exploited their customers' lack of knowledge concerning cigarette use and nicotine addiction. Thus, Defendants' statements were material to consumers of tobacco products and to others, such as the recipients of secondhand smoke, who were affected by Defendants' products.

For all the foregoing reasons, the Court concludes that Defendants are liable for violations of 18 U.S.C. § 1962(D).[37]

VIII. DEFENDANTS HAVE VIOLATED 18 U.S.C. §1962(d)

18 U.S.C. § 1962(d) provides in part: "It shall be unlawful for any person to conspire to violate any of the provisions of . . . Subsection (c) of this Section."

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[37] Before trial in this case, Defendants raised a number of affirmative defenses. The Court granted the Government's Motion for Partial Summary Judgment for these defenses as to liability. See Order #476; see also Order #227, #356, #509, #538, and #586. However, at that time the Court reserved judgment about how these affirmative defenses might apply to remedies. See Mem. Op. to Order #476 at 27 n.21. Defendants now appropriately raise the same affirmative defenses in regard to remedies.

Repeating the arguments from their pre-trial brief, Defendants again assert that waiver, laches, unclean hands, *in pari delicto*, and equitable estoppel bar any claim for relief by the Government. See Defs.'Post-Trial Br. on Affirmative Defenses 18, Sept. 7, 2005. As in the pre-trial brief on affirmative defenses, Defendants' make the broad argument that because the Federal Trade Commission has had an historical role regulating tobacco products, the Court cannot grant the Government any relief in this action. See Defs.' Post-Trial Reply Br. in Support of Their Affirmative Defenses 1, Sept. 29, 2005. In previously rejecting this theory and Defendants' affirmative defenses in regards to liabilities, this Court found that, "the case law overwhelmingly supports the Government's position" that the enumerated equitable defenses may not be asserted against the United States "when, as here, 'it is acting in its sovereign capacity to exercise public rights to protect the public interest.'" United States v. Philip Morris, Inc., 300 F. Supp. 2d 65-66 (D.D.C. 2004) (internal citations omitted).

Significantly, the facts have not changed since Defendants asked this Court to rule on affirmative defenses in the liability stage of this matter. Furthermore, Defendants have not put forth any new arguments or cited any new precedent for why the Court should rule in favor of the affirmative defenses they now re-raise as to remedies. Therefore, this Court finds that the affirmative defenses now re-raised by Defendants as to remedies do not preclude the United States from obtaining relief.

A. Applicable Case Law

To establish a conspiracy violation of 18 U.S.C. § 1962(d), the United States must prove each of the following elements:

1. The existence of an enterprise;

2. That the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and

3. That each defendant knowingly agreed to the commission of a violation of 18 U.S.C. 1962(c).[38]

See, e.g., Salinas v. United States, 522 U.S. 52, 62-65 (1997); United States v. Philip Morris Inc., 130 F. Supp. 2d 96, 100 (D.D.C. 2001); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998); United States v. To, 144 F.3d 737, 744 (11th Cir. 1998); Jones v. Meridian Towers Apartments, Inc., 816 F. Supp. 762, 772-73 (D.D.C. 1993).

Although a substantive RICO offense under § 1962(c), requires proof that each defendant committed at least two racketeering acts, a RICO conspiracy charge does not require proof of the actual commission of any racketeering act or any overt act. See, e.g., Salinas, 522 U.S. at 63; United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986) (collecting cases); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); United States v. Brooklier, 685 F.2d 1208, 1222-23 (9th Cir. 1982); United States v. Corrado, 286 F.3d 934, 937 (6th Cir. 2002); Glecier, 923 F.2d at 500; Gonzalez, 921

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[38] The first two elements are also required to establish the substantive RICO violation, which has been addressed supra, in Sections VII(C) and (D).

F.2d at 1547-48; United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988); United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987).

As the Supreme Court explained in Salinas, "[t]he RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in [18 U.S.C.] § 371." 522 U.S. at 63. As in the case of conventional conspiracy offenses, each co-conspirator is liable for the acts of all other conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy. See, e.g., Salinas, 522 U.S. at 63-64; P & B Autobody, 43 F.3d at 1562; Pungitore, 910 F. 2d at 1145-48; United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

Moreover, the existence of a conspiracy is not disproved merely because its membership changes over time or some defendants cease to participate in it. See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986) ("An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time."); United States v. Warner, 690 F.2d 545, 549 n.7 (6th Cir. 1982); United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Boyd, 595 F.2d 120, 123 (3d Cir. 1978); United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) ("Nor does a single conspiracy become several merely because of personnel changes."); United States v. Michel, 588 F.2d 986 (5th Cir. 1979); United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982) (for RICO conspiracy, continuity may be met even with changes in personnel or even when different individuals manage the affairs of the enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985) (personnel change does not prevent RICO conspiracy); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992) ("What was essential is that the criminal 'goal or

overall plan' have persisted without fundamental alteration, notwithstanding variations in personnel and their roles."); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir. 1988) (single conspiracy can be found even where "the cast of characters changed over the course of the enterprise"); United States v. Nasse, 432 F.2d 1293, 1297 (7th Cir. 1970); United States v. Sepulvedam, 15 F.3d 1161, 1191 (1st Cir. 1993) ("in a unitary conspiracy it is not necessary that the membership remain static") (citing United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988)); United States v. Bryant, 364 F.2d 598, 603 (4th Cir. 1966) ("The addition of new members to a conspiracy or the withdrawal of old ones from it does not change the status of the other conspirators.") (quoting Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956)); United States v. Shorter, 54 F.3d 1248 (7th Cir. 1995).

In addition, even if one conspirator did not participate in, or was unaware of, acts undertaken by co-conspirators in furtherance of the conspiracy, it is nevertheless liable for such acts, including those that occur prior to its joining the conspiracy. See, e.g., Salinas v. United States, 522 U.S. 52, 63-64 (1997); Pinkerton v. United States, 328 U.S. 640, 646-47 (1996); United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. Pungitore, 910 F. 2d 1084, 1145-48 (3d Cir. 1990); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975). Such liability remains even if the defendant has ceased his participation in the conspiracy. See, e.g., United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997); In Re Corrugated Container Antitrust Litig., 662 F.2d 875, 886 (D.C. Cir. 1981); United States v. Nava-Salazar, 30 F.3d 780, 799 (7th Cir. 1994); United States v. Loya, 807 F. 2d 1483, 1493 (9th Cir. 1987); United States v. Read, 658 F.2d 1225, 1239-40 (7th Cir. 1981).

B. Each Defendant[39] Is Liable for the RICO Conspiracy Charge Because Each Entered into the Requisite Conspiratorial Agreement

"In order to be guilty of a RICO conspiracy, a defendant must either agree to [individually] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise." United States v. Nguyen, 255 F.3d 1335, 1341 (11th Cir. 2001); see also United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001); Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 964 (7th Cir. 2000); To, 144 F.3d at 744; United States v. Brazel, 102 F.3d 1120, 1138 (11th Cir. 1997); United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996). Defendants are liable for a RICO conspiracy under either test.

First, each Defendant individually agreed to commit at least two Racketeering Acts. The overwhelming evidence demonstrates that each Defendant personally committed numerous Racketeering Acts in furtherance of the affairs of the Enterprise. See Findings of Fact Section VII(G)(3)(a), supra. "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." Elliott, 571 F.2d at 903; see also United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992); United States v. Crockett, 979 F.2d 1204, 1218 (7th Cir. 1991); United States v. Carlock, 806 F.2d at 547 (5th Cir. 1986); United States v. Melton, 689 F.2d 679, 683 (7th Cir. 1982); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981).

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[39] As discussed in great detail, infra at Section VIII(C), Liggett withdrew from the conspiracy in 1997. Accordingly, Liggett is not liable as a conspirator for any acts that occurred subsequent to 1997.

Second, each Defendant agreed to participate in the conduct of the Enterprise with the knowledge and intent that other members of the conspiracy would also commit at least two predicate acts in furtherance of the Enterprise. A RICO conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254 (1940). As the Supreme Court explained in reference to RICO:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues. . . .
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> * * *
>
> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 63-65.

Thus, to prove a RICO conspiracy,

> [t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.

Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted); Accord Posada-Rios, 158 F.3d at 857; To, 144 F.3d at 744. It is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995) (quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986)). Accord Brouwer, 199 F.3d at 964; United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993) (quoting Neapolitan).

Defendants' conspiracy was in existence as of December 1953, when several of the cigarette company Defendants met in New York City to create CTR and to discuss and outline the Enterprise's future strategy.[40] Each Defendant agreed to commit a substantive RICO offense with the knowledge that other members of the Enterprise were also conspiring to commit racketeering activity. All Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of the shared objective -- to use mail and wire transmissions to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public. Defendants executed the scheme by using several different strategies including: (1) denying that there were adverse health effects from smoking; (2) making false, misleading, and deceptive public statements designed to maintain doubt about whether smoking and exposure to secondhand smoke cause disease; (3) denying the addictiveness of smoking cigarettes and the role of nicotine therein; (4) disseminating advertising for light and low tar cigarettes suggesting they were less harmful than full flavor ones; and (5) undertaking a publicly announced duty to conduct and publicize disinterested and independent research into the health effects of smoking upon which the public could rely. See Findings of Fact Sections III and V.

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[40] As noted earlier, no evidence has been presented regarding a conspiracy before 1953.

Moreover, the cigarette company Defendants jointly participated at various times and to various degrees in creating, funding, directing and controlling Defendants CTR, TI and other entities and causing Defendants CTR and TI to commit numerous racketeering acts to further those shared objectives. Furthermore, the frequent oral and written communications between and among Defendants illustrate their joint efforts to pursue their shared objectives. Significantly, Defendants worked together continuously, in many different venues and through many different entities, to disseminate their agreed upon deceptive public position denying the link between smoking cigarettes and adverse health effects, denying the addictiveness of smoking cigarettes and nicotine, and denying their marketing of cigarettes to young people. See Findings of Fact Sections V(A, B, F).

In addition, each Defendant also agreed to facilitate the substantive RICO violation by concealing or suppressing information and documents which may have been detrimental to the interests of the members of the Enterprise. Such information might well have been discoverable in smoking and health liability cases against Defendants and therefore could have constituted, or led to, evidence of the link between smoking cigarettes, addiction, and adverse health effects. See Findings of Fact Section V(H).

Thus, each Defendant knew the goals of the Enterprise, the general nature of the conspiracy, and that other members of the conspiracy would commit at least two Racketeering Acts in furtherance of the Enterprise's scheme to defraud. Indeed, each Defendant took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy, including committing numerous Racketeering Acts in furtherance of the Enterprise's affairs. Hence, each Defendant entered into the requisite conspiratorial agreement. Accord Salinas, 522 U.S. at 66 ("[E]ven if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to

violate subsection (c). The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d).").

While there is much explicit evidence of actual agreement between Defendants in the Findings of Fact, RICO liability does not require such an explicit agreement. "Regardless of the method used to prove the agreement, the government does not have to establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy." Starrett, 55 F.3d at 1544 (internal quotations and citations deleted).

Even though the criminal activities may differ, they must still be linked to allow the inference of an agreement. United States v. Boylan, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy conviction upheld where "the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash, from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy."); Ashman, 979 F.2d at 492 (in investment scheme, evidence sufficient for RICO conspiracy where defendants served as "bag men" for each other, used similar procedures for covering losses, and "were well aware that they were part of an ongoing and flexible agreement to commit fraud as the need -- or perhaps the opportunity -- arose"); see also United States

v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000); To, 144 F.3d at 744; United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); Rastelli, 870 F.2d at 828 (collecting cases); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985); Elliott, 571 F.2d at 902-03.

To establish sufficient knowledge, it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." Rastelli, 870 F.2d at 828 (collecting cases). Accord Zichettello, 208 F.3d at 100; Brazel, 102 F.3d at 1138; Eufrasio, 935 F.2d at 577 n.29; Rosenthal, 793 F.2d at 1228; De Peri, 778 F.2d at 975; Elliott, 571 F.2d at 903-04. Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857 (citations and internal quotations omitted).

For all the foregoing reasons, the Court concludes that Defendants are liable for conspiracy under 18 U.S.C. § 1962(d) of RICO because they both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c) of RICO.[41]

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[41] Contrary to Altria's claim, the prohibition against intracorporate conspiracies under the antitrust laws does not apply to this case. In Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the Seventh Circuit explained:

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law – protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

(continued...)

C. Liggett Withdrew from the Conspiracy

Where an alleged conspirator communicates his abandonment in a manner reasonably calculated to reach co-conspirators, the conspirator is deemed to have withdrawn from the conspiracy. United States v. Thomas, 114 F.3d 228, 267-9 (D.C. Cir.), cert. denied, 522 U.S. 1033 (1997) (collecting cases); see also United States v. United States Gypsum Co., 438 U.S. 422, 463-64 (1978); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 616 (7th Cir. 1978); In re Corrugated Container Antitrust Litig., 662 F.2d 875, 886 (D.C. Cir. 1981). Although there is clear and convincing evidence that Liggett participated in the RICO Enterprise and conspiracy during its formative years, the Court finds that it withdrew from the conspiracy in 1997.

In 1996, Liggett broke ranks with the tobacco industry when it cooperated with states' Attorneys General in the prosecution of certain claims against itself and other tobacco company Defendants, and made historic statements concerning the health and addiction risks of smoking. See Findings of Fact Section VIII(C). Liggett's invaluable cooperation with government authorities and public health officials was well-publicized. Id. The states' Attorneys General, as well as numerous other government and public health officials, publicly acknowledged that Liggett's conduct and cooperation was a key element in achieving important settlements with other major tobacco companies, including the Master Settlement Agreement.

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

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[41](...continued)
875 F.2d at 1281 (citations omitted). Accordingly, because Altria conspired to violate 18 U.S.C. §1962(c), it is liable under RICO conspiracy, even though one of the Defendants with which Altria conspired was Philip Morris USA, Altria's subsidiary.

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, CEO of Liggett at the time, and others affiliated with Liggett testified on behalf of the states' Attorneys General in those cases where trials occurred. Id. at 5:6-19. As a result of these and other actions in 1996 and 1997, Liggett has isolated itself, and been isolated from, the other cigarette company Defendants. In this case, Liggett was represented by its own individual counsel and conducted its own defense.

Liggett communicated its withdrawal from the Enterprise and the conspiracy by, among other things, its public statements and open cooperation with the state and federal governments in the prosecution of their claims against the other tobacco company Defendants. See Findings of Fact Section VIII(C). Given Liggett's conduct, the evidence shows Liggett is not continuing to "conspire" with other tobacco company defendants.[42]

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[42] Withdrawal does not preclude liability even in criminal prosecutions involving substantive mail and wire fraud offenses. For example, in United States v. Read, 658 F.2d 1225 (7th Cir. 1981), the Seventh Circuit explained the differences between the application of the withdrawal defense to substantive, as opposed to conspiracy, offenses. In holding that withdrawal was not a (continued...)