practices. United States v. Philip Morris USA Inc., 316 F. Supp. 2d 6, 11 (D.D.C. 2004) (internal quotation marks and citations omitted; items in list renumbered).

4085. The MSA contains no provision regulating the use of the descriptors "light" and "low tar." Myers WD, 24:16-18.

4086. The MSA did not earmark any funds for smoking cessation programs, nor did any of its provisions require the settling States to spend any funds for this purpose. Myers WD, 54:16-20.

4087. The advertising campaigns of the three leading youth brands, Marlboro, Newport, and Kool, for youth have not changed since the MSA. For example, Lorillard has not changed its principal "Pleasure" advertising campaign for Newport, the second-leading brand smoked among youth ages twelve to seventeen. Milstein TT, 1/10/05, 9312:1-9314:9, 9417:18-9421:25.

4088. The MSA's requirement to provide public access to certain tobacco industry documents through tobacco document websites applies only to the original participating manufacturers. Moreover, the MSA's requirement to maintain these tobacco document websites expires on June 30, 2010. (no bates) (JD 045158 at § IV, ¶¶ 36-41).

CONCLUSIONS OF LAW

VII. DEFENDANTS HAVE VIOLATED 18 U.S.C. 1962(c)

A. Introduction

The United States established by a preponderance of the evidence that Defendants and others comprised an association-in-fact enterprise ("Enterprise") and that each Defendant participated in the conduct, management, and operation of the Enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c); see, e.g., Sedima v. Imrex Co., 473 U.S. 479, 491 (1985); Yellow Bus Lines, Inc. v. Drivers, Chauffers & Helpers Local Union 639, 913 F.2d 948, 954 (D.C.

Cir. 1990); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 280 n.12 (3d Cir. 1985). Section 1962(c) provides:

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

18 U.S.C. § 1962(c). The United States has proven this violation by establishing each of the following elements:

- The existence of an enterprise;
- The enterprise was engaged in, or its activities affected, interstate or foreign commerce;
- Each defendant was employed by or associated with the enterprise;
- Each defendant conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise;
- Each defendant committed at least two acts of racketeering within 10 years of one another; and
- The racketeering acts constitute a pattern of racketeering activity.

See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985); United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997) (listing elements); United States v. Philip Morris USA, 316 F. Supp. 2d 13, 16 (D.D.C. 2004).

All the alleged predicate racketeering acts in this case involve mail or wire fraud offenses, in violation of 18 U.S.C. § 1341 or § 1343. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of

> false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, [mails or causes the mailing of any matter] . . . shall be fined under this title or imprisoned not more than 20 years, or both.

To establish an offense under § 1341 (or § 1343), the plaintiff must prove by a preponderance of evidence the following elements:

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

- The defendant mailed any matter, or caused the mailing of any matter (or sent or caused to be send by interstate wire transmission), for the purpose of furthering or executing such scheme or artifice, and

- The defendant acted with the specific intent to defraud or deceive.

See Neder v. United States, 527 U.S. 1, 24-25 (1999); United States v. Philip Morris USA, 304 F. Supp. 2d 60, 69 (D.D.C. 2004). The extensive, detailed Findings of Fact set forth above, establish -- overwhelmingly -- that Defendants devised a scheme to defraud and used mailings and wire transmissions for the purpose of furthering it. The purpose of the scheme was to obtain, from smokers and potential smokers, money, i.e., the cost of cigarettes, to fill the coffers of the corporate Defendants. Put more colloquially, and less legalistically, over the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused

the legal system in order to achieve their goal -- to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

B. Defendants Engaged in a Scheme to Defraud Smokers and Potential Smokers

The Government has proven that the Enterprise knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises. Defendants participated in the Enterprise's overarching scheme to defraud smokers and potential smokers in order to maximize their profits by preserving and enhancing the market for cigarettes, to avoid costly liability judgments, to derail attempts to make smoking socially unacceptable, and to sustain the cigarette industry.

In order to carry out this scheme, Defendants made the following false and fraudulent statements in a number of areas, including: (1) deceiving consumers into starting and continuing to buy and smoke cigarettes by misrepresenting and concealing the adverse health effects caused by smoking and exposure to environmental cigarette smoke, by maintaining that there was an "open question" as to whether smoking cigarettes causes disease and other adverse effects, despite the fact that Defendants knew otherwise, and by ensuring that their research, development, and marketing of cigarettes remained consistent with these core public positions (see Findings of Fact V(A)); (2) deceiving consumers into becoming or staying addicted to cigarettes by maintaining that neither smoking nor nicotine is addictive, despite the fact that Defendants knew these positions were false (see Findings of Fact V(B)); (3) deceiving consumers into becoming or staying addicted to cigarettes by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they engaged in such efforts (see Findings of Fact V(C)); (4) deceiving consumers, particularly parents and young people, by denying that they marketed to youth, while engaging in

such marketing and advertising with the intent of addicting young people and enticing them to become lifelong smokers (see Findings of Fact V(F)); and (5) deceiving consumers through deceptive marketing and cigarette design modifications to exploit smokers' desire for less hazardous and "low tar" cigarettes which Defendants knew to be no safer than full-flavor cigarettes (see Findings of Fact V(G)).

The individual components must be viewed not independently but in context of the entire scheme to defraud.[10] It is sufficient to prove by the totality of the circumstances that the defendant devised a scheme intended to defraud which included one or more of the individual component schemes alleged. See, e.g., Philip Morris, 304 F. Supp. 2d at 66-67; United States v. Godwin, 272 F.3d 659, 666-67 (4th Cir. 2001); United States v. O'Connell, 172 F.3d 921, 1998 WL 720696 (D.C. Cir. 1998) (table); United States v. Lemire, 720 F.2d 1327,1337 n. 12 (D.C. Cir. 1983); accord United States v. Clausen, 792 F.2d 102, 105 (8th Cir. 1986); United States v. Stull, 743 F.2d 439, 442 & n.2 (6th Cir. 1984) (collecting cases similarly holding); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981); United States v. Jordan, 626 F.2d 928, 931 (D.C. Cir. 1980); United States v. Amrep Corp., 560 F.2d 539, 546-47 (2d Cir. 1977).

The mail and wire fraud violations underlying the RICO violations cover any "scheme...to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1342, 1343. Defendants claim that their public statements do not constitute Racketeering Acts and were not in furtherance of a scheme to defraud because they were simply statements of opinion held in good faith. de Mango v. United States, 636

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[10] The Government presented this case as one overarching scheme based upon seven pillars. The Court is not bound by the Government's conceptual analysis and did not find it the most useful approach.

F.2d 714, 720 n.9 (D.C. Cir. 1980) ("[A] statement of opinion cannot constitute fraud"). This argument is unpersuasive.

First, in light of the overwhelming evidence of what the Enterprise as a whole and individual Defendants knew, it is 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. The Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as the Defendants' lawyers, making statements which were inconsistent with the internal knowledge and practice of the corporation itself. To call such statements "opinions," strains credulity.

Second, while federal courts have demonstrated a willingness to find vague statements or "rosy affirmations" by a company spokesman insufficient to hold a company liable for fraud, see In re Ford Motor Co. Secs. Litig., 381 F.3d 563, 571 (6th Cir. 2004) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996)) (finding that vague statements by corporate mangers and spokespersons are not actionable for securities fraud because no reasonable investor would have relied on them), that approach is not appropriate for statements whose falsity can be proved "through the orthodox evidentiary process," Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1090, 1091-93 (1991). Indeed, where objective data is available to disprove a statement or demonstrate that it is misleading at the time it was made, a public statement of opinion by a company spokesperson can constitute actionable fraud. See City of Monroe Employees Retirement System v. Bridgestone Corp., 387 F.3d 468, 487-492 (6th Cir. 2004) (holding that even if a statement alluding to objective data was classified as opinion, it was specific enough to form the basis of an actionable securities claim).

In the context of securities fraud litigation, courts have found that a "statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed; (2) that there is [a] reasonable basis for that belief; and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that one of these implied factual assertions is inaccurate." In re Apple Computer Sec. Litigation, 886 F.2d 1109, 1113 (9th Cir. 1989). Accordingly, even where a speaker may not be aware of undisclosed facts and issues an opinion in supposed good faith, the statement will provide grounds for fraud where it can be proved that there is no reasonable basis for the speaker's belief. Were this not the case, companies would be able to shield themselves from liability by keeping their spokespersons in the dark about facts that are inconsistent with their public statements.

The analogy to securities fraud, though imperfect, is useful in this case. In securities fraud, a court tests the materiality of opinions issued by company spokespersons by determining whether a reasonable investor would have relied on the statement. Va. Bankshares, Inc. v. Sandberg, 501 U.S. at 1093-1094. In the case at bar, the materiality of public statements can be determined by assessing the public's reliance on those statements for their health and safety. When a spokesperson of a large, sophisticated corporation makes statements of what Defendants now characterize as "opinion," but which can be proved false by information that was available and known to the corporation at the time, and the public relies on those statements, the company cannot be permitted to escape liability merely because it declined to inform that individual spokesperson that his or her statement was misleading. As courts have recognized in the securities fraud context, failure to disclose or correct a misleading statement, even a statement which may be characterized as an

opinion, is of particular concern where the public does not have other information with which they can evaluate the reliability of the opinion that was stated. See Helwig v. Vencor, Inc., 251 F.3d 540, 559-561 (6th Cir. 2001).

The totality of the evidence proves Defendants' wide reaching and pervasive scheme to defraud consumers and potential consumers of cigarettes. As established at trial and explained below, Defendants coordinated their public relations, research, cigarette design and marketing efforts in order to advance their overarching scheme to defraud by: (1) denying the adverse health effects of active smoking; (2) denying the addictiveness of nicotine and cigarette smoking; (3) denying their manipulation of the nicotine content of cigarettes; (4) misrepresenting the health risks attached to light and low tar cigarettes; (5) denying their marketing to youth; (6) denying the adverse health effects of secondhand smoke; and (7) suppressing, concealing, and destroying information and documents related to the adverse health effects of smoking. The Court will address each area, seriatim.

1. Defendants Falsely Denied the Adverse Health Effects of Smoking

Smoking is a cause of significant disease and death. The evidence presented in this case demonstrates the extent of suffering by smokers and former smokers. Cigarette smoking and exposure to secondhand smoke kills 440,000 Americans every year, or more than 1,200 every single day. The annual number of deaths due to cigarette smoking is substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS. Approximately one out of every five deaths that occur in the United States is caused by cigarette smoking. See Findings of Fact, V(A)(1).

Defendants' joint efforts to deny and distort the health effects of cigarette smoking consisted of making numerous widely disseminated public statements that denied or questioned smoking's harms; attacking legitimate scientific investigation; continually calling for more research; and, years after questions of causation were resolved in the public health community, repeatedly promising to determine through "objective" research by "independent" scientists, whether smoking was a cause of disease.[11]

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. The intense public relations activity -- consisting of numerous press releases, advertisements, and other false statements -- before and particularly after publication of the 1964 Surgeon General's Report on Smoking and Health (the first to announce the consensus of the scientific and public health community that smoking caused disease and death), is but one example. See Findings of Fact Section V(A)(3)(c) and V(A)(5)(c). This continued despite widespread internal acknowledgment among Defendants' executives and scientists that smoking causes disease. See, e.g., Farone WD, 66:1-18 ("There was widespread acceptance that smoking caused disease. I never talked with a scientist at Philip Morris who said that smoking doesn't cause disease.").

Even after the 1964 Report, a February 26, 1972 Tobacco Institute press release asserted that the 1972 Surgeon General's Report, which announced the consensus of the scientific and public

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[11] The alleged Racketeering Acts relating to this component of the scheme to defraud are Racketeering Act Nos. 1-3, 5, 7, 10-14, 18, 23, 24, 26, 27, 29, 30, 33, 34, 38, 42, 43, 46, 50, 51, 54, 57, 62, 64, 65, 82, 85, 92, 99, 105-107, 115, 120, & 123.

health community that smoking causes chronic obstructive bronchopulmonary disease (COPD) and other cardiovascular diseases, as well as cancer, "insults the scientific community" and that the report was "another example of 'press conference science' -- an absolute masterpiece of bureaucratic obfuscation." The press release also asserted 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." TIMN 0210602-03 at 0602 (US 21322).

Of paramount significance is that Defendants' internal documents openly acknowledge the purpose of their public relations strategy. For example, William Kloepfer, Vice President of Public Relations for the Tobacco Institute, wrote to Earle Clements, President of the Tobacco Institute admitting his concern about the purpose: "Our basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." TIMN0072354-56 at 2354 (US 63576). The Tobacco Institute's 1968 internal "Tobacco and Health Research Procedural Memo" advised: "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!" TIMN0071488-91 at 1489 (US 21302). Similarly, an undated internal B&W document titled "Smoking and Health Proposal" explained: "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. It is also the means of establishing a controversy." 690010951-0959 at 0959 (US 21040).

As another example, in a 1975 marketing document, B&W acknowledged the necessity of continuing the "open controversy" strategy:

> Smokers perceive cigarette smoking as dangerous for one's health. However, they continue to smoke. Thus, they are faced with the fact that they are behaving illogically. They respond by providing either a rationalization for smoking or by repressing their perceptions of the dangers involved. . . . The advertising must also cope with consumer attitudes about smoking, providing either a rationale or a means of repressing the health concern.

680113760-3763 at 3761-3762 (US 20987).

Defendants understood that most individuals, when starting to smoke, do not adequately appreciate the full risk associated with smoking to make an informed decision about whether or not to engage in smoking behavior. In fact, the evidence shows that most people's knowledge of the nature and consequences of diseases caused by smoking tends to be superficial. See Findings of Fact Section V(B); Slovic WD, 18:14-20:5; Weinstein WD, 24:7-29:22.

Using the sophisticated and well-organized machinery created to serve their agenda, Defendants fraudulently denied the adverse health effects of smoking for at least 40 years in order to sustain the appearance of an open controversy about the link between smoking and disease, and thereby maintain and enhance the cigarette market and their collective revenues.

2. Defendants Falsely Denied that Nicotine and Smoking Are Addictive

Defendants have made and continue to make false and fraudulent statements about the addictiveness of nicotine and smoking.[12] Fact and expert testimony, as well as Defendants' internal documents spanning five decades, firmly establish that Defendants have intended their statements about addiction to further the Enterprise's scheme to defraud by concealing what Defendants openly

[12] The alleged Racketeering Acts relating to this component of the scheme to defraud are Racketeering Act Nos. 15, 25, 30, 56, 58, 60, 63, 71, 72, 74, 75, 79, 81, 103, 104, 109, 110, 114, 116, 132, & 133.

recognized internally – that smoking is an addiction driven primarily by the pharmacological effects of nicotine.

Defendants' internal research reflects their understanding that nicotine is the most important chemical delivered by cigarettes because it is what compels smokers to smoke. Their product research and development efforts had the overriding objective of harnessing and manipulating the power of nicotine and ensuring that their marketed products delivered enough nicotine to create and sustain addiction.[13]

By the early 1980s, the medical and scientific communities recognized that the results of clinical observations, laboratory research, and population studies together justified the conclusion that tobacco-delivered nicotine was addictive. Henningfield TT, 11/22/04, 6811:11- 6812:2.

In response to the emergence of a scientific consensus on this issue in the early 1980s, Defendants began making four types of public statements: (1) Smoking cigarettes is not addictive because some smokers can, and do, quit smoking on their own (e.g., "smoking is a truly personal choice which can be stopped if and when a person decides to do so" (no bates) (US 22727); (2) Smoking cigarettes is not addictive because it does not lead to physical "dependence" (e.g., "the claim that there is a physical dependence to smoking is simply a desperate attempt to find some way to differentiate smoking from other habits" (no bates) (US 85366); (3) Smoking cigarettes is not addictive because it does not induce "intoxication" (e.g., "Tobacco is not intoxicating, in direct

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[13] Indeed, to this day none of Defendant cigarette manufacturers publicly admit that nicotine is an addictive drug delivered in cigarettes. Defendants' current public statements on addiction avoid any mention of nicotine, let alone its role in addiction. See Findings of Fact Section V(B)(4)(j). Dr. Jack Henningfield and Dr. Michael Eriksen both testified that Defendants' current statements about addiction omit material information and are not fully consistent with the conclusions of the medical and scientific communities. Henningfield WD, 104:23-109:22; Eriksen TT, 5/16/05, 21248:20-21249:15.

contrast to any other substance that has been claimed to be addictive, from heroin and cocaine through to alcohol" (no bates) (US 23036); (4) Smoking cigarettes is not addictive because cigarettes are not like other addictive drugs -- rather, smoking is merely a pleasurable behavior (e.g., the "attachment" to smoking is in the same category as "tennis, jogging, candy, rock music, Coca-Cola, members of the opposite sex and hamburgers" (no bates) (US 65625) (CEO of Philip Morris analogized smoking to eating Gummi Bears saying "I don't like it when I don't eat my Gummi Bears, but I'm certainly not addicted to them," Morgan PD, Broin v. Philip Morris, et al., 4/17/97, 77:20-78:23).

As to the first category of statements, there is simply no evidence in the record to support the assertion that smoking is not addictive because a smoker can voluntarily quit. Not a single defense witness could provide any support, scientific or otherwise, for this proposition. See Dawson WD, 49:5-20; Rowell TT, 16678:21-16679:4; Keane WD, 22:9-14.

As to the second and third categories of public statements, Defendants cited to characteristics of addictive drugs – physical dependence[14] and intoxication – as essential markers of addiction when they knew they were not and had not been considered so by the scientific community for decades. See Findings of Fact Section V(B)(2)(b). In making these types of statements, Defendants sought to distort the terminology of addiction by relying on criteria which are no longer recognized by the scientific community. Additionally, Defendants' public statements directly contradicted their own internal recognition that smoking could actually cause intoxication. See, e.g., Farone WD, 72:19-74:3, 78:17- 80:14 (discussing basis for conclusion that Defendants understood smoking to be

[14] "Physical dependence" and "withdrawal" are generally considered equivalent concepts. The occurrence of withdrawal symptoms upon removal of the dependence-producing agent is the marker for physical dependence. Rowell TT, 3/23/05, 16701:10-13.

addictive and Philip Morris's knowledge of nicotine's role in smoking addiction). Defendants similarly understood that smokers experience withdrawal symptoms upon cessation. 1000348671-8751 at 8676, 8708 (US 20097) (1971 Philip Morris document stating that a realistic view of cessation would show "a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline").

Finally, as to the fourth category of statements, Defendants denied to the public what they recognized internally beginning as early as the 1950s: people smoke primarily because of the pharmacological effects of the drug nicotine. Defendants' own nicotine expert, Dr. Rowell, readily agreed that smoking cigarettes involves use of a drug and is not comparable to non-drug "habits" cited by Defendants in their public statements, such as jogging, playing tennis, or nailbiting. Rowell TT, 3/24/05, 16685:5-16687:19, 16633:24-1634:10. The Findings of Fact recount at great length and in great detail that Defendants knew smoking was addictive because of nicotine. See generally Findings of Fact Section V(B)(3). Indeed, documents consistently reflect that Defendants considered themselves to be in the "nicotine business" because nicotine is the "sine qua non" of cigarettes. See, e.g., US 22848 at 7837-7839 (Philip Morris in 1969: "We have then as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine. . . . [N]one [of the psychological motives for smoking] are adequate to sustain the habit in the absence of nicotine."); US 20659 at 5684-5685 (R.J. Reynolds' researcher in 1972: "Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects. . . . [T]he confirmed user of tobacco products is primarily seeking the physiological 'satisfaction' derived from nicotine.").

Moreover, internal documents and testimony from former company employees affirmed that within their corporate walls, Defendants openly recognized the addictiveness of cigarettes. Dr. Farone testified that during his time at Philip Morris there was "widespread acceptance internally throughout the company – among executives, scientists, and marketing people" that nicotine was primarily responsible for addiction to smoking. Farone WD, 72:21-73:1, 74:10-23.

Defendants have intentionally maintained and coordinated their fraudulent position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking is not dangerous. By the use of this fraud, Defendants have kept more smokers smoking, recruited more new smokers, and maintained or increased revenues.

3. Defendants Falsely Denied that They Manipulated Cigarette Design and Composition so as to Assure Nicotine Delivery Levels Which Create and Sustain Addiction

Defendants recognized the relationship between nicotine delivery and continued cigarette sales. See generally Findings of Fact Section V(C)(1)(c). By delivering the optimum amount of nicotine, Defendants could keep people smoking, keep those already addicted satisfied, and therefore maintain or increase cigarette sales revenue. Based on this understanding, Defendants actively tried to ensure that smokers would continue to receive sufficient nicotine from cigarettes that would deliver reduced tar and nicotine measurements under the FTC Method. See generally Findings of Fact Section V(C)(2).

Defendants dedicated substantial resources to devising techniques to modify and manipulate the amount of nicotine that their products deliver. Defendants have studied extensively how every characteristic of every component of cigarettes -- including the tobacco blend, the paper, the filter, additives, and the manufacturing process -- affects nicotine delivery. They have utilized that

understanding in designing their cigarettes. Defendants have designed their cigarettes with a central overriding objective -- to ensure that smokers obtain enough nicotine to create and sustain addiction.

Nevertheless, Defendants have publicly and fraudulently denied that they manipulate nicotine delivery. The evidence establishes that Defendants' statements denying manipulation of nicotine have been intentionally deceptive, misleading, or otherwise fraudulent when made. Through these and other false statements, Defendants have furthered their common efforts to deceive the public and carry out their fraudulent scheme.[15]

Defendants spent many millions of dollars and thousands of scientist hours over decades to ensure that smokers of all brands consumed sufficient nicotine to establish and maintain addiction. Defendants' own internal evidence shows that (a) they intended to manipulate the nicotine delivery of their cigarettes; (b) they employed numerous design techniques because they intended and believed that those techniques allowed them to successfully control nicotine delivery; and (c) these efforts were driven by Defendants' widespread understanding that nicotine is an addictive drug and that cigarette smoking is a drug-driven addiction.

Nevertheless, at the same time they were pursuing these techniques, Defendants fraudulently denied both their efforts to manipulate nicotine and their knowledge of nicotine's addictiveness. Defendants have publicly and fraudulently denied that they manipulate nicotine and falsely asserted that the level of nicotine in a cigarette is inextricably linked to the cigarette's tar level, that nicotine delivery levels automatically follow tar delivery levels in cigarette smoke, that nicotine is an essential flavorant, and that because they do not add "extra" nicotine to cigarettes they are not

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[15] The Racketeering Acts associated with this component of the scheme to defraud are Racketeering Act Nos. 109-113

engaged in manipulating the delivery of nicotine through the smoke. For example, on a March 27, 1994, airing of "Face the Nation," Brennan Dawson, Vice President of the Tobacco Institute, 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.

TLT0730851-1975 (US 77012). Through these and other false statements, Defendants have furthered their common efforts to deceive the public regarding their control and manipulation of nicotine.

4. Defendants Falsely Represented that Light and Low Tar Cigarettes Deliver Less Nicotine and Tar and, Therefore, Present Fewer Health Risks than Full-Flavor Cigarettes

The evidence establishes that the vast majority of people who smoke today want to quit due to health concerns. Defendants accurately perceive smokers' desire to quit as a significant threat to their economic welfare and possibly their existence; obviously, if sufficient numbers of smokers who want to quit actually do so, it will greatly diminish Defendants' earnings. In 1978, a Tobacco Institute document offered the following chilling assessment of the threat to Defendants' businesses: "low tar cigarette smokers . . . are potential cigarette quitters. . . . And more of them than the average have tried to quit smoking. Since low tar smokers are an expanding share of the market, their greater desire to quit smoking poses a special problem for the cigarette industry." 501565967-6019 at 6008 (US 21866).

As part of a scheme to intercept potential quitters and dissuade them from giving up smoking, Defendants developed and introduced filtered and purportedly "low tar and nicotine" cigarettes. As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated

marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes, and thus an acceptable alternative to quitting, while at the same time carefully avoiding any admission that their full-flavor cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them buying and smoking cigarettes.[16]

Defendants' efforts have been successful. Even though low tar smokers have a greater desire to quit, their misconception that low tar cigarettes are less harmful dissuades them from doing so. Current research demonstrates that approximately 50% of all smokers of lower tar cigarettes chose such products because they perceive them to be a "healthier" cigarette and a potential step toward quitting. Weinstein WD, 53:3-54:20; Benowitz WD, 60:8-22.

Defendants were aware, however, that because of nicotine addiction, smokers would not smoke "health reassurance" cigarettes if they failed to supply enough nicotine to sustain their addiction. Defendants therefore designed their low nicotine and low tar cigarettes with what they referred to as "elasticity" of delivery. This created the illusion that there would be less nicotine and less tar, but at the same time it would facilitate a smoker's ability to compensate for the reduced nicotine yield. As a result of smoker compensation, discussed in detail in the Findings of Facts, smokers inhale essentially the same amount of nicotine (and with it, tar) from low tar cigarettes as from regular cigarettes.

In short, Defendants have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and

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[16] The alleged Racketeering Acts relating to this claimed scheme are Racketeering Act Nos. 36, 37, 39, 47, 48, 53, 119 & 124.

nicotine was false and misleading. Defendants have known for decades that each smoker has a particular nicotine requirement that he or she must satisfy in order to sustain the addiction and, as a result, smokers will inhale the same amount of nicotine, and with it tar, from low tar cigarettes as they do from regular cigarettes. Benowitz WD, 55:11-22; 56:22-23; 57:5-9; 57:23-1; Benowitz TT, 11/2/04, 4762:23-24; 4763:14-16; Farone WD, 103:18-104:1; see also Findings of Fact Section V(E)(2).

Despite overwhelming evidence that Defendants intended to market low tar cigarettes in order to deter potential quitters, Defendants have consistently maintained publicly that "all of their marketing activities had one and only one purpose: to impact the brand choice of adults who had already chosen to smoke." In addition, "[t]he tobacco companies expressly stated they had no interest in either (1) increasing the likelihood of anyone's beginning to smoke or (2) decreasing the likelihood that a current smoker would quit." Dolan WD, 56:3-14.

These public statements are blatantly false. For instance, Carolyn Levy, former Philip Morris Director of Consumer Research and Senior Vice President for Marketing and Sales Information, testified that at the same time Philip Morris was making public statements that it had no interest in intercepting quitters, she was conducting research on ways to deter smokers from quitting. Levy WD, 33:12-34:9, 34:23-35:2. Levy testified that Philip Morris was "studying the factors that influence quitting," including whether "people quit because of health concerns," so that Philip Morris could "design products or line extensions of existing brands that addressed those factors." Asked if the purpose was "[s]o that people would keep smoking Philip Morris cigarettes rather than quitting," Levy testified: "Yes, if Philip Morris could design new products to address those concerns." Levy WD, 31:9-22.

As part of the Enterprise's scheme to defraud smokers, Defendants withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation. Farone WD, 112:23-113:10 (Defendants' superior knowledge of compensation was closely held within Philip Morris and the tobacco industry and there was an "effort on the part of [his] co-workers at Philip Morris, including [his] supervisors, to restrict any public acknowledgment on the part of Philip Morris of the phenomena of compensation"). For example, a 1978 BATCo memorandum about its internal research stated:

> In general, a majority of habitual smokers compensate for changed delivery, if they change to a lower delivery brand than their usual brand. . . . If they choose [a] lower delivery brand which has a higher tar to nicotine ratio than their usual brand (which is often the case with lower delivery products) the smokers will in fact increase the amounts of tar and gas phase that they take in, in order to take the same amount of nicotine.

105553905-3914 at 3905, 3907, 3913 (US 34799). In addition, 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. 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 as measured by the FTC method.

Defendants acknowledge that, today, every major manufacturer continues to manufacture and sell low tar brands and brand extensions in both the "light" and "ultra light" categories. Ivey WD, 54:6-17; Bonhomme WD, 8:13-9:18. Defendants use these so-called brand descriptors such as "light," "medium," and "mild" to market their brand extensions as low in tar with full knowledge that a substantial number of smokers interpret these descriptors as indicating a less harmful cigarette. See Findings of Fact Section V(E)(3).

The misleading nature of Defendants' design and marketing of filtered and low tar cigarettes continues. See generally Burns WD, 30:9-12; 62:5-7; Farone WD, 3:12-22; 4:20-22; 72:13-18; 115:19-116:2; Henningfield WD, 55:13-56:7; 66:14-67:12; 82:16-19.

5. Defendants Falsely Denied that They Market to Youth

Defendants engaged in coordinated activity in order to protect their ability to recruit new, youth smokers through cigarette marketing, often utilizing the same joint organizations that were initially created to carry out deceptive public relations campaigns related to disease risks. In order to protect each company's ability to continue to market to the teenagers who are of such vital importance to their continued survival as older smokers quit or die, Defendants have continually represented to the public, both through the Tobacco Institute and individually, that they do not market to youth, that their marketing is only aimed at adult smokers, and that their marketing has no impact on youth smoking. These public statements are false and misleading and have been made to further the Enterprise's overall objective of maximizing Defendants' profits from the sale of cigarettes.[17]

Defendants' fraudulent statements stem from their recognition, contained in internal documents written for decades, that new teenage smokers were essential to their continued profitability. See Findings of Fact Section V(F)(2). For example, a 1981 report conducted by the Philip Morris Research Center, titled "Young Smokers Prevalence, Trends, Implications, and Related Demographic Trends," stated that "Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens. . . . The

[17] The alleged Racketeering Acts relating to this component of the scheme to defraud are Racketeering Act Nos. 4, 6, 35, 49, 61, 76, 83, 84, 86, 87, 89, 91, 93, 94, 96, 97, 100, 102, 117, 118, 121, 122, 125-131, 134-148.

smoking patterns of teenagers are particularly important to Philip Morris." 1000390803-0855 at 0808-0809 (US 22334). See also 501899346-9359 at 9351 (US 20688) (1974 internal R.J. Reynolds memorandum concluding that "most smokers begin smoking regularly and select a usual brand at or before the age of 18"); 2041761791-1801 at 1791, 1795 (US 21493) (1973 internal Philip Morris Memorandum titled "Incidence of Smoking Cigarettes" discussing a survey measuring smoking incidence among 12-17 year olds); 01110993-1032 at 1030 (US 20031) (1981 internal Lorillard document commenting that the company "must continually keep in mind that Newport is being heavily supported by blacks and the under 18 smokers. We are on somewhat thin ice should either of these two groups decide to shift their smoking habits"); 680500903-1076 at 0930 (US 21607) (1974 B&W Five Year Plan for all of B&W brands stating "the younger smokers' importance cannot be denied. They have distinct brand choices and association appears to exist between growth brands and segments, and the younger smoker"). Defendants not only recognized the importance of protecting their ability to market to youth, but acted in concert based on their shared interest.

Defendants aggressively pursued the youth market, often not distinguishing those under 18 from those under 21, while publicly denying their activities. For example, Tobacco Institute spokesperson Brennan Dawson appeared on television and provided statements to newspapers, making such assertions as, "If a child never picks up another cigarette, it would be fine with the tobacco industry." See, e.g., (no bates) (US 85153), (no bates) (US 85154). Indeed, many of the Racketeering Acts associated with Defendants' youth marketing consist of advertisements that appeal to and target youth, the designs of which are based on Defendants' research on teenage behaviors and preferences. See e.g., Racketeering Acts 76, 83, 84, 97, 102, 135-142, 147 and 148.

Simultaneously, Defendants made public assertions that they did not market to youth, that they viewed cigarette smoking as "an adult custom," that they were committed to reducing youth smoking, and similar pronouncements. See Findings of Fact Section V(F)(7). These statements continue to the present day, appearing on Defendants' websites, in promotional materials, and in corporate principles. Similarly, Defendants continue to assert that their marketing has no effect on smoking prevalence and that they market only to current smokers in order to influence brand switching. See id.

Defendants argue that their fraudulent denials of marketing to youth have not actually served the goal of the Enterprise to preserve and enhance the cigarette market. However, the Court has already found that Defendants' fraudulent denials hid and protected their efforts to market to youth, efforts which are a substantial contributing factor to youth smoking initiation. See Findings of Fact Section V(F)(3). Defendants' efforts to target youth are based on a recognition that the youth market is critical to the growth of their industry; their denials of those efforts are based on the recognition that the public considers pursuit of the youth market to be ethically unacceptable.

In any event, it is immaterial to Defendants' liability whether they actually succeeded in their efforts to market to youth or to increase their revenues. As this Court has previously stated on numerous occasions, to establish RICO liability, the United States is not required to prove that Defendants succeeded in their scheme to defraud. United States v. Philip Morris, Inc., 273 F. Supp. 2d 3, 6 (D.D.C. 2002) (completion of scheme to defraud not required under federal fraud statutes); Philip Morris, 116 F. Supp. 2d 131, 153 (D.D.C. 2000) ("A defendant who uses the mail with the **intent** of defrauding someone of property is guilty (or in this case, liable), whether the attempt succeeds or not.") (emphasis in original).

Over many decades, Defendants have tracked the smoking behavior and brand preference of youth. At the same time Defendants were studying why youth start smoking, they were designing their marketing campaigns to appeal to the psychological needs of adolescents. See Findings of Fact Section V(F)(4) (discussing internal research examining what causes adolescents to smoke and whether their marketing effectively associates cigarette brands with youth-appealing themes and imagery). Defendants have also positioned their marketing to reach the maximum number of youth viewers. See Findings of Fact Section V(F)(5).

Defendants claim that the MSA fundamentally changed their marketing practices and prevents them from marketing to youth. While the Findings of Fact demonstrate that Defendants' practices have changed to some degree, their fundamental interest in recruiting new youth smokers, however, has not. Indeed, Defendants' marketing expenditures have increased substantially since signing the MSA. See Findings of Fact Section V(F)(5)(a). The 2005 Cigarette Report from the FTC shows that advertising and promotional spending increased by over 21% from 2002 to 2003, rising to a staggering $15.15 billion. FTC Cigarette Report for 2003 (2005) (available at http://www.ftc.gov/opa/2005/08/cigreport.htm). Spending on magazine advertising, including several magazines with substantial youth readership, increased by 46.4%, more than twice the increase in total advertising expenditures, from 2002 to 2003. Id. at 3.

Defendants have not abandoned or altered the youth-appealing themes and images they use in their marketing campaigns. Philip Morris continues to utilize the same Marlboro brand imagery, particularly the rugged, masculine Marlboro man, in its direct mail marketing, at point of sale, and on Marlboro cigarette packs, where it has been so phenomenally successful in the past. LeVan PD, U.S. v. Philip Morris, 6/25/02, 124:14-17, 221:10-221:14; Biglan TT, 1/10/05, 9530:6-9533:3.

Lorillard has not changed the themes of its principal advertising campaign for its Newport Brand, the "Pleasure" campaign, which features attractive, vibrant young adults enjoying recreational activities and which has remained constant and successful for the past 30 years. Milstein TT, 1/10/05, 9312:1-9314:9; 9417:18-9421:25; Orlowsky WD, 30:14-31:5. B&W continues to use youth-appealing imagery in the marketing campaigns for its Kool brand of cigarettes. Indeed, B&W received numerous complaints that its B Kool campaign, which ran from 1997 to 2000, appealed to adolescents. (no bates) (US 92037). R.J. Reynolds continues to target adolescents through its magazine advertising, which was appearing in Rolling Stone magazine at the same time its President, Lynn Beasley, testified in this case, under oath, that the company had ceased advertising in those publications. RJR has also recently launched cigarette brands in youth-appealing flavors such as Kauai Kolada and Twista Lime, which are clearly designed to target and entice youth. (no bates) (US 90119).

6. Defendants Falsely Denied that ETS Causes Disease

Exposure to secondhand smoke causes lung cancer in adults. Passive exposure causes two to three percent of all lung cancer cases in the United States. Compare DXA0390094-0699 at 0118, 0309 (US 88654) (1992 EPA Risk Assessment) (over 3,000 deaths annually) with Samet WD, 63:15-64:5 (155,000 lung cancer deaths from all causes in 2000) and DXA0390094-0699 at 218 (US 88654) (98,451 lung cancer deaths in 1979). Exposure to secondhand smoke can also cause coronary heart disease, exacerbation of asthma, reduced lung function, and respiratory symptoms in children. See generally Samet WD.[18]

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[18] Although it is not in the record because it was issued this year, and accordingly, the Court does not rely upon it, the 2006 Surgeon General Report, titled "The Health and Consequences (continued...)

Despite their internal acknowledgment of the hazards of secondhand smoke, Defendants have fraudulently denied that ETS causes disease. That public position and Defendants' efforts to deny and distort the scientific evidence of the harmfulness of ETS are evidenced not only in decades of press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but in evidence of concerted, multifaceted public relations strategies designed to counter mainstream scientific publications. See Findings of Fact Section V(G)(6-8). For example, from January 1984 to April 1986, Reynolds ran a series of advertisements in newspapers across the country. One was titled "Smoking in Public: Let's separate fact from fiction"; another was titled "Secondhand smoke: Let's clear the air"; and a third ran under the headline "Secondhand smoke: The Myth and the Reality." The three Reynolds advertisements asserted: "In fact, there is little evidence -- and certainly nothing which proves scientifically -- that cigarette smoke causes disease in nonsmokers." 506290558-0792 at 0608, 0611, 0612 (US 29799). In addition, in December 1986, the Tobacco Institute published a brochure titled "Tobacco Smoke and the Nonsmoker: Scientific Integrity at the Crossroads." The Tobacco Institute claimed in its brochure that "a detailed review of the scientific literature on ETS" led to the conclusion that: "The

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[18](...continued)
of Involuntary Exposure to Tobacco Smoke," contains noteworthy conclusions, which are entirely consistent with these Findings. In particular, the Surgeon General found "there is no risk-free level of exposure to secondhand smoke." Office on Smoking and Health, U.S. Dept. Of Health and Human Servs., The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon Gen. — Executive Summary 9 (2006). Exposure to secondhand smoke can increase the risk of a child being born at a low birth weight, increase the risk of sudden infant death syndrome, and cause acute respiratory infections and conditions in children as well as adults. Id. at 9, 11, 12. Secondhand smoke also adversely affects the cardiovascular system, and causes coronary heart disease and lung cancer. Id. at 9, 13.

Available at: http://www.cdc.gov/tobacco

evidence does not support conclusions that ETS represents a health hazard to nonsmokers." TIMN 284404-4413 at 4405 (US 77088). Defendants' efforts continued even after the Surgeon General's seminal 1986 Report concluded that "involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers." VXA2110670-1053 at 0673 (US 63709).

Defendants' efforts to deny and distort the disease risks of exposure to secondhand smoke, or ETS, spread to virtually every corner of the world. Beginning in the 1970s, Defendants crafted and carried out an "open question" strategy, derived from the public relations strategy they employed successfully to discredit research related to active smoking, to address the issue of passive smoking. They carried out this strategy through a comprehensive plan, and the expenditure of an extraordinary amount of money, to develop a worldwide network of consultants involved in a public relations offensive to undermine the growing scientific consensus that ETS causes lung cancer, as well as other serious diseases. These consultants attacked legitimate scientific investigation through:

- The identification and pre-selection of scientists touted as "independent" ETS consultants by Covington & Burling, particularly John Rupp, and Shook, Hardy & Bacon.

- The creation of supposedly "independent" scientific groups, such as Indoor Air International ("IAI") and the Associates for Research on Indoor Air ("ARIA"), and even a scientific journal written by lawyers and industry consultants that exists to this day.

- The review, editing, and rewriting of consultants' papers and editorials by industry lawyers and scientists before publication.

- The planning and execution of numerous industry controlled symposia all over the world to generate favorable publications.

See generally Findings of Fact Section V(G)(6)(a)((6)).

Defendants justify the powerful public relations machinery they employed to attack the scientific evidence establishing ETS as a cause of disease by asserting that the evidence did not establish a link between exposure to secondhand smoke and diseases such as lung cancer and cardiovascular disease. However, the scientific community had reached a consensus on ETS as a cause of disease by 1986, as announced in the Surgeon General's Report. Moreover, and most significantly, Defendants themselves had determined by the 1970s that ETS was harmful to nonsmokers. See Findings of Fact Section V(G)(3).

Defendants still, to this day, fraudulently deny the health effects of ETS exposure. At trial, Philip Morris, BATCo, Brown &Williamson, Lorillard, and R.J. Reynolds denied that ETS causes disease in nonsmokers:

- RJR continues to publicly dispute that secondhand smoke causes diseases and other adverse health effects in nonsmokers. The company's position on its website indicates: "Considering all of the evidence, in our opinion, it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults." US 9201). Mary Ward, an in-house attorney for RJR until 2004, testified that the RJR position on passive smoking has not changed since she joined the company in 1985, with the exception of admitting that ETS "may trigger attacks in asthmatics." Ward TT, 11/4/04, 5076:9-5077:22.

- Lorillard continues to dispute publicly the scientific consensus as well. Lorillard general counsel Ron Milstein testified that his company has never admitted in any forum that ETS exposure causes disease, and that an October 2003 press release containing one of his statements was in line with the company's position that ETS is not a proven health hazard. Milstein TT, 1/7/05, 9263:8-9264:24.

- B&W's most recent website tells the public that ETS is not harmful. The company's 2003 website stated: "It is, therefore, our view 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." US 76761. B&W CEO Susan Ivey testified that her company places its positions on its website for consumers to rely on. Ivey TT, 11/16/04, 6098:7-19.

- BATCo also denies that passive smoke is a health hazard to adults or children. (no bates) (US 86747).

- From 1999-2001, the Philip Morris website publicly stated its disagreement with the scientific consensus as well: "Many scientists and regulators have concluded that ETS poses a health risk to nonsmokers. Even though we do not agree with many of their conclusions, below we have provided some links so you can access some of their views." (no bates) (US 92056 at 2); Parrish TT, 1/25/05, 11080:23-11082:14.

- In contrast to its corporate position on active smoking, Philip Morris does not state its agreement with, or even acknowledge the existence of, the scientific consensus that passive smoking causes disease. (no bates) (US 92055).

As they did with active smoking, using the Enterprise's public relations machinery, Defendants fraudulently denied the adverse health effects of ETS in order to maintain the appearance an open controversy about the link between ETS and disease and thus maintain and enhance the cigarette market and their collective revenues.

7. Defendants Suppressed Documents, Information, and Research

Throughout the past fifty years, Defendants have engaged in parallel efforts to suppress, conceal, and destroy documents and information in furtherance of the Enterprise's goals of (1) preventing the public from learning the truth about smoking's adverse impact on health; (2) preventing the public from learning the truth about the addictiveness of nicotine; and (3) avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation. These activities occurred despite declarations by Defendants that (a) they did not conceal, suppress or destroy evidence, and that (b) they shared with the American people all pertinent information regarding the true health effects of smoking, including research findings related to smoking and health. See, e.g., Farone TT, 10/12/04, 2091:23-2092:14; Farone WD, 156:3-15 (Philip Morris

wanted to bury "any research that was contrary to the company's position on smoking and health and addiction.").[19]

Defendants' suppression of information was aimed, in large part, at protecting them from exposure in smoking and health litigation. Indeed, much of the documentary and testimonial evidence directly references their fear of litigation exposure from scientific data and reports in their possession. The testimony of leading scientists from both Brown & Williamson and Philip Morris reflect Defendants' concerns over scientific information becoming available to plaintiffs in smoking and health litigation. Kendrick Wells, B&W Assistant General Counsel for Product Litigation, confirmed that throughout his 30-year tenure at B&W, the company feared that documents created by other BAT Group companies and statements made by employees of other BAT Group companies could adversely affect B&W's litigation position in the United States. Wells WD, 5:15-6:18. The concern over the use of information against the Defendants in litigation was also expressed in documents that chronicle the Defendants' cooperative efforts to suppress and conceal information. See e.g., (no bates) (US 21203) (memorandum in which outside counsel warned the Committee of Counsel that "should the results of the survey prove unfavorable, they may be subpoenaed or otherwise fall into the hands of the FTC, a Congressional Committee, or a plaintiff in pending cancer litigation").

In some instances, Defendants destroyed documents to prevent their release. See, e.g., (no bates) (US 21677) (RJR scientists confirm they will remove documents from the research and development files if it becomes clear the documents will expose RJR in litigation); (no bates) (US

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[19] The alleged Racketeering Acts relating to this claimed scheme are Racketeering Act Nos. 11, 19, 20, 21, 28, 41, 58, 63, 71, 72, 74, 75, 103 and 108.

34839) (in notes of a BATCo meeting in 1986 it was reported that research documents would be destroyed as part of "spring cleaning"). Defendants also employed lawyers to review and edit scientific documents to ensure that no damaging information was retained in company files. See, e.g., Findings of Fact Section V(H)(1). In addition, certain Defendants, including Philip Morris and Brown & Williamson, made arrangements to ship secret scientific information outside of the United States or to use foreign scientific laboratories to shield documents from disclosure in litigation. For example, Philip Morris bought a foreign research facility in Germany known as INBIFO and established company policies to prevent its research documents from entering or being retained in the United States. Farone WD, 21:16-22:9, 147:11-152:15; Farone TT, 10/07/04, 1938:2-1939:16. Defendants attempted to create attorney-client privilege where none properly existed. See Findings of Fact Section V(H)(3).

Many of the actions to suppress information were joint efforts by all of the Defendants through the Committee of Counsel, through other joint organizations, or through Defendants' law firms, including Covington & Burling and Shook, Hardy & Bacon, which often represented one or more of the Defendants.

C. Defendants Established an Enterprise

1. Applicable Legal Standards

Defendants formed a RICO Enterprise, comprised of a group of business entities and individuals associated-in-fact, including Defendants to this action, their agents and employees, and other organizations and individuals.

The RICO statute provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in

fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has held that an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). In accordance with Turkette, the Court of Appeals for this Circuit has consistently held that an association-in-fact "enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity," and that the enterprise need only involve "some structure, to distinguish an enterprise from a mere conspiracy." United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (citations omitted); accord United States v. White, 116 F.3d 903, 924 & 925 n.7 (D.C. Cir. 1997); United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir. 1988). As our Circuit further explained: "It is not necessary that the enterprise . . . have any particular or formal structure but it must have sufficient organization that its members function and operated together in a coordinated manner in order to carry out the common purpose alleged." Perholtz, 842 F.2d at 364.

Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to: inferences from the members' commission of similar racketeering acts in furtherance of a shared objective; financial ties; coordination of activities; a community of interests and objectives; the interlocking nature of the members' schemes; and the overlapping nature of the wrongful conduct. See, e.g., United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (members of drug trafficking enterprise provided other members with financial assistance and coordinated transportation of drugs); Richardson, 167 F.3d at 625 ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern."); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997); Perholtz, 842 F.2d at 355

("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise."); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985) (jury could have inferred the existence of the alleged association-in-fact enterprise from the "coordinated nature of the defendants' activity" and that the defendants' racketeering acts were facilitated by their nexus to the enterprise); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) (jury entitled to infer existence of enterprise from circumstantial evidence).

"It is not essential that each and every person named [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time . . . or if certain defendants are found by the [fact finder] not to have been members at any time." Perholtz, 842 F.2d at 364. Likewise, it is not necessary to prove "that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 697 F.2d 915, 922 (11th Cir. 1983); see also United States v. Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989).

This Court has already held, consistent with the law of this Circuit, that a RICO enterprise may consist of "a group of individual[s], partnerships, and corporations associated in fact," United States v. Philip Morris Inc., 116 F. Supp. 2d at 152 (quoting Perholtz, 842 F.2d at 351, n.12). In Perholtz itself, the D.C. Circuit held that RICO's definition of "enterprise" includes an association-in-fact of corporations, legal entities and individuals. 842 F.2d at 352-53.

2. Defendants' Enterprise Had a Common Purpose

The central shared objective of Defendants has been to maximize the profits of the cigarette company Defendants by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud existing and potential smokers. Indeed, documents recounting

the December 1953 meeting at the Plaza Hotel attended by the presidents of Defendants Philip Morris, RJR, B&W, Lorillard, and American -- a meeting called by American's president to discuss an "industry response" to research identifying cigarette smoking as a cause of lung cancer -- report that the executives agreed to jointly

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

MTP0023548-3552 at 3549 (US 21411). See also Findings of Fact Section III(B). Defendants recognized that their competing companies would benefit from working together on certain common problems while continuing to compete against each other for the largest share of the cigarette market.

Over the next several decades, the common goal of preserving and enhancing the cigarette market, maximizing profits, avoiding costly liability judgments, and deterring or minimizing attempts to make smoking socially unacceptable remained central to the actions of Defendants. During that time, Defendants uniformly denied, both individually and collectively: that smoking had been proven as a cause of cancer and other serious diseases (while falsely promising that the industry was funding independent research to determine the health effects of smoking); that secondhand smoke caused disease; that smoking was addictive; that the industry manipulated the levels of nicotine in its products; that light and low tar cigarettes were no less hazardous than full flavor cigarettes; and that the industry marketed its products to young people.

The United States has shown that the Defendant members of the Enterprise who were not

physically present at the Plaza Hotel meeting -- including Liggett, Altria (which was formed in 1985 and had previously been known as Philip Morris Companies), BATCo, CTR (which was first created as the Tobacco Industry Research Committee in the wake of the December 1953 meeting), and the Tobacco Institute (which was formed in 1958) -- also shared the common goals of the Enterprise and acted in furtherance of those goals. See Findings of Fact Section III. Moreover, in furtherance of the central objectives of the Enterprise, Defendants attempted to, and at times did, conceal or suppress information and destroy documents. Their purpose in taking such action was to avoid adverse liability judgments in litigation involving smoking and health issues and to prevent discovery of evidence regarding the causal link between cigarettes, addiction, and disease. See Findings of Fact Section V(H).

3. The Enterprise operated through both formal and informal organization

Like an amoeba, the organization of the Enterprise changed its shape to fit its current needs, adding organizations when necessary and eliminating them when they became obsolete. Whatever the shape or composition of the Enterprise at any given time, again like an amoeba, its core purpose remained constant: survival of the industry. The participants in the Enterprise coordinated and strategized in order to preserve and enhance the cigarette market and, in turn, their individual revenues. The Enterprise created and used formal and informal entities, many with overlapping participants and purposes, to serve Defendants' central mission.

For example, in terms of formal organization, TIRC/CTR and the Tobacco Institute were jointly formed and funded by other Defendant-members of the Enterprise to help the industry execute the strategy devised to achieve their shared goal. TIRC/CTR sponsored and funded research that attacked scientific studies demonstrating the harmful effects of smoking cigarettes but did not itself

conduct research addressing the fundamental questions regarding the adverse health effects of smoking. Moreover, attorneys for Defendants initiated and oversaw CTR "Special Projects" -- research projects conceived and directed by industry representatives, including industry lawyers, to support scientists who had shown a willingness and ability to generate data, and provide testimony, that would bolster the industry's litigation position before courts and governmental bodies. See Findings of Fact Section III(E)(2). Altria executives served on the Board of Directors of CTR, and Altria had, and exercised, approval authority for CTR special projects. See, e.g., Parrish TT, 1/27/05, 11349:8-11352:23, 11355:1-11357:8; (no bates) US 87508; (no bates) US 20384.

Similarly, from 1958 to 1998, the Tobacco Institute actively designed, wrote, and caused to be published press releases, advertisements, pamphlets, and testimony that advanced Defendants' jointly-formulated positions on smoking and health issues, including denying that smoking cigarettes caused disease and was addictive, and supported the false claim that the link between smoking cigarettes and exposure to secondhand smoke and adverse health effects was an "open question." See Findings of Fact Section III(D)(3). The Tobacco Institute served as an effective conduit of information between members of the Enterprise both domestically and internationally through its various committees. See Findings of Fact Section III(D)(4). Altria executives attended meetings of the TI Committee of Counsel and sat on the TI Executive Committee. Parrish TT, 1/27/05, 11352:24-11353:24; (no bates) (US 62461); (no bates) (US 88252); (no bates) (US 88308).

Defendants also used numerous other means -- including structures of varying degrees of formality such as CIAR, the Committee of Counsel, the ETS Advisory Committee, the Ad Hoc

Committee, the Research Liaison Committee, the Industry Technical Committee, law firms[20], and direct communications between and among members of the Enterprise -- to coordinate their activities, ensure continued adherence to the joint strategy, and enable the Enterprise to respond as new threats to the industry arose. See Findings of Fact Section III(F).

Defendants' claim that the Enterprise no longer has any organization within the meaning of 18 U.S.C. § 1962(c) because all of the "all of the organizational vehicles for the 'enterprise' no longer exist" is unpersuasive. Defs.' Corrected Trial Brief at 29. While it is true that CTR and TI were dissolved pursuant to the terms of the MSA, all of the other organizations either still exist or can be readily re-activated. Moreover, the individuals and Defendant-companies participating in these organizations, who, incidentally, often overlapped, still exist. Most importantly, Defendants have an ongoing need to satisfy the same purposes which these organizations met. Put simply, these organizations can be resurrected, recreated, or reincarnated at any time as Defendants wish. For example, Philip Morris currently has PMERP (Philip Morris External Research Program) which operates out of CIAR's former headquarters, is directed by CIAR's former scientific director, Max Eisenberg, and continues to fund many former CIAR projects.

4. The Enterprise Has Functioned as a Continuous Unit

The evidence also convincingly demonstrates that the Enterprise has functioned as a continuous unit from at least December 1953,[21] when the executives of five Defendants (Philip

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[20] Despite the apparent conflict of interest, a few law firms, particularly Covington & Burling and Shook, Hardy & Bacon, represented the shared interests of all the Defendants and coordinated a significant part of the Enterprise's activities.

[21] For purposes of this lawsuit, the Enterprise was in existence as early as December 1953. No evidence was presented about the Enterprise prior to 1953.

Morris, RJR, B&W, Lorillard and American) agreed to launch their long-term campaign to deceive and mislead American smokers and potential smokers announced in the Frank Statement. See Findings of Fact Section III(B). For five decades, Defendants not only communicated directly and continuously with one another on matters relevant to the aims of the Enterprise, but also created, supported, and controlled a web of organizations, committees, and other bodies that facilitated coordinated behavior. For example, TIRC/CTR, which was created in 1954, existed until 1998, and the Tobacco Institute, which was created in 1958, existed until 2000. Jointly created and funded CIAR, which was created in 1988, existed through 1999. In addition, Defendants' participation in various other organizations, including many international organizations, continued for years. Defendants continue to participate in the TAC (formerly the TSMC and then the TRC) even today. Similarly, Defendants continue to participate in CORESTA, and the TDC (formerly ICOSI and then INFOTAB). See Findings of Fact Section III(I).

Over many years, Defendants, often used the Tobacco Institute to furnish advice, assistance, and even financial support to international industry-related groups and organizations as they worked on projects, publications, videos, conferences, briefing papers, and lobbying materials for the benefit of the Enterprise. See Findings of Fact Section III(D). For example, the Tobacco Institute funded and organized the College of Tobacco Knowledge, a series of annual seminars for employees of the tobacco industry and tobacco-related industries which addressed issues facing the industry at that time and sought to ensure presentation of a unified and consistent public stance on smoking and health issues. See Findings of Fact Section III(D)(5). Defendants utilized their outside lawyers to further the goals of the Enterprise, including attorneys such as John Rupp at Covington & Burling,

Donald Hoel at Shook, Hardy & Bacon, Andrew Foyle at Lovells, and others at Chadbourne & Parke and Jones Day.

Finally, Defendants have continued to adhere to many of the exact positions formulated at the very genesis of the Enterprise -- such as denial of the adverse health effects of smoking and exposure to secondhand smoke, denial of the addictive properties of nicotine, and denial that Defendants market to youth. See Findings of Fact Section V(A,B,F,G).

In sum, the Enterprise consisted of individual Defendants working together to coordinate significant activities for over 50 years through TIRC/CTR, the Tobacco Institute, and an array of other overlapping entities. Their activities were calculated to serve their shared objectives, including their primary goal of maximizing profits by preserving and expanding the market for cigarettes. See, e.g., United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996); Securitron Magnalock Corp., 65 F.3d at 263-64; Perholtz, 842 F.2d at 355; Local 1804-1, 812 F. Supp. at 1310-15; Mitland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 1055 (S.D.N.Y. 1992).

D. The Enterprise Engaged in and Its Activities Affected Interstate and Foreign Commerce

There can simply be no denying that the Enterprise engaged in, and its activities affected, interstate or foreign commerce. This has been proven, in part, by the fact that each individual Defendant itself had an extensive nexus to interstate or foreign commerce. See, e.g., United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (collecting cases); United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Bagnariol, 665 F.2d 877, 892-93 (9th Cir. 1981); United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981).

In fact, each of the cigarette company Defendants stipulated that from 1953 to the present it has been engaged in, and its activities affect, interstate and foreign commerce within the meaning of 18 U.S.C. § 1962(c) and (d). Similarly, Altria stipulated that it has engaged in interstate and foreign commerce since it was formed as Philip Morris Companies in 1985. See Order #280.

Between 1954 and 1998, Defendants CTR and TI (beginning in 1958), both incorporated in New York state, each received over $500 million in funding in interstate commerce via the interstate banking system from various cigarette company Defendants located in different states. See Findings of Fact Section IV(I,J). During that same time period, CTR funded millions of dollars of research projects, which were conducted by researchers and institutions in various states and abroad, the results of which were published in periodicals and books throughout the United States and in foreign countries. Similarly, TI issued thousands of press releases and public relations advertisements which were disseminated in interstate commerce throughout the United States in various newspapers, magazines, periodicals and books. See Findings of Fact Section III(C,D). Thus, CTR and TI were engaged in and their activities affected interstate commerce.

Because many of BATCo's Racketeering Acts took place outside the United States, Defendants claim that they cannot be the basis of RICO violations. RICO may apply to conduct which occurs outside the United States as long as it has a substantial direct effect on the United States. Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002). RICO is an expansive statute, broadly construed to reach a wide array of activity. United States v. Pepe, 747 F.2d 632 (11th Cir. 1984). Generally, courts have concluded that this broad construction does not include international schemes largely unrelated to the United States. See e.g., Brink's Mat Limited v. Diamond, 906 F.2d 1519, 1524 (11th Cir. 1990) . In determining whether RICO applies extraterritorially, allegations must meet

either the "conduct" test or the "effects" test. Under the "conduct" test, RICO applies where the conduct within the United States directly caused a foreign injury. North South Fin. Corp. v. Al-Turki, 100 F.3d 1051 (2d Cir. 1996). Under the "effects" test, RICO applies when the foreign conduct at issue has "substantial" effects within the United States. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2nd Cir. 1989). This test is met when the domestic effect is a "direct and foreseeable result of the conduct outside of the United States." Id. at 262. At all times, the primary consideration is whether the scheme to defraud or artifice has a tangential or direct effect on the United States. See e.g., Butte Min. PLC v. Smith, 876 F. Supp. 1153 (D. Mont. 1995); United States v. Noriega, 746 F. Supp. 1506, 1516-1517 (S.D. Fla. 1990); Consolidated Gold Fields PLC v. Minorco S.A., 871 F.2d 252, 261-62 (2d Cir.1989).

While it is true that many of BATCo's activities and statements took place outside of the United States, they nevertheless had substantial direct effects on the United States. First, many of BATCo's statements and policies at issue in this case concerned US subsidiary/affiliate Brown & Williamson and potential litigation in the United States. Second, and most importantly, BATCo's activities and statements furthered the Enterprise's overall scheme to defraud, which had a tremendous impact on the United States, as demonstrated in the Findings of Fact.

Finally, the evidence that all Defendants taken together have bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce since 1954 conclusively establishes the requisite effect on interstate commerce.

E. Each Defendant Was Associated with, but Distinct from, the Enterprise

1. Each Defendant Is Associated with the Enterprise

To prove a defendant's association with an association-in-fact enterprise, it is not necessary to prove that the defendant had a formal position in the enterprise, participated in all the activities of the enterprise, "had full knowledge of all the details of" its activities, or even knew about the participation of all the other members in the enterprise. Rather, it is sufficient that the defendant "know the general nature of the enterprise and know that the enterprise extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989) (collecting cases); see also United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002) ("Association may be by means of an informal or loose relationship. To associate has its plain meaning. . . . 'Associated' means to be joined, often in a loose relationship, as a partner, fellow worker, colleague, friend, companion or ally. Thus, although a person's role in the enterprise may be very minor, a person will still be associated with the enterprise if he knowingly joins with a group of individuals associated in fact who constitute the enterprise."); United States v. Zichetello, 208 F.3d 72, 99 (2d Cir. 2000); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); United States v. Console, 13 F.3d 641, 653 (3d Cir. 1993); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981).

Moreover, "[a] defendant is considered to have 'associated with' a RICO enterprise if he engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise," Blue Cross & Blue Shield of N.J., Inc. v, Philip Morris, Inc.,113 F. Supp. 2d 345, 366 (E.D.N.Y. 2000), or otherwise commits racketeering acts in the conduct of the enterprise's affairs. See, e.g., United States v. Watchmaker, 761 F.2d 1459, 1476 (11th Cir. 1985); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978). In addition, a defendant

"associates with" an enterprise when he conducts business with or through the enterprise, or otherwise has an effect on its activities, including its unlawful activities. United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992).

The extensive Findings of Fact establish that not only did each Defendant know the general nature and purpose of the Enterprise, and that it extended beyond any one Defendant's individual role, but each Defendant also knew that all the other Defendants were participating in the Enterprise to achieve their shared objective. Defendants formed numerous entities -- both formal and informal -- to achieve their shared objective, as summarized above and set forth in great detail in the Findings of Fact. For example, decades after they had internally recognized that smoking caused disease, all Defendants publicly maintained that the link between smoking and disease remained an "open question." See Findings of Fact Section V(A)(5)(c).

Defendants Liggett and Altria were also associated with the Enterprise. Liggett shared and supported the common objectives of TIRC/CTR with the other Defendants. See generally Findings of Fact Section III. Defendant Altria also shared and supported the common objective of CTR. Altria employees not only knew about the activities of CTR, but were involved in them as well, attending CTR Board of Director meetings and CTR Annual Member meetings and participating in the approval and funding decisions related to CTR Special Projects. Pollice WD, 6:1-12:12; Pollice TT, 10/04/04, 1526:22-1527:14, 1528:19-1529:1. See Findings of Fact Section III(C). Similarly, Defendant BATCo shared and supported the common objectives of TIRC/CTR. Communications and contact between high level smoking and health research scientists at BATCo and scientists affiliated with TIRC/CTR were frequent and direct. TIRC/CTR employees also traveled to England to attend meetings with BATCo employees and other members of international tobacco

organizations. BATCo was a critical participant in worldwide efforts to deny or distort the health risks of ETS exposure, though organizations such as IEMC, INFOTAB, CORESTA, the Verband der Cigaretteindustrie (VdC) (the German trade association of cigarette manufacturers including German and Austrian manufacturers as well as Philip Morris, R.J. Reynolds, and BATCo), and others, and its participation included coordination with CIAR. See Findings of Fact Section III(I).

Throughout the life of the Enterprise, Defendants have coordinated their fraudulent activities through other formal entities, such as TI, CTR, CIAR, and ICOSI as well. See Findings of Fact Section III (C, D, H, I). In addition, Defendants' use of informal organizations such as the Ad Hoc Committee (which was comprised of tobacco industry lawyers and advised Defendants on matters affecting the tobacco industry), the Research Liaison Committee (which was also comprised of lawyers who reviewed, directed and coordinated joint research activity by Defendants), the ETS Advisory Committee (which dealt with issues related to environmental tobacco smoke and led to the formation of CIAR), and the Industry Technical Committee (which was comprised of the scientific directors of the cigarette company Defendants and assisted TIRC/CTR on technical issues related to cigarette design and other matters), allowed the Enterprise to direct the conduct of its members by providing mechanisms for quickly responding to areas of common concern and develop coordinated strategies for responding to them. See Findings of Fact Sections III(F) and V(G)(a).

The documentary and testimonial evidence of direct communications among Defendants -- phone calls, meetings, and correspondence at the highest levels of their respective corporate, scientific, and legal hierarchies -- is overwhelming. This evidence establishes that each Defendant knew that (and in innumerable instances, knew how) other Defendants were acting to further the common purpose of the Enterprise. See generally Findings of Fact. Moreover, all Defendants

maintained their association with all the formal and informal activities comprising the Enterprise through periodic meetings, scientific symposia, correspondence and conversations regarding, inter alia, research projects, public statements, and advertising. Again, all these efforts were designed to advance the primary objective of the Enterprise: to maximize profits by acting in concert to preserve and enhance the market for cigarettes, to avoid legal liability that could result in large damage awards and increase public recognition of the harmful effects of smoking and its addictiveness, and to deflect efforts to make smoking socially unacceptable. In addition, as discussed in Section VII(G)(3)(a), infra, all of the Defendants committed racketeering acts in furtherance of the shared objectives of the Enterprise.

Thus, each Defendant has been proven to be associated with the Enterprise and its ongoing activities.

2. Each Defendant is Distinct from the Enterprise

This Court has already held:

> Regardless of how the enterprise is defined (if at all), the Government has proven the distinctness element in this case. This Court has already held that an "association-in-fact" enterprise can be a group of corporations. See Philip Morris, 116 F. Supp. 2d at 152-53. Moreover, there is no dispute that each individual Defendant is a separate legal entity. Thus, if this Court should find an enterprise comprised of at least two of the Defendants, the individual Defendants will be distinct from the enterprise itself.

United States v. Philip Morris USA, 327 F. Supp. 2d 13, 18 (D.D.C. 2004).

F. Each Defendant Participated in the Conduct of the Enterprise

Section 1962(c) requires proof that each defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs." Addressing this element, the Supreme

Court held that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation or management of the enterprise itself." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993). The Court explained:

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

Id. at 179. A defendant may satisfy this test even if he did not have significant control over the enterprise's affairs. As the Court pointed out in Reves, "RICO liability is not limited to those with primary responsibility for the enterprise's affairs" and it specifically "disagree[d] with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '**significant control** over or within an enterprise.'" Id. at 179 & n.4 (quoting Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) (emphasis in Reves)).

The Supreme Court recognized that:

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

Id. at 184.

Following Reves, the federal courts of appeals have made it clear that a defendant need not be among the enterprise's "control group" in order to be held liable for a substantive RICO violation;

rather, a defendant need only intentionally perform acts that are related to, and further, its operation or management. As the First Circuit explained: "The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performance of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 24 (1st Cir. 1993) (quoting Reves). Numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise implemented decisions directed by those higher up the ladder in the enterprise or committed racketeering acts which furthered the basic goals of the enterprise at the direction of other members of the enterprise. See, e.g., United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997); United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995).

In this case, high-level employees of each Defendant not only participated in the operation and management of the Enterprise, but also each Defendant, acting through these employees, played a significant role in making and implementing decisions in furtherance of the Enterprise's activities and purposes. See generally Findings of Fact.

For example, the member companies, as well as the Tobacco Institute and Altria, participated in the Committee of Counsel to further the Enterprise's objective. The Committee of Counsel made key decisions regarding the Enterprise's activities in many areas including, but not limited to, joint research, litigation defense and public relations. See Findings of Fact Section III(D)(4)(a). In a presentation to the Committee of Counsel in the early 1980s, Ernest Pepples, B&W General Counsel, reported that "[t]he products liability environment is growing more hostile with dramatic speed. . . . A mistake -- any concession -- by a defendant will be costly." Complaining of certain health

claims in a Philip Morris advertisement that suggested that certain cigarettes were unsafe, Pepples noted that:

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

(no bates) (US 20874).

In addition, each Defendant had some part in directing the affairs of the Enterprise by coordinating and causing the public dissemination of false, misleading or deceptive statements denying the link between smoking cigarettes and adverse health effects, denying the addictiveness of smoking, and by committing related racketeering acts, all in furtherance of the primary, shared objective of the Enterprise. See Findings of Fact V(A, B).

Defendant Altria (f/k/a Philip Morris Companies) argues that, as a parent company to Philip Morris, it did not participate in the affairs of the Enterprise. The Court concludes, however, that Altria did participate in the Enterprise both directly, by joining many of the Enterprise's organizations and by supporting its objective, and indirectly, by controlling the policies and public positions of Philip Morris, the only subsidiary of Altria which manufactures cigarettes. Altria participated directly in the operation and management of the Enterprise through, for example, the Scientific Research Review Committee ("SRRC"), which had responsibility for overseeing "all scientific studies, related to tobacco, smoke and/or smoking, conducted or funded by Philip Morris Companies or any of its subsidiaries around the world" with authority to review and approve all funding of scientific studies related to those topics. SRRC was represented on the following entities

which conducted jointly-funded research with other tobacco companies: CIAR; VDC; Association Suisse des Fabricants de Cigarettes; Centre de Cooperation pour Les Rechereches Scientifiques Relatives au Tabac – CORESTA (France); Tobacco Manufacturing Association (TMA), formerly Tobacco Advisory Council (TAC) and Tobacco Research Council (TRC) (UK); and Australian Cigarette Association. Reif PD, U.S. v. Philip Morris, 7/30/03, 49:1- 49:12. After the MSA-mandated dissolution of CTR and CIAR, the SRRC continued to approve research projects funded by Philip Morris through its "External Research Program" which was created in 2000 to take over the function of funding third-party research and eventually took the place of the SRRC. Id. at 194:15-195:13.

Altria also conducted and participated in the conduct of the Enterprise by controlling the positions of Defendant Philip Morris USA. Although Philip Morris has its own communications department, Altria controls its communications on sensitive issues such as litigation against Philip Morris, Philip Morris's opposition to federal excise taxes on cigarettes, and Philip Morris's support for FDA regulation of tobacco products -- even when those issues affect Philip Morris alone among Altria's many subsidiary companies. John Hoel PD, U.S. v. Philip Morris, 5/30/03, 60:12-63:7, 67:3-22, 166:17-167:14; see also (no bates) (US 44422) (1999 memo from Philip Morris Companies to Philip Morris outlining the company's position and strategy on a proposed federal excise tax increase for cigarettes); US 45675 (2001 memo outlining Philip Morris' position on FDA regulation of cigarettes). As another example, Altria, through its subsidiaries, controls the use of the Marlboro trademark both in the United States and abroad. Myers TT, 5/19/05, 21719:8-21720:13. Altria also established Worldwide Scientific Affairs ("WSA"), an internal working group which coordinates scientific research and science policy, including smoking and health issues, across all of the Altria

companies. WSA was organized in regions covering various operating company subsidiaries, including Philip Morris, Philip Morris International, and their subsidiaries, in various parts of the world; scientific policy of Altria subsidiaries was coordinated across these regions in which subsidiaries did business. Reif PD, U.S.. v. Philip Morris, 3/30/04, 316:17-318:7; (no bates) (US 89153); (no bates) (US 89155). Altria also established a department of Worldwide Regulatory Affairs (WRA), to coordinate and ensure consistency in regulatory policy statements and responses across all of the Altria companies. See, e.g., Keane TT, 1/19/05, 10484:19-10489:3; (no bates) (US 41574); Reif PD, U.S. v. Philip Morris, 3/30/04, 344:14-345:11.[22]

In addition, the volume and frequency of correspondence between and among Defendants, and the consistent participation of their representatives in regular meetings, demonstrates the degree to which all Defendants directed and coordinated activities in furtherance of the affairs of the Enterprise. See generally Findings of Fact Sections III and V(G). Similarly, most Defendants endeavored to conceal or suppress information and documents and/or to destroy records which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in tobacco and health-related liability cases against Defendants, and provide evidence of the link between smoking cigarettes and adverse health consequences and addictiveness. See Findings of Fact Section V(H).

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[22] Altria argues that there is no legal justification for piercing its corporate veil. However, Defendant's argument misses the point. The United States does not seek to pierce Altria's corporate veil or to hold Altria liable under some form of agency theory. Rather, the Court holds that Altria is liable for its own violations of RICO and its participation in the Enterprise, in part due to its control of Philip Morris policies, research, and public statements and, in part, due to its own individual actions. Altria is itself party to the scheme to defraud consumers by denying the health effects of smoking, the addictiveness of nicotine, the manipulation of nicotine delivery from cigarettes, the hazards of secondhand smoke, and marketing to youth.

Accordingly, the evidence establishes that each Defendant participated, directly and indirectly, in the conduct of the Enterprise. Reves, at 179.

G. Each Defendant Carried Out Its Participation in the Conduct of the Enterprise by Engaging in a Pattern of Racketeering Activity

1. The Government Has Proven that Defendants Caused Mailings and Wire Transmissions, in Furtherance of the Scheme to Defraud, in Violation of 18 U.S.C. § § 1341 and/or 1343

The Supreme Court has ruled that one "'causes' the mails to be used" when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . ." Pereira v. United States, 347 U.S. 1, 8-9 (1954); see also Maze, 414 U.S. at 399-400; United States v. Serang, 156 F.3d 910, 914 (9th Cir. 1998); Sawyer, 85 F.3d at 723 n.6; United States v. Alexander, 135 F.3d 470, 474-75 (7th Cir. 1998); United States v. McClelland, 868 F.2d 704, 707 (5th Cir. 1989); United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979).

The "causing" requirement does not impose an onerous burden. United States v. Weisman, 83 F.2d 470, 474 (2d Cir. 1936) (interpreting 18 U.S.C. § 338, the former mail fraud statute). In Weisman, the defendant, who operated a fraudulent property purchase scheme, responded to a series of advertisements placed by individuals seeking to sell properties. The court of appeals noted that "Weisman, so far as possible, abstained from using the mails in connection with his fraudulent transactions." Id. at 472. However, with regard to one customer, Lewis, the defendant dictated a typewritten response to Lewis' advertisement, and the defendant's agent delivered the response to the newspaper by hand delivery. Id.

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

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

Id. at 473.

To counter the overwhelming circumstantial evidence showing the likelihood that Defendants would use mailings and wire transmissions to conduct the affairs of the Enterprise, Defendants rely on a Fifth Circuit case which held that "the use of circumstantial evidence does not relieve the Government of its burden of establishing use of the mails 'beyond a mere likelihood or probability.'" United States v. Massey, 827 F.2d 995, 999 (5th Cir. 1987). In Massey, the Fifth Circuit held that "[c]ircumstantial evidence 'such as testimony regarding office practice' is sufficient only 'so long as the circumstances proven directly support the inference and exclude all reasonable doubt to the extent of overcoming the presumption of innocence." Id. However, in that criminal case, evidence was presented which suggested it was just as likely that the mails weren't used as it was that they were. Thus, in Massey, a criminal case, unlike here, there was reasonable doubt as to whether the

mails were used. In this case, the United States has proven by a preponderance of the evidence, and even beyond a reasonable doubt, that the mails and wires were used to transmit Defendants' fraudulent statements. Indeed, Defendants could not have carried out the Enterprise's scheme to defraud without mailings and wire transmissions of their fraudulent statements.

To establish a charge of mail or wire fraud under 18 U.S.C. §§ 1341 and 1343, the matter or communication sent via the mails or wires need not itself contain false or misleading information or evidence fraud. Rather, "'innocent' mailings -- ones that contain no false information -- may supply the mailing element." Schmuck v. United States, 489 U.S. 705, 715 (1989) (citing Parr v. United States, 363 U.S. 370, 390 (1960)); see also Philip Morris, 304 F. Supp. 2d at 70.

The D.C. Circuit has long held that 18 U.S.C. § 1341 does not require that any mailing utilized to establish a mail fraud prosecution be false: "Under the mail fraud statute it is not necessary that the individual mailing relied upon by the prosecution be shown to be in any way false or inaccurate, if the matter mailed is utilized in furtherance of or pursuant to the scheme to defraud." United States v. Reid, 533 F.2d 1255, 1263 (D.C. Cir. 1976) (footnote omitted); see also Deaver v. United States, 155 F.2d 740, 744 (D.C. Cir 1946) ("a 'scheme' may be fraudulent though no misrepresentation is made"); Tabas v. Tabas, 47 F.3d 1280, 1294 n.18 (7th Cir. 1995); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413-14 (7th Cir. 1991) ("The actual violation is the mailing, although the mailing must relate to the underlying fraudulent scheme. . . . The mailing need not contain any misrepresentations. Rather 'innocent' mailings – ones that contain no false information – may supply the mailing element."). Moreover, "it does not matter that some of these mailings contained no false or misleading information, and individually contained no pecuniary loss; routine and innocent mailings can also supply an element of the offense of mail fraud." United

States v. Hickok, 77 F.3d 992, 1004 (7th Cir. 1996) (citing United States v. Brocksmith, 991 F.2d 1363, 1368 (7th Cir. 1993)).

Moreover, the mailing or wire transmission need not be essential to the scheme or succeed in deceiving; rather it need only be "for the purpose of executing the scheme." United States v. Maze, 414 U.S. 395, 400 (1974); see also United States v. Coyle, 63 F.3d 1239, 1244 (3d Cir. 1995); United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995); Kehr Packages, 926 F.2d at 1413; United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981); Reid, 533 F.2d at 1264. "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive . . . ." Schmuck, 489 U.S. at 715. In this case, Defendants caused the mailings and wire transmissions in order to communicate their fraudulent statements to the American public. See generally, Findings of Fact.

It should be noted that courts have taken a flexible approach to the "in furtherance" requirement, holding that it is sufficient that the mailing or wire transmission was "incident to an essential part of the scheme. . . or a step in [the] plot." Schmuck, at 711 (quoting Badders v. United States, 240 U.S. 391, 394 (1916)); see also United States v. Sun-Diamond Growers, 138 F.3d 961, 972 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999); Coyle, 63 F.3d at 1244; United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995); United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992); United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983) ("mailings made to promote the scheme . . . or which facilitate the concealment of the scheme"); United States v. McClelland, 868 F.2d 704, 707-09 (5th Cir. 1989) (mailings which tended to further the scheme).

In this case, all of the Racketeering Acts promoted and furthered Defendants' execution of their fraudulent scheme to maximize their profits, to avoid costly verdicts, and to derail attempts to make smoking socially unacceptable by perpetrating the deceptions which have already been enumerated and described in great detail in the Findings of Fact.

The evidence shows that it was the Defendant's routine or standard business practice -- which one would expect of any major corporation -- to send or receive matters via the mails or wire transmission. Moreover, Defendants spoke or wrote their fraudulent statements with the knowledge that the use of the mails and wires "c[ould] reasonably be foreseen." Pereira, 347 U.S. at 8-9. Finally, each of the alleged mailings and wire transmissions was in furtherance of the overarching scheme to defraud. Accordingly, the United States has proven that Defendants "caused" the mailings and wire transmissions underlying the Racketeering Acts in an effort to further the scheme to defraud.

a. Defendants' Routine Mailing Practices

The evidence is undisputed that Defendants employed the following routine mailing practices.[23]

(1) Philip Morris

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[23] Prior to 1974, the United States Mail was virtually the only means of authorized postal delivery in the United States. See Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 519 (1991); O'Brien, 644 F. Supp. at 142. Moreover, effective September 13, 1994, Congress amended the mail fraud statute to attach liability to anyone who in furtherance of a scheme to defraud, "deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Pub. L. No. 102-322 (codified as amended at 18 U.S.C. § 1341 (1994)). See also In re clerkship of Sabita Soneji, 128 F. Supp. 2d 1287 (D.D.C. 2004-2006).

All of Philip Morris' incoming mail flows either to its Richmond, Virginia, or New York City, New York mail room facilities. Approximately 80% of its United States mail would have flowed through Philip Morris' central Richmond facilities prior to September 11, 2001. Since September 11, 2001, approximately 85% of the incoming correspondence and packages arriving at Philip Morris' Richmond mail room was sent by U.S. Mail. Philip Morris estimated that as of July 1, 2002, about three-quarters of items arriving in its New York mail room were sent by U.S. Mail. Since September 11, 2001, 75% of the mails and materials Philip Morris has sent have been transmitted by U.S. Mail. Philip Morris did not begin using private courier or commercial carriers, e.g. Fedex (formerly Federal Express), DHL, Airborne Express, and United Parcel Service, to send correspondence or packages any earlier than 1967. Philip Morris now uses fax machines, an Internet web site, and e-mail, as well as United States Mail, to transmit documents. Dale Frazier Dep., 33:20-34:10, 20:12-20:17, 12:12-13:17, 22:6-18, 42:19-43:17, 23:10-23:15, 42:19-43:17.

(2) Lorillard

Since 1994, seventy-five percent of the total mailings to and from Lorillard have been made via U.S. Mail. Lorillard generally sends its public statements and press releases electronically to the news organizations. Becky Wright Dep., 6/27/02, 14:11-14:25.

(3) Liggett

Liggett sends correspondence by U.S. Mail and commercial carriers. Liggett did not transmit documents by facsimile until the mid-1980s.

(4) R.J. Reynolds

In 1968, U.S. Mail was generally R.J. Reynolds' only means of transmitting documents. During the 1970s, most of R.J. Reynolds' correspondence was transmitted by U.S. Mail. Gwendowlyn Beck Joyner Dep., 6/28/02, 14:18-15:22.

(5) The Tobacco Institute

The Tobacco Institute transmitted its booklet, "Helping Youth Decide," by U.S. Mail when single copies were requested. U.S. Mail was the Tobacco Institute's most frequent mode of sending correspondence. Approximately 90% of its incoming mail was delivered by U.S. mail and 90% of its press releases were sent by U.S. Mail. William Adams Dep. 6/19/02, 448:02-11, 454:19-455:01, 479:20-480:04.

(6) Council For Tobacco Research

The Council For Tobacco Research ("CTR") sent its annual reports through mailing houses. Individual requests for the annual reports were answered with U.S. Mail packages. More often than not, CTR used the U.S. Mail to send award letters, checks, and routine correspondence to grantees. It used U.S. Mail to send correspondence and funds to special projects recipients, and the recipients' affiliated institutions, as well as to send minutes of board of directors meetings and annual meetings. CTR used U.S. Mail to send agenda books containing applications for review by its Scientific Advisory Board. CTR did not acquire a fax machine until 1989 or 1990. Harmon McAllister Dep, 5/24/02, 65:11-66:19, 67:07-18.

b. Prior Stipulations and Admissions Establish the Mailings and Wire Transmissions Underlying 79 of the Alleged 145 Racketeering Acts

Defendants' stipulations and admissions proved that they "caused" the mailings and wire transmissions underlying the following 79 Racketeering Acts: 3, 4, 5, 6, 7, 8, 10, 11, 12, 17, 18, 21, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 38, 42, 44, 45, 46, 49, 50, 51, 52, 53, 54, 57, 60, 63, 66, 67, 68, 70, 73, 77, 79, 81, 82, 86, 87, 88, 89, 90, 94, 96, 98, 99, 103, 104, 105, 106, 108, 109, 110, 114, 115, 116, 117, 118, 121, 122, 124, 125, 127, 129, 132, 133, 143, 144, 145, and 146. See United

States Proposed Findings of Fact, Section IV, Paragraphs 1-5; see also United States Final Proposed Conclusions of Law (vol. 1), (I)(G)(5)(d).[24]

c. The Mailings and Wire Transmissions Underlying the Alleged Racketeering Acts Which Involve Defendants' Press Releases and Advertisements Were Disseminated to the Public Via the United States Mails and Wire Transmissions

The United States established that Defendants' issued their advertisements and press releases in various newspapers and magazines, that were thereafter disseminated to the public via the United States Mails. For example, the "Frank Statement to Cigarette Smokers", which underlies Racketeering Act 1, was published on January 4, 1954 in 448 newspapers throughout the United States.

The Court has already taken judicial notice that since 1954, the following newspapers have been routinely sent to subscribers via U.S. Mail, and that this practice was reasonably foreseeable as to each Defendant: Atlanta Constitution*;* Atlanta Journal*;* Boston Globe*;* Charlotte Observer*;* Chicago Tribune*;* Los Angeles Times*;* Miami Herald*;* New York Times*;* San Diego Union-Tribune*;* Washington Post. Order #616. In addition, the Court has already taken judicial notice that the following newspapers have been routinely sent to subscribers via United States Mail beginning in the years noted, and that this practice was reasonably foreseeable as to each Defendant: Atlanta

[24] The Court attempted to be very certain about the Racketeering Acts to which Defendants have stipulated or admitted the "causing" requirement, but it proved impossible. Both the Government's and Defendants' papers on this issue are unclear and at times inconsistent. For example, the Government states in its July 1, 2004 Proposed Conclusions of Law that Defendants' stipulations and admissions on the "causing" requirement include Racketeering Acts 68, 115, 118, 124, 125, 127, 129, and 144. However, in its Post-Trial Proposed Findings of Fact, those Racketeering Acts are not included in the list of stipulations and admissions on "causing." With no guidance from the parties, the Court is left to guess.

Journal-Constitution - 2001; New York Post - 1993; Philadelphia Inquirer - 1970; Village Voice - 1959. Id.

The Court has taken judicial notice that since 1954, the following magazines have been routinely sent to subscribers via U.S. Mail, and that this practice was reasonably foreseeable as to each Defendant: Car Craft; 4-Wheel & Off-Road; Glamour; Hot Rod; Mademoiselle (through 2001); Motorcyclist; Playboy; Vogue. Id. The Court has taken judicial notice that the following magazines have been routinely sent to subscribers via U.S. Mail beginning in the years noted, and that this practice was reasonably foreseeable as to each Defendant: Allure - 1991; ESPN The Magazine - 1998; GQ-Gentlemen's Quarterly - 1957; Maxim - 1997. Id. Accordingly, Defendants caused the Racketeering Acts by publishing press releases and advertisements in the listed newspapers or magazines.

Moreover, when a Defendant sends press releases and advertisements to newspapers and magazines for dissemination, it is obviously reasonably foreseeable that the newspapers and magazines will use the U.S. Mail to send such matter to their subscribers, and therefore, that such Defendant "caused" the use of the mails within the meaning of the mail fraud statute. See, e.g., Carpenter, 484 U.S. at 28 ("[U]sing the wires and the mail to print and send the [Wall Street] Journal to its customers" containing the column at issue "was not only anticipated but an essential part of the scheme."); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 992 (8th Cir. 1989) ("[I]t was almost certain that notice of [foreclosure sales] would be mailed to other claimants or that notice would be published in newspapers and copies of the notice distributed through the mails."); United States v. Bowers, 644 F.2d 320 (4th Cir. 1981) (holding that it was reasonably foreseeable that newspapers would be mailed to some subscribers containing the advertisements the defendant placed

in the newspaper); United States v. Shepherd, 587 F.2d 943, 944 (8th Cir. 1978); United States v. Buchanan, 544 F.2d 1322, 1324-25 (5th Cir. 1977); Pritchard v. United States, 386 F.2d 760, 764 (8th Cir. 1967) (same for advertisements in magazines as well as newspapers); Atkinson v. United States, 344 F.2d 97, 98-99 (8th Cir. 1965) (same for advertisements in newspapers); Weisman, 83 F.2d at 473 (holding that it was reasonably foreseeable to the defendant that the letter he hand-delivered to a newspaper in response to an advertisement would be sent by the newspaper to its customer via the U.S. mails).

For the foregoing reasons, it is clear beyond any question that Defendants caused the mailings and wire transmissions underlying the 30 Racketeering Acts involving the news media's dissemination of Defendants' press releases and advertisements to their subscribers.

d. Defendants Caused Wire, Radio, and Television Transmissions Underlying the Racketeering Acts

Defendants caused the Racketeering Acts which involved wire, radio, and television transmissions. As Pereira noted, "Where one does an act with knowledge that the use of the mails [or wires] will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." 347 U.S. at 8-9 (1954). Here, too, there can be no question that it was reasonably foreseeable that Defendants' representatives' statements would be broadcast to the public via the wire, radio, and television transmissions. Indeed, 18 U.S.C. § 1343 explicitly provides that it applies when a person "causes to be transmitted by means of . . . television communication in interstate or foreign commerce" a communication to execute a scheme to defraud.

For instance, various statements from Defendants' internet websites are or were published on the worldwide web, a global network of computers which employs telephone, fiberoptic, and

other wire and wireless infrastructures. Similarly, telephone communications, telexes, cable letters, telegrams, e-mails, facsimile transmissions, and television and radio involve the use of wire and radio/television signals in interstate and/or foreign commerce. Therefore, Racketeering Acts 103-116, 130, 134, 137, and 143-147 were transmitted by use of the wires, radio, and television signals in interstate and/or foreign commerce. 689033421-3421 (US 31045); 508293416-3416 (US 21514); 1002605545-5564 (US 35622); 680273641-3643 (US 20998); 504331775-1776 (US 22738); 301030943-0944 (US 46577); 2029200293-0294 (US 21537); 450010016-0019 (US 21539); 690149518-9531 at 9520 (US 21046); 690149518-9531 (US 78732); TLT0770044-0049 (US 86656); TLT0770095-0128 (US 72410).

e. The Mailings and Wire Transmissions Involving Communications Were Sent or Received by Defendants or their Representatives

Defendants caused the mailings and wire transmissions, which involve communications sent or received by Defendants and their representatives, that underlie the remaining Racketeering Acts. It was Defendants' routine or standard business practice to send or receive matters via the mails or wire transmissions. Therefore, it was reasonably foreseeable that the mails would be used by a Defendant or by a third-party as a result of a Defendant's actions in the ordinary course of business. Moreover, 33 of the 41Racketeering Acts which Defendants challenge involve correspondence mailed from one city to another. They are Racketeering Acts 2, 3, 6, 7, 9, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 33, 40, 41, 58, 62, 69, 71, 72, 74, 75, 79, 80, 81, 85, 117, 132 and 133.

In addition, Defendants "caused" the mailings of matters which they had sent or received in response to correspondence that they sent. See, e.g., United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992); McClelland, 868 F.2d at 707; Diggs, 613 F.2d at 998-99; United States v. United

Medical & Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (defendant's broker mailed fraudulent reports); United States v. Bortnovsky, 879 F.2d 30, 36-37 (2d Cir. 1989) (defendant's agent sent the mailings); United States v. Tiller, 302 F.3d 98, 103 (3d Cir. 2002) (defendant's employer). For purposes of Section 1341, when a defendant sets a course of events in motion, and then receives a mailing in response to his action, he is deemed to have "caused" the use of the mails. See, e.g., United States v. Toliver, 541 F.2d 958, 966-67 (2d Cir. 1976) (where defendants made fraudulent representations to state unemployment office, which then mailed unemployment checks to defendants, defendants "caused" the mailings); United States v. Otto, 742 F.2d 104, 109 (3d Cir. 1984) (letter written by investor-victim was responsive to defendant's failure to fulfill terms of earlier agreement); United States v. Weisman, 83 F.2d 470, 472-73 (2d Cir. 1936).[25]

In light of Defendants' routine mailing practices, Defendants "caused" the mailings and wire transmissions of correspondence they sent or received which furthered the Enterprise's scheme to defraud.

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

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

All Defendant cigarette companies who were members of or involved in CTR and TI are liable for the mailings and wire transmissions caused by these organizations[26] under the predicate provisions of 18 U.S.C. §§ 1341 and 1343, the mail and wire fraud statutes, respectively.[27]

Each of the six cigarette company Defendants participated in the creation, funding, and support of TIRC/CTR and TI. See Findings of Fact Sections III(B, C, D). They formed, funded, and staffed these entities in order that they would further the Enterprise's scheme to defraud. Specifically, these entities funded research supporting Defendants' position on smoking and health issues and served as a forum to issue public statements on smoking and health and related matters. See id. The cigarette company Defendants provided directors and officers of the organizations; reviewed, approved or recommended approval of various research proposals and public statements (including research reports and press releases); and provided many other forms of advice and assistance which both enabled and encouraged the mailings and wire transmissions at issue. See id. Indeed, Defendants' essential purpose in forming CTR and TI was to use them to issue advertisements, press releases, and research reports.

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

[27] The Government has argued that Defendants are liable for CTR and TI's racketeering acts as aiders and abettors under 18 U.S.C. § 2(a) ("[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). However, because the Court finds Defendants caused CTR and TI's mailings on other grounds, it need not reach that issue.

There can be no question that the cigarette company Defendants are liable for the Racketeering Acts committed by CTR and TI under the mail and wire fraud statutes. As has already been noted, to establish a violation of the mail fraud statute it is not necessary to show that the defendant itself actually mailed anything; it is sufficient instead to prove that it caused a mailing or that use of the mails was reasonably foreseeable from its actions. The mailings and wire transmissions of CTR and TI were reasonably foreseeable or otherwise "caused" by the six cigarette company Defendants, given the involvement of those Defendants in their creation, funding, and on-going activities. Therefore, the Defendant tobacco companies must be held liable for the mailings of CTR and TI. United States v. Rodgers, 624 F.2d 1303, 1308-1309 (5th Cir. 1980) ("co-schemers" liable for mail fraud); United States v. Craig, 573 F.2d 455 (7th Cir. 1977); Maxwell, 920 F.2d at 1036 ("All that is required is that appellant have knowingly and willingly participated in the scheme; she need not have performed every key act herself"); Amrep Corp., 560 F.2d at 545 ("So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind as to which all parties had agreed."); United States v. Stapleton, 293 F.3d 1111, 1115-16 (9th Cir. 2002); United States v. Joyce, 499 F.2d 9, 16 (7th Cir. 1974) ("As a member of a mail fraud scheme, [the defendant] was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme").

2. The First Amendment Does Not Protect Defendants' False and Misleading Public Statements

Defendants argue that all of their public statements denying nicotine manipulation, the addictiveness of cigarettes, and youth marketing are statements of opinion, made in the course of petitioning the government, and, therefore, deserve the full protection of the First Amendment.

Defs.' Corrected Post-Trial Brief at 82, 87.[28] Specifically, Defendants rely upon the Noerr-Pennington doctrine to immunize all of their public statements under the First Amendment. Id. Defendants also allege that the Government must prove by "a heightened 'clear and convincing' standard of proof," rather than a "preponderance of the evidence" standard, that all their statements were intentionally fraudulent. Id.

The Court finds that only those statements Defendants made directly to legislative bodies merit Noerr-Pennington immunity. However, to be clear, it must be remembered that the vast majority of Defendants' statements were made with the primary purpose of influencing smokers, potential smokers, and the general public and are, therefore, not protected by the Noerr-Pennington doctrine. As to the latter category, the Court finds that the Government has met its burden of proof to show that those statements were fraudulent.

a. Noerr-Pennington Protects Only Those Defendants' Statements Made in the Course of Petitioning the Legislature; It Does Not Immunize Statements Made with the Purpose of Influencing Smokers, Potential Smokers, and the General Public

The Noerr-Pennington doctrine was developed as a direct application of the Petition Clause of the First Amendment.[29] See Falise v. American Tobacco Co., 94 F. Supp. 2d 316, 350 (E.D.N.Y. 2000) (quoting Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1059) (9th Cir. 1998)). The doctrine holds that "the Sherman Act does not prohibit . . . persons from associating together in an

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[28] In particular, Defendants single out the testimony of their CEOs at the Waxman hearings and a May, 1994 letter from Phillip Morris to Rep. Waxman expressing the view that nicotine is not addictive, to show that Defendants were primarily engaged in influencing governmental action. Defs. Corrected Post-Trial Brief at 82, 87.

[29] "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. Amend. 1.

attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961); accord United Mine Workers v. Pennington, 381 U.S. 657 (1965).[30]

Clearly, not every public relations campaign qualifies under Noerr-Pennington as "petitioning the government;"[31] if that were the case, the Noerr-Pennington doctrine would extend to virtually all activities. Here, the majority of the racketeering acts alleged as part of the addiction and manipulation sub-schemes do not constitute petitioning activity before the Congress, or the executive branch. On the contrary, most of those acts are simply press releases or advertisements aimed at influencing smokers, potential smokers, and the public, and do not constitute "attempt[s] to persuade the legislature or the executive to take particular action," Noerr Motor Freight, 365 U.S. at 136. See e.g., Racketeering Acts Nos. 15, 25, 37, 39, 53, 56, 58, 60, 63, 71, 72, 74, 75, 79, 81, 103, 104, 116,

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[30] Noerr-Pennington immunity is not absolute. It allows a "sham" exception for "situations in which persons use the governmental process -- as opposed to the outcome of that process -- as a . . . weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 380 (1991) (emphasis in original) (internal citations omitted).

[31] See Falise, 94 F. Supp. 2d at 351-352, where plaintiffs alleged that defendant tobacco manufacturers had historically invested RICO racketeering funds in a "scorched earth litigation strategy" designed to intimidate them into not suing defendants. Defendants had argued that the Noerr-Pennington doctrine immunized their earlier litigation strategies.

The Falise court held that the Noerr-Pennington doctrine did not apply because the challenged conduct had nothing to do with petitioning. "Defendants, having been hailed into court in the earlier litigation, were clearly not exercising their right to petition the government." Instead, Defendants' right to utilize the tools of the adversarial process "invoke[d] issues of procedural due process under the Fifth and Fourteenth Amendments, rather than the First Amendment right to petition the government." Id.

132, and 133. Consequently, these acts do not fall under the protective umbrella of the Noerr-Pennington doctrine.

Six Racketeering Acts remain. They are comprised of the CEOs' testimony before the Waxman Subcommittee and the letter from Philip Morris to Rep. Waxman and fall into a different category. Unlike Defendants' many statements that target smokers, potential smokers, and the general public, the remaining six acts constitute direct attempts to persuade government officials. The Court finds that these six acts merit Noerr-Pennington immunity as "petitioning activity" and are therefore not actionable.

b. The Government Has Met the Necessary Standard of Proof to Show that Defendants' Actions Are Fraudulent

"[T]he First Amendment does not shield fraud." Moreover, as the Supreme Court has recently ruled, "simply labeling an action one for 'fraud' . . . will not carry the day." Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 612, 617 (2003).[32] Generally, a plaintiff must prove five elements by "clear and convincing evidence" to prevail on a fraud claim. See e.g., Armstrong v Accrediting Council Continuing Educ. & Training, Inc., 961 F. Supp. 305, 309 (D.D.C. 1997). They are: (1) a false representation, (2) in reference to a material fact, (3) made with the knowledge of its falsity, (4) with the intent to deceive, and (5) on which action is taken in reliance upon the representation. Id.

The Government claims that a "clear and convincing" standard of proof does not apply here, arguing that "fraudulent representations are judged by the same standard of proof -- preponderance

[32] Fraudulent statements are entitled to a lesser level of protection than other speech because "the intentional lie [does not] materially advance society's interest in uninhibited, robust, and wide-open debate on public issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

of the evidence – applicable to the United States' civil RICO and RICO conspiracy claims." Defendants, on the other hand, cite a number of Supreme Court opinions, such as Madigan, for the proposition that a clear and convincing standard of proof is required. Defs.' Corrected Post-Trial Brief at 27.

Defendants are correct that Madigan provides at least some support for a clear and convincing standard of proof requirement in cases of fraudulent representation involving speech. See 538 U.S. at 619-21. Madigan held that "[a]s restated in Illinois case law, to prove a defendant liable for fraud, the complainant must [show that defendant's actions satisfy the five requirements for fraud and] these showings must be made by clear and convincing evidence." Id. at 620 (emphasis added) (citations omitted). Moreover, "[e]xacting proof requirements of this order . . . have been held to provide sufficient breathing room for protected speech." Id. at 620-21 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502 (1984)). This Court has previously noted that because Madigan was applying Illinois state law, which did mandate the use of a clear and convincing standard of proof, that the Supreme Court did not hold that that standard was necessarily mandated in all federal cases involving fraud. See Mem. Op. to Order # 624 at 3.

In this case, the evidence of Defendants' fraud is so overwhelming that it easily meets the clear and convincing standard of proof.[33] The Findings of Fact lay out in exhaustive detail the

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[33] As this Court previously stated, "the standard of proof required to show that speech is fraudulent . . . is a thorny issue," where case law is not settled. Mem. Op. To Order #624 at 3 n.1. The Court need not decide this issue here because there is ample proof of Defendants' fraud under any standard that could be applied. The Government's evidence is sufficient to satisfy both a preponderance of the evidence standard and a clear and convincing evidence standard. Accordingly, the Court finds it unnecessary to make a broad statement concerning which standard of proof is (continued...)

myriad ways in which Defendants made public statements, often directly to consumers, which were flatly contradicted by their internal correspondence, knowledge, and understanding. Thus, whichever standard of proof is required to show fraud, the Court finds that the Government has met its burden.

3. Defendants Engaged in a Pattern of Racketeering Activity in Furtherance of the Scheme to Defraud

a. Each Defendant Committed at Least Two Racketeering Acts, the Last One of Which Occurred Within Ten Years from the Commission of the Prior Racketeering Act

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). Because each Defendant has committed two or more Racketeering Acts within ten years of each other, that standard is clearly met in this case. See generally Findings of Fact.

Defendants assert, without citing any authority or offering any analysis, that the United States must prove that each Defendant committed two or more racketeering acts within ten years of each other as to each aspect of the over-arching scheme to defraud. Defs.' Corrected Trial Brief at 114. Defendants are wrong. The requirement of two racketeering acts pertains to the pattern of racketeering activity, which in this case is the overall scheme to defraud itself, and not the hundreds of individual discrete predicate activities that comprise it.

18 U.S.C. § 1961(5) establishes that a "pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after October 15, 1970 (the date on which the

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[33](...continued)
required in cases involving alleged intentionally fraudulent statements.

RICO statute was enacted) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The Supreme Court has concluded that in light of the "very relaxed limits of the pattern concept fixed in § 1961(5) . . . Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates," H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989); see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486-490 (1985). Furthermore, the Court explained that "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminality." Id.

The Supreme Court has explained that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. . . . We find no support . . . that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes." H.J., Inc. at 236. Under this reasoning, it is clear that the predicate acts of racketeering need not relate to separate illegal schemes, nor must they relate to each aspect of the over-arching scheme to defraud. Rather, the evidence cited in the Findings of Fact demonstrates that each Defendant has therefore committed more than two Racketeering Acts with respect to the Enterprise's overall scheme to defraud.

b. The Racketeering Acts Are Related and Continuous

The Supreme Court has stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related," and that they either extended over

"a substantial period of time," "or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 242 (1989). This requirement is commonly referred to as the "continuity plus relationship test." Defendants' activities easily meet the test for "a pattern of racketeering activity" articulated by the Supreme Court.

(1) The Racketeering Acts Are Related

As already noted, the requisite relationship is established when the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. at 240. "Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." Id. at 238.

The federal courts of appeals have repeatedly held that the predicate racketeering acts under RICO need not be similar or directly related to each other. Rather, it is sufficient that the racketeering acts be related in some way to the affairs of the Enterprise, including furthering its goals or benefitting it in some way. See, e.g., United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998); United States v. White, 116 F.3d 903, 925 n.7 (D.C. Cir. 1997) (stating in jury instructions that in order to show a pattern of racketeering activity, the government must prove that "the racketeering acts had the same or similar purposes, results, participants, victims or methods of commission or were otherwise interrelated by distinguishing characteristics and were not isolated events"); United States v. Eufrasio, 935 F.2d 553, 566 (3d Cir. 1991); United States v. Gonzalez, 921 F.2d 1530, 1540 (11th Cir. 1991); United States v. Angiulo, 897 F.2d 1169, 1180 (1st Cir. 1990); United States v. Indelicato, 865 F.2d 1370, 1382-84 (2d Cir. 1989) (en banc); United States v. Qaoud, 777 F.2d 1105,

1115 (6th Cir. 1985); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir. 1982); United States v. Lee Stoller Enter., Inc., 652 F.2d 1313, 1319 (7th Cir. 1981); United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978).

Defendants' Racketeering Acts are related. While Defendants argue that a "multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity," Lipin Enters., Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring), the evidence in this case demonstrates far more than a mere multiplicity of mailings. All the Racketeering Acts have the same or similar purposes and methods of commission: they each involve mailings or wire transmissions by Defendants to carry out the Enterprise's overarching scheme to defraud consumers and potential consumers of cigarettes. Moreover, all the predicate Racketeering Acts furthered the goals and purposes of the Enterprise to sustain and maximize profits, to avoid costly liability judgments, and to frustrate attempts to make smoking socially unacceptable.

(2) The Racketeering Acts Have Been Continuous

Many forms of proof may establish the required "continuity." H.J. Inc., 492 U.S. at 240-43. By way of illustration, the Supreme Court approved several alternative methods for meeting the "continuity" requirement, stating:

> [1] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time.
> . . .
>
> [2] A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.
>
> . . .

> [3] The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id. at 242-243. Following H.J. Inc., our Circuit has also adopted a flexible approach to determine whether "continuity" has been proven. United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999).

In addition, as the Supreme Court, the D.C. Circuit and other courts have ruled, the requisite continuity may be shown by the overall nature of the Enterprise and its members, considered in their entirety, including uncharged unlawful activities. H.J. Inc., 492 U.S. at 242-43; Richardson, 167 F.3d at 626.

Here, Defendants' 145 racketeering acts occurred over a period of 45 years, which surely constitutes a "substantial period" of time. Moreover, these racketeering acts "are a regular way of conducting defendant's ongoing legitimate business," H.J. Inc., 492 U.S. at 243. Because Defendants are in a position to continue their fraudulent activity, "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." Id. at 242. Thus, the requisite pattern of racketeering activity has been established.

4. Defendants Acted with the Specific Intent to Defraud or Deceive

Mail and wire fraud are specific intent crimes. United States v. Walker, 191 F.3d 326, 334 (2d. Cir. 1999). The D.C. Circuit has stated that specific intent "requires more than a mere general intent to engage in certain conduct and to do certain acts." United States v. Rhone, 864 F.2d 832, 834 (D.C. Cir 1989). Rather, specific intent requires a showing that a person "knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law." Id.

In committing the racketeering acts that are at issue in this case, each Defendant acted with the requisite specific intent to defraud.

Liability for mail and wire fraud attaches if, under the totality of the circumstances, the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property. See, e.g., McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791-93 (1st Cir. 1990); United States v. Cronic, 900 F.2d 1511, 1513-14 (10th Cir. 1990); Atlas Pile Driving, 886 F.2d at 991; Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967); Silverman v. United States, 213 F.2d 405, 406 (5th Cir. 1954); Deaver, 155 F.2d at 743. Each individual racketeering act does not have to independently satisfy all of the elements of the mail and wire fraud statutes; the thing mailed or transmitted need only be intended to further the scheme in some way. Schmuck v. United States, 489 U.S. 705, 715 (1989); see also Philip Morris, 304 F. Supp. 2d at 70.

A mail or wire fraud offense does not necessarily require proof of any misrepresentation of fact or affirmative false statement, although such would be highly probative of a scheme to defraud. Philip Morris, 304 F. Supp. 2d at 70; United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981). The mail fraud statute covers all fraudulent and deceptive statements, including statements that are literally true but deceptive in the context in which they are made. See, e.g., Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) ("A half truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled"); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) (holding that misleading newspaper ads and letters which were mailed "need not be false or fraudulent on

their face, and the accused need not misrepresent any fact" since "it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading"); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977).

The United States has proven that Defendants have acted willfully and intentionally to further the Enterprise's scheme to defraud by making statements which were directly contrary to the internal, collective knowledge of each individual Defendant and the Enterprise as a whole. Accordingly, the Government has met its burden to show that Defendants acted with the specific intent to defraud or deceive.

a. Defendants Are Liable for the Acts of Their Officers, Employees, and Agents

Each Defendant is liable for the acts of its officers, employees, and agents. Because a corporation can act only through its agents, it may be held liable for the acts of its officers, employees, and other agents in certain circumstances. Meyer v. Holly, 537 U.S. 280, 285 (2003); Burlington Indus., Inc. v. Ellerth, 524 U.S. 724, 756 (1998); New York Central & Hudson R.R. v. United States, 212 U.S. 481, 494 (1909) (holding that "a corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act"); R.R. Co. v. Hanning, 82 U.S. 649, 657 (1872) (finding that "the principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of"); Restatement (Second) of Agency § 219, et seq. (1958). Specifically, under the theory of respondeat superior, a corporation may be held liable

for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment so long as the action is motivated, at least in part, to benefit the corporation. Sun-Diamond Growers, 138 F.3d at 970, aff'd, 526 U.S. 398 (1999); Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir. 1984); Restatement (Second) of Agency § 236.

Furthermore, if a corporate agent exercises the authority conferred upon him and performs an act within the course of his employment, the corporation is liable even if the act was unlawful or was done contrary to instructions or policies, as long as the agent acted with an intent to benefit the corporation. United States v. Automated Med. Labs, 770 F.2d 399, 407 (4th Cir. 1985); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295, 1296-97 (10th Cir. 1972); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d at 204-05; Egan v. United States, 137 F.2d 369 (8th Cir. 1943).

While the federal courts of appeals have not reached a consensus about how the theory of respondeat superior applies specifically in RICO cases brought under § 1962(c), the Third, Sixth, and Eleventh Circuits have all found that where, as here, the defendant corporation is not the Enterprise itself, the corporation is liable for the acts of its officers. Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1405 (11th Cir. 1994) (citing Petro-Tech, Inc. V. Western Co., 824 F.2d 1349, 1361-62 (3rd Cir. 1987)) (finding that "theories of respondeat superior . . . are not out of place" where the defendants named are not the section 1962(c) enterprise); Davis v. Mutual Life Ins. Co., 6 F.3d 367,379 (6th Cir. 1998) (holding that "[n]o . . . prohibition . . . prevents the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents,

particularly where the corporation benefitted by those acts."). Similarly, the Ninth Circuit has held that "an employer that is benefitted by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise." Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1154 (9th Cir. 1992); compare with Miranda v. Ponce Federal Bank, 948 F.2d 41, 45 (1st Cir. 1991) (declining to apply "corporate liability on the enterprise's part under a theory of respondeat superior") see also Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987) (declining to apply respondeat superior where doing so would violate Congress's intent to separate the enterprise and the criminal "person").

There are strong public policy grounds supporting this approach. Applying respondeat superior "will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities. Thus, respondeat superior and agency liability furthers both the compensatory and deterrent goals of the RICO statute." Brady, 974 F.2d at 1155. Likewise, the Sixth Circuit has held that a prohibition, if it existed, against imposing liability vicariously "would prevent corporate 'persons' from ever being found liable under RICO, since corporate principals may only act through their agents. Such a rule would be manifestly contrary to the intent of Congress." Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 379 (6th Cir. 1993). Similarly, in this vein, the Supreme Court has recognized that there is "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. . . . If it were not so, many offenses might go unpunished and acts be committed in violation of the law, where [as here] the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy." New York Central, 212 U.S. at 495.

b. Defendants Are Deemed to Possess the Collective Knowledge of Their Officers, Employees, and Agents

Corporations are liable for the collective knowledge of all employees and agents within (and acting on behalf of) the corporation. United States v. Bank of New England, N.A., 821 F.2d 844, 855-56 (1st Cir. 1987). In that case, the Bank of New England was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court instructed the jury to consider the bank "as an institution" whose "knowledge is the sum of the knowledge of all the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment." Id. at 855. As to intent, the Court instructed: "If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports." Id.

On appeal, the bank challenged the trial court's instructions regarding its knowledge and intent. The bank contended that "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." Id. at 856. The First Circuit rejected the bank's argument, finding the instructions correct as to both knowledge and intent. It's reasoning, which the Court finds highly persuasive, was that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." Id. at 856. In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead innocence." Id. (citations omitted). As the

Eleventh Circuit emphasized in First Alabama Bank, N.A. v. First State Insurance Co., 899 F.2d 1045, 1060 n.8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person."

In cases decided after Bank of New England, courts have continued to allow the knowledge of agents and employees to be aggregated and imputed to the corporation. See, e.g., Sun-Diamond Growers, 964 F. Supp. at 491 n.10 (D.D.C. 1997) (noting that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation"), reversed on other grounds, 138 F.3d 961 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999). In In re Worldcom, Inc. Securities Litigation, for example, the court considered a challenge to certifications by accounting firm Arthur Andersen under the fraud provision of the Securities Exchange Act of 1934. That statute, like the mail and wire fraud statutes, requires proof of "an intent to deceive, manipulate, or defraud." 352 F. Supp. 2d 472 (S.D.N.Y. 2005). Relying on Bank of New England, the District Court held that "plaintiffs in securities fraud cases need not prove that any one individual employee of a corporate defendant also acted with scienter. Proof of a corporation's collective knowledge and intent is sufficient." Id. at 497.

Thus,"the knowledge of the employee is the knowledge of the corporation." Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976); see also United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000); United States v. Inv. Enters., 10 F.3d 263, 266 (5th Cir. 1993); Eitel v.

Schmidlapp, 459 F.2d 609, 615 (4th Cir. 1972) (where defendant's agent fraudulently conveyed property to defendant, agent's knowledge of fraud would be imputed to principal even where there was no evidence of actual knowledge on part of principal: "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew."); Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179, 182 (4th Cir. 1935).

Moreover, a principal is held responsible for the knowledge acquired by its agent even if the information is never communicated to it, see, e.g., N.Y. Univ. v. First Fin. Ins. Co., 322 F.3d 750, n.2 (2d Cir. 2003), and even after termination of the services of that officer, employee, or agent, see Acme Precision Prods., Inc. v. Am. Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970).

In a much earlier case, dealing with somewhat different issues, the Supreme Court set forth its persuasive rationale for the collective knowledge doctrine:

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

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

Thus, the applicable case law makes clear that the knowledge, conduct, and statements of Defendants' agents and employees may be attributed to Defendants as corporate-principals.

c. Specific Intent May Be Established by the Collective Knowledge of Each Defendant and of the Enterprise as a Whole

In light of the extensive Findings of Fact describing what each Defendant company knew as well as the totality of the circumstances, the Court concludes that Defendants' fraudulent statements designated as Racketeering Acts evidence a specific intent to defraud. The Findings of Fact are

replete with examples of representatives of each cigarette company Defendant, of CTR, and of the Tobacco Institute, either willfully stating something which they knew to be untrue or recklessly disregarding the falsity of their statements. A particularly egregious example is the use of hundreds of documents demonstrating Defendants' intent to offer smokers health reassurances with Light/Low Tar cigarettes even though Defendants knew that such cigarettes offer no meaningful reduction in disease risk. See Findings of Fact Section V(E)(5).

Many of the fraudulent, deceptive, and misleading statements were issued as press releases, paid newspaper statements, pamphlets, and similar documents in the name of the corporate Defendants themselves. For example, the Tobacco Institute's 1974 version of its pamphlet titled "The Cigarette Controversy" (no bates) (US 23020), was attributed to the Tobacco Institute itself, rather than any named individual. Likewise, the 1994 advertisement in the New York Times containing misleading and deceptive statements on nicotine and addiction titled, "Facts You Should Know," (no bates) (US 65446), was issued by Philip Morris itself. In those instances, where such statements directly contradicted the internal knowledge of the company, specific intent to defraud is easily established. The overwhelming evidence that Defendants, collectively, possessed knowledge demonstrating the fraudulent nature of their public statements on, inter alia, the health effects of smoking and exposure to secondhand smoke, the addictiveness of smoking and nicotine, and their marketing to youth is set forth in the Findings of Fact.

Regarding those statements made by individuals rather than a Defendant company itself, which are clearly attributable to the Defendant company, those statements also demonstrate the requisite intent to defraud on the part of the company.

As discussed in detail above, the courts, including our Circuit, have established and affirmed the collective knowledge doctrine. However, the courts, including our Circuit, have uniformly rejected the theory of collective intent that the Government advocates -- i.e., that 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. Our Court of Appeals has stated that in Bank of New England, "corporate knowledge of certain facts was accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depended on the wrongful intent of specific employees." Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996) (finding that "[i]ndividual acts of negligence on the part of employees -- without more -- cannot . . . be combined to create a wrongful corporate intent.")[34]; see also United States v. L.B.S. Bank-NewYork, Inc., 757 F.Supp. 496, 501 n.7 (E.D. Pa. 1990) ("although knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, specific intent cannot be aggregated similarly) (citations omitted); First Equity Corp. v. Standard & Poors Corp., 690 F.Supp. 256, 259-260 (S.D.N.Y. 1988) (holding that corporation cannot be deemed to have the requisite intent by mere inconsistences in knowledge of various employees).

At the same time, the courts, including our Circuit, have also rejected the theory of specific intent which Defendants advocate, i.e. requiring that a corporate state of mind can only be established by looking at each individual corporate agent at the time s/he acted. To do so would

[34] Defendants try to read into this brief footnote more than is warranted. In light of the complexity and confusion in the law on this issue, it is hard to believe that this somewhat Delphic footnote will bear the weight which Defendants place on it.

create an insurmountable burden for a plaintiff in corporate mail and wire fraud cases and frustrate the purposes of the statute.

While courts have not clearly articulated exactly what degree of proof is required, it is both appropriate and equitable to conclude that a company's fraudulent intent may be inferred from all of the circumstantial evidence including the company's collective knowledge. Saba, 78 F.3d at 668 ("the actor's intent may be inferred from indirect evidence and the reckless nature of his acts"); see also, Dana Corp. v. Blue Cross & Blue Shield Mutual of Northern Ohio, 900 F.2d 882, 886 n.2 (6th Cir. 1990); L.B.S. Bank-New York, 757 F. Supp. at 501 n.7.

Moreover, the public policy reasons which support the doctrine of collective knowledge apply equally here. There is "every reason in public policy" why a corporation, which can only act through its agents and officers, and which profits by their actions, should be held liable when the totality of circumstances demonstrate that such corporation collectively knew what it was doing or saying was false, but did it or said it nevertheless, even if it is impossible to determine the state of mind of the individual agent or officer at the time. Indeed, if it were otherwise, Defendants could avoid liability by simply dividing up duties to ensure that fraudulent statements were only made by or uninformed employees.

Specific intent of individual Defendants and their employees can be inferred from the collective knowledge of each Defendant company itself and the reckless disregard of that knowledge evidenced in statements made by, and on behalf of, each Defendant company. Evidence establishing reckless disregard for the truth or falsity of a statement, as well as willful blindness, satisfies the intent standard. 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");

In re Korean Airlines Disaster of September 1, 1983, 704 F. Supp. 1135, 1136 (D.D.C. 1988), aff'd in relevant part, 932 F.2d 1475 (D.C. Cir. 1991); United States v. Prows, 118 F.3d 686, 692 (10th Cir. 1997); United States v. Coyle, 63 F.3d 1239, 1243 (3rd Cir. 1995). In addition, "[f]raudulent intent may be inferred from the modus operandi of the scheme." United States v. Reid, 533 F.2d 1255, 1264 (D.C. Cir. 1976). Fraudulent intent may also be proven by inference from the totality of the circumstances, including by indirect or circumstantial evidence. See, e.g., United States v. Alston, 609 F.2d 531, 538 (D.C. Cir. 1979) (totality of the circumstances); United States v. Sawyer, 85 F.3d 713, 733 (1st Cir. 1996) (indirect and circumstantial evidence).

In this case, evidence of the existence and methods of the Enterprise's overall scheme to defraud and Defendants' individual roles in that Enterprise – including each Defendant's purposeful and conscious actions taken in light of its collective knowledge – reveals a "cumulative pattern" of decisions, actions, and inaction that is powerful circumstantial evidence of specific fraudulent intent. See In re WorldCom, Inc. Sec. Litig., 352 F. Supp. 2d at 499. The Findings of Fact overwhelmingly demonstrate that Defendants took deliberate steps to protect, execute, and further the fraudulent scheme by making statements that they knew were not true. Again, to give but one example, the members of the Tobacco Institute Executive Committee, comprised of cigarette company Defendants' executives, approved TI communications directed to the public that promoted the fraudulent position that there was an "open question" regarding whether smoking or nicotine is addictive. At the same time, each of those executives' companies had knowledge both that smoking and nicotine are addictive and that smoking causes disease. See Findings of Fact Section V(B)(3). In 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.

In addition, Defendants' representatives' reckless disregard for the truth of their public statements about the health effects of smoking, smoking and nicotine addiction, and other smoking and health issues similarly establishes specific intent to defraud. Numerous documents from the 1950s forward show Defendants' recognition that their internal understanding of smoking's adverse health effects and the addictiveness of nicotine contradicted the position they took with smokers, potential smokers, and the American public. See, e.g., (no bates) (US 21794) (internal memo of Philip Morris nicotine researcher acknowledging that nicotine is a drug while noting Philip Morris's policy that "we must be officially heedless of the drug properties of nicotine"). 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. Further, there is substantial evidence in the record that over the years, numerous executives and scientists of Defendants participated actively in the oversight and control of industry activities that were calculated to advance their fraudulent scheme. For instance, the Chief Executive Officers of Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett, served on the Board of Directors and/or the Executive Committee of the Tobacco Institute. The General Counsels of the Cigarette Company Defendants were members of the Committee of Counsel. The Boards of Directors of CTR and CIAR were comprised of employees of Defendants. Furthermore, Defendants actively supported, both with funding and manpower, the numerous other bodies whose structures, functions, and activities are described throughout the Findings of Fact.

Accordingly, the specific intent required for liability under 18 U.S.C. §§ 1341 and 1343 is demonstrated by each Defendant's public statements and representations, its collective knowledge and the collective knowledge of the Enterprise of which it was a part, and its willful disregard of that knowledge.

5. Defendants' False and Fraudulent Statements, Representations, and Promises Were Material

Materiality is a fundamental element of common law fraud. See Neder v. United States, 527 U.S. 1, 22 (1999). A matter is material if:

> (a) a reasonable [person] would attach importance to its existence or nonexistence in determining his [or her] choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his [or her] choice of action, although a reasonable [person] would not so regard it.

Restatement (Second) of Torts, § 538(2)(a)-(b) (1977).[35]

With respect to the second prong of the Restatement's definition of materiality, the D.C. Circuit has explained that a fraudulent scheme can exist even when "no reasonable [prudent] person

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[35] It is noteworthy that cases involving the FTC's determinations of materiality are consistent with the Court's finding here, even though such cases are brought pursuant to the FTC Act rather than the RICO statute. As a general rule, deceptive advertising or claims permit an inference "that the deception will constitute a material factor in a purchaser's decision to buy." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); see also FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40-43 (D.C. Cir. 1985) (holding that deceptive advertising touting Defendants' low tar cigarettes created an "inherent tendency to deceive" consumers and was material); FTC v. Wilcox, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) ("Express claims or deliberately-made implied claims used to induce the purchase of a particular product or service are presumed to be material"). Moreover, materiality is presumed for matters that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting Deception Statement, 103 FTC at 182); see also Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992).

would have believed [the defendant's] misrepresentations . . . [or] where [people] unreasonably believed the representations made to them." United Stated v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). Instead, "the only issue is whether there is a plan, scheme or artifice intended to defraud." Id. at 1036 (quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980)).

Although this Circuit emphasizes the second clause of the Restatement definition, this Court concludes that Defendants' statements qualify as material under both clauses. First, Defendants' assertion that no reasonably prudent consumer would have relied upon or believed their fraudulent misrepresentations, because of contrary information available in the public domain, strains credulity. For much of the period during which the alleged racketeering acts took place, Defendants were the primary source of information regarding cigarette smoking and tobacco addiction. See e.g., Findings of Fact at Section V(B)(2)(b). The public health community had a far less sophisticated understanding of the health hazards associated with smoking and for fewer resources to disseminate the information it did have. See id. It would have been reasonable, therefore, for consumers to believe that Defendants' statements accurately reflected current knowledge about the dangers of smoking.

In addition, one can only wonder just why Defendants were spending millions upon millions of dollars in advertising every year if they thought no one -- smoker, potential smoker, or member of the public -- was going to believe it and rely on it. The question answers itself. Moreover, Defendants knew, as their many internal documents reveal, just how badly ordinary smokers addicted to nicotine did not want to believe, in the early days, that smoking was 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. For Defendants to now deny that the "disinformation" they

were spending millions on to deceive the public would not have been of import to a reasonable person in determining his or her choice of action is the height of disingenuousness. Thus, Defendants' statements were material under the "reasonable person" standard of the Restatement's definition of materiality.

Second, the Government has produced ample and convincing evidence to show that Defendants' statements were material under the second clause of the Restatement definition as well. Many of Defendants' statements were made with the intention to mislead the public. See generally Findings of Fact. For example, shortly after issuance of the Surgeon General's Report on secondhand smoke, Philip Morris advertisements featured smokers "talking" to the reader and asserting, "Please don't tell me my cigarette smoke is harmful to you. There's just no convincing proof that it is," and "I know there's no proof my smoke can hurt you." (no bates) (US 20554). Defendants' internal documents demonstrate that they expressly recognized that their customers were "likely to regard [these fraudulent misrepresentations] as important in determining [their] choice of action," Restatement (Second) of Torts, § 538(2)(b). See id. at 67-69 & n.4; Order # 235, Mem. Op. at 2. Defendants' conduct is, therefore, material under the second prong of the Restatement definition because Defendants knew that consumers would rely on their advertising and marketing when determining whether to smoke cigarettes.

Defendants attempt to show that their statements were not material by defining a "material statement" as one that "must 'be of importance to a reasonable person in making a decision about a particular matter or transaction.'" Defs.' Corrected Post-Trial Brief at 23 (citing United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996). Under that definition, Defendants claim, that their statements could only be material if they were "of that type that reasonable consumers would take

into account in purchasing cigarettes." Id. at 73. Applying their narrow definition of materiality, Defendants allege, first, that the Government cannot show that consumers relied on Defendants' statements when considering to purchase cigarettes, see id. at 68, and, second, that the public had reached a "saturation" level of awareness about smoking and "universally disbelieved" statements by Defendants. See id. at 74.

As the Government notes in its brief, however, Defendants' definition of materiality, which focuses solely on the "reasonable person" standard, is insufficient. See Govt Post-Trial Brief at 11. Defendants' liability does not hinge solely upon whether their statements "[were of the type that] reasonable consumers would take into account," Defs.' Corrected Post-Trial Brief at 73, but also on whether "[Defendants'] "knew or [had] reason to know that [consumers of tobacco products] regard[ed] or [were] likely to regard [Defendants' statements] as important in [their decision to smoke cigarettes]," Restatement (Second) of Torts § 538 (2)(b). Contrary to Defendants' assertions, the evidence here demonstrates that their statements are material under both the Restatement tests.[36]

Defendants' attempts to prove that consumers disregarded or disbelieved their statements about the safety hazards associated with smoking are not to be believed. See Defs.' Corrected Post-Trial Brief at 68, 74. The clear weight of the evidence shows that Defendants took advantage of and

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[36] Defendants also may not escape liability for their scheme to defraud by claiming that the public was not injured by their misconduct. To establish a mail or wire fraud violation, a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct. See Philip Morris, 304 F. Supp. 2d at 69-70; Philip Morris, 116 F. Supp. 2d at 153; Philip Morris, 273 F. Supp. 2d at 6. Thus, "the common-law requirements of justifiable reliance and damages . . . plainly have no place in the federal statutes." Neder, 527 U.S. at 24-25.