manipulation, and low tar cigarettes, in order to protect themselves from smoking and health related claims in litigation, and in order to avoid regulation which they viewed as harmful: they suppressed, concealed, and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in smoking and health related litigation and to federal regulatory agencies, and to shield those documents from the harsh light of day.

4035. While it is true that some of these efforts were unsuccessful and some of the elaborate document "retention" policies were either not fully implemented or not implemented at all, the fact remains that many were fully complied with. Consequently, we can never know the full extent of the evidence destroyed and lost to public view.

VI. THE PROVISIONS AND IMPLICATIONS OF SETTLEMENT AGREEMENTS BY DEFENDANTS

A. Liggett's Settlement Agreement with Various States

4036. In the mid-1990s, Liggett, along with the major tobacco companies (Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard and American), was named as a defendant in lawsuits brought by certain states' Attorneys General. These lawsuits involved claims seeking reimbursement of costs associated with smoking, as well as claims of targeting and marketing to youth. In late 1995, Liggett began negotiating a series of settlements of those lawsuits. LeBow WD, 1:19-23.

4037. In March 1996, Liggett reached a settlement agreement which resolved the claims of the Attorneys General of five states: Florida, Louisiana, Massachusetts, Mississippi and West Virginia. (no bates) (LGI 11). Among the most significant terms were Liggett's agreement to

withdraw its opposition to FDA jurisdiction over cigarettes, and Liggett's agreement to comply with several FDA proposed advertising and marketing restrictions, including termination of billboard advertising in certain areas. Liggett further agreed to pay $140 million to the five states. Id.

4038. Immediately following execution of these agreements, Liggett was sued by several additional states' Attorneys General. Within a few months of the March 1996 Settlement Agreements, over twelve other states' Attorneys General sued Liggett and the other major tobacco companies. LeBow WD, 4:5-8. In March 1997, Liggett entered into a comprehensive agreement with seventeen additional states' Attorneys General. (no bates) (LGI 338).

4039. As part of the March 1997 settlement, Liggett agreed to make a public statement acknowledging, among other things, that smoking is a cause of lung cancer and other diseases and that both cigarette smoking and nicotine are addictive. Liggett also added a voluntary warning label on the packs of its cigarettes which states, "Warning: Smoking is Addictive." Liggett agreed to significant advertising and marketing restrictions, particularly those affecting youth, and agreed to provide cooperation and assistance to the states' Attorneys General in the prosecution of their ongoing lawsuits against Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard. Id.; LeBow WD, 4:20-5:4.

4040. There were several ways in which Liggett provided cooperation and assistance to the states' Attorneys General in their continuing lawsuits against the major tobacco companies. Liggett agreed to waive attorney-client privilege and work product protection with respect to internal Liggett-only privileged documents relevant to smoking and health issues and produced such documents to the states. As to joint defense privileged documents in Liggett's possession, Liggett produced many of those documents to courts around the country for in camera reviews and Liggett's

outside counsel participated in efforts to have such documents de-privileged. These productions resulted in the first judicial decisions compelling the major tobacco companies to release privileged documents. Liggett also agreed to make its scientists and executives available for informational interviews by the Attorneys General and their outside counsel and conducted informational tours of Liggett's manufacturing facilities for counsel for the states and others in the public health community. Finally, Bennet LeBow and others affiliated with Liggett testified on behalf of the states' Attorneys General in those cases where trials were commenced. Id. at 5:6-19.

4041. Throughout 1997 and early 1998, Liggett continued to negotiate and enter into settlements with additional states that sued or contemplated suing the tobacco companies. By March 1998, Liggett had entered into Settlement Agreements with forty-one states and a number of United States territories. Id. at 7:17-20.

4042. Liggett's Settlement Agreements facilitated successful negotiation of the 1998 Master Settlement Agreement.

4043. Liggett became a signatory to the Master Settlement Agreement in November 1998, at the same time that the major companies entered into that Agreement. Liggett and the forty-plus states and territories with which it had previously settled agreed to replace the terms of their prior agreements with the terms of the Master Settlement Agreement in order, among other things, to provide uniformity among the companies and the states with respect to advertising, marketing and company conduct restrictions. Id. at 8:1-6.

B. The Master Settlement Agreement

1. Provisions of the MSA

4044. On November 23, 1998, Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard (the "Original Participating Manufacturers" or "OPMs") and Liggett entered into the Master Settlement Agreement ("MSA") with fifty-two jurisdictions, including forty-six states and the District of Columbia, thereby ending the lawsuits brought by the states' Attorneys General against the tobacco industry. Keane TT, 1/19/05, 10537:2-18; (no bates) (JD 045158). Prior to signing the MSA, various Defendant cigarette manufacturers entered into separate settlements with four of the states that had filed lawsuits against them where trial was about to start or had started: Mississippi, Florida, Texas, and Minnesota. Comprehensive Settlement Agreement and Release, In re: Moore ex rel Miss. Tobacco Litig., (no bates) (JD 064832); Settlement Agreement, Florida v. Am. Tobacco Co., C.A. No. 95-1466 AH (Fla. Cir. Ct. Aug. 25, 1997) (280801139/1155), (no bates) (JD 012500); Comprehensive Settlement and Release, Texas v. Am. Tobacco Co., No. 5-96CV-91 (E.D. Tex. Jan. 16, 1998), (no bates) (JD 012504); Settlement Agreement and Stipulation for Entry of Consent Judgment, Minnesota v. Philip Morris, Inc., No. C1-94-8565 (Dist. Ct. Ramsey Cty., May 8, 1998) (106035397/5425), (no bates) (JD 012501). Each of the settlement agreements with these four states provided much of the same injunctive and related relief as the MSA. The MSA resulted in the dismissal of more than forty state lawsuits pending against the Defendants and others. Szymanczyk WD, 12:12-18; Brandt TT, 9/27/04, 674:6-675:18 (noting that forty suits are pending).

4045. The MSA required its approval and the entry of a Consent Decree and Final Judgment embodying various injunctive and other provisions by the court before which each settling state's

lawsuit was pending. (no bates) (JD 045158 at § XIII(b) and Ex. L); (no bates) (JD 040017); Szymanczyk WD, 103:9-18; Myers TT, 5/18/05, 21623:1-11.

4046. The signatory cigarette manufacturers, including many of the Defendants in this case, are individually bound by all provisions of the MSA. (no bates) (JD 045158). Some of its most significant provisions are set forth herein.

4047. The MSA states:

> (a) Prohibition on Youth Targeting. No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

(no bates) (JD 045158 at § 111(a)).

4048. The MSA states:

> (r) Prohibition on Material Misrepresentations. No Participating Manufacturer may make any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients. Nothing in this subsection shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

(no bates) (JD 045158 at § III(r)).

4049. The MSA states:

> (q) Prohibition on Agreements to Suppress Research. No Participating Manufacturer may enter into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking

> and health; or (3) limiting or suppressing research into the marketing or development of new products. . . .

(no bates) (JD045158 at §III(q)).

4050. The MSA prohibits the Original Participating Manufacturers and their lobbyists from opposing new state or local tobacco-control legislation, and specifically prohibits them from lobbying against measures to enhance the enforcement of laws that prohibit the sale of tobacco products to youth. (no bates) (JD 045158 at § III(m), ¶¶ 29-32).

4051. The MSA contains the following specific prohibitions:

-- use of cartoon characters in tobacco product advertising;

-- use of billboards for tobacco product advertising;

-- tobacco product advertisements in stadiums, arenas and shopping malls;

-- tobacco product brand name sponsorships of concerts; football, basketball, baseball, soccer or hockey games or leagues; or any other event where the intended audience contains a significant percentage of youth or in which any paid participants or contestants are youth;

-- tobacco product advertisements on public or private vehicles;

-- tobacco product advertisements in airports, bus stops, taxi stands, train stations, transportation waiting areas or "any similar location";

-- tobacco product advertisements outside of stores or in store windows that exceed a designated maximum size;

-- so-called "Brand Name Merchandise" -- caps, jackets, bags or similar apparel or consumer merchandise bearing tobacco brand names;

-- payments for product placement -- in other words, payments to another person or entity to "use, display or make reference

to" any tobacco product in any "motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game";

-- distribution of free samples of tobacco products except in adult-only facilities;

-- an injunction barring the companies from any agreement with each other that "has the purpose or effect" of "limiting or suppressing research into smoking and health";

-- an injunction barring the companies from any agreement with each other that "has the purpose or effect" of "limiting or suppressing research into the marketing and development of new products";

-- an injunction barring the companies from any agreement with each other that "has the purpose or effect" of "limiting competition in the production or distribution of information about health hazards or other consequences of use of Tobacco Products."

(no bates) (JD 045158 at § III).

4052. The MSA requires the permanent dissolution of CTR, TI, and CIAR. In addition, it prohibits the signatory cigarette manufacturers from establishing new industry research organizations like CTR in the future. (no bates) (JD 045158 at § III(o)). The MSA places restrictions on Defendants' formation of or participation in any tobacco-related trade associations, including the requirement that any such association "agree in writing not to act in any manner contrary to any provision" of the MSA, have independent legal counsel, and be subject to specified inspection rights of the States. Id. at § III(p). All other industry-created organizations were disbanded voluntarily and are therefore not subject to the MSA's prohibitions.

4053. The MSA requires Defendants to promulgate a series of "corporate culture commitments." These include: (a) establishment of corporate principles to comply with the MSA, to reduce youth smoking, and to educate employees and customers about the company's commitment to reduce youth smoking; (b) designation of an executive responsible for identifying methods for reducing youth access to cigarettes and youth smoking incidence; and (c) encouragement of employees to identify additional youth-smoking reduction measures. Id. at § III(l).

4054. The MSA provides that Defendants pay $25,000,000 each year for ten years to fund the establishment of an independent national foundation which researches and designs education programs to reduce youth smoking. The payments for this foundation end March 31, 2008. Id. at § VI(a)-(b). Pursuant to this provision, the National Association of Attorneys General ("NAAG") created the American Legacy Foundation in 1999, which, among other activities, carries out a nationwide advertising and education program to prevent and reduce youth smoking. The MSA also provides that the Foundation will monitor youth smoking and evaluate the effectiveness of various youth smoking prevention programs. The agreement provided the Foundation an additional $300,000,000 per year from 1999 through and including 2003 to fund the education program. Id. at § VI(c), (f).

4055. Defendants are required to establish a series of internet websites making publicly available millions of internal documents, including (a) all documents previously obtained through discovery by state Attorneys General, the Federal Trade Commission and certain other plaintiffs in decades of litigation and investigations and (b) all documents obtained in the future in discovery by any plaintiff in any civil action relating to smoking and health. This provision does not require disclosure of any documents over which Defendants claim protection due to privilege, trade secrecy

and confidentiality of proprietary business information. It is due to expire June 30, 2010. Id. at § IV; (no bates) (JD 046586 at 3000155795/5799).

2. Enforcement of the MSA

4056. Compliance with the MSA is monitored and enforced by NAAG and the various individual states' Attorney General offices. (no bates) (JD 045158 at § VII). The MSA, and the consent decrees and final judgments entered pursuant to it, contain provisions under which each state attorney general can seek access to the court in his or her jurisdiction charged with overseeing its enforcement. Id. at § VII(a)-(c).

4057. The MSA provides that each year each of the Original Participating Manufacturers (Philip Morris, B&W, RJR, and Lorillard) must pay their respective market share of a lump sum payment to all states for enforcement and monitoring of the MSA.[8] The payments continue in perpetuity and are as follows:

2000: $4,500,000,000.00

2001: $5,000,000,000.00

2002 and 2003: $6,500,000,000.00

2004-2007: $8,000,000,000.00

2008-2017: $8,139,000,000.00

2018 and each year thereafter: $9,000,000,000.00

Id. at § IX(c). These payments are not specifically earmarked for any designated use (unlike the payments for the Foundation). Each state has complete discretion on how to spend the funds, and states often spend the funds on matters not related to the effectuation and enforcement of the MSA.

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[8] The payment is subject to certain adjustments based on changes in the market.

In addition, the MSA provides one $50,000,000.00 bulk payment, by the Original Participating Manufacturers according to their respective market share, to NAAG in order to establish The States' Antitrust/Consumer Protection Tobacco Enforcement Fund which will facilitate and oversee enforcement and implementation of the MSA on a national level. The MSA also provides $150,000 per year until December 31, 2007, for NAAG to administratively coordinate between and amongst the individual states' Attorneys General. Id. at § VIII(a)-(c).

4058. The MSA requires that before any enforcement action may begin, a state must "[w]henever possible" first discuss the dispute with the company to determine if it can be resolved informally. Id. at § VII(c)(6), ¶¶ 50-51; § XVIII(m), ¶ 134. If these informal discussions are unsuccessful, the state must then provide thirty days' written notice of its intent to initiate a proceeding. Id. § VII(c)(2), ¶ 50. The thirty day period may be shortened in the event the Attorney General determines that the enforcement matter involves a compelling, time-sensitive public health and safety concern. Id. at § VII(a)-(c). The MSA specifically prohibits any state from "seek[ing] to enforce the terms of the Consent Decree of another Settling State." Id. at § VII(b), (c)(1), ¶ 49.

4059. States may seek injunctive relief for violations, as well as contempt and criminal sanctions for failure to comply with any enforcement order. Id. at § III(b)-(c). The states are given broad rights of inspection and discovery of Defendants' documents and representatives whenever they have reasonable cause to believe that a violation has occurred. Id. at § VII(g).

4060. The MSA provides that NAAG shall coordinate and facilitate the MSA's implementation and enforcement by the states. Id. at § VIII. Among, other things, NAAG:

> -- Assists "in coordinating the inspection and discovery activities referred to in subsections III(p)(3) and VII(g) regarding compliance with this Agreement by the

Participating Manufacturers and any new tobacco-related trade associations." Id. at § VIII(a)(1).

-- Convenes "at least two meetings per year and one major national conference every three years for the Attorneys General of the Settling States, the directors of the [American Legacy] Foundation and three persons designated by each Participating Manufacturer. The purpose of the meetings and conference is to evaluate the success of this Agreement and coordinate efforts by the Attorneys General and the Participating Manufacturers to continue to reduce Youth smoking." Id. at § VIII(a)(2).

-- Supports and coordinates "the efforts of the Attorneys General of the Settling States in carrying out their responsibilities under this Agreement." Id. at § VIII(a)(3).

4061. The Attorneys General monitor marketplace and company activities, make inquires of the companies, and file actions to enforce the MSA in the appropriate state court. Szymanczyk TT, 4/11/05, 18461:1-17; see also (no bates) (JD 045158 at § VIII(c)); Szymanczyk WD, 206:18-208:12; Myers TT, 5/18/05, 21622:5-21623:11.

4062. In addition to these informal enforcement actions, the Attorneys General have brought formal enforcement proceedings against particular manufacturers when a practice has violated one of the provisions of the MSA and the informal inquiry process has not resolved their concerns. Szymanczyk WD, 211:21-212:2; Beasley WD, 48:11-62:4. These formal actions have been few in number for a variety of reasons, including the limited resources committed by each state for such litigation. A few examples are detailed below.

4063. Three states -- Illinois, New York, and Maryland -- filed actions against Brown & Williamson alleging that its "Kool Mixx" marketing campaign violated the MSA's prohibition against youth targeting. B&W settled the actions on October 5, 2004, two weeks after trial began,

agreeing to restrictions on their future Kool Mixx promotions and monetary payments to support youth smoking prevention. (no bates) (US 92037). Susan Ivey, current President and CEO of Reynolds American and Chairman and CEO of RJR, and former CEO of B&W, acknowledged receiving complaints about the "B Kool" ad campaign from Governor Chiles of Florida. Ivey WD, 11:4-12:1. "Brown & Williamson did not change the content of the B Kool campaign as a result of the concerns expressed by NAAG," and Governor Chiles. Smith WD, 32:20-33:8.

4064. The states' Attorneys General have complained to Philip Morris that more than forty types of activities violate the MSA. Dolan TT, 12/8/04, 8010:5-10; (no bates) (JD 041836); (no bates) (JD 050566); (no bates) (JD 053079); (no bates) (JD 046586); (no bates) (JD 055037).

4065. Over the years, the Attorneys General's inquiries of Philip Morris have dealt with a number of issues, including:

-- Anti-smoking billboards. Szymanczyk WD, 109:15-16, 109:23-110:1; (no bates) (JD 055043) (examples of anti-smoking ads posted by Attorneys General).

-- Brand names on third-party billboards. Szymanczyk TT, 4/11/05, 18469:20-23; Szymanczyk WD, 212:8-214:8; (no bates) (JD 045035); (no bates) (JD 042509); (no bates) (JD 042510); (no bates) (JD 045154).

-- Cartoon advertisements. Szymanczyk WD, 214:11-16, 215:6-8; (no bates) (JD 055045); Szymanczyk TT, 4/11/05, 18464:23-18465:3.

-- Coupon promotions. Szymanczyk TT, 4/11/05, 18476:16-18477:19; (no bates) (JD 041836 at 2077583781/3782, 2077583994/3997); Szymanczyk WD, 216:16-217:21; (no bates) (JD 045791).

-- Magazine advertisements. Szymanczyk WD, 118:6-125:23, 218:2-219:18; (no bates) (JD 041836 at 2077583999/4001,

2075833781/3782); (no bates) (JD 053086); (no bates) (JD 053107); (no bates) (JD 042590); (no bates) (JD 041075).

-- Brand name merchandise. (no bates) (JD 054552 at 2085607342/7345, 2085319973/9974); (no bates) (JD 053133); (no bates) (JD 054552 at 2086150949/0950, 3000152691/2693, 2086153499/3501); see also (no bates) (JD 055037).

-- Product placement in movies. (no bates) (JD 054552 at 3000152703/2706, 3001022923/2925); see also (no bates) (JD 055037); Beran WD, 11:7-10.

-- Sponsorships. (no bates) (JD 041836 at 2077583781, 2077583985-3992); (no bates) (JD 055037).

4066. One notable dispute occurred in 2001. The MSA limited Philip Morris to just one brand name sponsorship in a racing series. Philip Morris used that to sponsor a Marlboro brand race team in the Champion Auto Racing Teams, Inc., otherwise known as "CART" racing league. In 2001, Philip Morris attempted to enter its CART Marlboro brand race cars in the Memorial Day Indianapolis 500, a race in the Indy Racing League. Philip Morris's chairman and CEO, Michael Szymanczyk, admitted that CART and the Indy Racing League are two distinct racing leagues, with two distinct approval organizations. Szymanczyk TT, 4/11/05, 18377:15-19.

4067. After Washington State Attorney General Christine Gregoire notified Philip Morris that sponsoring Marlboro vehicles in races in two different leagues would violate the MSA, Philip Morris removed the Marlboro brand names from its race cars and uniforms for the 2001 Indianapolis 500, but Marlboro color and images remained. Szymanczyk WD, 131:1-132:10. Following the 2001 season, Philip Morris switched from its CART Marlboro brand sponsorship to its current Indy Racing League Marlboro sponsorship. Szymanczyk TT, 4/11/05, 18380:22-18381:1.

4068. Several courts have held that RJR violated the MSA. See, e.g., People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317, 323, 327-28 (Cal. Ct. App. 2004) (discussed supra; finding that RJR did not change its youth magazine placement policies from the 1998 signing of the MSA until the day that it was sued in March 2001, and that RJR's 2001 changes had insignificant effects on youth exposure to its advertising campaigns); State ex rel. Goddard v. R.J. Reynolds Tobacco Co., 75 P.3d 1075 (Ariz. Ct. App. 2003) (holding that RJR violated the MSA by placing cigarette advertisements at auto racetrack year-round); People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal. Rptr. 2d 151 (Cal. Ct. App. 2003) (same; discussed infra); State ex rel. Petro v. R.J. Reynolds Tobacco Co., 820 N.E.2d 910 (Ohio 2004) (discussed infra; finding RJR violated the MSA with promotional tobacco brand name matchbooks).

4069. Most recently, on July 26, 2005, the State of Vermont filed a complaint and petition for contempt, alleging that RJR has violated MSA § III(r) which prohibits any participating manufacturer from making "any material misrepresentation of fact regarding the health consequences of using any tobacco product." Complaint, Vermont v. R.J. Reynolds Tobacco Co., No. 744-97 CNC & S-0816-98 (Vt. Superior Ct. filed July 26, 2005).

4070. RJR was the only signatory to the MSA which continued to distribute branded matchbooks with cigarette advertisements. Ohio ex rel. Petro v. R.J. Reynolds Tobacco Co., 820 N.E.2d 910, 914 (Ohio 2004). In 1999, several states' Attorneys General alerted RJR that its branded matchbooks violated the MSA's prohibition on tobacco brand merchandise. When informal discussions failed, Ohio moved for a show-cause order in March 2001. After proceedings in the trial court and intermediate appellate court, the Ohio Supreme Court affirmed the trial court on December 30, 2004, holding that RJR had violated the MSA's prohibition on distributing tobacco branded

merchandise, and that the MSA intended to prohibit the "subtle yet ubiquitous marketing of tobacco products." Id. at 917.

4071. RJR also faced a lawsuit by the California Attorney General for failing to change its magazine advertising placement policies following execution of the MSA. People, ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004). On November 4, 1999, state Attorneys General met with RJR and voiced concern about its targeting youth in magazine advertising placement. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., No. GIC 764118, 2002 WL 1292994, at *4 (Cal. Superior Ct. June 6, 2002). After informal discussions failed to resolve the issue, a complaint was filed in March 2001. The California Court of Appeals affirmed the trial court's decision on March 19, 2004, and denied rehearing on June 9, 2004.

4072. While there have been a small number of successful enforcement actions brought by state Attorneys General under the MSA, that fact alone does not demonstrate that the MSA has been or will continue to be adequately enforced. There are significant variations amongst the states in the amount of funding and quality of resources devoted to MSA enforcement. Moreover, enforcement actions are subject to differing and inconsistent rulings, because each jurisdiction applies its own law of contracts to interpret the MSA's terms. Contrast People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal. Rptr. 2d 151 (Cal. Ct. App. 2003) (racetrack ads prohibited), with New York v. R.J. Reynolds Tobacco Co., 761 N.Y.S.2d 596 (N.Y. App. Div. 2003) (racetrack ads allowed).

3. Developments Since the MSA

4073. There is no question that the MSA has either directly brought about certain significant changes in industry practices or indirectly contributed to those developments.

4074. Since the MSA went into effect in late 1998, youth smoking rates, which peaked in 1997, have declined. The CDC reported a smoking rate of 36.4% among students in grades nine through twelve in 1997, with a decline to 21.9% in 2003. (no bates) (JDEM 040369); see also (no bates) (JDEM 040199).[9]

4075. Since the execution of the MSA, Defendants' market share and overall competitive position have declined relative to non-Defendant manufacturers. Carlton WD, 10:24-11:4; (no bates) (JDEM 010431); (no bates) (JDEM 010432); see also Gruber TT, 5/10/05, 20677:10-14; Beasley WD, 8:20-9:23, 13:10-15:9, 16:8-17:2. Specifically, cigarette company Defendants' market share declined from 97% in 1998 to 85% in 2004. Carlton WD, 8:13-9:2; (no bates) (JD 052903); (no bates) (JD 065406); Gruber TT, 5/10/05, 21677:3-14; (no bates) (JDEM 010431) (discussed at Carlton WD, 11:3); (no bates) (JDEM 010432) (discussed at Carlton WD, 11:4). Approximately 200 new companies have entered the U. S. cigarette market since 1998. Szymanczyk TT, 4/11/05, 18516:15-18.

4076. Three of the Defendants in this case are not subject to all the provisions of the MSA. As this Court previously recognized, "the MSA cannot preclude relief in this RICO action because two of the Defendants, BATCo and Altria, are not even signatories to that Agreement." United States v. Philip Morris USA Inc., 316 F. Supp. 2d 6, 12 (D.D.C. 2004). In addition, a third Defendant, Liggett, is exempt from important provisions of the MSA. LeBow TT, 4/4/05, 17570:14-17572:4.

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[9] On June 6, 2006, the CDC issued a Report finding that the decline in youth smoking rates which began in 1998 plateaued because teenage smoking initiation is on the rise again. However, this Report is not part of the record in this case. The Court is not relying upon this information.

4077. Defendants' assertions that, as a result of the MSA, they are now new companies headed by changed management are simply not accurate. Wells TT, 9/22/04, 213:24, 220:17-21; Szymanczyk TT, 4/7/05, 18110:7-10.

4078. For example, Philip Morris management has not changed in any meaningful way. Michael Szymanczyk, President of Philip Morris, conceded that the Philip Morris executives whom he promoted to his Senior Leadership Team, and whom he appointed to their current positions since 1999, were in fact veteran employees who averaged some fifteen to twenty years' tenure at Philip Morris or one of its sister companies:

> Michael Szymanczyk: appointed to current position, Chairman and Chief Executive Officer, in 1997; actual tenure -- fifteen years.
>
> John Nelson: appointed to current position, Senior Vice President, Research and Development, in 2002; actual tenure -- fifteen years.
>
> David Beran: appointed to current position, Executive Vice President, Strategy, Communication, and Consumer Contact, in 2002; actual tenure -- fifteen to thirty years.
>
> Craig Johnson: appointed to current position, Executive Vice President, Sales and Distribution, in 2002; actual tenure -- about fifteen years.
>
> Denise Keane: appointed to current position, Senior Vice President and General Counsel, in 2001; actual tenure -- almost thirty years.
>
> Howard Willard: appointed to current position, Senior Vice President, Corporate Responsibility, in 2002; actual tenure -- about fifteen years.
>
> Nancy Lund: appointed to current position, Senior Vice President, Marketing, in 1999; actual tenure -- twenty years.
>
> Gregory Cummings: appointed to current position, Senior Vice President, Manufacturing and Quality, in 2002; actual tenure -- twenty-five years.

> Kevin Benner: appointed to current position, Senior Vice President, Human Resources, in 2003; actual tenure -- eight years.
>
> Tina Walls: appointed to current position, Senior Vice President, Corporate Affairs, in 2003; actual tenure -- nineteen to twenty years.
>
> Michael Farris: appointed to current position, Vice President of Leaf, in 2004; actual tenure -- about twenty years.
>
> Virginia Murphy: appointed to current position, Senior Vice President, Compliance and Branch Integrity, in 2005; actual tenure -- about twelve years.
>
> Richard Solana: appointed to current position, Vice President, Research and Technology, in 2005; actual tenure -- eleven to twelve years.
>
> Harry Steele: appointed to current position, Vice President, in 1990; actual tenure -- about twenty years.

(no bates) (JDEM 040284); Szymanczyk TT, 4/7/05, 18111:24-18117:9. Indeed, Szymanczyk acknowledged that, in picking his Senior Leadership Team, he did not "go outside of Philip Morris to fill any of those positions . . . on the exhibit JDEM 040284." Szymanczyk TT, 4/7/05, 18118:18-18119:3. In sum, the employees selected by the President of Philip Morris are not "new blood," but rather, very long-time employees who have been thoroughly imbued with the public relations, marketing, research and development, and ethical policies of Philip Morris.

4079. In particular, Philip Morris chose long-time Philip Morris employees to staff the Youth Smoking Prevention Program. The Program is not staffed with a single professional from outside the company who had experience and credentials in the smoking prevention area. Szymanczyk TT, 4/7/05, 18273:7-18274:13.

4080. Lorillard's senior management team reflects an average of twenty-two years' tenure with the company:

> Martin L. Orlowsky, Chairman, President and CEO: twenty-five years.
>
> Ronald Milstein, Vice President and General Counsel: nine years.
>
> George Telford, Vice President, Brand Marketing: twenty-nine years.
>
> Kathy Sparrow, Vice President, Sales: twenty-five years.
>
> Victor D. Lindsley III, Senior Group Brand Director: twenty-four years.

Orlowsky WD, 1:2-14; Milstein TT, 1/7/05, 9257:11-12; Telford PD, United States v. Philip Morris, 6/26/02, 15:3-16:6; Sparrow PD, United States v. Philip Morris, 2/25/02, 9:19-22; Lindsley PD, United States v. Philip Morris, 5/16/02, 13:17-14:12.

4081. BATCo's senior management team reflects an average of twenty-three years' tenure with BATCo and Brown & Williamson. BATCo and B&W have, over the years, had varying corporate relationships but have, at a minimum, always worked together closely and cooperatively:

> Paul Adams, Chairman of BATCo, also Managing Director and CEO of BAT plc: fourteen years.
>
> Nicholas Brookes, former Chairman and CEO of B&W, now Regional Director, America-Pacific Region of BATCo: twenty-seven years.
>
> Graham Read, BATCo Head of Global Strategic Research: twenty-nine years.

Brookes PD, United States v. Philip Morris, 5/2/02, 19:21-20:1; Adams PD, United States v. Philip Morris, 8/22/02, 14:1-10; Read TT, 3/21/05, 16281:19-16282:1.

4082. R.J. Reynolds's senior management team (which, after the merger with B&W, now includes many senior managers from B&W) reflects an average of twenty-four years' tenure with the industry:

Andrew Schindler, Non-Executive Chairman, RAI: thirty-one years.

Susan M. Ivey, President and CEO, RAI; Chairman and CEO, RJR; former CEO of B&W: twenty-four years.

Lynn J. Beasley, President and Chief Operating Officer, RJR: twenty-three years.

Charles A. Blixt, Executive Vice President and General Counsel, RAI and RJR Tobacco: twenty years.

Frances Creighton, Executive Vice President, Marketing, RJR Tobacco: twenty-four years.

Brennan M. Dawson, Senior Vice President, Government Relations, RJRT; former Vice President for External Affairs at B&W and former TI spokesperson: nineteen years.

Schindler WD, 1:6-2:11; Ivey WD, 1:3-2:11; Beasley WD, 1:6-13; Blixt PD, United States v. Philip Morris Inc., 10/31/02, 20:4-6; Creighton PD, United States v. Philip Morris Inc., 6/20/02, 13:22-24; Dawson WD, 1:19-20, 2:6-9, 3:1-2, 3:21-4:1.

4083. Defendants have not lowered their total marketing and promotion expenditures in response to the MSA's prohibition on billboard advertising and its restrictions on print advertising. To the contrary, they have both increased their marketing expenditures and shifted those increased expenditures towards price-based promotions, as detailed more fully in Section V(F)(5), supra. Dolan WD, 145:10-146:22; Krugman WD, 101:16-102:9.

4084. The MSA does not: (1) require Defendants to make corrective statements regarding health risks of smoking and nicotine addiction; (2) require Defendants to fund effective cessation programs; (3) appoint court-appointed officials to implement the relief granted; (4) enjoin Defendants from future RICO violations; or (5) enjoin Defendants' alleged youth-marketing

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.