tobacco company Defendants. Govt Findings of Fact, Section IV.C., paras. 607, 1059-1070. The Government nevertheless asserts that Liggett has ongoing RICO violations because it continues to market low tar cigarettes and does not admit that they are no less hazardous than their full-flavor counterparts.

Despite the fact that Liggett continues to sell low tar cigarettes, the Court finds that, based on Liggett's behavior in every other component of the Enterprise's scheme to defraud and Liggett's withdrawal from the RICO conspiracy, the totality of the circumstances demonstrates that Liggett is not reasonably likely to commit future RICO violations.[49]

Accordingly, even though Liggett is liable for past violations of 18 U.S.C. § 1962 (c) and (d), there is no reasonable likelihood of future violations, and therefore no remedies will be entered against Liggett.

XI. REMEDIES

A. Legal Standards Governing Remedies

Once RICO liability is established, 18 U.S.C. § 1964(a) states that:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

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[49] Moreover, because Liggett engages in virtually no consumer advertising, there is little opportunity for it to influence smoker beliefs concerning low-tar cigarettes. See JD Final Proposed Findings of Fact.

In Order #550, the Court denied Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim and, in doing so, laid out the existing standard for equitable remedies under § 1964(a) which prevent and restrain RICO violations. First, the Court noted that the full scope of a court's equitable jurisdiction must be recognized and applied except where "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction" or where there is a "clear and valid legislative command" limiting jurisdiction. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). Second, the Court held that the plain language of § 1964(a) requires a showing of a reasonable likelihood of future RICO violations before entering any equitable remedies. Third, the Court noted that one of the purposes of civil remedies under § 1964(a) is "to divest the association of the fruits of its ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981). Finally, based on the foregoing conclusions, the Court held that disgorgement prevents and restrains future RICO violations and is appropriate as an equitable civil RICO remedy.

Our Court of Appeals, in a 2-1 opinion written by Judge Sentelle, interpreted § 1964(a) to authorize only those remedies that are enumerated in the statute and equitable relief that "prevents and restrains" a defendant from engaging in future RICO violations. Accordingly, this Court is limited to ordering "remedies explicitly included in the statute," and "remedies similar in nature to those enumerated," see United States of America v. Philip Morris, Inc., 396 F.3d 1190, 1200, 1197 (2005) (quotations and internal citations omitted). Finding that all examples of appropriate remedies given in the text of the statute are "aimed at separating the RICO criminal from the enterprise so that he cannot commit violations in the future," id. at 1198 (emphasis in original), and that the terms "prevent and restrain" are also "aimed at future actions," id. at 1199, the D.C. Circuit concluded that

remedies similar in nature to those enumerated are "forward-looking remedies that are aimed at future violations," id. at 1198.[50]

Although the Government initially sought $289 billion in disgorgement in this case, Judge Sentelle's majority opinion explained that disgorgement is not an available remedy under § 1964(a) because it is not forward looking and does not separate the RICO criminal from the enterprise. The court characterized disgorgement strictly and narrowly as a "backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." Id. at 1198. Judge Sentelle's opinion distinguished between acting to "prevent and restrain" and acting to "discourage," and concluded that the general deterrence created by disgorgement "insofar as it makes RICO violations unprofitable" may not necessarily "prevent and restrain" future RICO violations. Id. at 1200. Consequently, the court found that disgorgement is not a forward looking remedy aimed at future violations, and therefore is not similar to those enumerated in § 1964(a). Additionally, because the court determined that disgorgement is "aimed at separating the criminal from his prior ill-gotten

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[50] Recently, the Tenth Circuit, without expressing an "opinion regarding whether, or in what circumstances, disgorgement is authorized under RICO" held that the presence of the term "restrain" in a statutory grant of general equity jurisdiction is not dispositive evidence of Congress's intent to limit remedies to those that are forward-looking." United States v. Rx Depot, Inc., 438 F.3d 1052, 1058-1059 (10th Cir. 2006) (declining to apply the D.C. Circuit's interpretation of the term "restrain" and upholding the Supreme Court interpretation permitting disgorgement as a forward-looking remedy in cases brought under § 332(a) of the FDCA). Rx Depot followed virtually the same analysis of a court's equitable powers to "restrain" violations as this Court did in Order #550, relying heavily on Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) and concluding that disgorgement is allowed under the Federal Food Drug, and Cosmetic Act, which states that "district courts . . . shall have jurisdiction, for cause shown to restrain violations." Id.

gains" and not intended to "separat[e] the criminal from the RICO enterprise to prevent future violations . . . [disgorgement] may not be properly inferred from § 1964(a)." Id. at 1200.[51]

Accordingly, this Court may not, as a matter of law, order disgorgement and may order only such remedies as are designed to "prevent and restrain" Defendants from committing future RICO violations by separating them from the RICO enterprise.

Defendants argue that the Court can enter none of the Government's proposed remedies. First, they interpret Judge Sentelle's opinion so narrowly as to preclude any remedy other than a standard injunction restraining future RICO violations. Specifically, Defendants argue that, as a consequence of the standard which they advocate, the Court cannot consider the public interest in fashioning remedies. Second, Defendants argue that the mere existence of the MSA renders any remedy which the Court may enter duplicative and therefore inappropriate. Finally, Defendants claim that they did not receive fair notice of the remedies which the Government seeks and, therefore, the Court cannot enter any of the requested relief.

Defendants are wrong for the following reasons.

First, unless a specific remedy would countermand statutory guidance from Congress, a court must take into account the public interest when considering whether its imposition is justified. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) ("As always, when federal courts

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[51] This determination has created a Circuit split. Contrary to the D.C. Circuit, both the Fifth and Second Circuits have adopted a standard of relief that permits disgorgement where it will prevent and restrain future RICO violations. As the Second Circuit reasoned, disgorgement may serve the goal of preventing and restraining future violations where "there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital for that purpose." United States v. Carson, 52 F.3d 1173, 1182 (2nd Cir. 1995); see also Richard v. Hoechst Celanese Chem. Group, 355 F.3d 345, 354-355 (5th Cir. 2003) (adopting the standard set forth by the Second Circuit but denying disgorgement on other grounds).

contemplate equitable relief, our holding must also take account of the public interest"). Defendants argue that "any perceived benefit to the public interest cannot determine the outcome if consideration of all the equities . . . tip the balance the other way." JD Corrected Post-Trial Brief at 154-55. There is no question that a court sitting in equity may not "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (reversing a medical necessity exception to an injunction that was granted on grounds of public interest, where the statute clearly prohibited the behavior). However, a court may consider the public interest when determining what types of remedies to fashion pursuant to a statute's dictates. Id. at 498 ("To the extent the district court considers the public interest . . . the court [may evaluate] how such interest . . . [is] affected by the selection of an injunction over other enforcement mechanisms."). Thus, the Court is not precluded from considering the public interest when it decides on the appropriateness of remedies.

Second, Defendants' claim that the existence of the MSA precludes all relief sought here is unpersuasive. Defendants rely on Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004), to argue that this Court is precluded from issuing any remedies because the MSA already enjoins Defendants' future RICO violations. However, this case is distinguishable from Gallatin Steel in a number of significant ways. In that case, two private citizens sought injunctive relief to prevent a steel manufacturer and slag processor from allegedly violating the Clean Air Act ("CAA") after a consent decree had been issued. The Sixth Circuit found that because the parties first entered into the consent agreement, additional injunctive relief would violate its terms and frustrate its purposes.

First, the Sixth Circuit reversed the district court's imposition of an injunction in Gallatin Steel because the CAA primarily serves the public interest, and "citizens acting as 'private attorneys

general' to enforce the [CAA who] seek relief . . . and accordingly 'personalized' remedies are not a first priority of the Act." Id. at 477. In this case, however, it is the Government that seeks remedies for the harms Defendants have caused smokers and potential smokers as well as the American public as a whole. Where private citizens were seeking redress in Gallatin Steel, in this case, Plaintiff, the United States Government, is acting in the public interest.

Second, the court in Gallatin Steel rested its opinion on conditions that are not present here. First, it found that the consent decree covered all the claims brought by the parties. Id. at 476. In this case, however, there are remedies distinct from and additional to those that were included in the Master Settlement Agreement. Furthermore, the MSA is enforced by the states, whereas the remedies sought in this case will be enforced by the federal government. Finally, here, certain of the Defendants in this case are not even parties to the MSA and therefore not bound by its provisions.

Third, the timing of the claims brought by the citizens in Gallatin Steel also distinguishes that case. In Gallatin Steel, the district court granted plaintiffs' injunction when the consent decrees were only three months old, "meaning that the remedial requirements imposed by the decrees either had just been completed or had not been completed at all." Id. at 476. By contrast, the MSA was implemented in 1998, providing eight years for Defendants to meet and complete the requirements imposed by that agreement. At this point, after eight years, the weaknesses of the MSA are well known, whereas the three month period in Gallatin Steel was clearly insufficient. Additionally, because portions of the MSA are due to expire soon, there is no danger that the remedies sought by the Government will be duplicative of those already contained in the MSA.

Because of the distinguishing factors set forth above, this Court finds no compelling reasons to follow the Sixth Circuit's ruling in Gallatin Steel. Accordingly, the Master Settlement Agreement does not preclude any remedies this Court may impose.

Finally, as a general matter, parties must be given fair notice of the remedies sought by opposing counsel. Defendants argue that they were not given sufficient notice of the remedies the Government requests. As the circuit courts have held, however, "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice." Socialist Workers Party v. Illinois State Bd. Of Elections, 566 F.2d 586, 587 (7th Cir. 1977) (finding that fair notice was given where appellants received a brief from opponent seeking injunctive relief and where more formal notice would not have provided defendants with greater opportunity to alter the result); see also United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (finding that fair notice was not given where defendants were denied a "basic procedural right to have disputed facts resolved through an evidentiary hearing"). Where injunctive relief is sought, both parties must be given an opportunity to have a remedies hearing. See generally Fed. R. Civ. P. 65. In Microsoft the court failed to allow defendants a hearing on remedies, despite their repeated requests. By stark contrast, in this action, 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. Defendants participated in a fourteen day remedies trial which was fully briefed, and at which thirteen witnesses testified. They had a full opportunity to cross-examine all Government witnesses. Moreover, 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. Accordingly, the Government's remedies requests do not abrogate Defendants' procedural rights.

B. Specific Remedies

The Court will address each of the Government's proposed remedies seriatim.

1. Prohibition of Brand Descriptors

As described in detail in the Findings of Fact, supra, cigarettes marketed with descriptors such as "low tar," "light," "mild," and similar terms are no less likely to be harmful than other cigarettes. The terms themselves have no standardized meaning aside from a non-enforceable industry practice to apply the "light" descriptor to cigarettes with 7 to 14 milligrams of tar as measured by the FTC method, and "ultra light" to cigarettes with fewer than 7 milligrams of tar. Keane WD, 56:14-23; Mulholland WD, 26:4-27:9; accord Henningfield WD, 56:8-11. Of even greater concern is the fact that Defendants design "light" cigarettes to allow smokers to obtain much higher levels of nicotine than are measured by the FTC method, and in fact manipulate cigarettes to provide sufficient nicotine delivery to create and sustain addiction. Burns WD, 29:6-13; Monograph 13, DXA0310399-0650 (US 58700).

The trial record overwhelmingly demonstrates that Defendants developed and marketed low tar and nicotine brands in order to dissuade smokers from quitting smoking. See Findings of Fact Section V(E). Defendants know that health concerns are the primary motivation for smokers' attempts to quit. They have conducted extensive research on quitting to help them identify, understand, and deter potential quitters. Defendants' internal documents show that they were confident that if they could convince potential quitters that low tar cigarettes were a healthier choice

and an acceptable alternative to quitting, they could keep their sales from declining. See also Burns WD, 41:12-18, 46:21-47:9, 49:11-20.

Based on that knowledge, Defendants introduced a number of brands and brand extensions lower in tar and nicotine and positioned them as 'health reassurance' brands to meet the health concerns of smokers. Defendants' own internal research showed that "smoking low tar and nicotine helped a smoker to reduce guilt about smoking and thus made a smoker less likely to quit. Smoking a 'health reassurance' product with its low tar FTC rating was a 'compromise' to justify not quitting." Dolan WD, 106:14-107:2; 118:4-8; 118:23-119:21; 126:8-16; accord Burns WD, 69:3-14 (beginning in the 1950s, Defendants "introduced and marketed filtered cigarettes and 'low tar and nicotine' cigarettes as an effort to prevent smokers from quitting based on growing health concerns among smokers"). As a result, consumers labor under a longstanding and pervasive misconception that "low tar/low nicotine" cigarettes are safer than their full flavor counterparts. See Findings of Fact Section V(E)(3).

As Dr. Farone testified, the terms "light" and "low tar," as used by Defendants, are "meaningless" and "arbitrary," because "light" and regular cigarettes of the same brand can have the same FTC yields:

> [T]here 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. So therefore the term 'light' is not related to tar or taste. For example, according to the most recent FTC report of tar and nicotine yields, Philip Morris sells versions of Virginia Slims and Virginia Slims Lights that both deliver 15 mg of tar by the FTC method.

Farone WD, 116:3-14; 525311179-1223 at 1185, 1207-1208, 1222 (US 52977).

Gary Burger, Senior President of Research & Development for RJR, admitted in a 1997 deposition, that RJR was aware that consumers smoke low tar cigarettes for the perceived health benefit. Burger said that "[c]ertainly, smokers perceive lower tar cigarettes in some ways to be better for them and therefore they want them." He further acknowledged that consumers "have that impression that there are higher levels of bad stuff in high tar cigarettes and lower levels of bad stuff in low tar cigarettes." Burger PD, Arch v. American Tobacco Co., 8/21/97, 226:9-243:18. In addition, research conducted for B&W as recently as 2000 confirmed that consumers still misperceive "lights" as less harmful. 250255060-5075 at 5064, 5066-5068, 5071-5075 (US 22170); Ivey WD, 59:20-60:12.

As data have emerged establishing that "light" and "mild" cigarettes are at least as harmful as "full-flavor" brands, Defendants have developed new descriptors to convey implied health reassurance messages. B&W developed and marketed the "Kool Natural Lights" brand extension in 1998. Despite having market research showing that consumers incorrectly interpret the word "natural" to mean that the cigarettes are safer than conventional cigarettes, B&W advertised Kool Natural Lights without informing consumers that "natural" cigarettes are no safer than any others. Smith TT, 1/6/05, 9178:18-9182:9; 210430297-0396 at 0322 (US 67711); ADV0100742-0744 (US 2701) (advertisement in 2001 issue of Rolling Stone); (US 12651) (advertisement in 2000 issue of Maxim).

Significantly, although lower-yield cigarettes have dominated the U.S. market for many years, there has been no corresponding reduction in smoking-related disease among U.S. smokers; in fact, the disease risk has increased. Burns WD, 33:18-35:9; Monograph 13, DXA0310399-0650 (US 58700).

Accordingly, the only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about "light" and "low tar" cigarettes is to prohibit them from using any descriptor which conveys a health message. It is not sufficient to forbid Defendants from misrepresenting the health effects of "light" and "low tar" cigarettes. By using descriptors such as "lights" and "low tar," Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message.

As the National Cancer Institute concluded in Monograph 13, descriptors are inherently deceptive. US 58700 at 0611, 0646. Similarly, the WHO Scientific Advisory Committee on Tobacco concluded that descriptors are inherently misleading, and recommended that "misleading health and exposure claims should be banned. . . . Banned terms should include light, ultra-light, mild and low tar, and may be extended to other misleading terms." US 86658 at 0695. As set out above, Defendants' own documents, including consumer research, and testimony demonstrate that Defendants both knew and intended to use brand descriptors to convey a false perception of reduced harm. See Findings of Fact Sections V(E)(3, 5).

The Court will therefore order a ban on any cigarette descriptors that convey implicit health claims. Prohibition of Defendants' future use of deceptive descriptors is forward looking and narrowly tailored to prevent and restrain their future fraudulent conduct relating to the marketing of low tar cigarettes. Indeed, this remedy directly addresses the ongoing fraud Defendants commit every day with their marketing of "light" cigarettes and the virtually certain continuation of such

fraud in the future in the absence of such a ban. Accordingly, beginning January 1, 2007, Defendants are prohibited from using any descriptors indicating lower tar delivery -- including, but not limited to, "low tar," "light," "mild," "medium" and "ultra light" -- which create the false impression that such cigarettes are less harmful to smokers.[52]

2. Corrective Communications

The trial record amply demonstrates that Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present. See Findings of Fact Sections V(A)(5)(c) and V(G)(7, 8), supra (public statements on adverse health effects, including exposure to secondhand smoke); Section V(B)(4), supra (public statements on addictiveness of smoking and nicotine); Section V(C)(3), supra (public statements on nicotine manipulation); Section V(F)(7), supra (public statements on youth marketing); Section V(E)(4), supra (statements on "light" and "low tar" cigarettes).

Evidence in the record also amply demonstrates that certain of Defendants' public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion. For example, Reynolds's current website statement on the health effects of smoking continues to insist that smoking "causes disease in some individuals" only "in combination with other factors." (JD 068012); see also Schindler TT,

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[52] Defendants claim that prohibition of their deceptive use of descriptors "would improperly invade the primary jurisdiction of the FTC," JD PFOF, ch. 13 ¶ 599, but "[t]he FTC does not impose, regulate, or require [descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Henningfield WD, 56:8-11. Further, Defendants' claim reiterates their previous argument that such relief is preempted by the FTC Act, an argument which the Court has already rejected. See United States v. Philip Morris, Inc., 263 F. Supp. 2d 72, 74 (D.D.C. 2003).

1/24/05, 10810:9-10813:5 (Reynolds' recent Chairman and CEO refusing to admit that cigarette smoking causes disease).

In addition, Philip Morris's current website claims that the company's position on addiction is the same as the public health community's, but Philip Morris's statement on addiction omits the material information that nicotine delivered by cigarettes is a drug and that it is addictive. 3000172188-2188 (JD 053199).

As the Court has noted, certain language in some of Defendants' more recent positions on smoking and health issues, following their decades of denials and distortion, do represent a step forward. See, e.g., Henningfield TT, 11/29/04, 7185:2-8. However, evidence in the record supports a finding that notwithstanding Defendants' self-serving claims that they have been more forthcoming on smoking and health issues, and notwithstanding a general prohibition in the MSA precluding those Defendants who are a party to it from making any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product," Defendants continue to make affirmative statements on smoking and health issues that are fraudulent. MSA § III(r) at 36 (JD-045158). Accordingly, an injunction ordering Defendants to issue corrective statements is appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.

Contrary to Defendants' arguments, the First Amendment does not preclude corrective statements where necessary to prevent consumers from being confused or misled. Any interest Defendants have in avoiding compelled speech are easily outweighed by the government's interest in preventing future consumer deception or confusion. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (upholding disclosure requirement in

attorney advertising regarding terms of contingency agreement). In accordance with this principle, our Court of Appeals has expressly held that mandatory disclosures regarding commercial products are consistent with the First Amendment when required to correct a manufacturer's campaign of deceptive or misleading marketing or to prevent consumer confusion. See Novartis Corp. v. FTC, 223 F.3d 783, 788-89 (D.C. Cir. 2000) (holding that the trial court was permitted to enter a corrective statement remedy because it "advances precisely the 'interest involved,' namely the avoidance of misleading and deceptive advertising); Warner-Lambert Co. v. FTC, 562 F.2d 749, 769-70 (D.C. Cir. 1977).

In Warner-Lambert, the D.C. Circuit upheld the FTC's order which required Warner-Lambert to cease and desist from representing that Listerine mouthwash prevents or alleviates the common cold, and required the company to include in future advertising the phrase "Listerine will not help prevent colds or sore throats or lessen their severity." 562 F.2d at 756. The Court rejected a First Amendment challenge to the order, finding that the protection extended to commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), which expressly permitted government regulation of false or misleading advertising, authorized an order requiring the company to make corrective statements in order to counteract its earlier, fraudulent statements. The court also upheld the FTC's position that the corrective statements were necessary because "a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims." Id.

The Court explained, in language that is particularly applicable to this case, that:

> 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. . . . Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of the continuing deception of the public.

Id. at 769.

Here, too, certain Defendants have recently modified their public statements regarding the adverse health effects of smoking cigarettes and their addictiveness. Nevertheless, as in Warner-Lambert, additional corrective statements to consumers and the public are necessary to prevent current and future advertisements from becoming "themselves part of the continuing deception of the public." 562 F.2d at 769. The injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful corrective communications. See Zauderer, 471 U.S. at 651.

The evidence identifies the various venues in which Defendants have made their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onsets, and Internet websites. See generally, Findings of Fact. For example, from the inception of the Enterprise's fraudulent scheme, newspapers and magazines have been primary vehicles for disseminating Defendants' public statements on smoking and health issues. See, e.g., 86017454-7454 (US 21418) (1954 Frank Statement printed in 448 newspapers nationwide); 2023011263-1263 (US 20371) (1994 Philip Morris "Facts You Should Know" advertisement in the New York Times);

500810940-0941 (US 23036) (BATCo's Blackie Letter to Editor in 1994); TI00581619-1629 (US 62969); Dawson WD, 114:18-115:21; Dawson TT, 1/12/05, 9907:21- 9918:8 (ghostwritten letter to the editor challenging evidence of health effects of secondhand smoke, prepared for outside scientist to send to editors at AP, UPI, and 22 newspapers across the country, without disclosing TI's role or that scientist was a paid Tobacco Institute consultant); 513943434- 3434 (US 50268) (1984 RJR newspaper statement that whether smoking causes disease is an "open controversy").

More recently, Defendants -- particularly Altria and Philip Morris -- have used many of these same vehicles very effectively to disseminate their recently adopted Corporate Principles, including statements on smoking and health positions and alleged youth smoking prevention efforts. Szymanczyk WD, 86:22-93:3, 150:12-22. See generally Keane TT, 1/19/05, 10566:4-10578:17. For example, Philip Morris and Altria have run a range of television (and radio) advertisements to improve their public image, to promote Philip Morris's website, and to warn the public that there is no such thing as a safe cigarette. See, e.g., Keane TT, 10/19/05, 10577:1-25, 10620:9-18 (testimony about Philip Morris's national television and radio advertising campaign).

Accordingly, the Court will structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages. Specifically, the Court will order Defendants to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to ETS (all the diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous

than full-flavor cigarettes). Within sixty days of the issuance of this opinion and order, both parties will submit a proposal for the exact wording of these statements. After the Court approves particular statements, Defendants must publish such corrective statements in newspapers and disseminate them through television, advertisements, onsets, in retail displays, and on their corporate websites, as detailed in the accompanying Order.[53]

3. Disclosure of Documents and Disaggregated Marketing Data

As discussed in great detail in the Findings of Fact, Defendants' suppression and concealment of information has been integral to the Enterprise's overarching scheme to defraud. Not only have Defendants failed to publicly disclose all the information they internally held about their cigarettes, but they have also created false controversies about the existence of such information.

The Court finds that in order to prevent and restrain such RICO violations in the future, Defendants must create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward. Disclosing such information will allow the public to monitor what Defendants are

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[53] Defendants' argument that requiring corrective statements on package onserts would conflict with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq. ("FCLAA") is unconvincing. This remedy falls within the narrow scope of equitable powers granted to the Court under Section 1964(a) because it specifically prevents and restrains Defendants from continuing to make statements about smoking and health that are fraudulent and misleading in vehicles which are likely to reach consumers. It does not implicate Section 5(a) of the FCLAA, because Section 5(a) only prohibits "state and federal rulemaking bodies from mandating particular cautionary statements" on cigarette packages. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992). Under the FCLAA, a "package" is defined as "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." 15 U.S.C. § 1332 (4). An onsert, which is only a small informational brochure attached to the outside of the "pack box, carton, or container . . . in which cigarettes are offered for sale, sold, or otherwise distributed to consumers," is not a package. Therefore, the remedy at issue does not implicate the FCLAA's preemption provision.

doing internally and to assess the accuracy of future information they may make available about their activities and their products. Imposing such disclosure requirements will act as a powerful restraint on Defendants' future fraudulent conduct. Indeed, this remedy is exactly what Judge Williams, in his concurrence in the disgorgement opinion, recommends that the District Court do under § 1964(a): "impose transparency requirements so that future violations will be quickly and easily identified." 396 F.3d at 1203 (Williams, J., concurring).

The Supreme Court has recognized, in numerous other contexts over the past century, that compelled disclosures of information can prevent and restrain future frauds. In the election context, it explained that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) (discussing campaign contribution disclosure requirements); see also Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 222 (1999) (O'Connor, J., concurring in part and dissenting in part). In a different context, in Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-38 (1980), the Supreme Court struck down under the First Amendment an ordinance that sought to reduce fraud by charitable organizations by dictating what percentage of their income they could spend on particular activities, but observed that "[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 637-38 (footnote omitted).

The Supreme Court has authorized injunctive relief requiring defendants who have been found to have engaged in past fraud to make ongoing public disclosures to prevent similar fraudulent conduct in the future. In SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), the

Supreme Court held that because the Investment Advisers Act of 1940 authorized courts "to enjoin any practice which operates 'as a fraud or deceit upon any client or prospective client,'" the trial court was authorized to issue an injunction requiring the defendant to make ongoing public disclosures as a "mild prophylactic" to prevent it from repeating its past fraudulent and deceitful practices. 375 U.S. at 185, 193, 198-99.

As discussed below, most Defendants are currently subject to some public disclosure requirements for documents under the MSA. Most of those requirements will end between 2008 and 2010. Extending those obligations, and subjecting all Defendants to similar, ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds.

The Government has also requested that Defendants be ordered to produce and make public all "health and safety risk information" in their own files relating to their products. The Government argues that disclosure of such information will prevent and restrain Defendants from making fraudulent denials about the hazardousness of their cigarettes. Although disclosure of health and safety risk information would obviously serve the public interest, the Government's request is far too broad and not narrowly tailored enough to include as a remedy.

a. Depositories

Requiring Defendants to make public the documents that they produce or use in future litigation or administrative actions, with certain safeguards to protect privileged and confidential trade secret information, is a first step towards preventing and restraining Defendants from engaging in future fraudulent activities. Document depositories will provide hard copies of documents to the public and thus will reduce Defendants' ability to suppress, conceal, or remove those documents from public access. While Defendants complain about the expense and burdensomeness of the

Government's request, they are basically being required to merely extend into the future the operation of document storage facilities which have existed for almost ten years.

Currently, certain Defendants maintain the Guildford and Minnesota Depositories, which contain hard copies of documents produced in those respective sets of litigation. The May 1998 Minnesota settlement obliged the settling defendants in that case to pay for maintenance and operation of the Minnesota Depository for ten years. Those Defendants and BATCo were also required to send any additional documents produced in other smoking and health litigation to the Minnesota Depository during the same ten year period. Those obligations cease in May 2008. Neither Liggett nor Altria is subject to those obligations.

During the Minnesota litigation, BATCo created the Guildford Depository in Guildford, England, to provide the Minnesota litigants with access to documents created before the document production cutoff date in that litigation, August 18, 1994. See Order #38 (protocols for United States trip to Guildford Depository for access to pre-August 18, 1994 documents available to the public); Order #75 ¶ 2 at 2 (same, for access to non-public "files created between August 18, 1994 and December 31, 1999"). BATCo is obliged to maintain and operate the Guildford Depository collection of documents from 1994 and earlier. See Minnesota Consent Judgment § VII(D) (JD-093326). That obligation also ceases in May 2008.

The Court will order Defendants to continue maintaining their Minnesota and Guildford Depository obligations for an additional fifteen years. Furthermore, Defendants must provide meaningful tools to identify and analyze those documents. To that end, both document depositories must include databases which search individual documents (rather than files) by multiple bibliographic fields, such as Bates number, date, author, title, etc. Defendants are to employ the

twenty-nine bibliographic fields specified in the MSA. Finally, Defendants must allow greater access to the Guildford Depository than that which is currently available. Presently, public access to the Guildford Depository is severely restricted, with only one organization and no more than six visitors allowed access per day; and copying requests often take weeks or months to fulfill. See Health Committee, U.K. House of Commons, The Tobacco Industry and the Health Risks of Smoking, vol. 1 (2000), (¶¶ 234, 237); 322241213-1295 at 1282-1283 (US 93249); 770007956-8214 at 7994 (US 88132). Defendants will be required to provide access, at a minimum, to six organizations and a dozen visitors per day.

b. Websites

Section IV of the MSA obliges certain Defendants to create and maintain document websites for all documents produced during litigation, except those which are privileged or confidential. See MSA § IV(c) & (e) at 36, 39 (JD 045158). See, e.g., Keane TT, 1/18/05, 10376:22-10377:7 (discussing Philip Morris's document website, www.pmdocs.com); McAllister WD, 8:25-9:4, 15:4-5 (discussing CTR document website, http://www.ctr-usa.org/ctr). The MSA's document website obligations expire on June 30, 2010. Neither Altria nor BATCo was a signatory to the MSA, and therefore neither is subject to these obligations.

Document websites have several significant desirable features that document depositories do not. Collections of tobacco documents placed on the web following the litigation of the 1990s, unlike the majority of non-digitized archival materials, are generally searchable through the web. In addition, relatively few members of the public are able to travel to Minnesota or England to access the Minnesota and Guildford Depositories, respectively, so a document website "increases the availability of the documents to the general public." Brandt WD, 28:1-8; Szymanczyk WD, 202:4-6.

Accordingly, the Court will order Defendants to maintain websites for all documents which have been produced in litigation for a period of fifteen years. In addition, Defendants must provide bibliographic information for each document, if it is not apparent on the face of the document, and shall make such documents searchable by multiple bibliographic fields.

c. Privilege Claims

The tobacco industry has withheld enormous numbers of documents on grounds of privilege. The defendants in the Minnesota litigation, for instance, withheld some 230,000 documents (estimated to contain over 1,000,000 pages) on grounds of privilege or confidentiality because of proprietary interest. See State of Minnesota v. Philip Morris, 606 N.W.2d at 682. Given the magnitude of this litigation, the volume of documents over which Defendants asserted privilege is, if anything, substantially larger. For example, BATCo alone served privilege logs in this case with 91,723 entries for 72,593 different documents that it withheld from production on grounds of privilege or protection. See R&R #112 at 4 & n.3, adopted by Order #359. In addition, as detailed in Section V(H) of the Findings of Fact, Defendants have abused these protections, using privilege and confidentiality designations to conceal potentially damaging information.

The purposes of document disclosure will be substantially frustrated unless the Court requires Defendants to provide complete and accurate information about any documents they withhold on grounds of privilege or other protection, including confidentiality. In order to provide the public with a reasonable method to determine which documents Defendants withhold on such grounds, the Court will order Defendants henceforth to provide full bibliographic information for all withheld documents, including titles (as well as a brief summary of the basis for the privilege or confidentiality assertion).

Compelling Defendants to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality is the only way to guarantee transparency and ensure that Defendants do not engage in similar egregious conduct in the future. Without a Court-ordered mechanism to ensure that all appropriate documents are either disclosed, or are logged as being withheld, Defendants will continue to suppress documents from the public. Defendants must similarly be required to identify all document fields and give meaningful explanations for all documents that they withhold on grounds of confidentiality.

Defendants will also be required to provide regularly-updated information concerning all waivers and losses of privilege and confidentiality. Indeed, in Order #51, § III.G.9, this Court ordered Defendants to identify all documents being withheld on grounds of privilege over which a court had previously ruled that their privilege assertion had been waived or was invalid. Imposing such a requirement on an ongoing basis is necessary to ensure that accurate and current information is available concerning which withheld documents have been adjudicated nonprivileged or non-confidential. Such a requirement is also necessary to ensure that once a Defendant waives privilege over particular documents, the public is on notice if and when the Defendant refuses to make those documents public.

d. Disaggregated Marketing Data

The FTC requires Defendants to maintain disaggregated marketing data[54] and to submit it at regular intervals, under strict confidentiality, pursuant to that agency's schedule for disclosure. Such data reveals with specificity exactly what Defendants' marketing dollars are being spent on. Such

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[54] Disaggregated data is data broken down by type of marketing, brand, geographical region, number of cigarettes sold, advertising in stores, and any other category of data collected and/or maintained by or on behalf of each Defendant regarding their cigarette marketing efforts.

information has never been available to the public because the FTC only publishes the data in aggregated form.

In order to ensure transparency of Defendants' marketing efforts, particularly those directed towards youth, and what effect such efforts are having, the Court will order Defendants to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the FTC. Disclosure of this data will prevent and restrain Defendants from continuing to make false denials about their youth marketing efforts and will enable the Government to monitor such activities. The data which Defendants provide to the Government will be disaggregated by type of marketing, brand, geographical region, type of promotion or marketing used, number of cigarettes sold, and location of marketing (e.g. in store, in magazine, etc.). Because such information is clearly proprietary, however, it will not be made public, as the Government requests. Instead, it will be disclosed only to the Department of Justice, the enforcing agent for this decree, and be subjected to appropriate protective orders, such as have already been used in this litigation with no difficulties.

4. General Injunctive Provisions[55]

Even under the narrow interpretation of 18 USC 1964(a) by which this Court is bound, the Court may enjoin specific future RICO violations upon its finding of liability under 1962(c) and (d). Accordingly, Defendants will be ordered to refrain from engaging in any act of racketeering, as

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[55] The Government has also requested a specific injunction against Defendants' ongoing and future youth marketing. Although such a remedy would certainly serve the public interest, it does not prevent and restrain future RICO violations, which, in this case, are not Defendants' continuing efforts to market to youth but rather their false denials of those efforts. Accordingly, because this injunction does not meet the standard set forth in Judge Sentelle's Opinion, the Court cannot enter such a remedy.

defined in 18 USC §1961(1) relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

Defendants will also be ordered not to participate in the management and/or control of any of the affairs of CTR, TI, CIAR, or any successor entities.

Defendants will also be ordered not to reconstitute the form or function of CTR, TI, or CIAR.

Finally, because this is a case involving fraudulent statements about the devastating consequences of smoking, Defendants will be prohibited from making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.

5. National Smoker Cessation Program

As laid out in detail in the Findings of Fact, Defendants employed highly sophisticated and expensive promotional campaigns to portray light and low tar cigarettes as less harmful than full flavor cigarettes in order to keep smokers from quitting. Defendants' concerted and ongoing effort to defraud consumers regarding light and low tar cigarettes has been a calculated and extremely successful scheme to increase their revenues at the expense of smokers, potential smokers, and the American public. Over 50% of those who smoke light and ultra light cigarettes mistakenly believe that lights offer a less hazardous option to full flavor cigarettes. Weinstein WD 53:3-18. Of the almost 47 million Americans who smoke cigarettes today, more than 81% smoke "light" or "ultralight" cigarettes. Moreover, 70% of these smokers want to quit, but in any given year only 40% will attempt to quit and, tragically, only 2.5% will succeed. Fiore WD, 69:5-8.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring Defendants to fund a national smoking cessation program including: (1) a national tobacco

quitline network that will provide access to evidence-based counseling and medications for tobacco cessation; (2) an extensive paid media campaign to encourage smokers to seek assistance to quit smoking; and (3) a research agenda to achieve future improvements in the reach, effectiveness and adoption of tobacco dependence interventions and physician and clinician training and education. See e.g., Fiore WD, 17:22-18:20.

Adoption of such a national smoking cessation program would unquestionably serve the public interest. However, under the narrow standard for §1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.

6. Youth Smoking Reduction Targets

There is overwhelming evidence in this case that Defendants encourage youth to smoke, track youth behaviors and preferences, market to youth based on that tracking, and accordingly, substantially contribute to youth smoking initiation and continuation. Because over 80% of adult smokers start before the age of 18, Defendants continue to pursue and profit from the youth market. Indeed, Defendants internally acknowledge that they cannot sustain the cigarette industry without securing new youth smokers. To give just one example, a 1984 R.J. Reynolds document candidly states, "Younger adult smokers are the only sources of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." 501431517-1610 at 1526 (US 20680).

To prevent related RICO violations, the Government asks the Court to require Defendants to reduce youth smoking by 6% per year between 2007 and 2013. This remedy would provide a total reduction in smoking of 42% by 2013 among individuals between twelve and twenty years old,

measured against a 2003 baseline year. Under the Government's plan, if Defendants should fail to meet their annual targets, they would be assessed $3,000 for each youth above the target who continues to smoke. The Government bases its figure on the fact that $3,000 is the upper limit on the lifetime proceeds a Defendant could expect to earn from making its brands appealing to an individual within the demographic target. Such reductions could be made in whatever fashion Defendants, who are most knowledgeable about marketing to youth, see fit, including price increases for their cigarettes, which have already been demonstrated to reduce youth smoking initiation. The government reasons that such a remedy would reduce the incentive for Defendants to make their products appealing to youth by removing their ability to profit from youth marketing and from youth smoking initiation.

Although such a remedy is forward-looking, could prevent future RICO violations, and would unquestionably serve the public interest, it is not sufficiently narrowly tailored to meet the standard articulated by our Court of Appeals. United States v. Philip Morris USA, Inc., et al., 396 F.3d at 1198-99. As Dr. Jonathan Gruber, an economist at the Massachusetts Institute of Technology, testified, the Youth Smoking Reduction Targets are an "outcome-based" remedy because they tie financial assessments to the outcome of youth smoking.[56] Youth smoking rates may

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[56] Dr. Gruber based his youth smoking reduction targets on the 1997 Proposed Resolution, a draft settlement proposed by certain Defendants to Congress when it was considering federal regulation of the tobacco industry and resolution of all pending tobacco lawsuits. As Defendants vigorously argue, because the 1997 Resolution was never adopted and was merely part of a comprehensive settlement package, it would not be an appropriate basis for setting targets for reductions in youth smoking.

In addition, Dr. Gruber proposed, as one possible means for decreasing youth smoking rates, that Defendants use price increases alone to effectuate the necessary reductions. Dr. Gruber did note that Defendants have at their disposal many other tools by which they could choose to achieve the

(continued...)

increase or decrease due to input factors beyond Defendants' control. Accordingly, because the targets are aimed at reducing the public health consequences of marketing to youth and are not narrowly tailored to prevent and restrain Defendants' future RICO violations, the Government's proposed remedy cannot be entered by this Court.

7. Corporate Structural Changes

Defendants have engaged in an overarching scheme to defraud smokers and potential smokers for more than 50 years, employing the research and development, advertising, marketing, and public relations capabilities of each individual company and of the Enterprise as a whole. As the evidence overwhelmingly demonstrates, 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. Such fraudulent behavior has been driven by a desire to increase company profits and avoid huge liability judgments in litigation.

The Government asserts that unless Defendants make fundamental changes in their business practices and policies, they will continue to engage in RICO violations as long as such behavior is profitable. The Government contends that a "culture of fraud" permeates Defendants' business practices and, as a result, Defendants cannot be trusted with the responsibility of identifying and implementing the necessary changes in their own companies. Accordingly, the Government requests

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[56](...continued)
targets, but that price increases alone could yield the same result, if Defendants chose to take that course. In response, Defendants raised the concern that, with price increases, they would lose some market share (however minimal) to tobacco manufacturers who are party to neither this Order nor the MSA. As a result, those manufacturers could market to youth without any restrictions and thus undermine the very purpose of Dr. Gruber's proposal. This effect, if it occurred, would be of concern.

that the Court appoint an Independent Investigative Officer ("IO") -- basically a tobacco czar -- to review Defendants' business policies, practices, and operations and identify and implement appropriate procedures and measures which will remove the incentives, practices, and policies that have led Defendants to commit the RICO violations for which they have been found liable in this litigation.

Specifically, the Government asks the Court to appoint an IO to review Defendants' premises, papers, and personnel. That IO would have full access to Defendants' facilities, operations, employees, meetings, and records and would investigate the ways "in which the people, tasks, competencies, structures, incentives, and culture of a firm interrelate." Bazerman WD, 45:12-23. Next, the IO would identify and implement procedures and measures that will prevent and restrain Defendants from engaging in future RICO violations, including but not limited to: (a) eliminating economic incentives for Defendants to market and sell cigarettes to youth; (b) changing compensation and promotion policies for managers and executives to reduce the likelihood of misconduct; (c) requiring subcontracting of certain research to independent third parties monitored by the Court; (d) requiring the institution of programs to educate managers in order to address bias in decision making; (e) creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution; and (f) changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct. Bazerman WD, 2:11-19, 3:4-15.

The Government also proposes appointment of an Independent Hearing Officer ("IHO") who would review Defendants' compliance with this Order, determine if there are violations, and enforce measures to remedy those violations. Therefore, while the IO would investigate Defendants'

business practices and compliance with this Court's Order, the IHO would serve as a quasi-judicial officer when violations are alleged by the IO.

Even though this proposed remedy might conceivably prevent and restrain Defendants' future RICO violations, it would require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution. The Court has no authority to order such a far-reaching remedy. See Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) ("Cobell II"); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) ("Cobell I"). In Cobell I, the court appointed a Court Monitor, with the parties' consent, to "monitor and review all of the Interior Defendants' trust reform activities on behalf of certain Native American tribes and file written reports of his findings with the Court" for a period of one year. Cobell I, 334 F.3d at 1133-35. At the end of that year, over defendant's objection, the District Court extended the Monitorship for at least an additional year. The D.C. Circuit reversed, holding that "the district court does not have inherent power to appoint a monitor -- at least not a monitor with the extensive duties the court assigned to [the Monitor in this case] -- over a party's objection." Id. at 1141. The court noted that "it was surely impermissible to invest the Court Monitor with wide-ranging extra-judicial duties" and that this particular "Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at 1142.

In this case, the Government's proposed remedy unconstitutionally delegates judicial powers to the Independent Hearing Officer. While it is permissible for the Court to appoint an individual to oversee and monitor implementation of a decree, here, as in Cobell I, the Court is being asked to give the IHO the power to conduct hearings, determine violations, and to direct changes in Defendants' actions and policies to ensure compliance with the Court's Order. The proposed IHO

would have the authority to require Defendants to adopt "procedures and measures" recommended by the IO. Additionally, the IHO would have the authority to order "removal of any officer, employee, or other member of senior management of any Defendant after determining that he or she acted in concert with one or more named Defendants in committing a civil RICO violation," which would obviously require the IHO to make determinations of liability. This suggested restructuring of Defendants' companies goes too far. The Court simply does not have the power to impose such a far-reaching and intrusive remedy. Accordingly, because the powers granted to the IHO constitute an impermissible delegation of Article III powers, the Court cannot enter the Government's proposed plan for oversight of the implementation of this decree by independent officers.

8. Public Education and Countermarketing Campaign

As laid out in detail in the Findings of Fact, Defendants have preserved and enhanced the market for cigarettes in part by making statements about the health effects of smoking and secondhand smoke and by denying their marketing to youth. Defendants denied that smoking and secondhand smoke cause disease long after they internally recognized that such facts were true, and thereby provided smokers with sufficient reason to maintain their addiction. In addition, Defendants spent hundreds of millions of dollars advertising their cigarettes with youth- appealing imagery and campaigns which substantially contributed to youth smoking initiation and continuation. Defendants' denials of the hazards of smoking are exceptionally effective because the general public, and youth in particular, significantly underestimate all the risks of beginning and continuing to smoke.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring Defendants to fund a long-term, extensive, culturally-competent public education and

countermarketing campaign. The Government proposes a campaign with two primary purposes: (1) educating youth and adults about the hazards of smoking and exposure to secondhand smoke and (2) informing youth that Defendants are marketing to and attempting to manipulate them. This campaign would be aimed at diluting both the impact of Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing efforts towards youth. Countermarketing would very likely help to change the social environment which currently normalizes tobacco use among youth, making it less socially acceptable. Finally, providing youth with fully accurate information about smoking would serve to reduce the number of youth smokers, reduce the number of addicted adult smokers in the future, and thereby potentially reduce the economic incentives for Defendants to continue their fraud.

Adoption of such a public education and countermarketing campaign would unquestionably serve the public interest. However, under the narrow standard for §1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.[57]

9. Costs

At the conclusion of the case, upon a finding of liability, it is appropriate to award costs. "Costs are accorded to prevailing litigants . . . under Rule 54(d) of the Federal Rules of Civil Procedure."[58] Moore v. National Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1107 (D.C. Cir. 1985);

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[57] As is obvious, the Court is not entering as remedies either the proposed national smoker cessation program or the proposed public education and countermarketing campaign. Accordingly, Joint Defendants' Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) with Respect to Certain Remedies Sought by the United States is denied as moot.

[58] Rule 54(d) of the FRCP states: "Except when express provisions therefor is made (continued...)

Hoska v. United States Dept. of the Army, 694 F.2d 270, 272 (D.C. Cir. 1982). Local Civil Rule 54.1 states that "[c]osts shall be taxed as provided in Rule 54(d), Federal Rules of Civil Procedure," and specifically enumerates those costs that can be awarded to the prevailing party. LCvR 54.1 (a) and (d).

Accordingly, because the United States has proven its case by a preponderance of the evidence and because the Court has found the Defendants liable under 18 U.S.C. §§ 1962(c) and (d), costs will be awarded to the Government. The United States will be required to serve and file a bill of costs in accordance with LCvR 54 within 30 days from the date of this Opinion and its accompanying Order.

A Final Judgment and Remedial Order will accompany this Opinion.

/s/

August 17, 2006

Gladys Kessler
United States District Court Judge

Copies served upon:
Counsel of record by ECF

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[58](...continued)
either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."