UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, and NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK, Intervenors, v. PHILIP MORRIS USA, INC., f/k/a PHILIP MORRIS INCORPORATED, *et al.*, Defendants.	Civil Action No. 99-CV-2496 (GK)

POST-TRIAL BRIEF OF PLAINTIFF-INTERVENORS

OF COUNSEL:

Professor G. Robert Blakey
William J. and Dorothy O'Neill
Professor of Law
Notre Dame Law School
Notre Dame, IN 46656
(D.C. Bar No. 424844)

David C. Vladeck
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(D.C. Bar No. 945063)

Katherine A. Meyer
(D.C. Bar No. 244301)
Howard M. Crystal
(D.C. Bar No. 446189)
Ethan Carson Eddy
(California Bar No. 237214)

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, Suite 700
Washington, DC 20009
202-588-5206

August 31, 2005

TABLE OF CONTENTS

INTRODUCTION 1

I. BACKGROUND: THE UNIQUE CHARACTERISTICS OF THE TOBACCO INDUSTRY 8

A. The "Youth-Initiation" Market Dynamic 9

B. Preservation of the Defendants' Market Requires Continuation Of the Campaign of Fraud and Conspiracy Designed To Prevent Consumers From Giving Up Tobacco 15

C. The Defendants Repeatedly Circumvent And Evade Constraints On Their Behavior 18

ARGUMENT 23

I. UNDER THE DECISION OF THE COURT OF APPEALS THIS COURT RETAINS THE EQUITABLE AUTHORITY TO CRAFT REMEDIES TO PREVENT AND RESTRAIN THE DEFENDANTS FROM CONTINUING TO ENGAGE IN THE RICO VIOLATIONS THAT HAVE BEEN PROVEN HERE. 23

A. The Court Has Equitable Power Under RICO To Prevent And Restrain The Tobacco Industry's Unlawful Practices 26

1. RICO Allows The Court To Prohibit Both Specific And General Practices As Necessary To Prevent Further Racketeering Violations By Defendants..26

2. Under the Court of Appeals' Decision The Court May Require The Tobacco Industry To Fund Programs And Pay Fines for Future Wrongdoing To Prevent And Restrain Rhe Defendants Future Activity By Depriving Them Of The Future Benefit Their Wrongful Behavior, Countering The Adverse Impact Of Any Violations And Depriving The Defendants Of The Means To Engage in Future Wrongdoing 29

II. THE PLAIN LANGUAGE OF RICO AUTHORIZES THE COURT TO REQUIRE THE TOBACCO INDUSTRY TO FUND PROGRAMS TO REDUCE THE NUMBER OF CONSUMERS WHO ARE AND WILL BECOME ADDICTED TO TOBACCO..32

III. THE SUPREME COURT'S DECISIONS IN THE ANTITRUST CONTEXT SUPPORT THE COURT'S AUTHORITY TO IMPOSE THE REMEDIES REQUESTED HERE 36

IV. ALL OF THE REMEDIES REQUESTED BY THE PUBLIC HEALTH INTERVENORS ARE BOTH NECESSARY AND PERMISSIBLE 39

A. Industry-Funded Cessation Program 40

1. The Cessation Program Should Be Funded at a Total of $4.8 Billion Per Year Until Less Than Ten Percent of Smokers Report That They Want Or Intend To Quit 40

2. The Proposed Cessation Remedy Is Both Effective and Narrowly Tailored, and Also Furthers Critical Public Health Purposes 47

3. This Court Is Authorized To Impose The Proposed Cessation Remedy 49

B. Industry-Funded Public Education and Countermarketing Programs 54

1. The Public Education and Countermarketing Remedy Should Be Of Sufficient Funding, Scope, and Duration 54

2. The Public Education and Countermarketing Remedy Is Both Effective and Narrowly Tailored, and Also Furthers Critical Public Health Purposes 67

3. This Court Is Authorized To Impose The Proposed Public Education And Countermarketing Remedy 68

C. The Youth Smoking Reduction Target Remedy 69

1. Youth Smoking Reduction Targets Should Be Adequately Measured And Their Violations Adequately Penalized 69

2. Youth Smoking Reduction Targets Are Both Effective and Narrowly Tailored, and Also Further Critical Public Health Purposes 79

3. This Court Is Authorized To Impose Youth Smoking Reduction Targets 81

D. Specific Prohibitions on Defendants' Future Conduct 81

1. Specific Prohibitions Are Necessary To Deprive the Defendants of the Tools By Which They Have Committed Fraud In the Past 82

2. Prohibitions Of General Applicability Are Also Necessary To Prevent Future Unlawful Conduct The Exact Form Of Which Is Yet Unknown ... 87

3. This Court Is Authorized To Impose All of the Proposed Prohibitions On Defendants' Future Conduct 93

4. None of the Proposed Restrictions Violates the First Amendment 94

5. Other Prohibited Practices Offered By Amicus Curiae 95

E. Document Disclosure Requirements... 95

1. Prohibitions Against Destroying, Concealing, Or Otherwise Putting Documents Out Of Reach Rather Than Disclosing 95

2. Disclosure Of Documents Produced By Defendants In Foreign Courts Or Administrative Proceedings 96

3. Providing Information From Defendants' Current Marketing Plans To Guide And Improve The Countermarketing And Cessation Remedies……………………………………………………………....... 97

4. Disclosing Payments and Support to Third Parties That Promote Defendants' Interests and Goals……………………………................... 98

5. Technical and Procedural Improvements to Proposed Document Disclosure and Document Websites …………………………………… 100

6. Other Improvements To The Disclosure Remedy 100

7. This Court Is Authorized To Impose the Proposed Document Disclosure Requirements 101

F. Enforcement By An Independent Officer. 102

1. The Independent Investigations Officer Must Be Vested With Sufficiently Broad Authority To Police All Aspects of the Court's Final Judgment and Order 102

2. This Court May Vest the Independent Officer With The Authority Necessary To Implement Its Decree 108

G. Other Sections of Government's Proposed Order 109

1. Review of Business Policies and Practices 109

2. Corrective Communications 109

3. Other Sections 110

CONCLUSION 110

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003)..34

Coppenweld Corp. v. Independent Tube Corp.,
467 U.S. 752 (1984) 37

Edenfield v. Fane,
507 U.S. 761 (1993)..94

Ford Motor Co. v. United States,
405 U.S. 562 (1972)..38, 50, 93, 94

Hartford Empire Co. v. United States,
323 U.S. 386 (1945)..94

International Boxing Club of N. Y., Inc. v. United States,
358 U.S. 242 (1959)..49

International Salt Co. v. United States,
332 U.S. 392 (1947)..37, 110

Maryland and Virginia Milk Producers Association v. U.S.,
362 U.S. 458 (1960)..50

McDaniel v. Sanchez,
452 U.S. 130 (1981)..34

National Society of Professional Engs v. United States,
435 U.S. 679 (1978)...27, 38, 94

Owasso Indep. School Dist. v. Falvo,
534 U.S. 426, 433 (2002) 32

Schine Chain Theaters v. United States,
334 U.S. 110 (1948).. *passim*

SEC v. First City Finance Corp.,
890 F.2d 1215 (D.C. Cir. 1989)..2

SEC v. Savoy Ind.,
587 F.2d 1149 (D.C. Cir. 1978)..2

Thompson v. W. States Medical Ctr.,
535 U.S. 357 (2002) 94

United States v. Bausch & Lomb,
321 U.S. 707 (1944) 38, 108

United States v. Cappetto,
502 F.2d 1351 (7th Cir. 1974) 2

United States v. Crescent Amusement Co.,
323 U.S. 173 (1945) 37, 50

United States v. Dixon, 509 U.S. 688 (1993) 34

United States v. E.I. Du Pont De Nemours and Co.,
366 U.S. 316 (1961) 37, 50, 53

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 109

United States v. Local 30, United Slate, Tile and Composition Roofers,
696 F. Supp. 1139 (E.D. Pa. 1988) 28

United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association,
871 F.2d 401 (3d Cir. 1989) 2

United States v. Local 359, United Seafood Workers Union,
705 F. Supp. 894 (S.D.N.Y. 1989) 28

United States v. Local 560, United Slate, Tile & Composition Roofers,
686 F. Supp. 1139 (E.D. Pa. 1988) 28

United States v. Loew's, Inc.,
371 U.S. 38 (1962) 94

United States v. Philip Morris USA.,
396 F.3d 1190 (D.C. Cir. 2005) .... *passim*

United States v. Sasso,
215 F.3d 283 (2d Cir. 2000) 27, 101, 108

United States v. Turkette,
452 U.S. 576 (1981) .... *passim*

United States v. United States Gypsum Co.,
340 U.S. 76 (1951) .... *passim*

United States v. Ward Baking Co.,
376 U.S. 327 (1964) 37

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 94

Waine v. Sacchet,
356 F.3d 510 (4th Cir. 2004) 34

STATE CASES

B.T. Produce Co. v. Robert A. Johnson Sales, Inc.,
354 F. Supp 2d 284, 285 n.2 (S.D.N.Y. 2004) 56

People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.,
132 Cal. Rptr. 2d 151 (Cal. Ct. App. 2003) 21

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317
(Cal. Ct. App. 2004) 21

State ex. rel Goddard v. R.J. Reynolds Tobacco Co.,
75 P.3d 1075 (Ariz. Ct. App. 2003) 21

State ex. rel. Petro v. R.J. Reynolds Tobacco Co.,
820 N.E.2d 910 (Ohio 2004) 21

DOCKETED CASES

American Legacy Foundation v. Lorillard Tobacco Co.,
No. 19406 (Del. Ch. Aug. 22, 2005) 63

Vermont v. R.J. Reynolds Tobacco Co.,
No. 744-97 (Vt. Super. Ct. July 26, 2005) 22

FEDERAL STATUTES

18 U.S.C. 1964(a) 23, 26, 32

18 U.S.C. 1961(4) 1

42 U.S.C. § 1964(a) .... *passim*

LEGISLATIVE MATERIALS

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) .... *passim*

INTRODUCTION

Pursuant to this Court's Order granting both intervention of right and permissive intervention, Order # 987 (July 15, 2005), this post-trial brief is submitted by six public health organizations – Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network (the "Public Health Intervenors") – to address the remedies that this Court should impose on the defendants in this case. As further demonstrated below, this Court has the unprecedented opportunity to fashion equitable remedies that will prevent millions of incidents of death and illness caused by tobacco, and will greatly reduce the number of children who become addicted to this devastating product.[1]

As they represented to this Court when they moved to intervene, the Public Health Intervenors do not address the liability question here. Rather, they endorse the Government's position that, since the early 1950's, the defendants have engaged in a pattern of racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to deceive consumers – particularly children and people in minority communities – so that they will start smoking tobacco and continue to smoke. This brief is focused solely on remedial issues, based on the premise that the remedial recommendations are appropriate if the court finds in favor of the Government on the liability issues.

The Public Health Intervenors believe that the Court will agree with the Government that the defendants have violated RICO by (1) denying that tobacco is addictive and that

---

[1] The interests and expertise of each of the Plaintiff-Intervenor organizations are thoroughly described in the memorandum in support of their motion to intervene and the accompanying declarations, and will not be repeated here.

tobacco use and exposure to second-hand smoke causes cancer and other serious illnesses; (2) marketing tobacco products to children to ensure a steady stream of addicted, repeat customers; (3) manipulating nicotine levels in cigarettes to ensure that consumers will continue to buy them; (4) marketing "low-tar" and "light" cigarettes so that smokers who want to quit will instead switch to these products and stay addicted to tobacco; and (5) suppressing important information about the hazards of smoking.

The Public Health Intervenors also endorse the Government's position that there is ample evidence concerning the nature, seriousness, and extent of defendants' RICO violations here to conclude that there is a reasonable likelihood that these activities will continue to occur in the future. See, e.g., United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (in a RICO case, the likelihood that defendants will commit wrongful acts in the future may be established "by inferences drawn from past conduct"), accord, United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, 871 F.2d 401, 409 (3d Cir. 1989); see also SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978) (to order equitable relief, court must find that there is a "reasonable likelihood of further violation[s] in the future"); SEC v. First City Fin. Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989) (to determine whether there is a "reasonable likelihood" of future violations, court should look at the "propensity for future violations based on the totality of the circumstances"). For all of these reasons, this brief will focus on how to prevent and restrain the defendants from committing future RICO violations.

The Public Health Intervenors propose the following remedies in addition to or, where appropriate, instead of the remedies proposed by the Government. These remedies include, but are not limited to, injunctive relief to curtail specific acts; a tobacco industry-

funded effective cessation program and public education program developed in a manner specifically to deter and prevent the defendants from continuing their wrongful acts; a program designed to specifically deter and prevent the defendants' from continuing their wrongful acts by fining the defendants if youth tobacco use reduction targets are not met, and a system for monitoring the defendants behavior to prevent future violations and curtail them when they occur.

As further demonstrated, all of these proposed remedies are consistent with Section 1964(a) of RICO, which provides the Court with jurisdiction to "issue a variety of orders 'to prevent and restrain' future RICO violations." United States v. Philip Morris USA., 396 F.3d 1190, 1198 (D.C. Cir. 2005). Thus, the proposed remedies are "forward-looking" and aimed at future violations. Moreover, in a case such as this one, where the evidence demonstrates that effective remedies must not only be comprehensive, but take into account the evidence of the defendants' history of evading and circumventing voluntary agreements, public pledges court orders, and legislative and regulatory restrictions, the Court may issue "appropriate orders" consistent with the language of the statute that go beyond specific, narrowly crafted injunctive relief.

The cessation program, public education program, and youth reduction penalty provision has been constructed to change market conditions to deprive the defendants of the means to engage in future wrongdoing, and of the future benefits of such wrongdoing, and by doing so, to reduce the likelihood of further violations.

These remedies are not designed to penalize the defendants for past wrongdoing; and, despite the Public Health Intervenors' belief that it would be legally appropriate to do so, they are also not designed to deprive the defendants of the benefits of, or cure the future

effects of, past wrongful acts. Rather, these remedies, if implemented, would prohibit the tobacco industry from violating RICO in the future, by depriving the defendants of the future benefits of their continuing and future wrongful acts.

As Dr. Bazerman testified, such remedies – if adequately funded and implemented – will create strong economic disincentives for the defendants to continue to deceive the public, which, in turn, will alter their corporate practices in ways that further "prevent and restrain" RICO violations. Bazerman WD, 4/28/05, 65:7-20. This kind of relief is necessary here, because the defendants' past practices demonstrate that, given the enormous profits the industry has reaped from its wrongful practices, the defendants have an enormous stake in finding ways to continue to deceive consumers, including young people who do not yet smoke, and to dissuade those who already smoke from quitting. Therefore, an essential step in stopping the defendants' similar behavior in the future – and thereby to "prevent and restrain" future violations of RICO – is to fashion remedies that will make it economically unprofitable for the defendants to continue to engage in these practices.

Broad remedial measures are also necessary because these defendants have shown a consistent history of circumventing public pledges, voluntary agreements, settlement agreements containing specific prohibitions, and direct legislative restrictions placed on their marketing activities, in order to continue their efforts to convince consumers to begin smoking, and to mislead already addicted customers in order to keep them smoking. For this reason, direct prohibitions to refrain from the unlawful acts at issue in this case need to be supplemented by more comprehensive remedial measures that eliminate the motive and/or means for continuing to engage in wrongful behavior in order to end those practices.

The remedies proposed by the Intervenors accomplish these forward-looking goals in several ways. First, these remedies will change future market conditions to deprive defendants of additional benefits of further illegal behavior by changing economic incentives. For example, as will be explained in more detail below, the evidence demonstrates that youth smoking rates are higher than they would have been without defendants' marketing practices and their fraudulent claims that they do <u>not</u> market to children. Therefore, by depriving the defendants of any profit if youth smoking rates are not reduced, the youth smoking reduction target provisions will eliminate any motive for the defendants to continue to violate both the specific and general prohibitions related to youth marketing. In addition, by imposing penalties high enough that defendants actually are worse off financially if those targets are not met, these remedies will provide a powerful specific economic disincentive to the defendants engaging in such practices.

Likewise, by requiring the funding of an effective, adequate, ongoing, independent youth public education campaign, the Court will minimize, if not eliminate, the impact of any efforts by the defendants to market to children. By doing so, the public education campaign will eliminate the financial benefit in the future to the defendants of engaging in any wrongful marketing practices that impact youth and, therefore, also eliminate the economic incentive to engage in such practices. In addition, by gearing the public education campaign payments to a standard based on youth smoking rates, as the Intervenors propose, this remedy will dramatically increase the cost to defendants of any violation. If the youth public education campaign is successful, it will also reduce the number of likely smokers among youth, thereby depriving the defendants of a market of likely smokers; and, the smaller the

potential market, the less the benefit of major expenditures to attract that market. As Judge Williams observed in his concurring opinion, altering the relative "returns to crime versus the possible costs" will, in turn, alter the likelihood of criminal action. 396 F.3d at 1203.

The same rationale applies to the funding of a sustained nationwide cessation program aimed at smokers who indicate a desire to quit. Thus, the evidence at trial detailed a series of acts by the defendants aimed at keeping smokers who indicate a desire to quit from doing so. In fact, the evidence presented by the Government indicated that approximately 70% of all smokers fall into this category. Therefore, as long as a significant population of smokers indicate a desire to quit, the defendants will continue to engage in fraudulent practices designed to deter them from doing so.

The Government's proposal does not go far enough in altering the economic incentives of the defendants or eliminating a sufficient number of these smokers to deprive the defendants of the benefits of continuing to find ways to keep these individuals as smokers. Thus, the Public Health Intervenors propose that the cessation program be funded at the level recommended by the Government's own expert witness, and that funding continue until no more than 10% of those individuals who continue to smoke indicate a desire to quit. By doing so, the program will prevent future wrongdoing in several ways. It will impose an addition financial cost to the defendants if the target goals are not met, and it will decrease the target population that has been the object, and continues to be the object, of the defendants' fraudulent acts to a level that will reduce the returns to the defendants of continued wrongful behavior, thus altering both their motive to engage in these acts and the likelihood that they will do so.

Second, the Public Health Intervenors' proposed remedies will change market conditions to stop future illegal behavior by depriving the defendants' of the means to engage in such wrongdoing. Cessation treatment eliminates those addicted smokers who want to quit. By eliminating the addiction of those consumers, this remedy will necessarily remove from defendants' customer base those people who are the targets of the defendants' lying about safer cigarettes. Likewise, the countermarketing remedy will eliminate the receptivity of youth to defendants' fraudulent marketing tactics, and thereby remove from the marketplace these young people who are the targets of those practices.

As explained below, the Public Health Intervenors' proposed remedies are also supported by the plain language of Section 1964(a) of RICO, which allows the Court to issue orders requiring the defendants "to divest" themselves of the future benefits they receive as a result of their ongoing illegal acts. The Intervenors' remedies will accomplish this in two ways: first, by depriving defendants of the additional profits they would otherwise receive in the future from smokers who quit smoking as a result of the cessation, public education, countermarketing, and youth target reduction remedies; and second, by reducing the number of smokers and would-be smokers upon whom the defendants can prey in the future.

Therefore, and as more fully explained below, all of the Public Health Intervenors' proposed remedies are both permissible and required to ensure that this Court effectively remedies the RICO violations that have extensively been documented here as likely to continue.[2]

---

[2] As the Court knows, on July 18, 2005, the United States filed a petition for certiorari of the D.C. Circuit's opinion. United States of America v. Philip Morris USA, Inc., et al.,

I. BACKGROUND: THE UNIQUE CHARACTERISTICS OF THE TOBACCO INDUSTRY.

Before turning to each of the precise remedies advocated by the Public Health Intervenors, it is important to briefly review the evidence that demonstrates why broad, comprehensive remedial measures are essential here, in addition to specific prohibitions that directly address the unlawful behaviors of the defendants that were demonstrated at trial. Underlying the evidence are a number of factors that make this case unique, and demonstrate that it is critical to fashion remedial measures that go beyond narrow injunctive relief.

The evidence demonstrates that this industry and these defendants in particular, are unique in many respects. First, virtually all of the defendants' new consumers are children too young to purchase the product legally, putting a much greater premium for the defendants on attracting these new users and then lying about their practices. Second, the product at issue is highly addictive, making a new youth smoker much more valuable to the defendants, and making it much more difficult for addicted smokers to quit even when they desire to do so. Third, cigarettes not only kill one out of two long-term users, they are the only consumable product sold that, when used exactly as recommended by the manufacturer, are lethal. Fourth, the vast majority of defendants' customers express a

---

pet. for cert. filed, No. 05-92 (July 18, 2005). In the event that the Supreme Court grants that petition, the Public Health Intervenors would request that the Court stay the remedies phase of this case until the Supreme Court issues a ruling, and, should such a ruling restore any disgorgement remedy, or otherwise address the scope of permissible remedies in this case, the Intervenors would also request an opportunity to submit a supplemental brief to this Court concerning these issues.

desire to quit using their products, provide significant incentives for the defendants to engage in further fraud in order to prevent these people from leaving their customer base.

The evidence also demonstrates that the defendants' behavior is unique because it reflects a 50-year pattern of continued fraud and deception, despite repeated public promises of reform, legislative and regulatory inquiry and action, and judicial intervention. Indeed, the tobacco industry's own continued behavior in the face of repeated efforts by all three branches of the Federal Government to bring about meaningful reform demonstrates that it has long been the conclusion of these defendants that it is essential for their business success to engage in the very type of fraud and deception that the Government demonstrated at trial.

For all of these reasons, it is essential that the Court adopt a comprehensive remedial approach to prevent and restrain the defendants from continuing to engage in the type of fraud and deception that has been a part, and remains a part, of this industry's standard operating procedure.

A. The "Youth-Initiation" Market Dynamic.

The defendants have known for decades, and peer-reviewed studies of a nationwide scope demonstrate that "[l]ess than one-third of smokers start after age 18." 507241613-1838 at 1617 (US 20774) (A); see also Dolan WD, 69:6-8; Eriksen WD, 1/17/2005, 3:12-23 (surveying the literature and concluding that over 80 percent of adults who smoke started smoking before age 18). Indeed, observing this phenomenon, Thomas Sandefur, former CEO of Brown & Williamson ("B&W") crassly stated, "we need to hook 'em young and hook 'em for life." Wigand WD, 89:8-15. Thus, given the low

initiation rate for adult smokers, the defendants know that they must market to youth because "younger adult smokers are the only source of replacement smokers." 501928562-8550 at 8526, 8465 (US 76187) (A); see also Dolan WD, 94:4.

Tellingly, the defendants confirm in their own words that this youth-initiation market dynamic is qualitatively unique to the tobacco industry. Thus, at a "Marketing Workshop for Law Department," an R.J. Reynolds presenter exhorted that "[b]ecause smoker loyalty is so high, younger adults are more important in cigarettes than in other businesses." 501893936-4129 at 3953, 3955 (emphasis added) (US 66350) (A). The same presentation concluded that "[y]ounger adult smoker gains have been a long term indicator of the brand's total market share gains." Id. (emphasis added). This unique quality derives from the fact that, unlike virtually any other legal consumer product imaginable, cigarettes are extremely addictive when used exactly as intended and directed.[3]

This approach to youth as an investment whose dividends are to be realized over the "long term," id., is a constant refrain throughout the defendants' internal documents. For example, in a 1989 internal memorandum entitled, "Dollar Value of YAS [Young Adult Smokers] Over Time," an R.J. Reynolds executive stated that "if we hold these

---

[3] It is also beyond question that cigarette products are also highly addictive, despite the defendants' repeated and fraudulent public protestations to the contrary. See, e.g., VXA0300208-0848 (US 64591) (A) (U.S. Surgeon General, Health Consequences of Smoking: Nicotine Addiction); Eriksen WD, 1/17/2005, 33:5-34:14 (describing how an individual smoker transitions from her first cigarette to physiological addiction and regular use); DeNoble WD,:18-15:22 (detailing industry research on nicotine's addictive properties). Moreover, the addictive nature of cigarettes virtually guarantees the defendants a continuing, steady revenue stream from individual consumers for the duration of the consumers' addictions. See, e.g., Gruber WD, 22:2-23:21 (using mortality and quit rates to determine revenue from lifelong smokers).

YAS for the market average of 7 years, they would be worth over $2.1 billion in aggregate incremental profit. . . . this *payout* should be worth a decent sized investment." 507181261-1261 at 1261 (US 20007) (O) (emphasis added); see also 501140435-0494 at 0453 (US 48724) (A) (recommending in the "Salem 1971 Annual Marketing Plan," that "[y]ounger adults must be recruited for trial and subsequent long-term loyalty") (emphasis added). This investment theme surfaces again in a 1984 memorandum between R.J. Reynolds executives: "[a]ttract a smoker at the earliest opportunity and let brand loyalty turn that smoker into a valuable asset." 502033156-3157 (US 49017) (A) (emphasis added). Therefore, youth smokers are undeniably a long-term investment for this industry, whose "value . . . compounds over time." 507241613-1838 at 1617 (US 20774) (A) (emphasis added). In sum, and using the lexicon of the defendants' own investment-based approach, the initial investment in illegal youth marketing yields important long-term dividends.

Indeed, the defendants admit that the youth-initiation market dynamic not only makes youth marketing essential to their profit forecasts, but also to their survival within the industry as a whole. For instance, a long-range planning document setting forth R.J. Reynolds's "Planning Assumptions and Forecast for the Period 1977-1986" noted that "the 14 to 18 year old group is an increasing segment of the smoking population," and concluded that it is therefore necessary to "establish a successful new brand in this market if our position in the Industry is to be maintained over the long term." 501630269-0288 at 0282 (US 60642) (A) (emphasis added). Given the force of the

youth-initiation market dynamic, as illustrated below, the defendants have structured their fraudulent and unlawful marketing efforts accordingly.

For instance, Philip Morris' internal documents reveal that, as early as 1953, it had measured the youth smoking demographic and deduced that "we have our greatest strength in the 15-24 age group." 2022239142-9147 at 9142, 9144 (US 22931) (A). In fact, during that decade, the leading cigarette manufacturers spent $1.2 billion on advertising, with an estimated 46 percent of television advertising alone reaching children. See 03573546-3751 (US 75032) (A) (Federal Trade Commission, Trade Regulation Rule, Table 10, (Sep. 1964)); FTCDOCS 004917531821 (JD 003567) (O) (Federal Trade Commission, Report to Congress, Table 7).

The intensity of youth-targeted cigarette advertising accelerated throughout the following decades, as illustrated by a "1975 Marketing Plans Presentation" sponsored by R.J. Reynolds, which emphasized "the growing importance of the young people in the cigarette market," and specifically defined the "young adult market" as the "14-24 age group." 500746950-6976 (US 21609) (A) (emphasis added); see also Dolan WD, 92:6. The presentation further stressed that this age group "represent[s] tomorrow's cigarette business." Id. (emphasis added). Therefore, to capitalize on this market, the "strategy becomes clear . . . . direct advertising appeal to the younger smokers . . . . with increased advertising insertions in traditional young adult magazines like Sports Illustrated, Playboy and Ms." Id. In sum, the presentation called for a targeted marketing campaign to "reach young adults where they work, play, and where they purchase their cigarettes." Id.

Having recognized the centrality of youth initiation to their continued financial viability, the defendants continued to target their advertising efforts to this segment of the population throughout the 1980s and 1990s. For example, in 1988, R.J. Reynolds launched its Joe Camel campaign, which featured a cartoon camel character widely recognized by children. See Biglan WD, 19:4-20:2 (citing empirical findings that children as young as six years old had over 90 percent recognition of Joe Camel, and that one third of smokers under age 18 had smoked Camel cigarettes). Indeed, by the year 2000, the Surgeon General observed that the highly effective Joe Camel campaign "epitomized" the influence of the defendants' marketing "on minors' understanding of tobacco use and on their decision to smoke." VXA1240104-0567 at 0130, 0272 (US 64316) (A) (U.S. Surgeon General, Reducing Tobacco Use (2000)) (confirming the association between "an increase in smoking initiation among adolescents during 1985-1989" and "considerable increases in promotion expenditures, as exemplified by the Joe Camel campaign").

As demonstrated by more recent youth marketing, the economic incentives to addict smokers during childhood continue to guide the defendants' behavior, even in the face of legally-binding settlement provisions prohibiting them from doing so, including those in a Master Settlement Agreement ("MSA") between the tobacco companies and numerous states. A particularly compelling example is the Kool Mixx advertising campaign launched in 2004 by B&W. That campaign used images of popular urban hip hop culture to deliver its marketing message that "DJ's are the Masters of the Hip Hop like Kool is the Master of Menthol. Kool Mixx special Edition Packs are our mark of

respect for these Hip Hop Players." ADV1150001-0117 (US 88094) (A). The advertisements appeared in a special edition of *Rolling Stone* magazine, and featured cartoon-like graphics of hip hop DJ's and young people dancing, as well as a music CD-ROM. USX5420003-0008 (US 89164) (A).

The Kool Mixx campaign was roundly denounced by minority communities as an initiative to "escalate [B&W's] targeting of black youth" by way of a "special cigarette package." US FF § III.E(7)(d), ¶ 4844 (citing statement of the National African American Tobacco Prevention Network). Attorneys General in three states thereafter brought suit against B&W for violating the MSA's prohibitions on youth marketing, resulting in a $1.46 million settlement to fund youth smoking prevention programs. See USX5560095-0114 (US 92037) (A) (settlement agreement between R.J. Reynolds and B&W and the Attorneys General of Maine, Illinois, and Maryland).

In fact, the Record demonstrates that the tobacco industry particularly targeted young people in economically disadvantaged settings. See, e.g., Carmona WD, 4/27/05, 16:6-14 ("racial/ethnic minority populations have been targets of tobacco industry marketing efforts, including sponsorships of cultural events and funding of organizations"); "Black Opportunity Analysis," (US 89347) (A) (R.J. Reynolds document exploring ways to market cigarettes to "Blacks"); see id., at 50592-5294 (stating that marketing executions "must evoke the "Hey, they're talking to me" reaction among Blacks," and that "Black-targeted efforts must accurately embody Black customs, cues, and symbols"). The Record also shows that such consumers lack the financial resources necessary to take advantage of currently available tobacco cessation programs. See, e.g.,

Carmona WD, *supra* (“racial and ethnic minorities typically have less access than non-Hispanic whites to appropriate cessation and prevention assistance”); Fiore TT, 5/17/05, 21287:14-22 (explaining that the “cost barriers” for people who want to quit smoking “are particularly important because of the high rates of smoking among the impoverished in America, the high rates of smoking among people who don’t have any insurance . . .”).

It is manifest that the defendants cannot continue to market to youth unless they also continue to violate RICO by placating the public, public officials and regulatory agencies with fraudulent public statements that they do not market to youth. See, e.g., 178200001-0132 at 0095 (US 35023) (A) (B&W executive testifying before the U.S. Senate in 1998 that the company has "a policy that we do not promote our products to kids or underage smokers”).

B. Preservation of the Defendants’ Market Requires Continuation Of the Campaign of Fraud and Conspiracy Designed To Prevent Consumers From Giving Up Tobacco.

As the Record also demonstrates, widespread fraud by the tobacco industry is also required to prevent a large part of its consumer base who would otherwise quit smoking from abandoning defendants’ product. It is important to stress that the tobacco industry is unique in this respect – i.e., it is difficult to identify another industry with a vast majority of customers who want to stop using its products, but are physically and psychologically unable to do so. See, e.g., Dolan WD, 101:1-106; Fiore WD, 5/9/2005, 42:13-14 (testifying that “most surveys” indicate that 70 percent or more of smokers seek to quit).

Moreover, many of those who consider quitting do so "because of concerns for their health." Dolan WD, 121:1-14.[4] However, as Dr. Dolan testified, if the smokers who wished to quit actually did so, it would present a "great threat to the companies' financial performance." Dolan WD, 103:2. Therefore, as early as the 1950s the defendants realized that this unique market dynamic posed an unusual marketing challenge – i.e., to find a "compromise" that would placate their consumers' health concerns but nevertheless keep these customers smoking. Burns WD, 69:3-14.

In pursuit of this task, over the decades the defendants commissioned numerous consumer perception studies to measure and understand their consumers' health concerns. For example, in 1982, R.J. Reynolds commissioned a "Product Research Report" which found that consumers who were "extremely concerned" about their health"primarily seek products that are lowest in tar." 503394459-4485 at 4463, 4467 (US 85036) (A). The strategic marketing response that emerged from these research efforts took the form of "health descriptors" or "health reassurance" labels such as "light" and "low tar," which the defendants have used in advertisements and on the packaging of their products for more than five decades. See Dolan WD, 118:4-19:21; 126:8-16. These statements represented, both explicitly and implicitly, that "low tar" products were more health protective than regular tar cigarettes. See, e.g., 91797854-7855 (US 74413) (A) (asserting in a 1952 advertisement that "[n]o other cigarette approaches such a degree of

---

[4] These health concerns first arose as early as the 1950s, when "the evidence implicating cigarette smoking as a cause of lung cancer became overwhelming . . . . [t]he research that appeared in the most elite, peer-reviewed journals all reached the same conclusion: that cigarette smoking was a serious health hazard that caused lung cancer and death." Brandt WD, 66:10-67:6. Since the 1950s, the consensus and its empirical support have only grown broader and deeper. See, e.g., TLT093001-0949 (US 88621) (U.S. Surgeon General, Health Consequences of Smoking (2000)).

health protection and taste satisfaction. Stop and think . . . and you'll start to smoke KENT"); (US 5578) (A) (conveying a fictional character's opinion in a 1977 advertisement that "like a lot of people I'm . . .aware of what's being said [regarding adverse health effects of smoking] . . . . I began searching for a cigarette that could give me less tar . . . . What am I doing about smoking? I'm smoking Vantage"); (US 9241) (A) (proclaiming in 1994 advertisement that "You can switch down to lower tar and still get satisfying taste. You've got MERIT.").

However, the Record also demonstrates that these descriptors were fraudulent. As the evidence adduced at trial overwhelmingly shows, the defendants knew and intended that "brand descriptors communicat[e] a less hazardous cigarette than full-flavor brands," Bonhomme WD, 20:3-6, while at the same time they also knew that these communications were, in their own words, "misguided." 1000046626-6661 at 6655 (US 20074) (A) (noting in 1977 Philip Morris internal memorandum that the implied health protective claims "rest on a set of fallacious premises" because the "data that [have] been used to justify the campaign for low nicotine cigarettes does nothing of the sort"). Therefore, tragically, smokers who switched to light and low tar mistakenly believed that doing so resulted in a real risk reduction of adverse health effects, when in fact, the perceived risk reduction was an "illusion." DXA0310399-0650 at 0418 (US 58700) (A) (National Cancer Institute, Monograph 13). This perceived risk reduction, in other words, was "substituted for a real risk reduction that would have occurred had the smoker quit smoking altogether." Id.

Put simply, the health descriptors fraud was and continues to be necessary to "deter[ ] smokers from quitting," so that defendants can maintain as many users of their products as possible. TLT0930001-0949 at 0911 (US 88621) (A) (U.S. Surgeon General Report (2004)). Thus, this unique market dynamic – posed by a consumer demographic that overwhelmingly wants to quit using the product – requires systemic fraud to maintain this part of the customer base. See Dolan WD, 118:4-19:21; 126:8-16 (testifying that without health descriptors, many smokers who wished to quit would have done so rather than accepting "light" cigarettes as a compromise between their health concerns and the difficulty inherent in quitting).

Moreover, the "threat to the [defendants'] financial performance," see Dolan WD, 103:2; posed by their consumers' health concerns continues to this day, as reflected by the defendants' continuing use of the misleading health descriptor terms. Therefore, as with the "youth-initiation" market condition described above, this unique market incentive will, by its very nature, create a propensity for defendants to continue to violate RICO.

C. The Defendants Repeatedly Circumvent And Evade Constraints On Their Behavior.

The Record also contains multiple examples, dating back decades and continuing today, of the defendants circumventing, evading and undermining voluntary agreements, legislation, regulations, requirements of litigation settlements and court orders that placed restrictions and commands on their conduct. Historical examples include the voluntary Advertising Code of 1964, the broadcast advertising ban of 1971, and defendants' longstanding efforts dating back to the 1960s to undermine and manipulate the Federal Trade

Commission's (FTC) tar and nicotine testing method. Moreover, it is of particular relevance in determining the kinds of remedies that the Court should impose that defendants' pattern of behavior continues today, as exemplified by defendants' numerous violations of the spirit and letter of the Master Settlement Agreement (MSA) and violations of Orders of this Court during the course of this litigation.

The inadequacy of traditional forms of injunctive relief to prevent and restrain future illegal acts by the tobacco industry is perhaps best demonstrated by defendants' long record of circumventing and evading restrictions concerning marketing to youth. For example, in 1964, defendants responded to the threat of federal regulation and growing public pressure by adopting a voluntary Advertising Code that the industry claimed would prevent marketing to underage smokers. 2025345360-5362 (US 20414) (A). As the Record demonstrates, defendants wrote the Code with loopholes that would permit them to continue to market to youth; they did not follow and continue not to follow many of the Code's provisions; and by 1970, they had completely abandoned the Code's enforcement mechanism. Krugman WD, 163:19-182:23. See also US FF § III.E(3)(a) & (b). Therefore, as summarized by Dr. Dean Krugman, a government witness with expertise in mass communication and marketing communication, "The industry's Advertising Code … has been largely ignored by the industry and has not stopped the tobacco companies from marketing to teenagers." Krugman WD, 163:22-164:5. Nevertheless, defendants sought to reap public relations benefits and to head off further restrictions on their marketing by repeatedly citing the code as preventing them from marketing to young people. Krugman WD, 165:10-166:2; see also US FF § III.E(3)(a), ¶¶ 4063-4078.

Defendants similarly continued to engage in marketing that is effective at reaching youth by circumventing the 1971 Broadcast Ban – the federal law that banned cigarette advertisements on television and radio. See US FF § V.A(2)(b), ¶¶ 22-29. Defendants circumvented the ban by sponsoring music and sporting events, including the Virginia Slims professional women's tennis tournament and Marlboro professional auto racing events, which resulted in and, in the case of the Marlboro racing sponsorship, continues to result in widespread television coverage of cigarette brand names and imagery. See, e.g., Krugman WD, 103:9-19, 107:21-112:23. Defendants also responded to the broadcast ban by massively increasing expenditures on billboard advertising, as well as print advertising. Thus, according to a May 1981 FTC Staff Report, "[t]he top five outdoor advertisers in 1979 were the five largest cigarette companies. Almost half of all billboards in the United States advertise cigarettes." (JD 004744) (A) (FTC, Staff Report on the Cigarette Investigation (1981), ch. 2 at 2-5).

The Record further shows that this circumvention of restrictions on marketing to youth has continued since the defendants agreed to the MSA in November 1998. See, e.g., US FF § V.A(3)(a). Thus, according to FTC annual reports on cigarette marketing, in the four years after the MSA, from 1998 to 2002, overall cigarette brand marketing expenditures in the U.S. (including both advertising and promotion expenditures) increased by 85 percent to $12.47 billion. (JD-013056) (A) (FTC, Cigarette Report for 2002 (2004) at 1). Moreover, the largest increase was in the category of price discounts, which in 2002 totaled $7.87 billion or 63.2 percent of overall cigarette marketing. Id.; see also Chaloupka WD, 73:3-14. Not surprisingly, as Dr. Frank Chaloupka, testified, teenage smoking behavior is two to three

times more sensitive to price than smoking among adults – a fact well known by the defendants. See Chaloupka WD, 94:23-124:4.[5]

In addition to these overall marketing trends, the Record contains multiple, specific examples of how defendants have violated both the spirit and the letter of the MSA. Indeed, as the Government aptly summarizes, RJR has been "a serial violator of the MSA." (US FF § V.A(3)(a), ¶ 59). Thus, for example:

> In an action initiated by the California attorney general, California courts found that RJR violated the MSA's prohibition against youth targeting by continuing to place cigarette ads in magazines with high youth readership. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal.Rptr.3d 317, 322-23 & n.3 (Cal. Ct. App. 2004). RJR has also been found to have violated the MSA by placing cigarette advertisements at an auto racetrack year-round and by promoting tobacco brand name matchbooks. See State ex. rel Goddard v. R.J. Reynolds Tobacco Co., 75 P.3d 1075 (Ariz. Ct. App. 2003); People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal.Rptr.2d 151 (Cal.Ct.App.2003); and State ex. rel. Petro v. R.J. Reynolds Tobacco Co., 820 N.E.2d 910 (Ohio 2004).
>
> As mentioned *supra*, three states filed actions against B&W in 2004 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 in this action), and agreed to restrictions on their future Kool Mixx promotions and monetary payments to support youth smoking prevention. (US 92037) (A).
>
> Philip Morris and Altria have circumvented the MSA provision restricting participating manufacturers to only one brand name sponsorship, by sponsoring two Marlboro motor sports teams, the Marlboro Indy Racing League Team and the Marlboro Formula 1 racing team. See US FF § V.A(2)(c)(ii), ¶¶ 35-41. Both receive

[5] Despite the requirements of the MSA, the Record details a long list of other forms of cigarette marketing that Defendants continue to engage in today and are effective at reaching youth. See US FF § ES-32 ("Cigarette Company Defendants continue to advertise in youth-oriented publications; employ imagery and messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youths will frequent such as convenience stores; engage in strategic pricing to attract youths; increase their marketing at point-of-sale locations with promotions, self-service displays, and other materials; sponsor sporting and entertainment events, many of which are televised or otherwise broadcast and draw large youth audiences; and engage in a host of other activities which are designed to attract youth to begin and continue smoking").

> significant television and other media coverage in the United States, exposing American youth to the Marlboro brand name and imagery.[6]

As several witnesses testified, such circumvention of the MSA is far from an isolated episode, but simply the latest recurrence of a longstanding pattern of behavior. As Dr. Gruber testified, "defendants have shown an ability to adapt in order to circumvent the intent of restrictions on their behavior," and have a "history of strategically moving from one marketing medium to another and effectively harnessing new mediums in unpredictable ways." Gruber WD, 10:2-4, 12:4-14 (citing Dolan WD, 146; Krugman WD 101-102).

Defendants' circumvention of restrictions and commands on their conduct are not limited to those involving youth marketing. For example, on June 26, 2005, the state of Vermont filed a complaint and petition for contempt alleging that RJR has violated the MSA's prohibition against 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 (Superior Ct. filed July 26, 2005). In another example, even though the MSA required defendants to shut down and disband the Center for Indoor Air Research, Philip Morris has reconstituted this entity, at the same address and with

[6] Philip Morris defends having two Marlboro sponsorships on the grounds that Philip Morris International (PMI) is the official sponsor of the Formula 1 team and neither PMI nor Altria is a signatory to the MSA. But this rationale overlooks the ultimate control that Altria, as the parent company of Philip Morris and PMI, has over the use of the Marlboro logo and the ultimate effect of these multiple Marlboro sponsorships in undermining the intent of the MSA's sponsorship restriction, which Philip Morris CEO and chairman Michael Szymanczyk agreed at trial was "to reduce the exposure of youth to the cigarette brand names and reduce the association of cigarettes with athletic events." Szymanczyk TT, 4/11/05, 18375:18-18376:3.

the same director, under the name "Philip Morris External Research Program." US FF § V.H, ¶¶ 350-363.[7]

Defendants' long record of circumventing, evading and undermining restrictions and commands on their conduct, including their recent and ongoing violations of the MSA and violations of this Court's Orders, shows that there is a significant likelihood that they will continue to violate basic injunctions and that a comprehensive remedy is needed to prevent and restrain ongoing and future illegal behavior.

ARGUMENT

I. UNDER THE DECISION OF THE COURT OF APPEALS THIS COURT RETAINS THE EQUITABLE AUTHORITY TO CRAFT REMEDIES TO PREVENT AND RESTRAIN THE DEFENDANTS FROM CONTINUING TO ENGAGE IN THE RICO VIOLATIONS THAT HAVE BEEN PROVEN HERE.

Introduction

Section 1964(a) of RICO, 18 U.S.C. § 1964(a) – the provision at issue in this case – empowers the Court with jurisdiction to "prevent and restrain" violations of RICO, by issuing "appropriate orders," to prevent and restrain future violations. As the Court of Appeals observed, "Section 1964(a) provides jurisdiction to issue a variety of orders 'to prevent and restrain' RICO violations." Philip Morris, 396 F.3d at 1198. The statute gives as "examples" of such forward-looking remedies that go beyond specific injunctive relief both divestment and dissolution.

[7] The Court of course is aware of Defendants' violations of its Orders during the course of this litigation. BATCo, Liggett, Philip Morris and Altria have all violated this Court's Orders, resulting in financial and other sanctions.

As the Court of Appeals also noted, the Section 1964(a) statutory "words 'including, but not limited to'' introduce a non-exhaustive list that sets out specific examples of a general principle" to guide a court in fashioning an appropriate set of remedies. Id.; see also S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969) (stressing that the remedies listed in Section 1964(a) "are not exclusive"). Therefore, based on the Court of Appeals' decision, the general principle that should guide a court in a civil RICO case is that any such remedies must be "directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations," 396 F.3d at 1200, and should not "apply RICO to new purposes that Congress never intended." Id. at 1201 (other citations omitted). The Court concluded that, in its view, a backward-looking remedy violates this principle, but it did not circumscribe forward-looking remedies that are consistent with the purposes of RICO. Id.

In this case, the Public Health Intervenors propose a series of remedies that are carefully tailored to be forward-looking, and are structured specifically to prevent future violations. These remedies are consistent with the most cautious interpretation of the decision of the Court of Appeals. They include specific prohibitions to directly address specific wrongful activities about which evidence was presented at trial. A number of these prohibitions were included in Section V of the Government's proposed order, but the Intervenors' proposal goes beyond the Government's request because the Government's proposed order does not include remedies for all of the specific wrongful acts that it proved at trial, including several remedies that the Government specifically indicated in its closing argument it would request.

The Intervenors also include a cessation program that is more consistent with the evidence that the Government presented at trial, and that is different in critical respects from the limited cessation program that the Government has now proposed; a public education program that is consistent with the public education program proposed by the Government, but funded at a level and for a duration that is more consistent with the evidence the Government presented at trial, rather than the Government's current proposal; and a youth reduction target program that accepts the Government's goal of reducing tobacco use among youth by 42%, but, consistent with the trial evidence, does so more rapidly, and imposes a penalty that is far more likely to accomplish the goal of preventing the defendants from attempting to circumvent the Court's order with regard to youth marketing. The Public Health Intervenors concur with the Government that a system for monitoring the defendants' behavior is essential to prevent and restrain future violations, but we provide a number of suggested changes to the government's specific proposal to enhance its effectiveness.

Each of these proposed remedial measures has been constructed to change future market conditions, in order to deprive the defendants of the means and opportunity to engage in future wrongdoing, and to enjoy the future financial benefits of their wrongdoing; to counter the adverse impact of any wrongful actions by the defendants; and, by doing so, to eliminate the incentive for the defendants to continue to engage in such behavior in the future. Thus, as explained more fully below, the impact of each of these proposed remedies is entirely on future profits and future behavior.

Alternatively, some of these proposed remedies – the cessation, public education, countermarketing, and youth reduction proposals – can be separately justified under the

Court's power to order the defendants "to divest" the defendants of the assets of their ongoing wrongful behavior, i.e., the addicted smokers who generate additional new revenue for the defendants in the future by continuing to buy their products, and who also provide a vulnerable customer base upon which the tobacco industry can continue to prey with its deceptive and fraudulent practices. Therefore, as a forward looking measure, the industry can be obligated, through such programs, to give these individuals a meaningful choice about whether to continue to consume tobacco products, and hence, to continue to contribute to the defendants' profits.

Moreover, such an approach is completely consistent with the Court of Appeals' decision. Indeed, as Judge Sentelle himself observed, "[d]ivestment" is an appropriate remedy under RICO because it "separat[es] the RICO criminal from the enterprise so that he cannot commit violations *in the future*." 396 F.3d at 1198 (emphasis in original).

A. The Court Has Equitable Power Under RICO To Prevent And Restrain The Tobacco Industry's Unlawful Practices.

1. RICO Allows The Court To Prohibit Both Specific And General Practices As Necessary To Prevent Further Racketeering Violations By Defendants.

In furtherance of its authority to "prevent and restrain" violations of the law, RICO authorizes the Court to impose "reasonable restrictions on the future activities,"of defendants. 18 U.S.C. § 1964(a) (emphasis added). Accordingly, the specific prohibitions recommended by the Government and the Public Health Intervenors are appropriate remedies to prevent future violations. The Record also demonstrates the defendants' repeated history of finding ways to skirt and circumvent public pledges and direct restrictions on its practices in a manner that continues to accomplish the defendants' wrongful goals and that is detrimental to

the public interest. Therefore, the Court not only may impose non-injunctive remedies aimed at ensuring that the tobacco industry does not employ other modes of fraud and deception that result in millions of Americans wrongfully becoming and staying addicted to their products for years to come, it must do so in this case to effectively prevent such future violations. See S. Rep. No. 617 at 82 (noting that Section 1964(a) was intended to provide district courts broad remedial authority to prohibit defendants found liable of racketeering practices from "engaging in the same kind of activity in the future," and to ensure the "protection of the public interest against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest") (emphasis added); see also United States v. United States Gypsum Co., 340 U.S. 78, 88-89 (1951) (noting that the court is "not limited to prohibition of the proven means by which the evil was accomplished); Nat'l Soc'y of Prof'l Eng. v. United States, 435 U.S. 679, 698 (1978) (it is "entirely appropriate" for the court to devise a remedy that "goes beyond a simply proscription against the precise conduct previously pursued").

In addition, the Court may impose disclosure and monitoring requirements, to ensure that the industry does not violate the Court's remedial order. See, e.g., S. Rep. No. 617 at 83 (noting with approval the Department of Justice's observation that Section 1964(a) provides for "flexible remedies," that "may be effectively monitored by the Court to insure that its decrees are not violated") (emphasis added); see also United States v. Sasso, 215 F.3d 283, 290-91 (2d Cir. 2000) (approval of monitor to oversee the operations of a union found to be in violation of RICO).

Indeed, in his concurring opinion in the Court of Appeals decision in this case, Judge Williams recognized that, despite the unavailability of the disgorgement remedy, the Court still has "the whole available panoply of genuinely forward-looking remedies," including "express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations." Philip Morris, 396 F.3d at 1204 (Williams, J.) (concurring opinion) (emphasis added); see also id. at 1205 (recognizing that the Court may impose "transparency-enhancing and prior approval measures) (emphasis added). Accordingly, the Court clearly has the authority to impose such "transparency-enhancing" remedies here. Id.; see also United States v. Local 359, United Seafood Workers Union, 705 F. Supp. 894 (S.D.N.Y. 1989), *aff'd in part and remanded in part*, 889 F.2d 1232 (2d Cir. 1989) (approving appointment of administrator to monitor and investigate violations of decree in antitrust case); United States v. Local 30, United Slate, Tile and Composition Roofers, 696 F. Supp. 1139 (E.D. Pa. 1988) (appointing liaison officer to oversee union's compliance with detailed set of court-ordered regulatons).[8]

[8] In fact, in some cases, courts have gone much further to ensure that the defendants do not continue to violate the law, by actually appointing a trustee to oversee the entire business operations of the defendants. See, e.g., United States v. Local 560, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139, 1164 (E.D. Pa. 1988) (court appoints trustee of union to protect the members' rights).

2. Under the Court of Appeals Decision The Court May Require The Tobacco Industry To Fund Programs And Pay Fines For Future Wrongdoing To Prevent And Restrain the Defendants Future Activity By Depriving Them of the Future Benefit of Their Wrongful Behavior, Countering the Adverse Impact of any Violations and Depriving the Defendants of the Means to Engage in Future Wrongdoing.

The cessation program, public education program and youth reduction penalty provisions proposed here have all been constructed to change future market conditions to deprive the defendants of the means to engage in future wrongdoing, and to enjoy the future benefits of their wrongdoing, and to counter the adverse impact of any such violation by the defendat tobacco companies, and which, in turn, will reduce economic incentives to engage in future violations.

These remedies are not designed to penalize the defendants for past wrong doing; they do not impose penalties that are nothing more than a general non-specific deterrent; they do not seek to deprive the defendants of, or cure the future effects of, past wrongful acts. Rather, these remedies deprive the defendants of the <u>future</u> benefits of and/or undermine the impact of continuing and future wrongful acts, thereby altering the cost-benefit ratio to the defendants of engaging in such acts, and serving the goal of preventing and restraining future wrongful behavior. As Judge Williams observed in his concurring opinion,

> ordinarily <u>the forces most affecting the likelihood of criminal action are</u>, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: <u>the returns to crime versus the possible costs</u>, all adjusted for risk (such as risk of getting caught).

396 F.3d at 1203 (emphasis added).

Moreover, the cessation remedy, public education remedy and youth reduction target remedy proposed by the Intervenors are each directly linked to a goal that the evidence at

trial has shown would be an indicator of whether the defendants are continuing to engage in ongoing wrongful behavior. Thus, the cessation program will continue until the number of addicted smokers who say they want to quit is reduced to no more than 10%. Therefore, if the defendants engage in wrongful behavior that discourages smokers from participating in these programs, the cost to the industry will be greater and the program will continue longer. If the program is successful, it will counteract the impact of the efforts of the defendants to find ways to keep these individuals smoking, and will dramatically shrink the market of addicted smokers looking to reduce their health risks by quitting – i.e., those who would be the target of the defendants' wrongful practices in the future – thus, dramatically reducing the economic benefit to the defendants of continuing to engage in these behaviors.

The youth public education program will continue until youth smoking rates meet specified targets. Again, any future actions of the defendants that result in more youth smoking will result in increased costs to the defendants and a longer duration of the program. However, if the program is successful, it will both undermine the impact of industry youth marketing efforts – making those efforts less financially beneficial to defendants – and will also shrink the pool of likely youth smokers, thereby depriving the defendants of the customer base that would be the subject of any such violations.

The youth reduction target program is specifically designed to deprive the defendants of any profit from encouraging youth to smoke, and, indeed, as proposed by the Intervenors, will result in a net financial loss to the defendants if future wrongful behavior results in the failure to reach youth smoking reduction targets.

Therefore, because the cessation, public education and counter-marketing programs – as designed by the Intervenors – will be effective in countering the defendants' attempts to deceive consumers into starting to smoke and continuing to smoke, it will no longer be worth the industry's economic financial investment to continue such practices. See WD Bazerman, id., 65:10-14 ("[t]o the extent that effective cessation programs eliminate this population in the long term, or immunize this population against defendants' misleading marketing campaigns, they will also eliminate the incentives that encourage defendants to design and market cigarettes in ways intended to appeal to this population"); see also id., 65:17-18 (emphasis added) (testifying that "the logic is the same" with respect to an "effective" counter-marketing program).

These programs – if adequately funded and effectively administered – will also necessarily reduce the number of people who will be smoking in the future. Accordingly, there will be far fewer consumers upon whom the industry can continue to practice its fraud and deception in an effort to keep these people addicted to its products. As Dr. Bazerman testified, such remedies will "remove from the marketplace a population of consumers and potential consumers of defendants' products, namely children," and, accordingly, the defendants' "incentive to market to this population will be eliminated and their behavior will change accordingly." WD Bazerman, 65:7-20. Hence, for all of these reasons, the remedies proposed by the Public Health Intervenors will both "prevent and restrain" future violations by dealing "with the economic base through which those individuals constitute such a serious threat to the economic wel-being of the Nation," – precisely as intended by Congress. S. Rep. No. 617 at 79.

II. THE PLAIN LANGUAGE OF RICO AUTHORIZES THE COURT TO REQUIRE THE TOBACCO INDUSTRY TO FUND PROGRAMS TO REDUCE THE NUMBER OF CONSUMERS WHO ARE AND WILL BECOME ADDICTED TO TOBACCO.

In addition to the argument made above, the Public Health Intervenors believe that the Court also has the independent authority under the plain language of the statute to order the defendants to fund the cessation, public education and counter-marketing programs proposed here, and also to impose the youth-reduction rate remedy that we have requested, and that such authority is not at all circumscribed by the Court of Appeals' decision when applied in a forward-looking manner. Thus, RICO provides the Court with authority to "prevent and restrain" violations of the statute, 18 U.S.C. § 1964(a), including ordering the defendants to "divest" themselves "of any interest, direct or indirect, in any enterprise." 18 U.S.C. § 1964(a) (emphasis added). The word "divest" means "to take away," Webster's Third New International Dictionary, *supra*, (1993), and the term "enterprise" is specifically defined by RICO to include "any individual." 18 U.S.C. § 1961(4). Owasso Indep. School Dist. v. Falvo, 534 U.S. 426, 433 (2002) (in construing statutes, words must be given their ordinary dictionary meaning).

Therefore, under the plain language of the statute, this Court has the power to fashion remedies directed at depriving the defendants of their long-term future investment in the millions of Americans who are already addicted to tobacco but will refrain from quitting because of the defendants' continuing deceptive practices – e.g., their marketing of such products as the "low tar" and "light" cigarettes – and those who will become addicted to tobacco in the future as a result of the defendants' continuing deceptive marketing practices, all aimed at securing additional addicted customers.

An effective way to accomplish that goal here is to craft remedies that will actually reduce the number of people who are already addicted to tobacco – so that they will not fall prey in the future to the defendants' deceptive acts – and that also ensure that those who are not yet addicted, including young people and those living in disadvantaged communities, are given accurate information about the hazards of tobacco, so that such vulnerable segments of the community are not lured into smoking in the future by defendants' unlawful practices. Indeed, in enacting RICO, Congress was particularly concerned about remedying the effects that racketeering activities have on the economically disadvantaged, particularly with respect to "predatory method[s]" used to promote the use of addictive drugs. S. Rep. No. 617 at 211 (Additional Views of Senator Scott). Thus, as one member of Congress observed, "[o]ne of the most disturbing aspects of organized crime today is the fact that its preponderant impact is upon those least able to pay the price that organized crime exacts: the urban poor." Id. See also id. (explaining that the "end points" of the drug distribution system "are found primarily in the low-income neighborhoods of our major cities").

Moreover, as the Supreme Court explained in United States v. Turkette, 452 U.S. 576, 585 (1981), the overall "aim" of Section 1964 is not only to put a stop to the unlawful activities, but to "divest the association of the fruits of its ill-gotten gains." Here, of course, the "fruits" of the tobacco industry's continuing violations are the millions of people who are already addicted to tobacco, and hence continue to contribute to the coffers of the defendants on a regular basis. Id. (emphasis added); see also 116 Cong. Rec. 585, 603 (1970) (Remarks of Senator Yarborough) (noting that to prevent further RICO violations, wrongdoers must be divested of "any interest [they] may have obtained" through their illegal activities) (emphasis

added); see also Hearings Before the House Committee on the Judiciary on S. 30 (May 20, 1970) at 107, Memorandum from Senator John L. McClellan [126] (the civil remedies must be employed "as a means of requiring individuals who have used racketeering methods to acquire or operate legitimate businesses to divest themselves of their ill-gotten interests and to refrain from entering the same lines of business") (emphasis added).[9]

Indeed, Judge Sentelle himself acknowledged that "divestment" is an appropriate "forward-looking" remedy under Section 1964(a) because it "separat[es] the RICO criminal from the enterprise so that he cannot commit violations *in the future*." 396 F.3d at 1198 (emphasis in original). Here, the Intervenors seek to accomplish this "separation" through industry-funded cessation, public education, and counter-marketing programs.

Therefore, in view of the plain language of the statute, its legislative history, and the Court of Appeals decision, it is certainly indisputable that this Court may deprive the

---

[9] For these reasons, and particularly the Supreme Court's ruling in Turkette, that the purpose of Section 1964(a) in RICO is to "divest [the defendant] of the fruits of its ill-gotten gains," 452 U.S. at 585 – i.e., gains that the defendants have already "gotten"– Judge Sentelle's contrary statement that Section 1964(a) is limited to remedying only "future violations" of the statute, 396 F.3d at 1198, must be treated as dictum. Thus, this statement is not only "unnecessary" to the ruling on disgorgement (which, the Court held, is strictly punitive in nature), see McDaniel v. Sanchez, 452 U.S. 130, 141-42 (1981), but it also contradicts a prior ruling of the Supreme Court. See Waine v. Sacchet, 356 F.3d 510, 517-18 (4th Cir. 2004), citing United States v. Dixon, 509 U.S. 688 (1993); see also Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 17 (2003), (Scalia, J., dissenting) (noting that "dicta of course has no precedential value" when it contradicts prior holdings of the Supreme Court).

Indeed, in view of this legislative history and the Supreme Court's ruling in Turkette, the Public Health Intervenors also believe that it would be permissible for this Court to fashion remedies to ensure that the defendants do not also enjoy the financial benefits of their past unlawful acts. However, in light of the Court of Appeals' gloss on the scope of permissible remedies, as emphasized by this Court in Order # 886, for purposes of this brief, plaintiff-intervenors have limited their divestment argument to only those interests the defendants may obtain as a result of their continuing violations.

defendants of the future financial benefits of their continuing unlawful acts. In other words, organizations engaged in unlawful racketeering practices should not be allowed to continue to reap the benefits of their illegal practices. For example, if, instead of selling cigarettes, defendants were engaged in a fraudulent insurance scheme of selling insurance policies to the elderly that, while making promises of pay-outs, in reality paid nothing, after the Court of Appeals' decision, the government may be barred from obtaining an order forcing defendants to disgorge their ill-gotten past profits. However, nothing in the Court of Appeals' ruling would foreclose remedies designed to bar these defendants from continuing to force elderly policy-holders to pay premiums on worthless insurance policies, once the companies had been ordered to stop selling more such policies. Similarly, this Court should be allowed to impose remedies that would divest the tobacco industry of its future investment in all of the addicted consumers it succeeds in obtaining as a result of its continuing RICO violations.

In fact, the Record shows that defendants' entire racketeering scheme has been designed to convince as many people as possible that smoking is neither harmful nor addictive, so that the tobacco industry can attract new customers who will become dependent on this product for many years to come, and hence, be forced to continue to enrich the defendants. As the Intervenors also demonstrated *supra*, in light of the importance of the "youth initiation" dynamic, and the well-established pattern of industry circumvention of past restrictions on its behavior, there is every reason to believe that this industry will continue to engage in unlawful practices to attract and keep a robust customer base.

Therefore, to "divest" the tobacco industry of "the fruits of its ill-gotten gains," Turkette, 452 U.S. at 586 (emphasis added), the Court must fashion remedies that not only

direct the companies to cease their illegal practices, but also help reduce the number of people who have already become addicted to tobacco as a result of those practices, but who will be unable to quit smoking because of the industry's continuing deceptive marketing of substitute products. Such remedies would also prevent others from falling prey to the industry's invitation to start smoking in the future, so that the tobacco industry does not continue to make money from these future victims of its crimes.

III. THE SUPREME COURT'S DECISIONS IN THE ANTITRUST CONTEXT SUPPORT THE COURT'S AUTHORITY TO IMPOSE THE REMEDIES REQUESTED HERE.

The authority vested in the district court under Section 1964(a) of RICO, to "prevent and restrain" violations of that statute, is identical to the language used in the remedy sections of the antitrust laws, upon which RICO was expressly modeled. See, e.g., S. Rep. No. 91-617 at 81 ("[t]he committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field"); see also Comments of Department of Justice on S.1861 (August 11, 1961), S. Rep. No. 617 at 125 "[t]here is ample precedent for application of these civil remedies to the conduct sought to be prohibited by this bill in decisions of the Supreme Court upholding similar civil remedies in antitrust cases"). Therefore, in discerning the scope of its equitable power here, this Court may look to the extensive body of Supreme Court decisions construing the appropriateness of relief granted under the anti-trust laws.

The Supreme Court has repeatedly construed the "prevent and restrain" language of the antitrust laws to authorize the trial court to order defendants to divest themselves of the "future benefits from their forbidden conduct." Gypsum Co., 340 U.S. at 89 (emphasis

added); accord, United States v. Ward Baking Co., 376 U.S. 327, 331 (1964); see also United States v. Crescent Amusement, 323 U.S. 189 ("[t]hose who violate the Act may not reap the benefits of their violations"); accord, United States v. E.I. duPont De Nemours & Co., 366 U.S. 316, 326-27 (1951); International Salt Co. v. United States, 332 U.S. 398, 400 (1947) ("[t]he District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do").

For example, Schine Chain Theaters v. United States, 334 U.S. 110, 128 (1948), *(rev'd on other grounds by* Coppenweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984)), involved a corporation's unlawful use of buying power to maintain a monopoly in motion picture theaters, in violation of the Sherman Act. In reviewing the district court's remedial order, the Court held that it would be entirely proper under the "prevent and restrain" language of the statute to require the offending corporation to divest itself of those theaters that it had acquired as a result of the unlawful practices, so that the corporation could not enjoy the "dividends" of its unlawful conspiracy – i.e. the revenue those theaters would continue to generate in the future. Id., 334 U.S. at 128. Thus, the Court explained:

> [i]n this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project.

334 U.S. at 128 (emphasis added). As the Court further explained, "[t]o require divestiture of theaters unlawfully acquired is not to add to the penalties that Congress provided in the

antitrust laws." Id. Rather, "[i]t is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Id. (emphasis added).

Again, here, the tobacco companies' unlawfully acquired "empires," Schine Chain Theaters, are the millions of people who have already become addicted to tobacco, and hence continue to buy the defendants' products on a regular basis, as well as those individuals who will become addicted to tobacco in the future. Hence, even heeding the Court of Appeals' admonition that RICO remedies may only be directed at "future violations," 396 F.3d at 1198, to deny defendants the "future benefits" from their continuing "forbidden conduct," Gypsum, and to deprive the industry of its ability to keep the "empire" it perpetuates through its continuing violations of the statute, Schine Chain Theaters – i.e., the millions of addicted Americans who will become addicted to tobacco in the future – the Court must fashion remedies that will reduce the number of individuals who will fall prey to these practices.

As the Supreme Court has explained, otherwise, the defendants "could retain the full dividends" of their unlawful acts and continue to "profit" from the very practices that they have "inflicted" on the victims of their crimes. 334 U.S. at 128; see also United States v. Bausch & Lomb, 321 U.S. 707, 726 (1947) (upholding "equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful [acts]") (emphasis added); Ford Motor Co. v. United States, 405 U.S. 502, 574 (1972) (upholding district court decree requiring Ford to divest itself of all interest in a spark plug company it acquired in violation of the Clayton Act, so that it could not "perpetuate the anticompetitive effects of the [unlawful] acquisition") (emphasis added; National Society of Professional Engineers v.

United States, 435 U.S. 679, 697 (1978) (having found violations of the law, the district court was "empowered to fashion appropriate restraints on the [defendant's] future activities . . . to avoid a recurrence of the violation").

While these antitrust cases generally involve remedies of past violations of the law, they certainly are equally applicable to the issue of whether the Court may impose similar remedies with regard to continuing violations of the law. Indeed, Judge Sentelle himself recognized that such "divestment" remedies were perfectly appropriate under Section 1964(a). 396 F.3d at 1198.

IV. ALL OF THE REMEDIES REQUESTED BY THE PUBLIC HEALTH INTERVENORS ARE BOTH NECESSARY AND PERMISSIBLE.

The Public Health Intervenors set forth below all of the remedies that they urge the Court to impose in this case. As to those remedies and other provisions set forth in the Government's June 27, 2005 Proposed Order that are not addressed here, the Public Health Intervenors agree with the Government, and hereby incorporate by reference the Government's arguments with respect to those provisions. In addition, for the convenience of the Court and the other parties, the Public Health Intervenors have included as an Appendix to this brief a "red-lined" version of the Government's June 27, 2005 Proposed Order, which shows all of the changes to that Proposed Order that are advocated by the Public Health Intervenors. Moreover, as further demonstrated below, each of the remedies advanced by the Public Health Intervenors is also well substantiated in the Record in this case, will be effective in accomplishing its purpose, and is narrowly tailored to achieve that purpose.

A. Industry-Funded Cessation Program

1. The Cessation Program Should Be Funded at a Total of $4.8 Billion Per Year Until Less Than Ten Percent of Smokers Report That They Want Or Intend To Quit.

To divest the defendants of future dividends from their unlawfully acquired investments, and to adequately prevent and restrain future RICO violations, a smoking cessation remedy must be of sufficient scope and duration. The trial Record clearly demonstrates the essential features of such a program. An effective cessation remedy must, in sum provide: (1) $3.2 billion annually for a nationwide cessation "quitline," counseling services and approved cessation medications until less than ten percent of smokers want to or intend to quit; (2) include $1 billion annually for clinical research to develop new smoking cessation therapies, and for training, education, and other support of clinicians who administer cessation therapies; (3) include a $600 million annual public education campaign to build awareness of and encourage smokers to participate in the cessation program; (4) be administered by an independent Cessation Administrative Organization; and (5) be extended in duration if the defendants make future public statements that are inconsistent with certain conclusions of the Surgeon General of the United States (and therefore a violation of the final order of this Court). Nothing short of this comprehensive program, which totals $4.8 billion,[10] will successfully divest the defendants of their unlawful interest and prevent and restrain future RICO violations.

---

[10] The funding for cessation treatment and services should be adjusted annually for inflation using the Consumer Price Index (CPI)/Medical Care Services index. Amounts for research, training and education and public education should be adjusted by the general CPI.

a) Quitline, Counseling, and Medications

Dr. Fiore testified that an effective nationwide smoking cessation program would require annual funding in the amount of $3.2 billion for a proactive telephone “quitline” that offers barrier-free, evidence-based counseling, as well as access to free FDA-approved smoking cessation medications for all smokers who wish to attempt to quit. See Fiore WD, 5/9/2005, 50:11-22. This cessation program should be sustained until fewer than ten percent of all people who smoke want to quit or intend to quit. While Dr. Fiore’s original proposal was designed with the intention to “allow every smoker in America who wants to quit to do so successfully,” Fiore WD, 5/9/05, 69:3-23, 70:1-2, the Public Health Intervenors recognize that achievement of this goal is not pragmatic. As a result, the Public Health Intervenors recommend a 10 percent threshold level that would signal a drastic reduction from the current number of smokers who indicate they want to quit (currently estimated at 70 percent of smokers), see Fiore TT, 5/17/05, 21280:4-21281:7; see also (US 18267) (A), and would be a clear indication that the availability of comprehensive services, consistent with those proposed by Dr. Fiore, see Fiore WD, 5/9/2005, 17:22-18:20, in combination with sustained public education, has resulted in the vast majority of all smokers who want to quit or intend to quit having done so. This approach is goal-oriented rather than pinned to a specific date, which in and of itself does not measure whether the defendants have been divested of their illegally obtained investment. As described in the Public Health Intervenors’ proposed Order, progress

toward the ten percent target can be verified via periodic, objective, independent studies and surveys.

As part of the cessation remedy proposed here, the defendants would be permitted the opportunity to petition the IO after ten years, and every two years thereafter to adjust their payments for cessation treatment services downward if the IO determines that the ten percent target has been achieved that year, thereby permitting the consideration of a lower level of payment. Absent such a finding by the IO, however, the remedy as outlined above should continue in full force until divestiture has been achieved.

b) Research, Education, and Training

In addition to the $3.2 billion for quitline, counseling and treatment services outlined above, Dr. Fiore testified that an effective cessation remedy would also require $1 billion annually to fund cessation-based clinical research and professional training for those who administer the cessation programs. See Fiore WD, 5/9/05, 61:19-62:10, 65:21-66:6. Dr. Fiore explained that research and training programs are a necessary adjunct to the actual treatment programs they support. See id. As with the treatment services set forth above in subsection (a), the research, training and education programs should be maintained until fewer than ten percent of all people who smoke want to or intend to quit.

c) Cessation-Specific Public Education

In addition to the general public education and countermarketing remedy described below, an effective cessation program must have its own outreach and public education campaign so that those who seek to quit will know it is available, including both the benefits to themselves in terms of improved health and in terms of their family,

friends, and coworkers because of reduced exposure to secondhand smoke. As Dr. Fiore testified, "there is a substantial and consistent body of evidence that media campaigns, especially when they are integrated with other tobacco control actions, reduce the consumption of tobacco and the prevalence of tobacco use." Fiore WD, 5/9/05, 55:2-7. In addition, Dr. Fiore noted that,

> a comprehensive media campaign such as that described by the Cessation Subcommittee that includes four goals: first, to promote the use of the national tobacco quitline and other effective cessation interventions: second, to motivate tobacco users to make a quit attempt and increase demand for effective cessation services; third, to motivate parents to quit by informing them of the health risks that secondhand smoke poses to their families and informing them that their smoking increases the likelihood that their children will smoke; and fourth, to reach all segments of the population, including the most underserved and hard-to-reach populations such as low socioeconomic status, certain racial and ethnic minorities, and those of limited English proficiency.

Fiore WD, 5/9/05, 54:1-9.

Dr. Fiore also noted that such a "campaign needs to be guided by media and communications science as to the most effective messages and strategies to implement. It needs to be pervasive – that is, to be a consistent presence in the everyday lives of smokers in the same way smokers encounter tobacco marketing. To do that, the media campaign must use the full range of media – radio, television, print media, signage, Internet, etc." Fiore WD, 5/9/05, 54:11-15.

A cessation-specific public education campaign funded at the level of $600 million is necessary to support an overall cessation scheme of the scope proposed here. The $600 million for cessation is part of the larger $1.2 billion to be paid annually by the defendants for all public education related activities - $600 million for cessation and $600 million for public education and counter-marketing to reduce youth smoking, educate

consumers about the health risks associated with the use of and exposure to various tobacco products, and educating consumers about the health risks associated with exposure to secondhand smoke). US FF § V.B, ¶¶ 153. The total public education amount recommended by the Public Health Intervenors ($1.2 billion) is fully consistent with the amounts proposed by Dr. Michael Eriksen. See Eriksen WD, 5/9/05, 10:15-23.

d) Cessation Administrative Organization

The cessation remedy, including both the treatment and research and training components, should be overseen and implemented by an independent, not-for-profit Cessation Administrative Organization (CAO). See Pl.'s Proposed Final J. and Order at 6, ¶ B.1. The CAO will be authorized to allocate the annual payments between the treatment, research, training and education components of the cessation remedy. In doing so, the CAO should consult with all relevant experts.

Additionally, the IO (in consultation with the CAO) should commission independent studies and surveys of the effectiveness of the programs implemented by the CAO, until the ten percent target, described *supra* in subsection (a), has been met. The findings and methodology of these studies and surveys should be made available to the public. The CAO should also inventory and coordinate with other cessation assistance services available to smokers in the United States, and, where appropriate, should provide grants to expand and improve these services.

In addition to these responsibilities, the Public Health Intervenors recommend that the CAO should have the authority to develop and disseminate its own cessation public education messages, with no input from the defendants, to all smokers on any and all

consumer marketing databases held by or controlled by the defendants. This remedy is necessary in light of the clear evidence presented during the course of the trial about the ineffectiveness, and potentially harmful effect, of health-related communications directed by the defendants to tobacco users. See, e.g., (US 21305) (A); (US 35622) (A).

To ensure that the cessation programs it administers are effectively divesting the defendants of the returns from their unlawfully-obtained investments, the CAO should conduct outreach to special population groups who face additional barriers to quitting tobacco use. Surgeon General Carmona testified that special populations have less access to prevention and cessation interventions, and observed that an effective cessation remedy requires "a lot more in high-risk populations, minority populations and youth, for example, to prevent them from starting, or if they have started, to help them to quit." Carmona WD, 4/27/05, 15:8-12, 16:10-14. This outreach is especially critical because, as noted several times throughout trial, special population groups have been deliberately and specifically targeted by the defendants. See, e.g., Schindler TT, 1/25/05, 10952:4-10953;14; Schindler WD, 112:2-22, 121:19-24; 505925251-5295 at 5253, 5263, 5278 (US 89347) (A); 507297419-7442 at 7438 (US 89351) (A); 507318253-8287 at 8254, 8257 (US 89346) (A). These specific population outreach efforts should also be coordinated with American Legacy Foundation and/or any other entities prescribed by this Court to implement the public education and countermarketing remedy described below. In sum, the outreach conducted by the CAO must be designed to reflect actual patterns of tobacco use in a way that, like the messages that the defendants have used to addict them, is culturally appropriate to the intended audience.

e) Extension Based on Future RICO Violations

Finally, as an enforcement mechanism, in the event that the IO finds that the defendants or any individual defendant has violated Section V of this order by, for example, making a public statement inconsistent with relevant public health findings published by the federal Government, the specific defendant's payments for public education related to cessation should be continued for an additional five years beyond the time they would otherwise terminate as described above. Specifically, the IO would have to find that the defendants made public statements contradicting the findings of the U.S. Surgeon General relating to the harms, addictiveness, or relative risk of any of the defendants' cigarettes to users or others -- including, but not limited to, the effects of secondhand smoke on others -- or relating to cessation programs or, treatments, including the creation of smokefree homes, workplaces and other spaces.

This provision is necessary to serve as an incentive in the future for the defendants not to engage in illegal acts and practices that are either designed to or have the effect of undermining the goals of this section. The Record justifies it because it demonstrates that the defendants have obstructed cessation efforts in the past in a variety of ways, including, for example, their marketing of light and low tar tobacco products, public statements that are inconsistent with highly credible, empirically-supported, governmental health care authorities, and the production of products that consumers perceive as less risky but which are not. As noted by Dr. David Kessler (when describing the U.S. Food and Drug Administration's efforts to regulate cigarettes as drug/nicotine

delivery devices) in his written direct testimony, "[t]he cigarette manufacturers denied that nicotine was addictive, denied that they manipulated the level of nicotine in cigarettes, stated that nicotine was in cigarettes for flavor and taste, denied that they intended nicotine's drug effects, and denied that consumers were misled by the published nicotine deliveries, as measured by the FTC Method." See, e.g., Kessler WD, 9/13/04, 16:18-21.

2. The Proposed Cessation Remedy Is Both Effective and Narrowly Tailored, and Also Furthers Critical Public Health Purposes.

The efficacy and narrowly-tailored quality of the cessation remedy proposed by the Public Health Intervenors is well-established in the trial Record for several reasons. First, as Dr. Fiore testified, only a cessation program of this scope will fully overcome existing barriers that have previously prevented smokers who wish to quit from accessing care and utilizing services. See Fiore WD, 5/9/2005, 20:7-18, 41:14-21, 42:21-43:8 (explaining that cessation treatment is currently underutilized because of "barriers to use even where services are offered," including "eligibility requirements, screening processes, co-payment obligations, language and other cultural barriers, limited access to services, lack of awareness, limits to covered benefits, and fragmentation of care"); Fiore TT, 5/17/05, 21285:6-24, 21286:25-21287:22 (explaining that the "cost barriers" for people who want to quit smoking "are particularly important because of the high rates of smoking among the impoverished in America, the high rates of smoking among people who don't have any insurance . . .") (emphasis added); Carmona WD, 16:4-8 (testifiying that "racial and ethnic minorities typically have less access than non-Hispanic whites to

appropriate cessation and prevention assistance"). The cessation program described above will overcome these barriers and is therefore an effective part of a broader remedial scheme.

Second, it will address known barriers to cessation access among special population groups, including African Americans, Asian Americans/Pacific Islanders, Latinos/Hispanics, Native Americans/Alaska Natives, Lesbian, Gay, Bisexual and Transgender (LGBT) individuals, and people of low socio-economic status. See Fiore WD, 5/9/2005, 29:7-8, 29:14-16. Finally, it will provide evidence-based resources for a sufficient duration so that every smoker who wants to quit has the opportunity to do so, taking into account the addictiveness and chronic disease aspects of tobacco use and dependence. See Burns TT, 2/16/2005, 13629:8-17; Carmona TT, 4/27/2005, 14:6-12; (JD-001210) (A) (U.S. Public Health Service, Clinical Practice Guideline: Treating Tobacco Use and Dependence (2000)); see also US FF § V.B, ¶¶ 125.

The cessation scheme set forth here is also narrowly tailored, because while each discrete element yields some reduction in tobacco use, they are maximally effective in achieving their divestiture function when they are implemented in concert as a comprehensive approach:

> Real-world experience . . . shows that the different parts of a comprehensive program are more effective when applied in tandem with other components of the program . . . . when more than one of these components are integrated, the reach, in terms of the number of smokers treated, and the outcomes, in terms of long term quit rates, are markedly increased.

Fiore WD, 5/9/05, 19:15-22. The goal-oriented as opposed to date-oriented endpoint also serves to narrowly tailor the remedy, since the remedy will end when the divestiture

occurs, and not at a point in time which may be before or after that moment. See section (a) *supra*.

3. This Court Is Authorized To Impose The Proposed Cessation Remedy.

The Public Health Intervenors' proposed cessation remedy is authorized by this Court's equitable authority to prevent and restrain future racketeering on the part of the defendants, as explained *supra*. More specifically, the cessation remedy prevents and restrains future violations by reducing the number of addicted smokers who want to quit, thereby reducing the economic incentives for the defendants to commit fraudulent acts aimed at that population. This inherently forward-looking remedy is also consistent with the Court of Appeals' ruling in that it is "directed toward future conduct." Philip Morris, 396 F.3d at 1198.

Alternatively, as set forth *supra*, this Court may also impose the cessation remedy under its power to "divest" the defendants of their unlawfully obtained investment, thereby ensuring that the defendants will not enjoy the assets, future dividends, and other interests derived from such illegal investments. By helping smokers who want to quit do so, the cessation remedy is narrowly tailored to accomplish the equitable divestiture objective. For instance, when a youth-addicted smoker successfully quits, she is no longer compelled to continue providing returns - in the form of regular cigarette purchases -- on the defendants' unlawful investment.

In fact, where, as here, the defendants "continued exercising their unlawful [means] long after they well knew that this activity was within the coverage of the [statute]," Int'l Boxing Club of N. Y., Inc. v. United States, 358 U.S. 242, 258 (1959); see

also US FF § II(B)(2) (outlining defendants' conspiracy to violate RICO), divestiture may be "the only effective means at hand by which . . . . to return the parties as near as possible to the status quo existing prior to the conspiracy."); see also Ford Motor Co., 405 U.S. 575 at 9 (noting that remedy is appropriate because it was designed to allow the victim of the anti-competitive activities to "re-establish" itself in the market); Crescent Amusement, 323 U.S. at 186 (noting that allowing district court to supervise future acquisitions was necessary because it was "impossible to turn back the clock" to the status quo that existed before the defendants violated the antitrust laws).

Moreover, the defendants cannot legitimately deny the applicability of divestiture in the form of a cessation remedy because, as explained *supra*, the "investment" and "dividend" ideology permeates their entire marketing strategy. Compare, e.g., (US 49017) (A) (R.J. Reynolds memorandum urging that its marketing "[a]ttract a smoker at the earliest opportunity and let brand loyalty turn that smoker into a valuable asset"; emphasis added) and (US 76187) (A) (observing that "younger adult smokers are the only source of replacement smokers"; emphasis added) with Maryland and Virginia Milk Producers Ass'n v. U.S., 362 U.S. 458, 472 (1960) (affirming antitrust decree requiring defendant to surrender all "assets [ ] tangible or intangible . . . and replacements therefore" acquired by way of the illegal conduct in question; emphasis added).[11]

---

[11] In its post-trial brief, the Government asserts that divestiture is an "extreme" remedy. Pl.'s Post-Trial Brief at 169. To the contrary, the Supreme Court has described divestiture as "simple, relatively easy to administer, and sure," and extolled that this "most important of antitrust remedies . . . . should always be in the forefront of a court's mind" when constructing an equitable remedy to prevent and restrain. Du Pont de Nemours & Co., 366 U.S. at 331.

a. The Government's Rationale for a Weaker Cessation Program Lacks Merit.

Prior to its closing argument in this case – and after the Court of Appeals' ruling – the Government insisted that it was "critical that all of the remedial programs sought as relief in this case be adequately funded for a sufficient period of time." Pl.'s Mem. Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875 at 12 (emphasis added). In service of this goal – and also after the Court of Appeals ruling – the Government submitted credible, relevant, and specific evidence and expert testimony outlining the scope and duration of remedial programs that would be necessary to prevent and restrain future RICO violations, including a $130 billion, twenty-five year smoking cessation program. Specifically, the Government presented the testimony of Drs. Bazerman and Fiore, who supported their conclusions with empirical findings, government reports, and their own substantial personal knowledge and experience.

Unfortunately, with respect to the cessation remedy, and to a lesser extent, the Government's other remedies, the Government has since abandoned this principle and much of the evidence that supports it. In its proposed remedies order and post-trial brief, the Government instead substitutes a radically curtailed cessation plan for the comprehensive cessation program originally detailed by its own expert, Dr. Fiore. See Pl.'s Post-Trial Brief at 201-19. The Court should reject the Government's substituted cessation program in favor of the remedy proposed by the Public Intervenors for several reasons.

First, the extremely modest scope of the Government's proposal is not calculated to prevent and restrain future RICO violations. Instead of a twenty-five year, $130 billion comprehensive program that had been designed to provide cessation services to every smoker seeking to quit, see Fiore WD at 17, 22; see also Fiore Expert Report ¶¶ 5, 6, 12, the Government's program as revised will only help 2,330,000 smokers quit -- about 5% of all smokers. See Pl.'s Post-Trial Brief at 209-10. If, as the Government asserts, the guiding premise is that a smaller consumer base will disincentivize the defendants from committing fraud in the future, by decreasing returns on their unlawful investments, see id at 226, the only slight reduction in consumer base achieved by the Government's new model will not accomplish this objective. Indeed, under the Government's proposal, the vast majority of smokers who seek to quit but are unable to quit will remain addicted, thereby keeping in place the market incentives that compel the defendants to commit fraud in the first place – namely, the need to deter additional consumers from quitting, and the need for "replacement" youth smokers. Accordingly, the reduced cessation program simply will not achieve the Government's stated goals.

Indeed, when asked on direct examination what it would take to implement an effective cessation remedy whereby all smokers who sought to quit were able to do so, Dr. Fiore stated, in no unwavering terms, that such a program would require $5.2 billion per year for twenty-five years. Fiore WD at 17:20, 20-21 (emphasis added). Therefore, the five year, $10 billion program belatedly substituted by the Government simply does not achieve the purpose of the cessation remedy – preventing and restraining future RICO violations.

Moreover, the strained legal rationale offered by the Government in support of <u>its</u> cessation remedy, by which a court is limited to relief for the unlawful acts committed between the entry of judgment and the moment at which the "set of remedies" becomes "fully implemented," Pl.'s Post-Trial Brief at 210, is completely unnecessary in light of the Court's equitable authority, the statute's legislative history, and Supreme Court precedent construing the "prevent and restrain" language.

In sharp contrast, the cessation remedy advanced by the Public Health Intervenors is a comparatively "simple, relatively easy to administer, and sure" way to prevent and restrain RICO violations. <u>E. I. du Pont de Nemours</u>, 366 U.S. at 331. It does not require the Court to divine the exact date when the suite of remedies will suddenly take hold and begin to alter the defendants' behavior. Nor, as explained *supra*, does it run afoul of the Court of Appeals decision outlawing disgorgement. In sum, the cessation remedy proposed by the Public Health Intervenors is the only cessation remedy that is supported by both the Record and the law.

Nor can the Government rationalize the change in its position on the scope, duration and size of the cessation proposal since its position on May 12, 2005 based on the Court of Appeals decision. The Government's legal rationale for why this much more limited cessation program is adequate and is compelled by the Court of Appeals decision has been a constantly moving target. The Government articulated one rationale on May 12, 2005 for a cessation program more consistent with what the Public Health Intervenors now propose, articulated a different rationale in their closing argument, and still another variation on its rationale in its Post-Trial brief.

Indeed, the Government's articulation in its post-trial brief of why the public education proposal it has put forth is not only justified legally, but essential to prevent future violations by the defendants, is inconsistent with the rationale it articulated for the more limited cessation program. In arguing in support of its Public Education proposal the Government emphasizes the need to remove the economic incentive for the defendants to engage in future violations as well as to dilute the impact and efficacy of any future violations in order to prevent those violations given the long history of such actions by the defendants. Pl.'s Post-Trial Brief at 220-23, 229. The limited cessation program proposed by the Government will not accomplish these goals.

B. Industry-Funded Public Education and Countermarketing Programs.

1. The Public Education and Countermarketing Remedy Should Be Of Sufficient Funding, Scope, and Duration.

To create disincentives that will prevent and restrain future RICO violations, and to divest the defendants of future dividends from their unlawfully acquired investments, a public education and countermarketing remedy of sufficient scope and duration must be established. The trial Record clearly demonstrates the essential features of such a program. As part of an effective overall remedial scheme, a public education campaign must, in sum: (1) receive adequate funding for all of its integrated components; (2) be sustained over time; (3) be run by an organization that is fully independent of the tobacco industry and that has a proven track record in delivering effective, national public education campaigns to counter the use of tobacco; (4) be regularly evaluated and adjusted based on evaluation results; and (5) be based on strategic and culturally appropriate messages. See Eriksen WD, 5/9/05, 3:17-4:2, 7:12-17.

Each of these elements is satisfied by the public education remedy set forth below, which comports with the general structure of the Government's Proposed Order but diverges as to the duration and annual funding, and addresses the Government's absence of mechanisms to continue the countermarketing efforts beyond ten years if they do not accomplish the required goals.[12] See Pl.'s Proposed Final J. Order at 9-10. However, as explained below, only a comprehensive countermarking campaign of the scope set forth by the Public Health Intervenors will complement the other remedies in the overall scheme so as to successfully divest the defendants of their unlawful interest and prevent and restrain future RICO violations.

a) Funding Level, Duration and Objectives

An annual funding level of $600 million is necessary to implement a nationwide comprehensive advertising and education program of the scope necessary to reach all of the market segments targeted by the defendants with in order to counter the defendants' extensive marketing and promotional efforts and prevent and restrain future violations by defendants. This $600 million figure is well within the $375 million to $1.125 billion range set forth by Dr. Eriksen, based on the U.S. Centers for Disease Control & Prevention's Best Practices for Comprehensive Tobacco Control Programs issued in 1999 (adjusted by Dr. Eriksen, to account for subsequent increases in inflation and population). See Eriksen WD, 5/9/05, 10:15-23. The $600 million per year also amounts to well less than one twentieth of the $15.15 billion spent by defendants to market and promote their products just in 2003 (more recent data is not yet available; but defendants' marketing

[12] By contrast, the Government's Proposed Order funds the countermarketing and public education remedy at a level of $400 million annually. See Pl.'s Proposed Final J. Order at 9-10.

and promotional expenditures have increased steadily each year). U.S. Federal Trade Commission, Cigarette Report for 2003 (2005).[13] In this regard, Dr. Eriksen also notes that the success of countermarketing efforts depends largely on the size of its funding relative to tobacco industry advertising and marketing budgets. Eriksen WD, 5/9/05, 5:12-17. The $600 million in proposed annual countermarketing funding is distinct from and in addition to the separate $600 million in annual funding for the cessation-specific public education campaign described *supra*. But even if these separate funding amounts for quite distinct, although complementary, purposes were added together, the annual total would still roughly approximate the upper level of Eriksen's funding range for countermarketing only, and would amount to less than ten percent of what the defendants have recently annually spent to market and promote their products. Indeed, the $600 million countermarketing payment appears even more reasonable when compared to Eriksen's recommended funding range after it ["it" refers to what?] is further adjusted to account for the more than 50 percent net increase in the defendants' marketing and promotional expenditures since 1999 (above and beyond the 25 percent increase that could be attributed to increases in inflation and population). See id. This produces a recommended funding range for countermarketing and public education of at least $525 million to $1.575 billion. See id.

[13] The Public Health Intervenors join in the Government's assertion that "[t]he Court can take judicial notice of the FTC Cigarette report for 2003." Pl.'s Post Trial Brief at 81 n.41 (quoting B.T. Produce Co. v. Robert A. Johnson Sales, Inc., 354 F. Supp 2d 284, 285 n.2 (S.D.N.Y. 2004); Fed. R. Evid. 201). For testimony regarding recent increases to defendants' marketing and promotional expenditures, which cites the annual FTC Cigarette Reports, see Krugman WD, 11/29/2004, 21:16-29:4. The FTC issued its Cigarette Report for 2003 in August 2005, after all trial testimony was completed. That report is now available at http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf.

Following Eriksen's adjustments of the original CDC recommended countermarketing funding levels to account for inflation from 1999 to the present, the defendants' future payments to support this countermarketing remedy should be adjusted each year, based on changes to the Consumer Price Index, to ensure that inflation does not erode the payments real value over time.

To make sure that the countermarketing remedy is in effect for long enough to produce a fundamental change in the industry's behavior and to alter the economic incentives of the industry sufficiently to deter future violations, it should operate, as in the Government's Proposed Order, for a minimum of ten years. See US FF § V.C, ¶ 192. After ten years, however, the annual payments should terminate only as soon as specific goals are met for each of the remedy's three objectives: (a) to reduce youth smoking levels, (b) to educate the public and, in particular, actual and potential consumers about the comparative health risks of various tobacco products, especially those with health descriptors such as "light" and "low tar", and (c) to educate the public and consumers about the harms associated with exposure to secondhand smoke. The following sections demonstrate the purpose of each goal and how each goal serves to prevent and restrain future violations by the defendants.

(1) Youth Smoking Reduction

To make it harder for the defendants to benefit from marketing to youth and otherwise exposing youth to misleading messages about tobacco use, the public education campaign must include youth smoking prevention and reduction, sustained over time, as one of its objectives. This component will help prevent and restrain future RICO

violations by “inoculating” youth from the defendants’ deceptive and unlawful youth marketing and other misleading messages regarding tobacco use, thereby reducing the incentive for the defendants to continue violating RICO. These objectives will be achieved by a public education campaign that continues for either ten years or to the point at which youth tobacco use declines to no more than five percent of youth, whichever occurs later. While a reduction to zero tobacco use by youth would be ideal, the five percent figure takes rough account of the fact that some youth smoking may be inevitable and that setting the target rate of youth tobacco use to zero would be impractical. In contrast, a five percent target is both reasonable and readily attainable.

The efficacy of adequately funded and well-designed youth countermarketing campaigns for reducing youth tobacco use rates is well demonstrated. See, e.g., Eriksen WD, 5/9/05, 5:18-25, 7:18-10:14; Biglan WD, 1/03/05, 398:18-400:16; see also (US 89453) (A) (Farrelly MJ, et al., "Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence," Am. J. Pub. H., 95(3): 425 (2005)) (noting that 22 percent of the decline in youth smoking prevalence between 1999 and 2002 was attributable to the national public education campaign run by the American Legacy Foundation known as truth®); Healton WD, 24:4-25:16; Brief of Amicus Curiae the Citizens’ Committee to Protect the Truth in Support of Position of Plaintiff United States of America (“Citizens Committee Amicus Brief”) at 10-28.

(2) Education As To Comparative Health Risks

To prevent and restrain future violations by the defendants directed at misleading actual or potential consumers about tobacco use harms and reducing such harms and risks

through means other than quitting or not starting, an effective countermarketing remedy must also educate the public as to the true comparative health risks of low tar, ultra low tar, mild, light, ultra light and other tobacco products and brands for which an express or implied statement, name or representation is used, and which a reasonable consumer would interpret as indicating that it has a different risk than standard tobacco products. This aspect is a necessary element of a countermarketing scheme designed to divest or restrain because, as the Record clearly indicates, the defendants constructed a false "controversy" over the issue of smoking and health decades ago and stayed true to this strategy well into the 1990s. See, e.g., Brandt WD, 9-20-04, 130:16-131:4 (testifying as to the defendants' "basic strategies of insisting on a continuing 'controversy'" which "persisted into the 1980s and 1990s"). As Dr. Brant explained, the media coverage of this "controversy" has also fundamentally misshaped public knowledge about the health risks of smoking. See id. (testifying as to media coverage of the defendants' assertions to Congress that "that the causal relationship of smoking and cancer had not been proven"); see also (US 20468) (A) (reporting same in Los Angeles Times).

In addition to undoing the damage from the defendants' creation of a health-related "controversy" where none actually existed, education as to true comparative health risks is also necessary because, as the Record makes clear, youth significantly underestimate the addictiveness of smoking. As Dr. Neal Benowitz noted, "[m]ost [youth] think they can smoke only for a few years then quit, but later they find that they have become addicted and cannot quit. Most youths underestimate the power of nicotine addiction and their personal risk of addiction." Benowitz WD, 10/25/04, 47:9-15.

Therefore, the comparative health risks education campaign must also effectively communicate with youth about nicotine and the powerful nature of addiction, as well as the negative consequences of addiction.

To counteract the defendants' misleading and fraudulent marketing and messages and thereby divest or restrain the defendants, this aspect of the countermarketing campaign should continue beyond the initial ten years until such time as more than ninety percent of the public over the age of twelve are fully informed concerning the comparative health risks, including addictiveness, among different tobacco products. While it would be ideal for 100 percent of the public to fully understand the comparative health risks of different health products, the 90 percent goal tries to acknowledge the impossibility of reaching 100 percent while setting an attainable and reasonable target that will effectively prevent and restrain future violations by defendants. Once 90 percent of the public fully understands this critically important information regarding tobacco products and tobacco use, it will no longer be worth the time, trouble, and expense for defendants to try to mislead them in order to maximize tobacco use rates and sales.

(3) Education As To the Effects of Secondhand Smoke

The third main element of an effective public education remedy is a dedicated campaign focused on increasing public knowledge about the harms associated with exposure to secondhand smoke and the effects of establishing smoke-free workplaces and environments. As with the defendants' generation of a false "controversy" with respect to the health effects of primary smoking, the defendants' also worked to develop an "open question" as to the harmful effects of exposure to secondhand smoke. For

example, in response to a 1974 statement by the Tobacco Institute Chairman, Mr. Horace Kornegay, that smoking restrictions not only impacted sales but also "could lead to the virtual elimination of cigarette smoking," see (US 22047) (O), the defendants were advised by their legal counsel to limit their position on secondhand smoke to statements such as “ETS not shown to be health hazard to non-smoker" and "[w]e cannot say ETS is 'safe' and if we do, this is a 'dangerous' statement.'" (US 20346) (A).

This element will serve the equitable goals of the remedy because smokers -- including those illegally induced to start smoking or fraudulently induced to continue smoking – are more likely to quit once they learn of the true risks and harms to others associated with secondhand smoke. See, e.g., (US 64316) (Surgeon General’s Report (2000) at 16). For this aspect of the remedy to be effective as a divestiture or restraining device, it should continue beyond the initial ten years or until ninety percent of the public over the age of twelve are fully informed of the disease risks and other harms associated with exposure to secondhand smoke, whichever comes later. Here, too, the 90 percent goal is used instead of the ideal 100 percent goal in order to set an attainable, reasonable target that will still work effectively to prevent and restrain future violations by defendants by making any future efforts to mislead the public on secondhand smoke matters in order to increase tobacco use rates, and defendant profits, impractical.

b) American Legacy Foundation

The Public Health Intervenors concur with the part of section C of the Government’s Proposed Order which designates the American Legacy Foundation as the

public education and countermarketing entity.[14] Contrary to the defendants' assertions, see Defs.' Post-Trial Brief at § VI(B)(5), the American Legacy Foundation (the "Foundation") is uniquely qualified to execute an effective, nationwide counter-marketing and public education campaign. The Foundation was created pursuant to the Master Settlement Agreement (MSA), at the behest of the States with settlement funds that would have otherwise gone to the States. See (JD 045158) (A), MSA § VI (a). It was designed precisely for the purpose of delivering national public education and advertising campaigns to the American public about the dangers of tobacco and conducting and supporting programs to counter tobacco use. See Healton WD, 2/23/05, 3:1-6, 6:1-6, 8:11-10:19, see also id. at 23:15-17 (noting that national campaigns are much more cost-effective than separate state or local campaigns).

The Foundation's principal function is to carry out a "nationwide sustained advertising and education program to: (a) counter the use by Youth of tobacco products, and (b) educate the public and consumers about the cause and prevention of diseases associated with the use of Tobacco Products." MSA § VI(f)(1). See also MSA § VI (a) (foundation purposes), § VI (f)(2)-(11) (setting out additional functions) and § VI (g) (authorizing the Foundation to make grants to the settling states and their political subdivisions). The Foundation's proven, effective truth® counter-marketing campaign is

[14] The Government initially proposed that the American Legacy Foundation administer the countermarketing remedy, see Pl.'s Prop. J. and Order at 9, and the Public Health Intervenors fully support that proposal for the reasons set forth herein. In that regard, the Court should be apprised of the fact that five of the six Public Health Intervenors have received funds from the American Legacy Foundation over the past several years through various grants, contributions, and contracts. In addition, while the sixth, the Tobacco-Free Kids Action Fund, has not received any such funds or other support from the American Legacy Foundation, an affiliated nonprofit, the Campaign for Tobacco-Free Kids, has.

the largest youth smoking prevention campaign ever mounted in this country. See US FF § V ¶¶ 193-194, 201. In addition, the Foundation is deeply involved in public education campaigns on the subjects of secondhand smoke and smoking cessation. See Healton WD, 2/23/05, 9:8-10:16. The Foundation has collaborated with the CDC on the National Youth Tobacco Survey and other matters. See Eriksen WD, 1/19/05, 32:20-33:3. It also places a high premium on the objective evaluation of its programs. See Healton WD, 2/23/05, 10:17-18, 24:2-25:14l; Eriksen WD, 5-9-05, 5:8-11.

Also of significant importance, the Foundation has demonstrated a commitment to assuring that its programs reach those special populations disproportionately affected by tobacco. For example, the Foundation's Priority Populations Grants Initiative provides support to programs supporting six populations including African-Americans, Hispanics/Latinos, Asian-Americans, Native Americans, Gay, Lesbian, Bi-Sexual and Transgendered persons and low Socio-Economic Status persons, which bear a disproportionate share of the burden of the harms associated with tobacco use and exposure to secondhand smoke. See Healton WD, 2-23-05, 14:4-10. Moreover, as the Record demonstrates, there can be no question of the Foundation's independence from the Defendant companies.[15] The Foundation's unique purpose, relationship with both the States and the Federal health agencies, and track record in delivering effective, national,

[15] In addition to the defendants' rigorous cross-examination of Dr. Healton, defendant Lorillard Tobacco Company has gone so far as to try to shut down the Foundation in litigation in the Delaware Chancery Court. See Milstein TT, 9368-69, 9375-76. However, the Delaware Court recently granted summary judgment to Legacy and denied Lorillard's cross-motion for summary judgment when it found that Legacy's countermarketing and public education ads do not violate the MSA's prohibitions against vilification and personal attacks. See American Legacy Foundation v. Lorillard Tobacco Co., No. 19406 at 55 (Del. Ch. Aug. 22, 2005).

public education and advertising campaigns to counter the use of tobacco make it the best qualified organization to conduct the critically important national public education and advertising campaigns proposed by the Department of Justice.

The effectiveness of the Foundation's signature youth prevention campaign, truth®, has been definitively documented in two peer-reviewed articles evaluating the campaign that were published in the American Journal of Public Health (AJPH) and introduced into evidence in this case. See, e.g., (JD 065578) (A) (Farrelly MC, et al., "Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns," 92 Am. J. Pub. H. at 901 (2002)); (US 89452) (Farrelly MC, et al., "Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence," 95 Am. J. Pub. H. at 425 (2005) ("2005 article")). Most importantly, the 2005 AJPH study found that twenty-two percent of the decline in youth smoking prevalence between 1999 and 2002 is attributable to the national public education campaign truth®. See id.

As a testament to the documented effectiveness of the Foundation's truth® campaign, the defendants attempted to raise questions about the evaluation efforts themselves and, by association, the Foundation. See Defs.' Post-Trial Brief at VI(B)(5). However, the defendants produced no credible testimony or evidence to support a conclusion that that the campaign is ineffective. US FF § V ¶¶ 221-229; Pl.'s Post-Trial Brief at 230. Instead, defendants focused entirely on attacking the two AJPH studies. However, as the Government has shown, the testimony of defendants' sole witness on this point, a biostatistician with no experience whatsoever in the evaluation of media

campaigns, missed the mark entirely. See Pl.'s Post-Trial Brief at 230 n.141 and accompanying text; see also Citizens Committee Amicus Brief at 3-5, 10-22.

c) Allocation of Funds, Program Evaluation

Initially, the $600 million annual payment by the defendants should be allocated equally to each of the three objectives identified *supra* in subsection (a), but the Foundation should have the discretion and authority to revise that allocation after consultation with the Independent Investigations Officer (IO). As in the MSA, and the Government's proposed order, the Foundation should also be vested with the discretion to hold a portion of each year's payments from the defendants in reserve and manage such funds as appropriate for future use. As with the cessation remedy outlined above, the IO should have the authority to commission independent studies, including but not limited to surveys, to determine whether the criteria described above for terminating payments have been met.

d) Special Populations

Any public education and countermarketing remedy will be ineffective unless it reaches the entire population, including special populations such as African Americans, Asian Americans/Pacific Islanders, Latinos/Hispanics, Native Americans/Alaska Natives, Lesbian, Gay, Bisexual and Transgender (LGBT) individuals, and low socio-economic status individuals. This outreach is especially critical because special population groups have been deliberately and specifically targeted by the defendants. See, e.g., Schindler TT, 1/25/05, 10952:4-10953;14; Schindler WD, 112:2-22, 121:19-24; 505925251-5295 at 5253, 5263, 5278 (US 89347) (A); 507297419- 7442 at 7438 (US 89351) (A);

507318253-8287 at 8254, 8257 (US 89346) (A). These outreach efforts should be done in culturally appropriate ways that reflect population-specific tobacco use patterns and exposure to secondhand smoke. The Foundation should also take reasonable steps, taking into account the amount of tobacco use among the affected population and its size, to provide information in appropriate languages to persons of limited English proficiency.

In addition to the studies to be commissioned by the IO to assess whether the overall goals of the public education and counter-marketing campaigns are being met (see subsection (c) *supra*), the Foundation should be required to evaluate the cultural competency of its programs. The findings and methodology of these evaluations should be publicly available.

e) Extension Based on Future RICO Violations

As in the cessation remedy outlined above, in the event that the IO finds that the defendants have or any individual defendant has violated any of the prohibited practices in the Final Order and Judgment, such as making any statement to the public or consumers that is a material misrepresentation of fact that violates the Final Order and Judgment, including but not limited to any marketing messages or other statements by defendants that is inconsistent with established public health findings, the defendants' payments for public education related to cessation should be continued for an additional five years beyond the time they would otherwise terminate as described above. For example, the duration of the countermarketing payments would be extended if the IO found that the defendants had made new public statements contradicting the findings of the U.S. Surgeon General relating to the harms, addictiveness, or relative risk of any of

the defendants' cigarettes to users or others -- including, but not limited to, the effects of secondhand smoke on others -- or relating to cessation programs or treatments, including the creation of smokefree homes, workplaces and other spaces. This provision is necessary because the defendants have obstructed public education efforts in the past by way of public statements that are inconsistent with highly credible, empirically-supported, governmental health care authorities. See, e.g., US FF §III.A(l)(h) (citing evidence of public statements); Pl.'s Post-Trial Brief at 33-35, 38-42, 48-50 (describing public statements regarding health harms and addiction).

2. The Public Education and Countermarketing Remedy Is Both Effective and Narrowly Tailored, and Also Furthers Critical Public Health Purposes.

The Record unequivocally demonstrates that countermarketing and public education campaigns are an indispensable element of any strategy to reduce tobacco consumption. As noted by Dr. Eriksen, "countermarketing activities can promote smoking cessation and decrease the likelihood of initiation." Eriksen, WD, 5/9/05, 5:20-25 (quoting (US 18264) (A) (U.S. Surgeon General Report (2000))). Dr. Eriksen also outlined empirical evidence of the effectiveness of such campaigns, dating from the Fairness Doctrine in the early 1970s, to the Centers for Disease Control and Prevention's 1999 Best Practices Guide, to the 2001 report of the Task Force on Community Preventive Services, which concluded that there was "strong evidence" (the highest criterion of effectiveness) of the effectiveness of media campaigns with other interventions in tobacco control efforts. Eriksen, WD, 5/9/05, 8:9-10:14.

Public education and countermarketing campaigns are not only effective, but are also narrowly tailored, because they play a specific, well-defined role within a larger comprehensive remedy. See, e.g., Eriksen, WD, 5/9/05, 4:8-13; 5:20-25; 8:9-10:14 (testifying that countermarking is part of a "coordinated . . . [and] integrated . . . comprehensive tobacco control program"). By design, and as its very name suggests, countermarketing will counter the defendants' fraudulent messages head-on, using the same fora and media that the defendants have historically used.

3. This Court Is Authorized To Impose The Proposed Public Education And Countermarketing Remedy.

As with the cessation remedy outlined above, the Public Health Intervenors' proposed public education and countermarketing remedy is authorized by this Court's equitable authority to prevent and restrain future racketeering on the part of the defendants. The public education and countermarketing remedy prevents and restrains future violations by fully informing and hence "remov[ing] from the [smoking] marketplace a population of consumers and potential consumers of defendants' products," and, accordingly, the defendants' "incentive to market to this population will be eliminated and their behavior will change accordingly." See Bazerman WD, 65:7-20. Like cessation, this inherently forward-looking remedy is also consistent with the Court of Appeals' ruling in that it is "directed toward future conduct." Philip Morris, 396 F.3d at 1198. See also Pl.'s Post-Trial Brief at 220-229.

Alternatiavely, as set forth *supra*, this Court may also impose the public education and countermarketing remedy under its power to "divest" the defendants of their unlawfully obtained investment. Like the cessation remedy, the public education

campaign proposed here functions to divest the defendants of the "fruits" of their ill-obtained investments, see Turkette, 426 U.S. at 256, by reducing the number of people who have already become addicted, and preventing others from making cigarette consumption and smoking initiation choices based on the defendants' fraudulent misinformation.

C. The Youth Smoking Reduction Target Remedy.

1. Youth Smoking Reduction Targets Should Be Adequately Measured and Their Violations Adequately Penalized.

The Youth Smoking Reduction Targets and Penalties remedy serves the equitable goals of restraint and divestiture by helping current youth smokers to quit and by removing all of the defendants' incentives for marketing to children. This program is an essential part of a comprehensive remedial scheme designed to restrain the defendant companies from future RICO violations because, as the Record shows, the defendants have continually found ways to market their products in ways that make them appealing to youth and financially attractive to youth, despite their own pronouncements to the contrary, the efforts of others to stop them, and legal binding obligations to do so.

The Government established the general framework of, and a legal rationale that we support for an effective youth reduction remedy in its Proposed Order, including: (1) establishing target prevalence rates to which youth smoking must be reduced for each calendar year by each defendant company; (2) determining youth tobacco use for those years using national survey data; (3) assessing the defendant companies if they fail to meet target reductions in youth smoking of their brands; and (4) assuring that the monetary assessments are company-specific so that those defendant companies who take

measures to stop their activities that contribute to youth smoking are not punished for the efforts of those defendant companies who do not. See Pl.'s Proposed Final J. and Order at 10-15.

However, the Government's proposal does not go far enough in altering the economic incentives of the defendants and does not take into account the evidence that youth tobacco use can and should decline much more rapidly if the defendants do not engage in unlawful activities to make their products appealing to youth. Thus, to fully prevent the defendants from continuing their efforts to addict youth, and to assure that current youth smokers are not unlawfully enticed to continue smoking, an effective youth smoking reduction remedy must also or instead: (1) employ a shorter timeframe for achievement of the targets; (2) use a measure of 30-day youth smoking rather than daily youth smoking; (3) increase the penalty when the targets are missed; and (4) allocate a greater share of penalty payments to the public education and countermarketing efforts outlined above.

a) Shorter Timeframe For Achievement of the Targets

The Government proposed a 42% reduction target for smoking among 12 to 20 year olds during the period 2003 to 2013. Pl.'s Proposed Final J. and Order at 10. This proposal is based on Dr. Gruber's testimony, but it provides more time for reducing youth smoking than is warranted. Dr. Gruber bases the youth smoking reduction targets on the targets the defendants agreed to as part of their Proposed Resolution with the state Attorneys General in 1997. See Gruber WD, 15:8-18:4. Those targets called for a 60 percent decline in youth smoking between 1997 and 2007. See id. Dr. Gruber proposes

the same 60 percent decline from the 1997 levels, but requires that reduction to occur by the year 2013. See id. Given smoking declines that have occurred from 1997 to 2003, this means that youth smoking must decline by 42 percent between 2003 and 2013. See id.

However, it is clear from the Record that the defendant companies have continued to market to children in ways that make their products appealing and financially attractive to children in the time since both the Proposed Resolution of 1997 and the Master Settlement Agreement of 1998. The evidence demonstrates that the defendants' marketing practices impact both youth attitudes and youth tobacco use rates. The actions by the defendants that were presented at trial are at least partially responsible for the fact that youth smoking rates have not declined more rapidly since 1997. As testified by Dr. Frank Chaloupka, "The recent drop in teenage smoking is not as large as it would have otherwise been due to the increase in defendants' price-related marketing." Chaloupka WD, 93:6-8. These actions also explain why, in the last several years, youth smoking reductions have stagnated according to the most recent data. Eriksen WD: 41:9 -42:4.

From a public health perspective, and from what is known about how much youth smoking can be reduced absent the defendants' efforts to undermine progress, youth reduction targets more aggressive than those proposed by the Government are necessary. However, the basis in the trial record for the youth reduction targets invokes a rationale for the targets based solely on what the the defendant companies agreed to in the Proposed Resolution of 1997. Gruber WD: 15-16; (US 18263) (A) Thus, the Public Health Intervenors do not seek to lower the ultimate target, but to recognize that steeper

annual declines will occur if the defendants do make fundamental change. Dr. Chaloupka testified that the Defendant Companies' marketing activities have slowed youth smoking declines. See Chaloupka WD, 93:6-8. Because the defendants previously agreed to set the targets over a ten-year period, and because more aggressive targets are clearly achievable, the Public Health Intervenors recommend that the ultimate targets be achieved by the year 2010 rather than the year 2013, as proposed by Dr. Gruber and the Government. Using the same initial target year (2007) as Dr. Gruber and the same ultimate target reduction (42% from 2003 levels; 60% from 1997 levels), this equates to a 10.5 percent reduction in each year between 2007 through 2010 rather than the 6 percent proposed by Dr. Gruber. Thus, there is no difference in the ultimate goal; the only difference is that it will have to be achieved by 2010 rather than 2013. This proposal still allows the defendants more time to meet the goals than they originally proposed in 1997 (1997 to 2010 versus 1997 to 2007).

Based on this approach, the proportion of youth age 12 to 20 smoking each defendant company's products would have to decline by 10.5 percent by 2007, 21 percent by 2008, 31.5 percent by 2009, and 42 percent by 2010 in order to avoid penalties. No penalties would apply as long as the 42 percent reduction was maintained in years thereafter.

b) 30-Day Measure of Youth Smoking

The Government, based on Dr. Gruber's testimony, proposes daily smoking -- at least one cigarette per day per month -- as the measure of youth smoking for the targets. Pl.'s Proposed Final J. and Order at 11. However, daily smoking is not the best measure

of progress toward youth smoking reduction, nor is it the best measure of whether the defendants have stopped trying to influence youth to smoke, because the defendant companies seek to increase both smoking initiation and progression to more regular smoking by slowly increasing their level of consumption. As Dr. Dean Krugman testified, "Philip Morris clearly acknowledges that the Marlboro theme was a major factor in attracting teenagers to smoke and smoke the Marlboro brand. Basically, the advertising imagery of the Marlboro Man worked to attract starters." Krugman WD 65:9-11. Dr. Krugman further stated: "The companies know that adolescent smokers do not smoke as many cigarettes per day as adults, but, as those teenagers get older, they remain loyal to the cigarette brand and gradually increase the number of cigarettes they smoke each day, thus adding sales." Id. at 67. Virtually no youth who smoke start out as daily smokers but experiment with smoking and usually take years to become regular daily smokers. See Eriksen WD 34:16-23. The earlier they initiate smoking, the more likely they are to become regular smokers. According to Dr. Neil Benowitz, "The earlier a person starts smoking cigarettes, the more highly dependent they will be as an adult, and the more difficult it will be for them to quit. In addition, the earlier someone starts smoking, the higher that person's smoking rate is later on in life." Benowitz WD at 40. Thus, preventing initiation and slowing increases in consumption, and not just daily usage, is critical.

Dr. Gruber uses both the Monitoring the Future Survey and the National Survey on Drug Use or Health in developing the youth smoking reduction remedy. See Gruber WD, 15-18. However, both of these surveys suggest that there are many youth smokers

who have not yet become daily smokers and may not do so until after age 21. For example, according to the Monitoring the Future Survey, see Eriksen WD, 40;9-10, 15.6 percent of high school seniors in 2004 were daily smokers, while 25 percent were past month smokers. According to the National Survey on Drug Use or Health, while 20.8 percent of 12 to 20 year olds are past 30-day smokers, just 12.5 percent are daily smokers. (JD 054452) (A). In addition, of adults in the 2003 National Survey on Drug Use or Health who were ever regular daily smokers, 21 percent became daily smokers after age 21 even though more than 90 percent first smoked before age 21. See id. Thus, if the penalties are based only on daily smoking until reaching age 21, the defendants will continue to generate revenue without penalty from those youth who are past month but not daily smokers, as well as from those who start as children and do move on to daily smoking, even for a lifetime, but who do not do so until they reach age 21.

A thirty-day measure better accounts for such smokers and more fully addresses and more rapidly measures the defendants' marketing that impacts youth. The most authoritative studies already measure smoking rates based on whether a youth has smoked within the past thirty days, and the most frequently cited statistics are based on what percentage of youth have smoked within the last thirty days. As testified by Dr. Michael Eriksen:

> Regular or current smoking -- which is often measured as smoking at least once in the last 30 days -- is the best estimate of the proportion of adolescents who are considered to be current smokers. The epidemiology of adolescent smoking is such that young people begin to smoke infrequently, but quickly progress to smoking on most days. Having smoked at least one day among the previous 30 days provides a stable estimate of the current level of smoking among adolescents. Frequent or daily smoking, on the other hand, is more of a measure of committed smoking, often associated with symptoms of nicotine addiction. Many fewer teenagers are likely to report that they are daily smokers, and by only

> looking at daily smoking rates, one tends to severely underestimate the magnitude of the smoking problem. In general, for teenagers, current smoking rates are likely to be twice as high as daily or frequent smoking rates.

Eriksen ,WD 39:2-14.

Past month smoking is commonly measured by the simple question: "On how many days in the past month have you smoked?" Past month smokers are those who have smoked on at least one day in the past month. Prevalence of past month smokers should be reported in a company specific fashion, as proposed by the Government and as indicated in the National Survey on Drug Use and Health. See (JD 054452) (A).

c) Increased Penalties

The penalties proposed by the Government are based on the lifetime proceeds the defendants would garner from each smoker who begins before age 21, see Gruber WD, 22-27, and according to the Government, are intended to eliminate the profit to the defendants from youth smoking above the target levels. By the Government's own admission, the amount of the penalty just eliminates the profits to the defendants but does not penalize them. At the level recommended by the Government, the youth reduction penalty is less likely than the amounts and the formula recommended by the Public Health Intervenors to prevent the defendants from marketing to children According to Dr. Gruber, if smoking among children did not decline at all from 2003 levels, the largest penalty that all the defendant companies combined would pay in any given year would be $1.58 billion: "Under this structure, if there were no reduction in youth smoking, tobacco manufacturers would have payments that rise to a peak of $1,584 million in 2013, and then fall to $1,008 million thereafter." Gruber Expert Report at 12 At current

consumption levels in the United States, see (JD 013285) (Orzechowski & Walker, Tax Burden on Tobacco, (2004)), this amount is less than what could be generated by raising the price of a pack of cigarettes by less than ten cents, an amount that the defendants could generate through increased prices that would have little or no effect on youth smoking and, therefore, minimize the economic disincentive to market in ways that attract youth smokers. In short, while Dr. Gruber's testimony makes it clear that much larger price increases would be required to meet the targets, the penalties imposed come nowhere near those levels.

The goal of any penalty should be to act as an adequate financial disincentive to the defendants so that they will take no actions that have the impact of encouraging youth to use their products. The penalty must be high enough so that it cannot be easily offset by a price increase of a pack of cigarettes so small that it offsets the penalty without decreasing youth tobacco use.

To be effective, the size of the penalty must be such that if it were passed on to consumers, it would result in significant declines in tobacco use, especially among youth, whom Dr. Chaloupka testified are more price responsive than adults. Chaloupka WD: 31:15-18. Only if the penalty is sufficiently high that it cannot be passed on to consumers without sufficient business loss, will the defendants be faced with the real choice – do nothing to encourage youth tobacco use or face a serious financial penalty that cannot be passed on to consumers without impacting long term profitability. Financially significant price increases are especially critical with regard to youth smoking because, as the scientific community and the defendants agree, price increases have an

impact on smoking rates and a two to three times larger effect on youth than on adults. See, e.g., US FF ¶¶ 4657-4691. By gearing the penalty to a price per pack calculation, the youth reduction penalty will both deter the defendants from future unlawful behavior and help to bring about the reductions in youth tobacco use that is one of the goals of the Order.

In order to achieve the 10.5 percent reduction proposed by the Government, a 15.5 percent increase in the price of cigarettes would be required based on the commonly accepted elasticity for 30-day youth smoking of -.0675. See Chaloupka and Grossman, National Bureau of Economic Research Working Paper (1996) (cited in US FF § V, ¶ 457). While this elasticity figure is commonly accepted, other evidence introduced suggests that elasticity of youth smoking could be even lower. As cited in the Community Guide to Preventive Services, "The median estimates from the reviewed studies suggest that a 10% increase in the price of tobacco products will result in a 3.7% decrease in the number of adolescents who use tobacco." (US 64554) (A). Thus, the IO should have the authority to commission research to determine whether youth price elasticity has changed over time and revise the price elasticity that would be used in the penalties. The use of a lower elasticity would result in higher penalties for the defendant companies. While Dr. Gruber cites a price elasticity of .1 to calculate the price increase required to meet the target, he is using an elasticity to reduce daily smoking. Gruber WD, 20:18-23.

An effective penalty should therefore be based on the proper price elasticity – one that is keyed to monthly smoking, as opposed to daily smoking. Therefore, in any given

year that the defendants miss their target, they should pay an assessment equal to the price per pack increase required to reduce smoking to the target level, based on the price elasticity of thirty-day smoking. For example, if no decline occurred by 2007, the penalty would be the price per pack increase required to reduce smoking by the 10.5 percent recommended by the Public Health Intervenors. The baseline price for each defendant should be the average price of its three brands most popular with youth or of its brands which comprise at least 75 percent of its sales to youth, whichever number of brands is smaller. Thus, if the average price per pack were $3.74, a 58 cent per pack increase would be required to reduce smoking to the target level. Only a penalty of this size, with its concomitant price increase, will serve as an adequate economic disincentive to prevent the defendants from marketing in ways that attract children. On a per-company basis, each defendant company's penalty would be the price increase thus calculated to bring the smoking rate to the target level multiplied by their pack sales in the previous year, as determined by data provided through the defendant companies' disclosure of disaggregated marketing data or by the IO based on the best available data. See Appendix A (providing a detailed description of how the penalties would be calculated).

This approach would restrain each defendant company from marketing to children in two ways. First, if the defendant company misses its target, it would pay a penalty that it either passes on to smokers, thereby bringing youth smoking rates down, or takes out of its profits. Second, because the targets are company-specific, each individual defendant company could find itself at a considerable price disadvantage if it failed to meet the

targets and had to raise its prices while others met their targets. This approach not only prevents the defendants from marketing to youth, including those who have already begun smoking, but would also put in place a remedy that would achieve the targeted declines if the defendant companies pass the cost of those penalties along to smokers. If they choose not to do that, it is likely their penalties will be even larger in subsequent years.

d) Allocation of Penalty Payments

The allocation of funds should be the converse of that proposed by the Government to place a greater emphasis on the use of the penalty funds to further the goal of decreasing tobacco use. The Public Health Intervenors recommend that 80 percent of the funds be allocated to the public education and countermarketing fund to discourage youth tobacco use and 20 percent to the cessation assistance and treatment and cessation outreach fund. This allocation of how funds should be spent will provide a further disincentive to the defendants to attempt to market to children because it will provide more funds to counter those efforts.

2. Youth Smoking Reduction Targets Are Both Effective and Narrowly Tailored, and Also Further Critical Public Health Purposes.

As expert defense witness Roman Weil testified, a reduction target remedy "does give defendants economic incentives to achieve the targeted reductions in youth smoking." Weil, WD 6:3-4. More specifically, the adequately-measured penalty scheme proposed here will effectively prevent ongoing violations because, as Dr. Max Bazerman testified, "[s]evere monetary fines are necessary to reduce the incentives for defendants to

. . . collusively engage in misconduct in the future. For this remedy to affect behavior, these fines must be significant." Bazerman WD, 64-65. The penalties set forth above are financially "significant" in the sense that they are based on a dollar amount that is mathematically calculated to prevent the defendants from offsetting any penalty by just raising the price of their products in a calculation by the defendants that the price increase will do less harm to profits than the penalty. The precise price increase recommended by the Public Health Intervenors is carefully calculated to prevent this from happening because it is based on youth price elasticity and based on the number necessary to achieve the court-ordered youth reduction targets, thereby eliminating any incentive of the defendants to violate the order in order to attract more youth smokers. For that reason the remedy is also narrowly tailored. It is further narrowly tailored in that it is company-specific, both in terms of penalties and the per-pack profit necessary to achieve the appropriate price increase.

3. This Court Is Authorized To Impose Youth Smoking Reduction Targets.

As with cessation, public education, and counter-marketing, the youth smoking reduction remedy will also serve to prevent and restrain violations of RICO by shrinking the customer base of youth smokers who have already started smoking, and who will begin to do so in the future as a result of the defendants' unlawful youth marketing practices**.** This inherently forward-looking remedy, based on targets keyed to the defendants' future behavior, is also consistent with the Court of Appeals' ruling in that it is "directed toward future conduct." Philip Morris, 396 F.3d at 1198. Indeed, Judge Williams recognized remedies like the youth smoking reduction targets proposed here,

which "establish schedules of draconian contempt penalties" for failure to meet this Court's order, as permissible "express controls over substantive conduct." Id. at 1203-04 (Williams, J., concurring) (emphasis added).

Alternatiavely, as set forth *supra*, this Court may also impose the youth smoking reductino remedy under its power to "divest" the defendants of their unlawfully obtained investments, thereby ensuring that the defendants will not enjoy the assets, future dividends, and other interests derived from such illegal investments.

D. Specific Prohibitions on Defendants' Future Conduct

Without question, prohibitions on specific conduct are necessary to prevent the defendants from violating RICO in the future. The Government set forth several specific prohibitions on future conduct in its Proposed Order, Section V, at 1-6, but as the Record shows, and as illustrated below, further steps are needed to truly prevent future unlawful actions and give effect to this Court's exercise of its equitable jurisdiction. Some of the prohibitions listed below modify the Government's Proposed Order, while others add to it, as indicated below. Specifically, the decree should not only restrict the defendants from using those particular tools or practices by which they are known to have committed fraud in the past, but should also include prohibitions of more general applicability, which are designed to address the defendants' ability to circumvent specifically-worded prohibitions by way of specific practices that are as of yet unknown and unseen.

1. **Specific Prohibitions Are Necessary To Deprive the Defendants of the Tools By Which They Have Committed Fraud In the Past.**

While the defendants have shown a persistent and ongoing ability to circumvent marketing and other restrictions placed on them in the past, see Dolan WD, 11/29/2004, 146:13 - 146:22, this fact alone should not deter the Court from placing restrictions and prohibitions on their illegal conduct. To this end, the Court should begin with prohibitions on the defendants' conduct that are well-known and clearly documented. The Public Health Intervenors specifically concur with sections 5.a and 5.b of the Government's Proposed Order, which prohibit, respectively, (1) the use of price promotions for any cigarette brand that is found to be amongst the five most popular brands among youth aged 12 to 20 years old, based on the NSDUH; and (2) the marketing, manufacturing or distribution of cigarette "kiddie packs" containing fewer than 20 cigarettes. See Pl.'s Proposed Final J. and Order at 36, ¶¶ 5.a, 5.b.

Four of the prohibited practices proposed by the Government will better achieve their articulated goals with slight modifications. First, the defendants should be prohibited from not only motor sports brand name sponsorship such as NASCAR or Formula One, see id. at ¶ 5.c, but also any brand name sponsorship of any other team, group, event, or activity that results in any exposure of a brand name sold in the United States, regardless of whether the exposure was intentional. This restriction should also apply to brand name sponsorships of events held internationally if the sponsorship results in exposure in the United States, such as Formula One races broadcast in the United

States but which take place outside the of the United States, regardless of whether the exposure was intentional.

The need for the motor sports prohibition was clearly articulated in the written direct testimony of Mr. Matthew Myers, who stated that:

> The MSA has allowed the industry in this country and overseas to continue to use brand name sponsorships to gain exposure to audiences that include large numbers of children . . . . The fact that the MSA sponsorship limitation continues to permit each manufacturer a sponsorship of racing series whose races can occur every week before audiences that can include 100,000 people and are broadcast nationwide is a serious loophole. . . . It is important to understand that race car sponsorships do not start and finish the minute the race starts and finishes. Brand name signs are plastered around racetrack and arenas, and kids are exposed to the imagery often for days before and after the event. Therefore, while the MSA sponsorship limitation has resulted in fewer sponsorships, it does not adequately deal with this very powerful marketing mechanism.

Myers WD, 35:8 – 36:14. The Record is equally demonstrative as to the need for restrictions of other event or activity sponsorships besides sporting events. For example, B&W's recent Kool Mixx marketing campaign, described in further detail *supra*, exploits music events and hip hop dance activities in its appeal to youth, particularly African-American youth. As noted by Dr. Michael Kamins, Associate Professor of marketing at the Marshall School of Business, "the Kool Mixx Campaign targets youth, particularly African/American youth." See US FF § III(v), ¶¶ 4844.

Second, no defendant should be permitted to market, distribute, or offer for sale or distribution in the United States any flavored cigarette, including candy or fruit flavored cigarettes such as Kauai Kolada from R.J. Reynolds, other than tobacco or menthol, see Pl.'s Proposed Final J. and Order at 37, ¶ 5.d, because, as demonstrated at trial, flavoried cigarettes are attractive to youth. See, e.g., (US 90119) (A) (letter from Hawaii Governor

Linda Lingle to R.J. Reynolds expressing concern that it was "[e]nticing this vulnerable population with flavored cigarettes [in order] to get them addicted at a very young age").

Third, no defendant should be permitted to advertise in anything other than black text on white background in magazines with large youth readerships (read by more than two million youth or whose youth readers constitute 15 percent or more of the total readership), in any retail outlet open to youth, or any internet website accessible to youth. This provision is fully consistent with the findings and conclusions of the Food and Drug Administration in its final proposed rule where it stated that "this text-only requirement would reduce the appeal of cigarette and smokeless tobacco product labeling and advertising to persons younger than 18 years of age and preserve advertising's informative aspects—that is, to provide useful information to consumers legally able to purchase these products." (US 64323) (A).

While the FDA prohibition was aimed at reducing the appeal of tobacco advertising to persons younger than 18 years of age, the evidence in this trial has made it clear that, with respect to the defendants, this prohibition should extend to anyone under 21 years of age. As observed by Dr. Dean Krugman, the defendants have clearly focused their advertising on individuals 21 years and younger, not just 18 and younger. Dr. Krugman stated, "Just as with Philip Morris, these R.J. Reynolds plans and documents show an unrelenting focus by the company on people under the age of 21 as targets for media advertising. There is no question that R.J. Reynolds broke with the Advertising Code's provision and the tobacco companies' public promises not to aim media advertising at those under the age of 21." Krugman WD, 12/3/04, 175:7-11.

Further, while the Government failed to include this proposal in its proposed final order and judgment, this proposal is fully consistent with arguments and evidence presented by the Government during its closing arguments and during the course of this trial. For example, one of the Government's own expert witnesses, Dr. Frank Chaloupka, recommended "replacing any youth-appealing or misleading imagery in cigarette advertising and promotion (but not cigarette packaging) to factual, black and white communication." Eriksen, WD, 5-9-05, p. 24:19-27:2. The Government stated in its post-trial brief that,

> The United States' proposed remedial order gives court-appointed officers flexibility to identify appropriate penalties for non-compliance with the Court's remedial order. This should include financial penalties or targeted action, such as <u>requiring the offending Defendant to replace youth-appealing or misleading advertising or promotional material with black and white, factual information</u> on replacement advertising for a specified period of time.

Pl.'s Post-Trial Brief at 265 (emphasis added).

The Government summarized its most compelling evidence on this point during closing arguments, when its counsel stated:

> What would prevent and restrain defendants from marketing to young people under 21, including teenagers with youth-appealing cigarette brand imagery?
>
> Dr. Eriksen recommended removal of any misleading or youth-appealing imagery used to market cigarettes.
>
> The United States proposes that the court require defendants to stop using imagery that Dr. Biglan and Dr. Krugman have testified is youth appealing, such as the youth-appealing image of the Marlboro Man, such as the youth-appealing imagery of the Newport brand or the KOOL brand or the Camel brand, which defendants have creatively placed on cigarette packs sold at retail in the middle of this trial. . . .
>
> Dr. Eriksen proposed that defendants be required to replace any youth appealing or misleading imagery in cigarette advertising and promotion, but not cigarette packaging, to factual black and white communications.

> Dr. Eriksen explained that it is feasible to impose this limitation upon certain of defendants' imagery because he analogized to the current approach required of the entire business community for SEC financial offerings.

Pl.'s Closing Argument, 6/7/05, 23037:4-23038:4. The Public Health Intervenors strongly endorse this proposal, which was unfortunately omitted from its final order.

Fourth, no Defendant should be permitted to include or continue to include in any consumer marketing database any information or records pertaining to any individual verified as a youth or to any person the Defendant did not directly identify and verify as not being a youth at the time the data were first collected. Further, the content of any of the defendants' consumer marketing databases must be consistent with any orders issued by the Independent Investigations Officer (IO) on this matter, including the elimination of all data held by defendants on any youth or persons not verified as being a youth. In addition, the IO should have the authority to periodically confirm, including through the performance of unannounced compliance checks (consistent with existing State and local youth tobacco access and purchase laws), the defendants' adherence to this prohibition. If there is any doubt about an individual being a youth or not, the assumption should be that they are a youth and they should therefore eliminated from the database.

Evidence adduced at trial reveals that these database oversight provisions are necessary, in light of the high volume of direct mailings and other contacts between the defendants and consumers in which the defendants did not verify the age of the recipients. As noted by Dr. Robert Dolan,

> While the tobacco companies publicly professed that this was a mechanism to address only current customers over the age of 21, they sent many mail pieces to people whose age they really did not know for sure, i.e. they sent mailings to

> people without a Government issued identification, such as driver's licenses, on file as verification of age.

Dolan WD, 11/29/2004, 148:18 – 149:4; see also 3000196023-6025 at 6023 (US 23056) (A) (documenting age-unverified mailings to tens of millions of individuals); (US 90002) (A) (same; millions of individuals).

2. Prohibitions Of General Applicability Are Also Necessary To Prevent Future Unlawful Conduct The Exact Form Of Which Is Yet Unknown.

In addition to specific prohibitions on prior, known illegal conduct by the defendants, an effective remedial scheme also requires prohibitions of more general applicability, which are designed to address the demonstrated ability of the defendants to circumvent even the most well-intentioned and specifically-worded prohibitions by way of particular practices that are as of yet unknown and unseen. The most current example of such conduct by the defendants relates to the Master Settlement Agreement. As noted by Dr. Dolan,

> The MSA's restrictions on inputs, i.e. the way companies can engage in marketing, does present challenges to the companies. Because of the MSA, the companies did modify their marketing practices. As they had in the past, however, they were able to draw on their marketing expertise to come up with a revised marketing approach to achieve their objectives or outputs.

Dolan WD, 11/29/2004, 146:13-:22. The best way to ensure that the defendants do not circumvent the specific injunctions is to compliment and supplement them with more generally-worded prohibitions policed by the IO. Nine such prohibitions are described below.

First, and most obviously, the defendants should be prohibited from engaging in any racketeering regarding cigarettes or tobacco products, as set forth in the

Government's Proposed Order. See Pl.'s Proposed Final J. and Order at 34, ¶¶ 1. Nor should the defendants be permitted to obstruct any Court-appointed officers charged with administering the final order. Id. at 37, ¶ 6.

Second, the defendants should be prohibited from engaging in any marketing activities that the IO finds have the effect of marketing cigarettes in a manner appealing to youth. See Pl.'s Proposed Final J. and Order at 36, ¶ 5. The Record in this trial on the marketing of cigarettes by the defendants in ways that appeal to youth is extensive. One illustrative example of the defendants' conduct that would fall under this generally-worded prohibition relates to youth-targeted price promotions. As described by Dr. Frank Chaloupka,

> The recent drop in teenage smoking is not as large as it would have otherwise been due to the increase in Defendants' price-related marketing. On the one hand you have increases in prices because of industry price increases and increases in excise taxes. These increases in prices generally reduce the number of teenagers who smoke and the number of cigarettes they smoke. On the other hand, increases in the tobacco companies' price-related cigarette marketing that reduce the actual price that teenagers pay for cigarettes increase the number of teenagers who smoke and increase the number of cigarettes they smoke.

Chaloupka WD, 95:6-12.

Third, the defendants should not be permitted to participate in any way in the management and/or control of any of the affairs of organizations such as the Center for Tobacco Research (CTR), the Tobacco Institute (TI) or The Center for Indoor Air Research ("CIAR"), or any successor to CTR, TI or CIAR. See Pl.'s Proposed Final J. and Order at 34, ¶ 2. As demonstrated throughout the course of this trial, future activity with similar third parties must be strictly disallowed in order to prevent future conspiracy and racketeering. This prohibition is needed to prevent future unlawful activity because

such third-party organizations have facilitated fraud and conspiracy in the past, and may do so again in ways that are yet unforeseen. For instance, the Tobacco Institute played an important role in the defendants' creation of false "controversy" over the link between secondhand smoke and illness -- in a brief but telling 1980 statement, the Tobacco Institute stated, "First of all, it is important to understand that there is no convincing evidence that tobacco smoke causes disease in nonsmokers." (US 20401) (A).

Fourth, the defendant companies should not be permitted to make any false, misleading or deceptive statements about cigarettes or secondhand smoke. See Pl.'s Proposed Final J. and Order at 34-35, ¶ 3. The defendants have previously made false misleading statements to both consumers and government agencies with respect to health, safety, addiction, secondhand smoke, and other information that consumers use in determining whether to purchase, smoke, or quit consuming cigarettes. One of the most notorious examples of the defendants lying to and attempting to mislead government officials was recounted by former FDA commissioner Dr. David Kessler, who explained that during the course of the FDA investigations leading to his agency's publication of a proposed rule,

> [t]he cigarette manufacturers denied that nicotine was addictive, denied that they manipulated the level of nicotine in cigarettes, stated that nicotine was in cigarettes for flavor and taste, denied that they intended nicotine's drug effects, and denied that consumers were misled by the published nicotine deliveries, as measured by the FTC Method.

Kessler WD, 9/13/04, 16:18-21. The dire health consequences of such deliberate deception make this prohibition especially critical because, as explained by Dr. David Burns,

> the cigarette companies were aware of nicotine compensation and design changes that could be employed to facilitate compensation by smokers . . . . [and] were aware that the FTC-machine measured yield was misleading to consumers and that the FTC yield provided little to no information on how much tar and nicotine, whether in absolute or relative terms, were likely to be ingested into the smoker's body.

Burns WD, 2/10/05, 48:12-17.

Fifth, and as proposed by the Government, the defendant companies should not be permitted to misrepresent any conclusions relating to the health risks or other harms from smoking or from exposure to secondhand smoke as set forth in any published reports of the Surgeon General of the United States. See Pl.'s Proposed Final J. and Order at 34-35, ¶ 3.

Sixth, the defendant companies should be required to publicly disclose any information concerning an actual or potential health or safety risk of smoking or secondhand smoke with which a reasonable consumer of cigarettes or potential consumer of cigarettes, including youth, would be concerned. See Pl.'s Proposed Final J. and Order at 34-35, ¶ 3. The need for such disclosure is demonstrated by trial evidence related to the defendants' concerns that publicity of the harms associated with secondhand smoke would impact the economic vitality of their industry. For instance, as noted in a 1986 British American Tobacco Company document, "[t]he world tobacco industry sees the ETS issue as the most serious threat to our whole business." (US 89556) (A); see also (US 32289) (O) (R.J. Reynolds CEO Ed Horrigan confessing in 1982 letter to Lorillard that, "[w]e all know that probably the biggest threat to our industry is the issue of passive smoking").

Seventh, the defendant companies should not be permitted to make any claims that suggest that any cigarette brand reduces exposure of smokers or nonsmokers to, or contains reduced levels of, any component of cigarette smoke or potentially reduces the adverse health effects of smoking or exposure to secondhand smoke. Specific terms such as "light," "ultra light," "mild," "natural," "low," "low-tar," "low smoke," and any other descriptors that reasonably could be expected to result in a consumer's believing that the cigarette brand or sub-brand may result in a lower risk of disease or is less hazardous to the smoker or bystander than other cigarettes should be prohibited. See Pl.'s Proposed Final J. and Order at 35-36, ¶ 4.

This prohibition is more broadly-worded than that proposed by the Government in that it addresses any efforts by the defendants to mislead consumers into believing that a specific brand or sub-brand is less harmful to the smoker or bystander than others or that it may deter some smokers from quitting. A more inclusive set of banned descriptors is necessary in light of trial evidence suggesting that "reduced risk" products do not in fact reduce the smokers' risks. For instance, as noted by the National Academy of Sciences, so-called Potential Reduced Exposure Products "have not yet been evaluated comprehensively enough (including for a sufficient time) to provide a scientific basis for concluding that they are associated with a reduced risk of disease compared to conventional tobacco use." (US 20919) (A) (Institute of Medicine, Clearing the Smoke (2001)); see also (US 58700) (A) (National Cancer Institute, Monograph 13, Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine (2001)) (stating that "epidemiological and other scientific evidence . . . does not

indicate a benefit to public health from changes in cigarette design and manufacturing over the last fifty years").

Eighth, the defendants should not be permitted to enter into any relationship with any other person, or provide any payment or other support to any other person, that has the purpose or effect of limiting, suppressing, or distorting research or information related to: (1) health hazards or other harms from the use of cigarettes; (2) the effectiveness of cessation treatments or strategies; (3) the effects of secondhand smoke or the effects of legal prohibitions designed to reduce or eliminate exposure to secondhand smoke; or (4) the effectiveness of public or private strategies designed or intended to prevent or reduce tobacco use or its harms or to promote the creation of smokefree environments. This prohibition is necessary in light of the voluminous evidence of information suppression and distortion within and among the defendant companies and their contractors and other related third parties, particularly with regard to secondhand smoke. <u>See, e.g.</u>, US FF § III(f)(i) ¶¶ 510-44, III(m)(i) – (iii), ¶¶ 1150-82.

Ninth, the defendants should not be permitted to use third parties to circumvent any prohibition or final order of this Court. This prohibition is necessary in light of the compelling evidence about the defendants' use of third party affiliations such as the Tobacco Institute or individuals or organizations supported through industry lawyers or other intermediaries to circumvent specific prohibitions or restrictions on their conduct, or to mislead public understanding of smoking and health-related issues, including exposure to secondhand smoke. <u>See, e.g.</u>, US FF § I.C. ¶¶ 136-249; <u>see also</u> (US 21305) (A) (stating in a 1970 Tobacco Institute advertisement that "[a]fter millions of dollars and

over 20 years of research: The question about smoking and health is still a question"). In sum, the defendants have proven themselves to be innovative, creative, and relentless purveyors of fraud. An effective injunctive scheme must remove all of the tools at their disposal – not only those they have used in the past, but those of yet unknown character that they will employ in the future.

3. This Court Is Authorized To Impose All of the Proposed Prohibitions On Defendants' Future Conduct.

All of the specific prohibitions on defendants' conduct – including both specifically and generally worded injunctions as set forth in the preceding subsections -- are expressly authorized under the "reasonable restraints" provision of § 1964(a), which authorizes a court to restrain "the future activities or investments of any person, including, but not limited to, prohibiting any person form engaging in the same type of endeavor as the enterprise engaged in." 42 U.S.C. § 1964(a). Additionally, each prohibition also constitutes an appropriate exercise of equitable authority under this Court's obligation to prevent and restrain future racketeering, as described *supra*.

More specifically, the Supreme Court has repeatedly affirmed injunctions that go beyond the scope of the specific unlawful acts known at the time of trial, based on the common sense observation that a truly preventive, forward-looking decree necessarily "involves predictions and assumptions concerning future economic and business events." Ford Motor Co., 405 U.S. at 578; see also Philip Morris USA Inc., et al., 396 F.3d at 1203 (Williams, J.) (concurring) (stressing that the Court may fashion a remedy here based on "the history of the defendant, including the past wrongs," and thus "can decree relief targeted to his plausible future behavior") (emphasis added).

Furthermore, "[t]o ensure [ ] that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." United States v. Loew's, Inc., 371 U.S. 38, 53 (1962). See also Nat'l Soc'y of Prof'l Engineers, 435 U.S. at 698 (agreeing with the Court of Appeals that an antitrust "injunction . . . . [which] goes beyond a simple proscription against the precise conduct previously pursued [ ] is entirely appropriate"); Ford Motor Co., 405 U.S. at 573 n.8 (rejecting defendants' argument "that antitrust violators may not be required to do more than return the market to the status quo ante" as an "[in]correct statement of the law" and affirming Paramount Pictures, 334 U.S. at 152-53, in which the Court "sustained broad injunctions . . . which were not related to the status quo ante"); Hartford Empire Co. v. United States, 323 U.S. 386, 409-10 (1945) (stating that "a decree need [not] deal only with the exact type of acts found to have been committed" and that a court may "prohibit acts which in another setting would be unobjectionable").

4. None of the Proposed Restrictions Violates the First Amendment.

None of the activities that the Proposed Order seeks to restrain and enjoin is entitled to First Amendment protection. Since the advent of the commercial speech doctrine in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976), there has been one fixed star in the constellation of First Amendment law — the commercial speech doctrine affords no protection to speech that is false, misleading, or deceptive or proposes an illegal transaction. See id., see also Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (false and misleading speech "is not protected by the First Amendment"); Edenfield v. Fane, 507 U.S. 761, 771 (1993)

(holding that the government may restrain commercial speech, so long as "the harms it recites are real and [ ] its restriction will in fact alleviate them to a material degree").

5. Other Prohibited Practices Offered By Amicus Curiae.

The Tobacco Control Legal Consortium filed an amicus curiae brief with this Court that addressed several key issues, including prohibited practices, in significant detail. See TCLC Amicus Brief, passim. The Public Health Intervenors respectfully request that the Court give this brief and the recommendations contained therein full consideration when making any final decisions about appropriate remedies.

E. Document Disclosure Requirements.

The Public Health Intervenors strongly concur with the Government on the need for strong disclosure requirements to prevent and restrain future violations by the defendants and endorse the disclosure requirements at pages 24 through 32 of the Proposed Order. To prevent and restrain future violations even more effectively, the Public Health Intervenors also propose the following additional disclosures and disclosure related provisions.

1. Prohibitions Against Destroying, Concealing, Or Otherwise Putting Documents Out Of Reach Rather Than Disclosing.

It is well established that defendants have a long history of concealing and destroying documents that provide evidence of their wrongful acts. See, e.g., US FF § I.K, ¶ 539; Gulson WD, 2/10/05, 9:15-10:4. Even in this trial, defendant Philip Morris/Altria has been fined by the Court for destroying e-mail messages over a period of at least two years in violation of this Court's order. Order #600, 7/21/04 (noting Philip Morris's "reckless disregard" and "gross indifference" toward its discovery and

document preservation obligations). Accordingly, it is important not only to require the kind of extensive disclosure necessary to ensure compliance with the entire Final Order and Judgment but also to prohibit defendants from taking steps to destroy or otherwise conceal or put out of reach (e.g., by developing or storing them in foreign countries) any of the documents required to be disclosed. In addition, the defendants should be required to secure, maintain, and disclose any foreign-based, foreign-stored, or foreign-created documents that the defendants have in their possession or otherwise control or have access to that fall under the disclosure categories. See also Brief of Amici Curiae Essential Action, et al., in Support of the Position of the Plaintiff United States of America Regarding Remedies ("Essential Action Amici Brief") at 15-18.

2. Disclosure Of Documents Produced By Defendants In Foreign Courts Or Administrative Proceedings.

The defendants should be required to disclose all documents relating to smoking and health, including secondhand smoke, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research produced by the defendants in any foreign court or administrative, and not merely those produced in U.S courts and administrative proceedings, as proposed by the Government. See Brief of Amicus Curiae Tobacco Control Legal Consortium and Others in Support of the Plaintiff United States of America and Intervenors Regarding Remedies ("TCLC Amicus Brief") at 2-4 and Essential Action Amici Brief at 15-17.

The trial Record contains extensive evidence of defendants' efforts to conceal certain activities or information, such as research findings, by delegating the activities to foreign-based subsidiaries, affiliates and third parties, including both researchers and

"independent" organizations created by defendants, themselves. See, e.g., DeNoble WD, 12/6/04, 36:4-18. Philip Morris, for example, has also deliberately tried to keep scientific information out of the United States by conducting certain types of research at a foreign research facility known as INBIFO and by establishing a strict protocol for the review of research documents pertaining to smoking and health. See Farone WD, 9/29/04, 147:4-9, 148:16-150:7. Requiring defendants to disclose relevant documents produced by the defendants in foreign lawsuits or administrative proceedings is one way to bring more of these documents to light. For example, documents that first surfaced during litigation in Australia outlined British American Tobacco's comprehensive document destruction policy, which has had a direct impact on this trial as well as others relating to defendants in the United States. As Mr. Gulson noted in his direct written testimony, the purpose of the policy was to protect all BAT Group companies from litigation by ensuring that all potentially damaging documents be destroyed. See Gulson WD, 2/10/05, 9:15-10:4, 13:10-20:11; see also (US 75779) (McCabe v. British American Tobacco Australia (Services) Ltd., [2002] VSC 73 (Supr. Ct. of Victoria at Melbourne Mar. 22, 2002), rev'd on appeal). According to Mr. Gulson, "Since the litigation environment in the United States was considered very hostile, there was a particular concern that the discovery of sensitive documents would hurt Brown & Williamson." Gulson WD, 2/10/05, 10:13-16. Accordingly, these foreign documents should be disclosed.

3. Providing Information From Defendants' Current Marketing Plans To Guide And Improve The Countermarketing And Cessation Remedies.

To develop and administer the countermarketing and cessation outreach and public education remedies to operate as effectively as possible, it is necessary that the American Legacy Foundation ("Foundation") and the Cessation Administrative Organization ("CAO") have a good understanding of the defendants current and ever-changing marketing plans and strategies. See, e.g., TCLC Amicus Brief at 4-8. At the same time, the Public Health Intervenors recognize that it is critical for this Court's Order to protect the proprietary business information or trade secrets of each defendant and avoid creating an unfair competitive disadvantage to any defendant from the disclosure of this information. To balance these two goals, the court should require that the IO regularly review defendants' current marketing plans, see Pl.'s Proposed Final J. and Order at § VI(C)(1)(f), and inform the Foundation and the CAO of that information which would assist them in developing and administering effective outreach, countermarketing, and public education strategies and content. Under this approach, the IO would provide important information without disclosing any trade secrets or proprietary information of defendants.

4. Disclosing Payments and Support to Third Parties That Promote Defendants' Interests and Goals.

The defendants have a clear history of providing grants and other support to third parties operating in the United States to promote the defendants' own political, advocacy, research, and marketing agendas and to provide the illusion of independent, third-party support for defendants' agendas, assertions, and activities, including their misrepresentations of material facts and other wrongful acts. See, e.g., US FF § III.A(2), ¶¶ 879, 883-884. It is critically important that the disclosure requirements ordered by the

Court address any efforts by defendants to support third-party activities that promote defendants' goals without revealing the defendants' support or involvement. Without the required disclosure of information relating to such grants and other payments or support provided to third parties who represent the defendants' interests or promote defendants' goals, the defendants may be able to evade restrictions placed on their own direct activities.[16] See also TCLC Amicus Brief at 8-9; Essential Action Amici Brief at 19-20.

Accordingly, the defendants should be required to disclose the name, address, and other basic identification information of any third parties that engage in public health or public policy related education, research, grassroots advocacy, lobbying, or other advocacy or political activities relating to tobacco, tobacco use, tobacco-caused harms, or efforts to prevent or reduce tobacco use or its harms – such as academic institutions, public policy centers, grassroots or citizen action groups, issue advocacy organizations, business or trade associations, and the like, including those based overseas – to which defendants provide any payments, grants, other funding, contracts, contributions, or other support, along with the amount of any such monetary payments, grants, contracts, or other provided funding and a description of any provided non-monetary contributions, support or assistance. See also TCLC Amicus Brief at 8-9; Essential Action Amici Brief at 19-20.

---

[16] The defendants should be explicitly prohibited from providing financial support or other assistance to third parties to engage in activities the defendants are prohibited from engaging in themselves, and must be required to take reasonable steps to stop third parties from engaging in such acts. Indeed, the required disclosure of the defendants' payments and other contributions and support to certain third parties, as proposed herein, will help to ensure that defendants comply with that prohibition on using third parties to undertake activities the defendants may not directly engage in themselves.

5. Technical and Procedural Improvements to Proposed Document Disclosure and Document Websites.

The Public Health Intervenors also recommend that the Court fully consider the recommendations, supporting arguments, and citations to the trial record and other relevant evidence in the Brief of Amicus Curiae the Regents of the University of California in Support of the United States' Proposed Final Judgment and Order ("Regents Amicus Brief"), including (a) requiring the disclosure, via the Internet, of documents in the BATCO Guildford document depository; (b) establishing a procedure for resolving problems of access to disclosed documents and documents on the document websites, including related penalties for violations by defendants; (c) prohibiting defendants from collecting and using information about the users of Internet document websites and depositories; and (d) addressing a number of related technical and procedural issues. The Public Health Intervenors note that the proposed order language submitted as part of the Regents Amicus Brief clarifies the recommendations of the brief.

6. Other Improvements To The Disclosure Remedy.

The TCLC Amicus Brief and the Essential Action Amici Brief also propose other measures relating to the disclosure remedy that the Public Health Intervenors urge the Court give serious consideration, such as the proposal in the TCLC Amicus Brief that current marketing plans be given directly to the American Legacy Foundation, under a confidentiality protective order to improve the effectiveness of its countermarketing efforts, see TCLC Amicus Brief at 4-8, and the proposals in the Essential Action Amici Brief relating to the disclosure of foreign-based documents relating to foreign marketing that reaches consumers and others in the United States or that relates to global or

internationally coordinated marketing practices or strategies in which the defendants participate, see Essential Action Amici Brief at 18-19, and generally to reach documents, data, and research findings that defendants may hide overseas. See id. at 15-18.

In sum, the general purpose of the disclosure requirements in the Government's Proposed Order and the purpose of all of the related improvements proposed here and in the referenced amici briefs is to ensure that the defendants will be required to disclose those documents and information that are the most critical for ensuring the defendants' compliance with the Final Judgment and Order, and to make it as difficult as possible for the defendants to avoid the disclosure requirements or to delay or interfere with public disclosure and review.

7. This Court Is Authorized To Impose the Proposed Document Disclosure Requirements.

As explained *supra*, the Court has ample authority to impose mandatory disclosure requirements on the defendants. Indeed, such requirements have routinely been imposed under the "prevent and restrain" language in the antitrust contest. See Philip Morris USA Inc., 396 F.3d at 1190 (Williams, J., concurring) (recognizing the Court's ability to impose "express controls over substantive conduct," including "transparency-enhancing orders"); Sasso, 215 F.3d at 190-91 (allowing remedial measures to promote "effective[ ] monitor[ing] by the Court to insure that its decrees are not violated").

F. <u>Enforcement By An Independent Officer</u>.

1. The Independent Investigations Officer Must Be Vested With Sufficiently Broad Authority To Police All Aspects of the <u>Court's Final Judgment and Order.</u>

The remedial decree proposed here will not serve its equitable purposes of divestiture and restraint if is not adequately policed and enforced. In light of the defendants' long history of circumventing both voluntarily undertaken and legally binding obligations, <u>see</u> *supra*, it is manifest that a court appointed officer must monitor the defendants' future behavior to assure that they do not violate the decree or commit further RICO violations. In section VI of its Proposed Order, the Government proposed the creation of an Independent Investigations Officer (IO) with the "authority and duty to supervise the implementation of the court-ordered relief." Pl.'s Proposed Final J. and Order at 38. However, to truly restrain future RICO violations and to give full effect to the letter and spirit of the remedial decree, the IO's authority should also include an affirmative duty to regularly review those particular practices of the defendants' which they have violated RICO.

Specifically, the IO's required oversight should include monitoring of: (a) the defendants' current marketing plans; (b) any contributions, grants, or contracts with third parties to carry out activities that defendants are prohibited from undertaking; (c) any efforts by the defendants to use international affiliates to undertake activities prohibited by the Court's order; (d) any internal decision making that balances the cost of future violations against the revenue or profits from continuing activities that are prohibited; (e) any activity designed to undermine the smoking cessation program or the public

education/countermarketing program; (f) communications between the defendants and their employees as to their obligations under this Court's order; (g) internal mechanisms for employees to report misconduct; (h) public disclosure of any proceedings before the IO; and (i) the implementation of a procedure by which the IO can receive public comments about the defendants' activities.

a) Defendants' Current Marketing Plans

It has been amply demonstrated in the Record that the defendants have intentionally marketed their cigarettes to people under the ages of 21 years while repeatedly denying publicly that they did so. See US FF § III.E; Dolan WD, 24:3-16; Chaloupka WD, 30:8-32:20. As part of their fraudulent denials about youth marketing, the defendants have claimed they only sought to shift individuals who already smoke from one brand to another, an assertion which the Record shows is untrue. See Dolan WD, 24:3-16. Therefore, in order to prevent future youth marketing, the Court should require the IO to evaluate the defendants' marketing plans and advertising practices to ensure that they do not violate the Court Order. After reviewing those plans and practices, the IO will provide the American Legacy Foundation and the Cessation Administrative Organization that information which the IO determines to be appropriate and which will assist those entities in administering their programs pursuant Sections IV(B) and IV(C).

b) Third Party Activities

As the evidence adduced at trial demonstrates, the defendants used third party organizations to carry out research and public relations activities that the defendants

themselves were prohibited from doing or when the defendants thought it best to have an "independent" third-party advance their objectives. See, e.g., US FF § III.A(2) ¶¶ 630, 665, 720, 739, 837. The IO should be given the authority to monitor the defendants for any use of third-party organizations to carry out activities prohibited by the Court.

c) International Affiliates

The defendants have long used overseas affiliates to carry out and coordinate their activities in furtherance of their conspiracy. See, e.g.,US FF ¶¶ 418, 491. Therefore, it is critical that the IO monitor any use of international affiliates to undertake activities prohibited by this Court's order.

d) Internal Deliberation That Balances the Cost of Future Violations With Profits From Continuing Violations

The IO should also monitor both the implementation of youth smoking reduction targets and the economic penalties outlined in section III (C), as well as other business practices, to ensure that economic incentives such as bonuses and profits no longer exist that would otherwise compel the defendants to commit fraud. Currently, the defendants' executives and companies have financial incentives to market to youth in order to maximize profits and shareholder returns and for personal compensation. See, e.g., US FF ¶¶ 325, 326. Therefore, it will be necessary for the IO to monitor the implementation of the economic incentives and the defendants' business practices regarding decision making and other internal considerations to ensure that the Court's order is not circumvented. Dr. Bazerman testified that court-appointed monitors should "have the authority, with the utilization of outside experts as needed, to review all aspects of

defendants' businesses…that address the incentives and biases that in my opinion will likely cause misconduct to continue." Bazerman WD, 2:22-3:3.

e) Activities That Undermine the Other Remedy Components

To give effect to the equitable goals of the entire remedial scheme, the IO should monitor not only compliance with the decree, but should also monitor the defendants' marketing, advertising and business practices to ensure that they do not also undermine or counteract any of remedy components. For instance, as demonstrated at trial, the defendants' media campaigns have not been proven effective at reducing youth smoking and in some instances may actually have furthered the RICO violation by contributing to an increase in youth smoking. See, e.g., US FF ¶¶ 4880-4887. The Record also shows that the defendants falsely marketed and promoted low tar cigarettes as less harmful than regular cigarettes to encourage switching to low tar brands rather than quitting. See, e.g., US FF § III (D). Therefore, the IO should have the affirmative responsibility to monitor the defendants to ensure that their conduct does not undermine the other remedies.

f) Employee Education

The decree should also include a procedure created by which the IO can require the defendants to ensure all of their executives, management, and other employees are familiar with the Court's final judgment and Order, particularly with respect to the prohibitions and restrictions placed on defendants. The IO should require the defendants to demonstrate that they have completed such employee education.

g) Whistleblower Protections

The IO should also require each defendant to ensure that all of its directors, officers, and employees have access to and are aware of an email address and toll-free number by which they can report violations of this Court's Order to the IO. Concurrent with this authority, the Order should include whistleblower protections to employees who report violations. Such a provision is critical in light of the defendants' Record of retaliating against individuals who have tried to communicate information and research that is in disagreement with official company policy and positions. See, generally, US FF § III.F(2); see also id. at ¶¶ 4960. As Dr. Bazerman noted, "internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution will prevent and restrain defendants from suppressing individuals who oppose defendants' public relations positions." Bazerman WD, 60:14-61:2.; see also US FF § V(G)(3), ¶¶ 341.

h) Public Availability of IO Proceedings

The Public Health Intervenors support the Government's proposed Procedural Rules as stated in their June 27th proposed Final Judgment and Order. However, to give full effect to the remedy, the public should have notice of and access to all proceedings, transcripts, final rulings and any penalties adjudged by the IO. In the interests of impartiality, none of the court appointed officers should have had any previous firsthand or third party affiliation, financial or otherwise, with the defendants or the tobacco industry or any organization with financial or other ties to the defendants.

i) IO Public Comment Procedure

The IO should create a procedure by which the IO can receive comments from the public about defendants' activities that may violate the Court's order. The defendants' own witness, Dr. Daniel Fischel, testified to the importance of having outside watchdog groups monitor senior managers and companies to ensure that they are acting lawfully. See Fischel, WD, 20:21-20:23. While watchdog and media groups are not sufficient to prevent future misconduct, see Bazerman WD, 35:13-35:23, they can provide useful and timely information to the IO.

j) Selection of Court Appointed Officers

The Government's (Proposed) Final Order and Judgment establishes certain criteria for the selection of court appointed officers. Public Health Intervenors recommend that any Court-appointed officer and any law firm or other organization with which such officers were previously associated should be prohibited from having represented any defendant or other tobacco company, or having received any payment or other support from any defendant or other tobacco company during the two year period prior to the appointment under this section. In addition, all Court-appointed officers and other staff hired or otherwise retained shall not for at least one year after finishing their work pursuant to this order, receive any payments or support from any defendant or other tobacco company.

2. This Court May Vest the Independent Officer With The Authority Necessary To Implement Its Decree.

The Independent Officer is unquestionably a permissible method of enforcing a decree and hence a "forward-looking" remedy. As further demonstrated *supra*, courts have also routinely appointed independent monitors, hearing officers, and even trustees to enforce an equitable decree, particularly where the provisions are complex and technical in nature. Specifically, in the RICO context, in United States v. Sasso, 215 F.3d 283, 289 (2d Cir. 2000), the Second Circuit affirmed a monitoring system imposed by the district court that was designed to "oversee the operations of the Local until it is cleansed of all racketeering and organized crime influence." Despite the fact that the decree required the defendant to fund the monitoring system with his own funds, the reviewing court expressly distinguished the remedy from disgorgement, stating that the oversight "was not tantamount to an order for disgorgement but rather was relief that was forward-looking," and that " it cannot be accomplished unless the monitorship is adequately funded." Id. at 291 (emphasis added); see also S. Rep. No. 617 at 83 (noting that Section 1964(a) provides for "flexible remedies," that "may be effectively monitored by the Court to insure that its decrees are not violated") (emphasis added). As with the monitorship in Sasso, here the presence of the IO will also "help prevent the illegal conduct" at issue. 215 F.3d at 291.

Indeed, as demonstrated *supra*, oversight requirements similar to those proposed here have also been repeatedly imposed under the analogous "prevent and restrain" provisions of the antitrust laws. See, e.g., Bausch & Lomb, 321 U.S. at 727 (upholding

antitrust decree requiring defendant to submit to inspections and interviewing of officers because "a mere prohibition of the precise scheme," without adequate oversight, "would be ineffectual"); Grinnell Corp., 384 U.S. at 579 (describing independent oversight as an "important and customary [ ] provision" to ensure the effectiveness of equitable relief").

G. Other Sections of Government's Proposed Order

1. Review of Business Policies and Practices

The Public Health Intervenors also endorse Section IV (G) of the Government's Proposed Order ("Review of Business Policies and Practices"), and specifically endorse Section III (G)(2) which requires the IO to "conclude his or her review and make recommendations within 180 days of the Final Judgment and Order." Pl.'s Proposed Final J. and Order at 33. However, if the Court determines that 180 days is not sufficient for the IO to render his or her recommendations, the Public Health Intervenors recommend that the IO be given additional time but still require affirmative action from the IO within a specific time period.

2. Corrective Communications

The Public Health Intervenors also endorse Section IV(E) which provides for corrective communications by defendants, but also recommend that the Court consider the changes to this section that are recommended in the brief of Amicus Curiae the Tobacco Control Legal Consortium (TCLC) et al. in Support of Position of Plaintiff United States of America and Public Health Intervenors.

3. Other Sections

The Public Health Intervenors endorse without qualification Sections II (Jurisdiction and Authority of the District Court) and III (Applicability) of the Government's Proposed Order.

CONCLUSION

For all of the foregoing reasons, the Public Health Intervenors respectfully request the Court to enter an Order incorporating all of the remedies they have advanced here. Indeed, particularly in light of this industry's well established pattern of taking every opportunity to circumvent precise restrictions that are placed on its behavior – in an effort to secure consumers, and especially children and people of disadvantaged communities, who will become addicted to its product and thus have no choice but to continue to buy this product for many years to come – without such remedies, "the Government [will have] won a lawsuit and lost a cause." Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947). As parties to this case, the Public Health Intervenors remain available to assist the Court in any way possible to craft and implement these critical remedies.

Respectfully submitted,

Katherine A. Meyer
(D.C. Bar No. 244301)
Howard M. Crystal
(D.C. Bar No. 446189)
Ethan Carson Eddy
(California Bar No. 237214)

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, Suite 700
Washington, DC 20009
202-588-5206

OF COUNSEL:

Professor G. Robert Blakey
William J. and Dorothy O'Neill
Professor of Law
Notre Dame Law School
Notre Dame, IN 46656
(D.C. Bar No. 424844)

David C. Vladeck
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
202-662-9535
(D.C. Bar No. 945063)

Date: August 31, 2005