.1599.

As shown above, Altria committed multiple racketeering acts in furtherance of the scheme to defraud. Moreover:

- Altria executives attended and participated in meetings of the CTR Board of Directors, which exercised control over CTR's research and public relations programs. FF40-41; FF39; FF59.

- Altria executives attended and participated in meetings of the Tobacco Institute Board of Directors and Executive Committee, which had "final approval authority on all Tobacco Institute matters." FF123, FF193; FF484.

- Altria was a member of the TI Committee of Counsel, and Altria hosted several meetings of that committee at its corporate headquarters in New York. FF173.

- Altria directed and funded CTR "Special Projects," which defendants used to further the scheme to defraud. FF506; FF266; FF278; US20326; US20310; US23047.

- Altria organized the 1987 "Project Downunder" conference, where defendants hatched their strategy for denying the health effects of ETS exposure. FF3481-3496.

- Altria issued a joint statement on behalf of defendants in 1996 denying the addictiveness of nicotine. FF1160.

- Altria's CEO claimed in 1997 that cigarettes are not a cause of lung cancer, and expressed doubt in 2002 that cigarettes had ever caused disease in any smoker. FF806; FF807.

See also FF195; FF797; FF1158; FF1163; FF1298; FF2200; FF2480; FF2483; FF3304; FF3391; FF3423; FF3425; FF3584; FF3719; FF3839. Altria does not confront these factual findings, let alone demonstrate clear error.

Altria also has exercised control over the public communications of its subsidiary Philip Morris USA on matters of smoking and health. Op.1546; see,

e.g., Hoel_PD_5/30/03 60-61 (Altria handles certain communications regarding litigation against Philip Morris USA pursuant to a "division of labor" between the companies). Altria structured its relationship with its subsidiaries "to maintain consistency among its companies on sensitive issues such as smoking and health, addiction, and passive smoking." Op.1599-1600. For example, in 2003, Altria persuaded its shareholders to vote down a proxy statement that would have required the company to disclose to Philip Morris USA customers the "actual health risks of smoking 'light and ultra light' cigarettes to disassociate them from any belief that such products are safer and deliver less tar and nicotine." FF2480. Altria opposed the proxy statement on behalf of its manufacturing subsidiaries, stating: "PM USA and PMI believe descriptors such as 'low-tar,' 'mild,' and 'light' serve as useful points of comparison for cigarette brands regarding characteristics such as strength of taste and reported tar yield." Ibid. (quoting US87741; US93345_49).

Against this background, the district court was plainly justified in concluding that, "because Altria has participated in the Enterprise and conspiracy, both directly and indirectly, it cannot escape liability simply by virtue of being a holding company." Op.1601.

Altria's remaining contentions are equally baseless. It urges that its racketeering acts cannot support RICO liability because they involve mailings by lawyers: according to Altria, "RICO does not apply to a lawyer's efforts on behalf of a client unless the lawyer acted with specific intent to defraud." Br.4. But Altria joined in the scheme to defraud; its executives acted with specific intent in doing so; and Altria's lawyers used the mails to further that scheme. No more was required to establish Altria's liability for mail fraud. It does not matter whether Altria's lawyers personally acted with specific intent to deceive, just as it does not matter whether the particular mailing was itself fraudulent. E.g., United States v. Diggs, 613 F.2d 988, 998-99 (D.C. Cir. 1979); United States v. Reid, 533 F.2d 1255, 1263 (D.C. Cir. 1976).[32]

Contrary to Altria's suggestion, the district court was not required to credit Altria's self-serving explanations for its participation in the enterprise. See, e.g., Br.5-6 (characterizing its funding of CTR "special projects" as innocent; describing its efforts to suppress research demonstrating nicotine addictiveness as a disagreement over employee confidentiality; and insisting that its letter

[32] In the one appellate case that Altria cites for its lawyer-mailing argument (Br.4), the court overturned mail fraud convictions because the evidence was insufficient to demonstrate a "scheme to defraud," not because the mailing was sent by a lawyer. United States v. Pendergraft, 297 F.3d 1198, 1209 (11th Cir. 2002).

coordinating a common industry position on smoking and cancer merely reflected a debate over scientific terminology). Based on the record as a whole and the modus operandi of the enterprise, the district court inferred that Altria acted with fraudulent intent. That finding was not clear error.

Although Altria claims that there was no finding that it used the mails for certain racketeering acts (as opposed to pouch or private courier), the district court found that it was defendants' "routine or standard business practice to send or receive matters via the mails." Op.1558. It is "well-established that evidence of business practice or office custom supports a finding of the mailing element of § 1341." United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); United States v. Waymer, 55 F.3d 564, 571 (11th Cir. 1995); United States v. Ledesma, 632 F.2d 670, 675 (7th Cir. 1980).

Even apart from Altria's substantive RICO violations, the record supports the finding that Altria conspired to violate RICO – and consequently bears responsibility for the conduct of its co-conspirators as well. See Salinas, 522 U.S. at 63-64 (each member of a RICO conspiracy "is responsible for the acts of each other") (citing Pinkerton v. United States, 328 U.S. 640, 646 (1946)). Altria devotes only a sentence to the conspiracy violation, claiming that "the government failed to introduce the required evidence that Altria knowingly joined the alleged

conspiracy with the specific intent to defraud." Br.7. But the district court found that Altria "knew the goals of the Enterprise" and "the general nature of the conspiracy," and that it "took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy." Op.1594. That finding is amply supported by the record, and no more was necessary to establish Altria's liability under § 1962(d). Salinas, 522 U.S. at 66 (finding a RICO conspiracy where the defendant "knew about and agreed to facilitate the scheme").

B. BATCo's Foreign Incorporation Does Not Immunize Its Conduct Under RICO

BATCo's separate arguments are equally unfounded. Characterizing the judgment against it as predicated on "entirely foreign conduct," BATCo asserts that the district court was "without subject matter jurisdiction" to hear the government's claims – or even to impose contempt sanctions for BATCo's willful defiance of discovery orders. Br.11, 20.

The argument fails at every step. First, BATCo can insist that the judgment is predicated on "entirely foreign conduct" only by ignoring the evidence that establishes BATCo's liability. BATCo participated in the operation of a RICO enterprise formed in the United States for the purpose of defrauding American consumers. It did so through the use of the United States mails and wires. BATCo's liability thus involves no question of "extraterritoriality" because its

racketeering acts are defined by their nexus with the United States. See Pasquantino v. United States, 544 U.S. 349, 371 (2005) (no extraterritorial application of the laws where defendants "used U.S. interstate wires to execute a scheme to defraud"); Envt'l Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) ("[T]he presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States.").

In any event, BATCo's characterization of its activities as "entirely foreign" disregards the wealth of contrary factual findings in the district court's opinion – none of which BATCo cites. Thus, while BATCo asserts that "no evidence was submitted that BATCo ever engaged in any marketing of cigarettes in this country," Br.8, the district court found that "millions of BATCo's State Express 555 brand cigarettes" are sold in the United States through a marketing agreement between BATCo and an RJR subsidiary. Op.1613 n.47 (citing US_77453). Similarly, many of the industry organizations that BATCo jointly founded and funded have held meetings in the United States – with representatives of BATCo present – to plot strategy for the enterprise. See, e.g., FF416 (ICOSI meeting in Kansas City); FF432 (INFOTAB meeting in Washington, D.C.); see also FF195 (BATCo representatives attended the TI College of Tobacco Knowledge); FF1702 (BATCo-organized conference in South Carolina on the pharmacological effects of

nicotine); FF1549 (BATCo experimental farm in North Carolina for growing genetically modified tobacco with extra nicotine).

Moreover, BATCo's overseas activities in support of the enterprise had substantial and direct effects in this country. Op.1538. For example, BATCo was a founding member of ICOSI – one of the organizations that defendants used, in BATCo's words, to "throw[] up a smoke screen and to throw doubt on smoking research findings which show smoke causes diseases," FF3468 – and BATCo founded or played a central role in many other entities that defendants used to facilitate their scheme to defraud the American public. FF404; Op.1541; see, e.g., FF434 (TDC); FF3458-3459 ("Operation Berkshire"); FF3475 (INFOTAB); FF3495 ("Operation Downunder"); FF3571 (IEMC); FF3650 (ARIA); FF3656 (IAI). Individually and through these organizations, BATCo collaborated with the domestic defendants to craft a unified message on matters of smoking and health – with a particular eye toward the industry's troubles in the United States. FF364; FF368; FF369; FF373; FF375; FF377; FF383; FF387; FF391; FF392; FF395; FF398; FF464; FF1017; FF3460; FF3472; FF3473. Indeed, the Tobacco Institute in 1981 specifically identified INFOTAB, of which BATCo was a founding member, as instrumental in protecting the industry's position in the United States

from the "powerful[]" "back-wash" of events in other countries. FF464 (quoting US28685_4).

BATCo also took pains to facilitate the success of the enterprise in the United States. BATCo conducted sensitive research into nicotine addictiveness – research that defendants were unwilling to conduct inside the United States for fear of disclosure in litigation – and secretly shared the results with other defendants, including RJR and B&W. FF1309; FF1317; FF1321; FF1322; FF1323; FF1328; FF1351; FF1398; FF4013-4014 (describing BATCo's practice of delivering damaging research reports to B&W in the United States by mailing unmarked envelopes to a local solo-practice attorney); FF1056 (quoting US22763) (Racketeering Act #53); FF1667 (quoting US21384) (Racketeering Act #60). BATCo also altered or suppressed research at the request of other defendants to avoid undercutting the enterprise's positions in the United States, FF426; FF1329-1335; FF3902 (US22976) (Racketeering Act #50); FF1331-1332 (US22129) (Racketeering Act #63); and developed abusive "document retention" policies expressly designed to prevent the disclosure in the United States of defendants' intimate understanding of the toxicity and addictiveness of cigarettes, FF3892-3896; FF3934; FF3983; FF4003. In addition, BATCo used its own funds to generate "marketable science" on behalf of the enterprise, including through CIAR,

FF3502, FF3509, FF3513, FF3520; FF3533; FF3535; FF3554; FF3756; through defendants' network of "independent" ETS consultants, FF3620; FF3621; FF3636; FF3637; FF3641; and through international scientific conferences composed of those industry consultants, FF3701; FF3714.

Against this background, there can be no contention that judgment against BATCo embodies an impermissible "extraterritorial" application of RICO. As this Court has stressed, under settled principles of territorial jurisdiction, "conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984); see also Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 & n.85 (D.C. Cir. 1980); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004).

BATCo's remaining contentions are baseless. It is irrelevant that the mailings and wire communications underlying BATCo's racketeering acts were "unpublished," were "not themselves directed toward U.S. consumers," and did not "describe[] any statements or conduct of BATCo in the United States." Br.3. What matters is that BATCo employed the United States mails and wires to further

defendants' overall scheme to defraud. Schmuck, 489 U.S. at 710-11. Likewise, the court was not required to identify "a specific loss or injury" by an American consumer "that proximately and directly flowed from BATCo's foreign conduct." Br.19. The mail and wire fraud statutes "punish[] the scheme, not its success." Pasquantino, 544 U.S. at 371 (citation omitted).

BATCo's contention the district court lacked "subject matter jurisdiction" is difficult to comprehend. Br. 20. In the principal case on which BATCo relies, this Court made clear that the argument that a statute does not apply extraterritorially "goes to the merits of the case, rather than the district court's subject-matter jurisdiction." United States v. Delgado-Garcia, 374 F.3d 1337, 1342 (D.C. Cir. 2004). Thus, even if BATCo's extraterritoriality objections had any merit, they would not deprive the district court of subject matter jurisdiction. And although BATCo argued below that it lacked the minimum contacts with the United States necessary to establish personal jurisdiction, the contention was baseless in light of the extensive contacts just discussed, and BATCo has not renewed it on appeal.[33]

[33] Accordingly, there is no basis for vacating the contempt sanctions imposed on BATCo for its willful defiance of court orders, see 287 F. Supp. 2d 5 (D.D.C. 2003), nor is there any warrant for overturning the evidentiary rulings related to the so-called Foyle Memorandum. Br. 20-21. Indeed, BATCo makes no attempt on appeal to challenge the ruling that the Foyle Memorandum was not properly subject to privilege. See Op.1463 n.42. And while BATCo complains that the government was permitted to introduce testimony from a former attorney for a

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING A LIKELIHOOD OF FUTURE VIOLATIONS THAT WARRANTS INJUNCTIVE RELIEF

Defendants' basic assertion on the merits is that their extraordinary collusive conduct and fraudulent representations did not violate RICO at any point in history. That argument would be plausible only if the statute included a specific exception for the tobacco industry.

While not explicitly admitting past fraudulent conduct, defendants urge that a suit for equitable relief is not well founded because they have changed their ways pursuant to the Master Settlement Agreement executed in litigation with the states. This contention fares no better.

A. Defendants' Violations Were Flagrant And Deliberate And Formed Part Of A Pattern

The "ultimate test" for determining the propriety of equitable relief is "whether the defendant's past conduct indicates ... that there is a reasonable likelihood of further violation(s) in the future." SEC v. Savoy Indus., 587 F.2d 1149, 1168 (D.C. Cir. 1978). To determine whether there is a reasonable likelihood of future violations, a district court considers three factors: "whether a

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BATCo subsidiary, Br. 7 n.5, this Court held that the subsidiary did not timely intervene to protect its alleged privilege, United States v. British Am. Tobacco Australia Servs., Ltd., 437 F.3d 1235 (D.C. Cir. 2006), and BATCo does not attempt to assert a privilege claim in its own right on appeal.

defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." SEC v. First City Financial Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989). "No single factor is determinative; instead, the district court should determine the propensity for future violations based on the totality of circumstances." Ibid.

As the test makes clear, injunctive relief may issue without a finding of present or ongoing violations. This Court has repeatedly sustained injunctions based on inferences from past conduct coupled with opportunities for future wrongdoing. See, e.g., SEC v. Washington Investment Network, 475 F.3d 392, 405 (D.C. Cir. 2007); SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); First City, 890 F.2d at 1228-29; Savoy Indus., 587 F.2d at 1168.

We have already shown that defendants' violations were "flagrant and deliberate" and formed "part of a pattern." First City, 890 F.2d at 1228. As this Court has explained, a pattern of deliberate violations often suffices by itself to justify injunctive relief. Bilzerian, 29 F.3d at 695.

B. Defendants' Business Will Present Opportunities For Future Violations

It is clear that defendants retain every incentive to continue their pattern of unlawful conduct. Today, as in 1953, defendants' sales depend on their ability to

raise doubts about the toxicity and addictiveness of their product. Thus, "the nature of [their] business activities" certainly will present them "with further temptations to violate the law." Savoy Indus., 587 F.2d at 1168.

Joint organizations have been the hallmark of defendants' enterprise, and there is no lack of joint organizations through which to coordinate their fraud. Although defendants emphasize the dissolution of TI and CTR, JD Br. 47-48, they have "numerous other means" to "coordinate their activities, ensure continued adherence to the joint strategy, and enable the Enterprise to respond as new threats to the industry" arise. Op.1533-1534.

- The Tobacco Documentation Centre (TDC) exists as successor to INFOTAB and its predecessor, ICOSI. FF434-440.
- The Tobacco Manufacturers Association (TMA) exists as successor to the Tobacco Advisory Council (TAC). FF403.
- The International Society of the Built Environment exists as successor to IAI. FF3662.
- The External Research Program, though now housed by Philip Morris, exists as successor to CIAR. FF3849-3852.

These organizations "present opportunities to violate the law in the future." First City, 890 F.2d at 1228. Indeed, TDC was formed (under the name ICOSI) so that Philip Morris, RJR, BATCo and other major manufacturers could "meet discreetly to develop a defense smoking and health strategy for major markets"

including the United States. FF3456 (quoting US20407). Likewise, TMA has served (under the name TAC) to allow American and British manufacturers to coordinate the tobacco industry's public positions on both sides of the Atlantic. FF390-403. And like its predecessor IAI, the International Society of the Built Environment "continues to publish its journal and hold conferences, and is still run by industry ETS consultants." FF3662.

From the perspective of the American consumer, it makes no difference whether defendants convene in Washington or London to coordinate their fraud on the American public. As an INFOTAB (now TDC) working group observed in explaining why a 1990 meeting would be held at the Tobacco Institute's Washington offices, "most members of the Working Group are already in, or need to be in, the States (i.e., 8 out of 11)." FF432 (quoting US62874_3).

C. Defendants Were Not Reformed By The MSA

Defendants claim that they have been reformed by virtue of the Master Settlement Agreement (MSA), or at least incapacitated by its enforcement provisions. JD Br. 39-53. They therefore insist that, irrespective of their past misdeeds, "no § 1964(a) remedy is permissible," JD Br. 17.

1. Defendants Have Already Conspired to Circumvent the MSA

The MSA, which was executed in November 1998 by Philip Morris, RJR, B&W, and Lorillard, resulted in the dismissal of more than forty state lawsuits and the creation of a patchwork of state-specific injunctions and consent decrees. FF4044. BATCo and Altria are not parties to the MSA. FF4076.

The MSA was, without doubt, an important settlement. But it should not be confused with an admission of guilt or a genuine change of course. Defendants entered into the MSA after Liggett agreed to help the state attorneys general to prosecute lawsuits against the other cigarette manufacturers. FF4039. As Philip Morris Companies (now Altria) advised its shareholders, the settlement was in the company's "best interest" because it resolved a "significant litigation threat currently affecting the U.S. tobacco industry." Form 8-K (11/25/1998). "The agreement provides that it is not an admission or concession or evidence of any liability or wrongdoing on the part of any party, and was entered into by the original participating manufacturers to avoid the further expense, inconvenience, burden and uncertainty of litigation." Ibid.[34]

[34] The Form 8-K is available at: http://www.sec.gov/Archives/edgar/data/764180/0001005477-98-003407.txt.

The Supreme Court has cautioned that "[w]hen defendants are shown to have settled into a continuing practice ... courts will not assume that it has been abandoned without clear proof." United States v. Oregon State Med. Soc., 343 U.S. 326, 333 (1952). "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." Ibid. Although defendants now insist that, as a matter of law, the existence of the MSA removes any cause for skepticism, JD Br. 41-44, the cases on which they rely establish no such sweeping proposition. In Comfort Lake Association, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998), for example, the court merely held that the plaintiff's request for an injunction against future violations of a pollution permit became moot when the permit was terminated. Id. at 354-55.

Skepticism of defendants' "protestations of repentance and reform" is especially warranted here, because the ink was barely dry on the MSA when defendants began plotting to circumvent its requirements.

As defendants stress, the MSA required the dissolution of CIAR, the front organization that defendants used to generate "ammunition which ... happens to be science" in the "battlefield" of ETS. FF3447, FF3532; MSA § III(o) (JD45158);

see JD Br. 47. What defendants do not mention, however, is that on November 25, 1998 – only *two days* after the MSA was signed – Lorillard's general counsel sent a letter to the general counsel of Philip Morris, copied to their counterparts at B&W and RJR, urging that the group arrange a call to "**discuss the status of the plan to reinstate CIAR**." FF3849 (quoting US22164) (emphasis added). The former director of CIAR admitted at trial that the organization's Board of Directors likewise planned to reconstitute the organization notwithstanding the MSA. Eisenberg TT_11/15/04_5881.

To that end, Covington & Burling prepared a letter to reassure CIAR's "contractor" scientists that their funding would continue after the dissolution of "[t]he current CIAR." US75412_2. The letter explained that "[t]he members of CIAR have decided to create a new organization to continue the work for which CIAR has entered into contractual commitments." Ibid. It assured the contractors that "[t]he members of CIAR that will be members of the new organization intend to continue to fund the research that [the contractor] has been conducting under a new contract that will be entered into once the new organization has been established." Ibid. The following year, the former director of CIAR faxed Philip Morris a proposal to create just such an organization. FF3850.

Subsequently, in 2000, Philip Morris established an organization that it calls the "External Research Program." FF3851. It is run by the former director of CIAR. FF3851. It occupies the same offices that housed CIAR, employs many of the same individuals employed by CIAR, and even uses the same phone numbers as CIAR. FF3851. It has the same basic structure as CIAR, including a public "scientific advisory board" with no authority to approve projects or commit funds, and it has given grants to many of the same industry consultants who received CIAR funding. FF3856, FF3852.

2. Defendants Continue to Misrepresent the Toxicity and Addictiveness of Cigarettes Notwithstanding the MSA

Nor has there been any meaningful reform in defendants' personnel or business practices. As the district court found, defendants' "assertions that, as a result of the MSA, they are now new companies headed by changed management are simply not accurate." FF4077; Op.1608.

As the president of Philip Morris conceded at trial, "the Philip Morris executives whom he promoted to his Senior Leadership Team, and whom he appointed to their current positions since 1999, were in fact veteran employees who averaged some fifteen to twenty years' tenure at Philip Morris or one of its sister companies." FF4078 (listing executives). Likewise, "Lorillard's senior management team reflects an average of twenty-two years' tenure with the

company." FF4080; see also FF4081 (BATCo, averaging 23 years' tenure); FF4082 (RJR, 24 years). As the district court observed, "[t]he assertion that such longstanding, faithful employees will usher in dramatically new corporate policies seems reasonably unlikely." Op.1608.

The record makes clear they have not. As the district court found, "[t]he evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity." Op.1603. Although there is no need to show ongoing violations to justify injunctive relief, the district court found that defendants' "continuing conduct misleads consumers in order to maximize Defendants' revenues by recruiting new smokers (the majority of whom are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry." Op.1604. It thus "continues to further the objectives of the overarching scheme to defraud, which began by at least 1953." Ibid.

Plainly, the record refutes any suggestion that the signing of MSA in 1998 put a halt to the fraud that provides the basis for this case.[35] To the contrary, defendants have gone so far as to remove preexisting warnings on brands that they acquire. When, for instance, Philip Morris acquired three cigarette brands from

[35] The district court imposed substantial limits on the government's ability to obtain discovery of documents created after January 1, 2001. DN265_26; DN741_4-5.

Liggett in 1999, it removed package labels that explicitly stated that smoking is addictive. FF1260-1261. And when, in 2001, B&W acquired "Advance" brand cigarettes from an independent company, it promptly removed the following warnings:

- "Smoking can take YEARS off your life";
- "IT IS STILL BETTER TO QUIT THAN TO SWITCH OR SMOKE;"
- "Smoking related diseases can KILL you"; and
- "ALL SMOKED TOBACCO PRODUCTS ARE ADDICTIVE AND POSE SERIOUS HEALTH HAZARDS."

Compare US52963 (independent company's onsert) with US87216 (B&W replacement onsert); see FF1988-1996.

As discussed above, moreover, a central feature of the fraud has been defendants' persistent claim that cigarettes are "addictive" only in the "everyday meaning – when we talk about being 'news junkies' or 'chocoholics'"– rather than in "a drug sense." US89300_9-10. Thus, the Tobacco Institute's Vice President for Public Affairs flatly denied that there is a chemical component to the addiction: "There is no chemical addiction"; "it's not a chemical dependency." US87155_9.

Although defendants urge that "all defendants now agree that smoking is addictive," JD Br. 56, that admission still depends on the "loose, jargony" sense of

the word that defendants impressed upon the American public in TI's 1994 television appearances. US89319_3. "[N]o Defendant accepts the Surgeon General's definition of addiction, no Defendant admits that nicotine is the drug delivered by cigarettes that creates and sustains addiction, and no Defendant acknowledges that the reason quitting smoking is so difficult, and not simply a function of individual will power, is because of its addictive nature." FF1246. Thus, as of the time of trial, B&W's website stated that cigarette smoking is addictive "by modern day definitions of the term," but asserted that "it is inappropriate to call cigarette smoking addictive in the same sense as heroin, cocaine or other hard drugs." US87157. The website declared that such a claim "defies common sense" and "is contrary to much scientific research[.]" Ibid.; FF1250; see also FF1249 (RJR); FF1252 (B&W and Reynolds). Lorillard's president testified that "smoking is not addictive in a 'pharmacological sense,'" FF1253, allowing only that it is addictive in a sense that includes any "pleasurable activity that can be difficult to stop." FF1202 (quoting Orlowsky_WD_116).

To maintain this posture, defendants cannot admit their cultivated expertise in nicotine manipulation, and so they deny it. Op.1603; FF1751. Thus, as of 2004:

- Philip Morris's website stated: "[S]ome have alleged that the Company uses specific ingredients to affect nicotine delivery to smokers. That is simply not true." FF1751 (quoting US88058_1).

- B&W's website declared: "Brown & Williamson does not in any way control the level or nature of nicotine in cigarettes to induce people to start smoking or to prevent people from quitting." FF1753 (quoting US86656_1).

- RJR's website stated: RJR "do[es] not add nicotine or any nicotinic compounds to any of our cigarettes, nor do we do anything to enhance the effects of nicotine on the smoker." FF1752 (quoting US86942_1).

Defendants' insistence that cigarettes are not addictive in a "drug sense," and their related denial that they manipulate nicotine delivery to create and sustain addiction, facilitate their ongoing fraudulent marketing of "light" cigarettes. The MSA does not address defendants' use of "light," "low-tar," or similar health assurance descriptors. FF4085. All defendants continue to market "light" cigarettes to consumers seeking to reduce their health risks or quit, Op.1603, and their advertisements continue to imply that there are health benefits to be derived from smoking "light" cigarettes. See, e.g., FF2387 (2001 Institute of Medicine report citing the advertisements of Philip Morris, RJR, B&W, American Tobacco, Lorillard, and Liggett); FF2527 (2000 B&W report confirming that consumers perceive Carlton cigarettes as healthier). Defendants cannot and do not admit that they have designed their "light" products to facilitate smokers' compensation for nicotine, thereby nullifying the implied health benefits of their "light" brands. Moreover, despite the MSA, defendants have actually increased the number of

advertisements in youth oriented magazines. FF3033. Their advertising campaigns thus target the population most likely to be deceived by their false health reassurances. FF2700-2715.

Even on the basic issues of smoking and disease, defendants continue to dissemble. In 2002, Altria's CEO expressed doubt that Philip Morris cigarettes had ever caused disease in any individual smoker. FF807 (citing Bible PD, 8/22/02, 63-64). In 2000, B&W's website declared that "[w]e know of no way to verify that smoking is a cause of any particular person's adverse health[.]" FF821 (quoting JD12645_2). Likewise, years after the MSA, "no Defendant publicly admits that passive exposure to cigarette smoke causes disease or other adverse health effects." FF3305; see Op.1606 & n.45. Even in this litigation, defendants have denied that ETS exposure causes disease. FF3829. Unsurprisingly, the sole expert witness defendants could find to endorse that view – a professional witness with no training in medicine, epidemiology, toxicology, or biology, and no prior publications related to tobacco, smoking, or health – was thoroughly discredited. FF3358 n.30. As the district court found, "[n]o scientific or medical authority" endorses the methodology or conclusions defendants urged on the court, and leading statistical texts reject their witness's approach. Ibid.

Nevertheless, RJR's website at the time of trial informed visitors that, although "high concentrations" of smoke in the air may cause "temporary irritation," it is "unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults." FF3830 (quoting US92012_2). Lorillard has never admitted in any forum that ETS causes disease. FF3833. And BATCo's website at the time of trial flatly denied that passive smoke poses any health hazard to adults or children, conceding only that ETS can be "annoying." FF3835 (quoting US86747); see also FF3838.

3. Important Provisions of the MSA Have Expired or Will Soon Expire

As we have explained, the MSA neither ushered in an era of reform nor dissolved the "network of interlocking organizations" (FF3861) that defendants created to orchestrate their scheme to defraud.

Moreover, key provisions of the MSA have already begun to expire. In 2006, the inspection powers granted to state authorities under the MSA began to lapse, depriving states of the right to "inspect and copy" defendants' "books, records, meeting agenda and minutes, and other documents" and to interview their "directors, officers and employees" in order to investigate alleged violations. MSA § VII(g) (JD45158_52). As the district court observed, "the MSA's enforcement

mechanisms will steadily become less and less adequate as the authority begins to expire in one state after another, starting [in 2006]." Op.1611.

Likewise, the requirement that defendants maintain publicly accessible internet depositories of the documents disclosed in tobacco litigation will expire in June 2010. FF4055; MSA § IV(c)-(d) (JD45158_37-39). In urging the district court to find no reasonable likelihood of future RICO violations, defendants specifically highlighted the deterrent effect of these public document depositories, declaring that "transparency has been achieved so that people can monitor what the tobacco companies are doing." Tr._9/22/04_370. Cf. 396 F.3d at 1203 (Williams, J., concurring) (RICO authorizes courts to "impose transparency requirements so that future violations will be quickly and easily identified"). But under the terms of the MSA, defendants' obligation to maintain that transparency will evaporate within two years of the close of briefing in these appeals.

4. RICO Embodies Congress's Judgment that Piecemeal Prosecution of Discrete Violations Cannot Adequately Prevent and Restrain Long-Term Criminal Enterprises

Even leaving aside the details of the MSA, the suggestion that the agreement can substitute for equitable relief under section 1964(a) ignores the dangers that Congress intended RICO to address. The federal government has no power to enforce the MSA, and the agreement specifically bars states from punishing

violations occurring outside of their respective borders. MSA § VII(b), (c)(1). At best, therefore, the MSA provides a highly balkanized framework for the piecemeal prosecution of individual violations by individual defendants.

Congress enacted RICO precisely because it determined that such an approach provides inadequate tools to address the nationwide threats posed by organized, long-term criminal syndicates. "The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions." Turkette, 452 U.S. at 586; see also Sedima, 473 U.S. at 498; Russello v. United States, 464 U.S. 16, 26-28 (1983). In particular, "Congress was concerned in RICO with long-term criminal conduct" by organizations whose sophistication and resources enabled them to resist conventional state and federal enforcement actions. H.J. Inc., 492 U.S. at 242. By enacting RICO's "far-reaching civil enforcement scheme," Sedima, 473 U.S. at 483, Congress sought to empower the federal government to restrain the racketeering activities of criminal enterprises which – as this case illustrates – may be national and even global in reach. Defendants' suggestion that, faced with such an enterprise, the United States Attorney General or the federal district court must defer to the piecemeal enforcement actions of individual states is flatly at odds with Congress's design.

SECTION TWO: REMEDIES

I. THE EQUITABLE RELIEF ORDERED BY THE COURT WAS WITHIN ITS DISCRETION

The decision to grant injunctive relief is reviewed for abuse of discretion. SEC v. Washington Investment Network, 475 F.3d 392, 399, 407 (D.C. Cir. 2007). The equitable relief ordered by the district court was well within its discretion.

A. Fair Notice

As an initial matter, defendants broadly claim that the remedies were imposed "without adequate notice and opportunity to respond as required by due process[.]" JD Br. 134. As the district court explained, however, "Defendants received the Government's proposed remedies almost two months before the remedies trial and had an additional twelve days after the conclusion of the liability phase to prepare for the remedies phase." Op.1626. "Defendants participated in a fourteen day remedies trial which was fully briefed, and at which thirteen witnesses testified," and they "had a full opportunity to cross-examine all Government witnesses." Ibid. Moreover, defendants filed a lengthy post-trial brief challenging the remedies proposed by the government, DN5666_143-223, including the corrective communications defendants now claim they had no opportunity to address, DN5666_189-195.

After considering the evidence and arguments, the district court granted some but not all of the relief sought by the government. The court correctly rejected defendants' "fair notice" objection, observing that "Defendants point to no specific witness they were unable to cross-examine and no substantive area of testimony they were unable to rebut because of the alleged lack of notice." Op.1626-1627. Indeed, although defendants now tout their "offer of proof" regarding corrective statements, JD Br. 135, that offer claimed only that defendants would "possibly have offered testimony from one or more experts" on the issue. DN5657_10.

This case thus bears no resemblance to United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), where the district court imposed remedies without holding any remedies-phase hearing and without allowing the defendant to introduce specific, identified evidence to rebut the proposed remedies. Id. at 102; see also id. at 103 ("[I]n 53 pages of submissions, Microsoft identified the specific evidence it would introduce to challenge plaintiffs' representations.").

Although defendants claim that they had inadequate notice of the "precise nature of the corrective communications" ordered by the court, JD Br. 135, the district court has not yet ruled on that question. It directed the parties to submit competing proposals, Op.1636, but this Court stayed the injunction before district

court took final action on the proposals. Any objections to the details of corrective communications thus should be raised on remand.

B. Transparency Requirements: Document Depositories, Websites, And Disclosure Of Disaggregated Marketing Data

The grant of equitable jurisdiction in § 1964(a) allows a court to "impose transparency requirements so that future violations will be quickly and easily identified." United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1203 (D.C. Cir. 2005) (Williams, J., concurring). As the Supreme Court has observed, "the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive." SEC v. Capital Gains Research Bureau, 375 U.S. 180, 193, 200 (1963) (approving disclosure requirement as a "mild prophylactic" against future fraud).

The district court imposed specific disclosure requirements designed to assure transparency in defendants' business conduct. Op.1636-1643. The MSA required defendants to maintain depositories for public access to the documents they produce in litigation, subject to protections for privileged and trade secret information. Op.1638-1641. Those requirements lapse in 2010. Op.1639. The court required that defendants continue to maintain their depositories and websites. The court also required defendants to submit to the Department of Justice the same

disaggregated marketing data that they submit to the FTC, subject to protective orders. Op.1642-1643.

Defendants do not contest the district court's authority to impose such transparency requirements. To the contrary, they urged below that the virtual depositories established under the MSA were the crucial (and in their view, sufficient) means of assuring transparency:

> As far as transparency, so that this whole country, the whole world for that matter, can know what these tobacco companies are doing, today under the MSA, all the documents we produce in litigation, except if they're privileged or trade secret, are on the Website, by the terms of the MSA, they're there, and that transparency has been achieved so that people can monitor what the tobacco companies are doing.

Tr._9/22/04_370. Defendants' contention that the district court's remedies are "duplicative of existing disclosure obligations," JD Br. 136, does not bear scrutiny. They do not dispute that the requirements of the MSA will soon expire. The district court's order extends those disclosure obligations for a 15-year period beyond the existing expiration dates, and applies them to BATCo and Altria. Op.1639, 1641. The remedies are plainly not duplicative.

C. Brand Descriptors Such As "Light" And "Low Tar"

Defendants challenge the propriety of the provisions enjoining the use of these descriptors such as "light," "mild," "natural," and "low tar." These

arguments ignore the voluminous relevant fact-findings and demonstrate no abuse of the court's equitable discretion.

As discussed in detail above, the marketing of cigarette brands with descriptors such as "light," "mild," "natural," and "low tar" has played a crucial role in defendants' misrepresentations regarding the health risks of smoking, and is intimately related to their misrepresentations about nicotine addiction and their manipulation of nicotine intake. See Statement of Facts Point II(D). The marketing of these cigarettes is premised on defendants' recognition that smokers are "readily willing to sacrifice taste for a 'longer life.'" FF2263. But defendants have long understood that promise of "longer life" is illusory and that these "health reassurance" brands provide no meaningful health benefit to smokers. See also Op.1627-1631. Indeed, defendants designed their "light" brands to facilitate the compensation mechanisms that nullify the implied health benefits. Op.1627.

The deception has been extremely successful. See Statement of Facts Point II(D)(2), supra; Op.1644. Of the 47 million Americans who smoke cigarettes today, more than 81% smoke "light" or "ultralight" brands. Op.1644; FF2378. More than half of those smokers mistakenly believe that the brands are less harmful than other cigarettes. Op.1644 (citing Weinstein_WD_53).

As discussed above, defendants' claim that their descriptors have received "specific authorization" from the FTC is without merit and, indeed, is irreconcilable with their 1998 comments to the agency. See Argument (Liability) Point V(A), supra. Defendants' attempts to cast doubt on the materiality of their deceptions and omissions are likewise without basis. See Argument (Liability) Point III(C)(3), supra.

In addition to these broad-based attacks on the injunction, defendants contend that the bar on descriptors was broader than necessary to prevent the ongoing "light" cigarette fraud, suggesting that mandatory "disclaimers" would suffice. JD Br. 89. Inasmuch as defendants also argue that the district court lacks authority under § 1964(a) to require corrective statements of any kind, JD Br. 128-129, their theories in combination would preclude any relief. In any event, the court's choice of remedy for the "light" cigarette fraud was plainly not an abuse of discretion. As this Court explained in Brown & Williamson, consumers "habituated" to light cigarette claims are unlikely to give heed to a disclaimer. 778 F.2d at 43.

Nor do defendants identify any legitimate purpose served by their descriptors. Although they claimed at trial that "consumers choose lights for taste, because they prefer a lighter tasting cigarette," FF2554 (quoting Ivey WD_57),

their internal documents expose that claim as pretextual, revealing that smokers generally dislike the taste of "light" cigarettes but are "willing to sacrifice taste" for the illusion of "a 'longer life.'" US22158_65; FF2239. Indeed, "a lights brand with taste" seemed "almost a contradiction in terms" for many smokers of "full flavor" cigarettes, FF2566 (quoting US31643_80006526) – a point underscored by defendants' advertising campaigns. See, e.g., FF2269 (quoting US22172_2070717427) ("THE LOWEST IN TAR & NICOTINE: Try Now. Surprisingly good taste.").

D. Corrective Communications

As discussed above, defendants engaged in a decades-long campaign to deceive American consumers about the dangers and addictiveness of cigarettes. Their false statements and misleading omissions were made in newspapers, on television, in magazines, on cigarette pack "onserts," and on Internet websites. Op.1634.

Accordingly, the district court ordered defendants to make corrective statements about smoking and health through the same vehicles that defendants have used to perpetrate the fraud. Op.1635. The court required that corrective statements be made about addiction and nicotine manipulation, the dangers of mainstream and sidestream smoke, and the hazards of "light" cigarettes. Ibid.

1. Corrective Statements Are Forward-Looking Remedies

Defendants argue that this requirement does not "prevent and restrain" violations of RICO, urging that the remedy is "backward-looking" in the same sense as this Court used that term in declaring disgorgement impermissible on interlocutory appeal. JD Br. 129. But as this Court has explained, fraud by its nature is ongoing until corrected. Thus, in Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), this Court sustained an FTC order requiring a company to include in its advertisements the phrase "Listerine will not help prevent colds or sore throats or lessen their severity," id. at 765 n.1, explaining:

> To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed and purchased as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly.

Id. at 769 (quoted at Op.1633-1634). Likewise, this Court sustained a corrective advertising requirement in Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000), explaining that such a requirement is appropriate where deceptive advertising "played a substantial role in creating or reinforcing in the public's mind a false and

material belief which lives on after the false advertising ceases[.]" Id. at 787 (quotation marks omitted). Absent the corrective statement, "consumers continue to make purchasing decisions based on the false belief." Ibid.

The corrective statements ordered here are at least as clearly "necessary to prevent current and future advertisements from becoming 'themselves part of the continuing deception of the public.'" Op.1634 (quoting Warner-Lambert, 562 F.2d at 769). The relief is thus "narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages[.]" Ibid. Defendants' attempt to liken these corrective statements to disgorgement is meritless. As noted below, the government respectfully disagrees with this Court's characterization of disgorgement as a "quintessentially backward-looking remedy." 396 F.3d at 1198. What is crucial here, however, is that a similar characterization cannot aptly be applied to the requirement of corrective statements.

2. Corrective Statements Do Not Violate the First Amendment

Defendants contend that even if the corrective statement requirement "is intended to correct lingering consumer confusion, it still violates the First Amendment." JD Br. 130. This Court expressly rejected First Amendment challenges to the corrective statement requirements in Warner-Lambert and Novartis, perceiving "no First Amendment impediment to the remedy." Novartis,

223 F.3d at 789; see also Warner-Lambert, 562 F.2d at 768-69. As this Court explained, the corrective statement remedy "advances precisely the 'interest involved,' namely the avoidance of misleading and deceptive advertising." Novartis, 223 F.3d at 789 (quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980)). The notices here will dispel the consumer confusion created by defendants' deceptions, and are contoured to serve that interest. Ibid. Defendants cannot seriously contend that corrective statements will "add nothing" (JD Br. 130) to the public health warnings they have worked so hard to undermine.

Contrary to defendants' suggestion, their false claims did not cease to be commercial speech when made in the newspaper. JD Br. 131. Statements made to convince consumers to buy cigarettes are commercial speech regardless of whether they appear in an advertisement for a particular brand or in a "Frank Statement" to promote the sale of cigarettes generally. See Argument (Liability) Point V(B), supra (discussing defendants' First Amendment claims).

3. Defendants May Be Required to Issue Corrective Statements Through the Media Used to Disseminate the Fraud

Defendants' remaining objections to corrective statements focus on the venues in which the statements are required. They argue that they cannot be

required to make "freestanding statements" in newspapers, on television, or on the internet, JD Br. 131; that they cannot be required to make corrective statements on package "onserts," id. at 134; and they contend that they cannot be required to make corrective statements at points of sale, through countertop and header displays. Id. at 132-133. The district court clearly did not abuse its discretion in rejecting defendants' claim that virtually all venues are out-of-bounds.

Defendants made extensive use of the newspapers, television, and other media to disseminate their misrepresentations, and, as the district court explained, it is entirely appropriate to require that defendants issue corrective statements through the same media that the enterprise employed to effectuate its scheme. Op.1634-1635.

Defendants now contend that the Labeling Act barred the district court from requiring that corrective statements be made on package onserts. JD Br. 134. But the provision they cite concerns the warnings that must appear on any cigarette package. 15 U.S.C. § 1334(a). The onsert is a vehicle to provide corrective information. It is supplied along with the cigarette pack because that form of distribution targets most directly the persons deceived by defendants' misrepresentations.

Indeed, at trial, Philip Morris urged a distinction between onserts and the cigarette pack itself. Its senior vice president was asked why, when Philip Morris purchased three Liggett brands in 1999, it removed the preexisting pack labels stating that smoking is addictive, and replaced the labels with differently worded onserts. FF1260-1261. She testified that Philip Morris chose onserts over pack labels because "[a]s it related to the pack, the judgment was we existed under a statutory and regulatory regime and the content of the warning notices should, in fact, be directed by the government." Keane TT_1/18/05_10459; id. at 10461 (discussing the onserts). The clear import (uncontested by other defendants) was that onserts do not constitute the "pack" and thus are not covered by the "statutory and regulatory regime" that governs warnings. The district court's ruling reflects the same distinction. Op.1636 n.53.

Finally, defendants' objection to countertop and header displays rests on a misunderstanding of the district court's order. The court did not expect that retailers would display "three or more separate, substantively identical signs" on their countertops or in header displays. JD Br. 133. The order simply ensures that no defendant will evade its corrective advertising costs by free-riding on the expenditures another defendant has already made. And while the National Association of Convenience Stores insists that even a single countertop

requirement works an unconstitutional taking and a violation of the store's First Amendment and due process rights, the order does not impose any direct obligations on third party retailers, and it leaves retailers who choose to do business with defendants free to demand additional compensation to meet additional costs.

E. General Injunction Provisions

In addition to the specific remedies just discussed, the district court enjoined defendants from "committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States," Order_2, and from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." Order_3.

Defendants argue that these provisions are too vague to satisfy Rule 65(d) of the Federal Rules of Civil Procedure, JD Br. 137-139, characterizing the order as a "generalized injunction to obey the law." JD Br. 139. But unlike the injunction in SEC v. Washington Investment Network, 475 F.3d 392 (D.C. Cir. 2007), which provided in its entirety that defendants were "enjoined from future violations of"

the governing statute, id. at 407, the district court did not enjoin RICO violations in the abstract. It enjoined racketeering acts relating to "the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States." Order_2. It likewise did not enjoin deceptive statements in the abstract, but barred deceptions that "misrepresent[] or suppress[] information concerning cigarettes." Order_3. The court explained that the prohibited "material statements include, but are not limited to," any statement that "involves health, safety, or other" subjects of importance to a reasonable consumer of cigarettes; any statement to which "a reasonable consumer or potential consumer would attach importance" in deciding whether to smoke; and any statement where the defendant making the statement "knows or has reason to know that its recipient regards or is likely to regard [it] as important ... even if a reasonable person would not so regard it." Ibid.

The order thus closely tracks the conduct found by the court to violate RICO. Section 1964(a) expressly authorizes district courts to "prohibit[] any person from engaging in the same type of endeavor as the enterprise engaged in." 18 U.S.C. § 1964(a). And in any event, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless

enjoined, may fairly be anticipated from the defendant's conduct in the past." NLRB v. Express Pub. Co., 312 U.S. 426, 435 (1941). The injunction entered by the district court parallels those upheld in other civil RICO cases. See, e.g., United States v. Carson, 52 F.3d 1173, 1184-85 & n.10 (2d Cir. 1995); McLendon v. Continental Can Co., 908 F.2d 1171, 1182-83 (3d Cir. 1990); see also SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100, 1102-03 (2d Cir. 1972) (upholding, in securities fraud case, injunction barring defendants from all future violations of antifraud provisions of statute).

Moreover, as this Court has explained, "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.'" Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927 (D.C. Cir. 1982) (quoting United States v. Christie Indus., 465 F.2d 1000, 1007 (3d Cir. 1972)). Given the 1,400 pages of factual findings, defendants cannot seriously contend that they lack guidance in interpreting the injunction. And while they invoke the First Amendment, there is no constitutional defect in an injunction requiring defendants to deal honestly with their customers.

At bottom, defendants' objection is not that the injunction is unclear, but that it is broad. But Rule 65(d) limits vague injunctions, not comprehensive ones, and the Supreme Court has emphasized that broad decrees prohibiting future violations of a statute are "wholly warranted" where "a proclivity for unlawful conduct has been shown." McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949) (concluding that an order "enjoin[ing] any practices which were violations of th[e] statutory provisions" was justified by the defendant's "record of continuing and persistent violations"). As this Court has recognized, it "does not follow" from Rule 65(d) "that a broadly-phrased injunction may never be valid, nor that a prohibition of future transgressions, even in relatively wide-ranging terms, of a law already broken by the defendant is necessarily invalid." SEC v. Savoy Indus., 665 F.2d 1310, 1317 (D.C. Cir. 1981). Breadth may well be essential to remedy persistent illegality, lest "defendants simply work out new plans not within the ambit of the narrow prohibitions imposed upon them." Id. at 1317 n.53 (citing McComb, 336 U.S. at 192-93).

F. Application Of The Injunction To Foreign Conduct And Corporate Subsidiaries

The final order includes a mechanism to ensure that defendants cannot evade their obligations under the injunction through corporate reorganization. To this end, the order applies to subsidiaries and prohibits the sale or transfer of a

defendant's tobacco business, brands, or product formulas to any person or entity, unless the purchaser submits to the district court's jurisdiction and agrees to comply with the final injunction. Order_2, 17-18.

For example, as defendants note, B&W became a holding company in 2004 via a merger with Reynolds. JD Br. 59-60. The subsidiary and transfer provisions ensure that the new operating company that emerged from the merger, JD13296_5-6, is bound by the injunction.[36]

Although defendants stress the injunction's application to foreign subsidiaries, JD Br. 142, the United States brought this lawsuit to protect American consumers and the injunction should be understood in accordance with that core purpose. Given defendants' demonstrated record of using international organizations and research facilities to enable their scheme to defraud, the district court was entirely warranted in enjoining defendants from perpetrating their fraud on the American public from abroad. As this Court has stressed, the regulation of conduct abroad that causes harmful effects in the United States "is not an extraterritorial assertion of jurisdiction." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984). "[T]he doctrine of territorial

[36] BWH suggests that the new operating company alone should be subject to the injunction. JD Br. 59-60. This issue should be addressed by the district court in the first instance.

sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its 'sovereign' walls, while its own regulatory efforts are reflected back in its face." Ibid.; see also Steele, 344 U.S. at 288; Sisal, 274 U.S. at 276; FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 & n.85 (D.C. Cir. 1980).

While defendants thus cannot evade the injunction by colluding abroad to defraud American consumers, the injunction should not be read to govern overseas activities with no domestic effect. Indeed, the injunction specifically exempts from judicial oversight the transfers of tobacco businesses by entities "exclusively outside of the United States." Order_17-18. See also Order_2 (enjoining racketeering acts related to the sale or promotion of cigarettes "in the United States"); Order_3 (enjoining deceptive statements about cigarettes that are "disseminated to the United States public"); Order_5 (requiring onserts on cigarette packs "shipped for retail distribution in the United States"); Order_10-11 (requiring disclosure of documents produced in judicial or administrative proceedings "in the United States").

II. THE DISTRICT COURT MISTAKENLY CONCLUDED THAT CERTAIN REMEDIES WERE BEYOND ITS EQUITABLE AUTHORITY

Congress enacted RICO to create "enhanced sanctions and new remedies" to combat the unique threats posed by sophisticated and enduring criminal enterprises. United States v. Turkette, 452 U.S. 576, 589 (1981) (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947). To that end, Congress created a "far-reaching civil enforcement scheme," Sedima, SPRL v. Imrex Co., Inc., 473 U.S. 479, 483 (1985), because it recognized that the flexibility inherent in equitable remedies will often be essential in uprooting organized criminal conspiracies that have embedded themselves in the national economy, see S. Rep. No. 91-617, at 82-83 (1969). In addition, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). As the Supreme Court has stressed, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Sedima, 473 U.S. at 491 n.10.

A. Public Education And Smoking Cessation

In ruling on the availability of disgorgement in the context of an interlocutory appeal, a divided panel of this Court held that the remedy of disgorgement is not sufficiently tied to RICO's authorization of relief to "prevent

and restrain" violations. In the panel's view, the disgorgement remedy was entirely "backward-looking" and "duplicative" of RICO's damages and forfeiture provisions. 396 F.3d at 1198, 1201.

The district court was of course bound by this Court's disgorgement ruling. The district court erred, however, in concluding that certain non-disgorgement equitable remedies were also foreclosed by the Court's holding as a matter of law, Order #886 (DN4906), Op.1646, Op.1652, even though those remedies were not in any sense "duplicative" of a damages or forfeiture remedy and are necessary to prevent the future victimization of consumers as a result of defendants' fraud.

First, the government urged the district court to require defendants to fund a public education campaign designed to counteract defendants' campaign of disinformation. Even under the narrowest reading of § 1964(a), there can be no doubt that such a remedy would prevent and restrain future RICO violations. The goal of defendants' fraud has been (and remains) to prevent American consumers from understanding both the full extent of the health consequences of smoking and the addictiveness of nicotine, which greatly compounds those health effects. Defendants' ongoing fraudulent statements have "played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on" today. Novartis, 223 F.3d at 787. As this Court has emphasized, absent

correction, fraud is ongoing because "consumers continue to make purchasing decisions based on the false belief." Ibid. Thus, even if defendants' future advertisements are not deceptive "when viewed in isolation," "they must be seen against the background of over 50 years" of deception. Warner-Lambert Co. v. FTC, 562 F.2d 749, 769 (D.C. Cir. 1977). "When viewed from this perspective, advertising which fails to rebut the prior claims ... inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly." Ibid.

The requested public education remedy thus would "prevent and restrain" ongoing and future deceptions by requiring defendants to provide to consumers the fundamental health and addiction information that defendants have labored for decades to conceal, and thereby inoculate the public from further deceit. The prospective effect of such an injunction is most evident with regard to defendants' fraudulent denials of the addictiveness of nicotine and defendants' own extraordinary efforts to facilitate, through manipulations in the design of their products, the creation and prolongation of nicotine addiction. An honest appreciation of the risks and consequences of such addiction is crucial to current smokers, many of whom believe that smoking "light" cigarettes is a step toward quitting altogether. It is also crucial to any person, and particularly young persons,

who may be considering whether to begin smoking in the first place. As the district court recognized, a public education program would thus "unquestionably serve the public interest" by sapping the potency from defendants' ongoing misrepresentations and omissions and by undermining the efficacy of their youth marketing. Op.1651.

The requested education remedy is also particularly appropriate as a means of combating defendants' trademark strategy of describing settled issues of disease and addiction as "open questions," thereby providing smokers with "a psychological crutch and a self-rationale to continue smoking." FF636 (quoting US20189_1). The proposed program of education and countermarketing would finally halt this strategy and ensure that defendants' cherished "open questions" are emphatically closed. Because such a public education remedy would thus restrain defendants' ongoing fraud and prevent them from continuing it in the future, the district court erred in believing that this Court's disgorgement decision categorically barred the court from considering the government's proposals. Op.1652.

In conjunction with public education, the government also requested that defendants be required to fund a smoking cessation program. The education and smoking cessation remedies are closely related. The education remedy seeks to

ensure that consumers understand the true health consequences of smoking, both to themselves and (through exposure to ETS) to their spouses and children, as well the chemical basis of nicotine addiction and the extent to which defendants engineer their cigarettes to create and sustain it. A smoking cessation program is necessary to permit a meaningful response to that education: having built an enterprise predicated on falsely trapping millions of Americans in chemical handcuffs, defendants must not merely explain to consumers the truth about their predicament, but must also provide the key to escape.

The district court believed that, under this Court's disgorgement ruling, it was foreclosed from providing relief designed to free smokers whose addiction arose out of pre-judgment fraud, because such relief would counter the ongoing effects of past violations rather than prevent future violations. Order #886 at 5. This Court should not read the panel's ruling to restrict the equitable authority so significantly.

In the prior panel's view, the disgorgement remedy was entirely "backward-looking" and "duplicative" of RICO's damages and forfeiture provisions. 396 F.3d at 1198, 1201. That is clearly not the case with respect to the education and smoking cessation remedies, which are forward-looking and could only be ordered as a matter of the court's equitable authority.

The panel also stated that disgorgement is "awarded without respect to whether the defendant will act unlawfully in the future," and that the text of § 1964(a) "indicates" that "jurisdiction is limited to forward-looking remedies that are aimed at future violations." 396 F.3d at 1198. The district court quoted the latter statement in concluding that the panel decision did not "permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO." Order #886 at 5 (DN4906).

While it is understandable that the district court would apply the panel's language strictly, the panel's holding need not and should not be read so broadly on appeal. The only remedy before the prior panel was disgorgement. In that context, the panel distinguished between "remedies that address past harms" and those that "offer[] prospective relief," 396 F.3d at 1200, and concluded that disgorgement – "separating the criminal from his prior ill-gotten gains" – was barred. Ibid. (emphasis added). The panel had no occasion to consider the type of remedies at issue here, which are not even arguably duplicative of RICO's damages and forfeiture remedies, and do not address "past harms" or "prior" ill-gotten gains, but instead "offer[] prospective relief" against future harm by preventing further victimization of the public as a consequence of defendants' fraud.

Nor did the panel address the special nature of defendants' deceptions in inducing addiction. In the typical case, a successful deception will result in an ill-gotten gain that precedes a RICO judgment. In this case, however, the ill-gotten gains are not merely a matter of historical fact. Smokers addicted to nicotine through defendants' past conduct are a source of present and future sales; each new sale is just as clearly an acquisition of money by deception as the sales that preceded the district court's order. In rejecting disgorgement, the panel emphasized that the remedy is "both aimed at and measured by past conduct." 396 F.3d at 1198 (emphasis added); see also ibid. (emphasizing that disgorgement "is measured by the amount of prior unlawful gains"); id. at 1200 ("Disgorgement is ... aimed at separating the criminal from his prior ill-gotten gains."). That is not the case with regard to a smoking cessation remedy "aimed at" freeing the victims of ongoing addiction and preventing future profits from defendants' deceptions. The continuing plight of defendants' victims is not outside the reach of a court sitting in equity under § 1964(a). The ongoing nature of addiction would plainly justify an order designed to free unwilling consumers from the bonds of defendants' fraud and prevent the defendants from continuing to reap profits from that fraud.

There can be no question, for example, that § 1964(a) would allow a court to order rescission of an ongoing contract procured by past extortion or fraud. See

United States v. Mason Tenders Dist. Council, 1994 WL 742637, *3 (S.D.N.Y. 1994) (authorizing court-appointed monitor to "rescind any contract" of the union that "constitutes or furthers an act of racketeering"); cf. 18 U.S.C. 1964(a) (listing divestiture, dissolution and reorganization of an enterprise among the authorized remedies). A smoking cessation program would similarly enable defendants' victims to escape the addictive (as opposed to contractual) compulsion to continue purchasing defendants' products as a continuation of defendants' fraud.

Moreover, as the panel dissent noted, Congress expressly modeled RICO's grant of equitable authority on the antitrust laws, 396 F.3d at 1221-22, and the Supreme Court has repeatedly construed the Sherman Act's grant of authority to "prevent and restrain violations," 15 U.S.C. § 4, to permit equitable remedies designed to address the ongoing effects of past unlawful conduct. See, e.g., Ford Motor Co. v. United States, 405 U.S. 562, 573 & n.8 (1972); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957) (relief must "eliminate the effects" of the unlawful acquisition); United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944) ("the government should not be confined to an injunction against further violations"). Indeed, one meaning of the word "restrain" is to "moderate or limit the force, effect, development, or full exercise of." Webster's Third New International Dictionary 1936 (definition 2a). Thus, a smoking

cessation program designed to "moderate or limit" the ongoing "force" and "effect" of defendants' past fraudulent conduct is fully consistent with the text of § 1964(a), which authorizes courts to "restrain violations" of RICO.

In any event, even if the panel's statements on the prior appeal were extended beyond the issue that was before it, it would not foreclose a narrower smoker cessation program proposed by the government in response to the rulings made in Order #886, which instructed the government to revise its proposed remedies in light of this Court's ruling.[37] That more limited remedy would require defendants to fund a smoker cessation program calculated to address the number of smokers who would become addicted after the judgment, as a result of future fraud. That remedy restrains future fraud by removing the driving incentive behind the fraud – the desire to addict new smokers and to intercept would-be quitters through false health assurances. It targets the very linchpin of any scheme to defraud that defendants are likely to pursue in the future.

As the record illustrates, defendants have long understood that "the high profits additionally associated with the tobacco industry are directly related to the

[37] See Order #886 at 5 (directing the government, "[i]n fashioning its remedies testimony," to be "mindful of the plain, explicit language of Judge Sentelle's 2-1 Opinion," which, the court stated, did "not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO").

fact that the customer is dependent upon the product." FF1043 (quoting US21530_4). Much of their fraud has therefore focused on preventing the public from appreciating the virulence of nicotine addiction and the steps that defendants have employed to induce and sustain it. By requiring defendants to provide consumers with a ready and genuine means to overcome their dependence, the proposed smoking cessation remedy targets the nexus between defendants' fraud and their racketeering profits, thereby disrupting the sinister calculus that has made defendants' fraud so irresistible for so long. Cf. 396 F.3d at 1203 (Williams, J., concurring) (noting that the likelihood of future violations depends on a defendant's expected "returns" from a violation).

B. Monitoring

The district court recognized that "Defendants' fraudulent conduct has permeated all aspects of their operations – from how they design, manufacture, and market their products to how they communicate with the public about them – and continues to this day." Op.1647. Accordingly, as discussed above, the district court entered a series of remedies designed to prevent future violations, both by enjoining ongoing fraudulent marketing practices and by requiring disclosures of documents and disaggregated marketing data to achieve transparency in

defendants' business operations. Nonetheless, the district court declined to order any system for monitoring defendants' future compliance. Op.1648-1651.

There can be no doubt that some form of monitoring is authorized and is, indeed, essential in a case of this kind. As other RICO cases reflect, in the face of systemic corruption, it is imperative to appoint a court officer to assist in monitoring compliance with the decree. It can take years of intensive oversight to eliminate such corruption and it is simply not feasible to do so without the aid of a monitor. Thus, monitors and other court officers are common features of decrees entered under RICO's grant of equitable authority. See, e.g., United States v. Local 30, United Slate Tile, 871 F.2d 401, 404 (3d Cir. 1989); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 296 n.39 (3d Cir. 1985); United States v. Local 295, Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992); see also United States v. Sasso, 215 F.3d 283, 287-92 (2d Cir. 2000). As Congress explained in enacting RICO, the civil remedies available under section 1964 "are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the court to insure that is decrees are not violated." S. Rep. No. 91-617, at 82-83.

Even outside the RICO context, the Supreme Court has stressed that it is "well within" a district court's inherent authority to appoint an officer to monitor

compliance with a complex remedial injunction, particularly in the face of an "established record of resistance" to compliance with the law. Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 482 (1986). Indeed, courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties," and "[t]his power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties." Ex parte Peterson, 253 U.S. 300, 312 (1920). This Court has recognized the "well-established tradition allowing use of special masters to oversee compliance" with a remedial decree, United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C. Cir. 1998), a practice reflected in Rule 53(a) of the Federal Rules of Civil Procedure. As the advisory committee note to the 2003 amendments explains, "[r]eliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent."

Here, defendants have not merely "proved resistant or intransigent"; they have for decades schemed to deceive their customers about the toxicity and addictiveness of their product. To conceal their fraud, they have destroyed documents and concealed evidence overseas. The district court was compelled to sanction defendants repeatedly merely to ensure their compliance with discovery

obligations.[38] It is difficult to imagine a case in which a court-appointed monitor is more justified.

Moreover, as discussed above, additional public education and smoker cessation remedies are within the court's equitable discretion and, if ordered by the court, will entail some form of monitoring. Although the district court found the particular monitoring scheme proposed by the government to be objectionable in certain respects as an impermissible delegation of the judicial function, the court failed to implement even those aspects of the government's proposal (or some modified version of that proposal) that would not raise those concerns. The failure to impose any monitoring remedy, despite the evident need for some such relief to effectuate the goal of restraining future violations by these "intransigent" defendants, was an abuse of discretion. Accordingly, the district court should be directed on remand to consider what manner of monitoring is required to ensure the eradication of defendants' unlawful enterprise.

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[38] See, e.g., 2005 WL 729434 (D.D.C. 2005) (BATCo); 327 F. Supp. 2d 21 (D.D.C. 2004) (Philip Morris and Altria); 287 F. Supp. 2d 5 (D.D.C. 2003) (BATCo).

III. THE EQUITABLE REMEDY OF DISGORGEMENT IS AVAILABLE UNDER SECTION 1964(a)

Finally, we respectfully disagree with the panel's disgorgement ruling for the reasons stated by the dissent, 396 F.3d at 1215-27 (Tatel, J., dissenting), and we preserve the issue for further review.

The interlocutory decision was issued without the benefit of any factual record. The district court's findings of fact now demonstrate with unsettling clarity why Congress would not have intended to bar district courts from requiring RICO defendants, in appropriate cases, to disgorge their ill-gotten gains. By misrepresenting the potency of nicotine addiction and their own machinations to enhance it, defendants have converted a lethal product into an endlessly profitable one. In the words of one BATCo product designer:

> "A cigarette is the perfect type of a perfect pleasure. It is exquisite, and it leaves one unsatisfied. What more can one want." Let us provide the exquisiteness, and 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.**

US76168_10 (emphasis added) (citation omitted).

The Supreme Court has stressed that the purpose of RICO's civil remedies "is to divest the association of the fruits of its ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981). Yet as a result of the disgorgement ruling, defendants have been permitted to keep and enjoy the fruits of the fraud that they

perpetrated on American consumers for more than half a century. Plainly, Congress did not intend this result.

CONCLUSION

For the foregoing reasons, the Court should sustain the judgment of liability, uphold the relief ordered by the district court, and remand for consideration of the remedies addressed in our cross-appeal.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that the foregoing Proof Brief for the United States of America contains 48,766 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2), according to the count of WordPerfect 12. The brief therefore complies with the applicable word limit set by this Court's May 22, 2007 Order.

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Sarang Vijay Damle

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2007, I caused copies of the foregoing Brief for the United States of America to be to be filed with the Court by hand delivery, and served upon the following counsel in the manner indicated

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ADDENDUM

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