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)

REPLY MEMORANDUM IN SUPPORT OF THE
POST-TRIAL BRIEF OF THE PLAINTIFF-INTERVENORS

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Introduction

In their opening brief, the Public Health Intervenors demonstrated that, if the Court finds that there is a reasonable likelihood that defendants will continue to violate RICO, it may order remedies to prevent and restrain those and further violations, consistent with the plain language of Section 1964(a), the legislative history of RICO, Supreme Court case law, and the Court of Appeals decision in this case, United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005), petition for certiorari pending. In response, defendants make a series of arguments that have no merit.

First, defendants incorrectly insist that the Public Health Intervenors are barred from advancing any remedies that are not identical to those proposed by the Government, and inaccurately assert that the Public Health Intervenors' remedies must also be rejected because they have not been the subject of an "evidentiary hearing" as required by United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). Post-Trial Brief of Joint Defendants ("Defs.' Br.") at 2-3. However, Microsoft is distinguishable from this case since here, the Court has had an evidentiary proceeding before imposing any remedies, the remedies the Public Health Intervenors propose are all fully justified by the existing record, and those remedies are also narrowly tailored to address the violations that have been established in this case.

Second, the defendants assert that the Court may only impose narrow injunctive relief, regardless of the nature of the violations of law that are established here. However, in their opening brief the Public Health Intervenors demonstrated that in light of both the harmful and addictive quality of the products at issue, and the defendants' proven history of adapting their deceptive practices to circumvent the impact of whatever pledges they have made or restrictions that have been imposed, the Court can – and indeed must – go beyond simply ordering the

defendants to cease from engaging in the specific unlawful practices proven here. See Plaintiff-Intervenors' Post-Trial Brief ("Int. Br.") at 18-22.

Nothing in the Court of Appeals' decision ties the hands of the Court in the manner asserted by the defendants. Rather, as Judge Williams noted, once the Court finds a RICO violation, it has the authority to impose equitable remedies on a defendant "that have a genuine tendency to 'prevent and restrain' his future violations." United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1204 (D.C. Cir. 2005). Each of the remedies proposed by the Public Health Intervenors is carefully crafted to accomplish this goal.

Moreover, as the Supreme Court has repeatedly held under the antitrust laws – upon which RICO was expressly modeled – "[w]hen the [unlawful purpose] appears from a clear violation of the law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." Int'l Salt Co. v. United States, 332 U.S. 392, 400 (1947). Rather, the standard against which the trial court's remedies must be judged is "whether or not the required action reasonably tends to dissipate [the unlawful activity] and prevent evasions." United States v. Bausch & Lomb, 321 U.S. 707, 726 (1944) (emphasis added); see also United States v. Crescent Amusement Co., 323 U.S. 173, 188 (1945) ("[w]here the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct . . . ."); id. at 190 ("[t]he proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future") (emphasis added).

Therefore, as the Supreme Court has also held, "[t]he duty of the Court . . . is 'to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival.'" Id. at 188 (citation omitted) (emphasis added). Indeed, as Judge

Williams also noted in his concurring opinion, the Court may fashion remedies based on "the history of the defendant, including the past wrongs," and thus "can decree relief targeted to his plausible future behavior"). Philip Morris USA Inc., 396 F.3d at 1203 (emphasis added). Here, as the Record demonstrates, the defendants' "plausible future behavior" involves continuing to devise deceptive ways to attract underage smokers who will become addicted to tobacco for many years even while denying that they are doing so, and to convince addicted smokers not to quit smoking. See, e.g., Post-Trial Brief of Plaintiff-Intervenors ("Int. Br.") at 15-16, 26-27.[1]

Indeed, the Record shows that the defendants know that more than 90% of their customers start smoking before the age of 21, and that, based on their behavior and own internal records, the defendants believe that if they are not successful in securing those young smokers, they will no longer be as profitable. See, e.g., Int. Br. at 74 (citing (JD 054452) (A)). The Record also shows that the defendants have concluded that the only way they can convince consumers to begin and continue smoking a product that is extremely dangerous to their health, and that results in more than 400,000 preventable deaths each year, is to lie about its adverse health effects, lie about the fact that they market the product to children, and to lie by telling consumers that they can guard against adverse health effects by switching to "healthier" cigarettes. See, e.g., US FF §§ III(A), (D), (E). Therefore, as the Public Health Intervenors explained in their opening brief, to prevent and restrain the unlawful practices at issue here – and to "preclude their revival," Crescent Amusement, 323 U.S. at 188 – it is imperative that this

[1] Even now the defendants' actions give rise to concerns that they are devising ways to circumvent any order this Court may issue. Thus, knowing that the Court's remedies will focus on cigarettes, RJ Reynolds has recently announced its intention to expand its tobacco business by acquiring a smokeless tobacco business. See, e.g., Bloomberg News Service, Reynolds considering smokeless tobacco, WINSTON-SALEM JOURNAL (Sep. 21, 2005), available at: http://journalnow.com/servlet/Satellite?pagename=WSJ/MGArticle/WSJ_BasicArticle&c=MGArticle&cid=1031785179361.

Court fashion remedies that will either alter the benefit/cost ratio of engaging in such wrongful practices so that the cost of continuing to engage in such violations exceeds any possible benefit of doing so, or divest the defendants of the number of consumers upon whom they can continue to prey, producing the same deterrent result.

As demonstrated in their opening brief, all of the Public Health Intervenors' proposed remedies accomplish these objectives. As further demonstrated below, none of the defendants' contrary arguments has any merit.[2]

A. The Court May Impose All Of The Remedies Proposed By The Public Health Intervenors.

There is no merit to the defendants' insistence that the Public Health Intervenors may not be heard on any remedies that differ in any way from those advanced by the Government at some point in this case. Defs.' Opp'n Br. at 2-3. As this Court made clear when it granted the motion to intervene, the Public Health Intervenors moved to become parties for the express purpose of "being heard on the issue of the permissible and appropriate remedies in this case, should the Court find the defendants liable for the unlawful activities alleged in the Amended Complaint." Memorandum Opinion (July 22, 2005) ("Interv. Op.") at 1, (quoting Mot. to Intervene at 1) (emphasis added)). See also id. at 10 (noting that the defendants may respond to "whatever remedies the Intervenors will claim to be legally permissible, appropriate, and necessary") (emphasis added).

Accordingly, the Public Health Intervenors may propose whatever remedies they believe are supported by the Record and are needed to prevent and restrain future violations of RICO, regardless of whether the remedies are identical in every detail to the remedies advanced by the

[2] As stated in the Intervenors' opening brief, should the Supreme Court grant the Government's pending petition for certiorari regarding the Court of Appeals' disgorgement ruling, this Court should decide the liability issues, but stay the remedies phase of this case. See Int. Br. at 7 n.2.

Government. Indeed, this Court emphasized that it was granting the Public Health Intervenors party status because "it will serve the public interest for major public health organizations, such as Intervenors, who have long experience with smoking and health issues, to contribute their perspectives on what appropriate and legally permissible legal remedies may be imposed should liability be found." Id. at 10-11 (emphasis added).[3]

Similarly, there is also no merit to the defendants' insistence that the Public Health Intervenors' proposed remedies may not be considered because each and every component of those remedies was not the subject of a previous evidentiary hearing. The due process rights of the defendants have been amply satisfied by the proceedings that have been held here. The Court has held extensive hearings that have explored the need for public education campaigns, cessation programs, youth smoking reduction targets and each of the other proposed remedies. As the Public Health Intervenors explain more fully, *infra* at 14-25, the Record easily supports all of these remedies.

In fact, the most significant variation in the remedies proposed by the Public Health Intervenors from those discussed at trial is to make the duration of several remedies geared to the accomplishment of a benchmark that is directly impacted by the extent to which the defendants continue to violate the law. The Public Health Intervenors have proposed the use of such benchmarks precisely to address the defendants' complaint that the remedies originally proposed by the Government constituted punishment – and hence were inherently "backward-looking" – because they continued for a fixed term of years, without regard to whether the defendants were

[3] For the same reasons, should defendants and the Government enter into further settlement discussions concerning relief in this case, the Public Health Intervenors respectfully submit that they should be included in those discussions.

still engaged in any unlawful activities.[4] See Defendants Motion For Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) at 10-11 (July 10, 2005). Thus, under the Public Health Intervenors' proposal, the length of time it takes to achieve the benchmarks, and hence the time at which a particular remedy will expire, relates directly to the defendants' own behavior – i.e., the sooner they stop engaging in deceptive practices to secure and maintain addicted customers, the sooner they will be relieved of their obligation to fund certain remedies.

Furthermore, although the Public Health Intervenors do not believe any additional proceedings are necessary, in the event the Court determines that there is a need for further fact-finding with regard to any component of a particular remedy, the Court may entertain supplemental submissions for this purpose. See Interv. Op. at 10 ("if Joint Defendants conclude that they need to submit additional Proposed Findings of Fact responsive to any legal argument made by Intervenors in their trial brief, they may file a motion to do so").

B. The Court May Impose Remedies That Will "Divest" Defendants Of Their Long-Term Assets In Addicted Consumers.

As the Public Health Intervenors explained in their opening brief, at 32-36, requiring the defendants to fund the proposed cessation and public education and counter-marketing programs is consistent with the plain language of Section 1964(a) of RICO, which makes clear that one way to "prevent and restrain" further violations of the statute is to "divest" the defendants of "any interest, direct or indirect, in any enterprise." 18 U.S.C. § 1964(a) (emphasis added). Indeed, Judge Sentelle recognized that a "[d]ivestment" remedy is authorized by this provision of RICO. 396 F.3d at 1198.

[4] Nonetheless, the Intervenors do not concur with the defendants' position that the Government's proposed remedies fail to comply with the Court of Appeals' decision. See, e.g., Defs.' Post-Trial Br. at § IX(B).

Here, the Record demonstrates that the defendants engage in fraudulent practices for the very purpose of securing new – predominantly young – customers, and that defendants also engage in deceptive practices to keep those consumers who wish to quit smoking from doing so – all to ensure the defendants a continuing stream of future "dividends" from these consumers, whose free choice to quit has been severely limited by the addictive nature of the defendants' products, and who, therefore, despite their desire to quit, continue to enrich the defendants every time they buy a pack of cigarettes.[5] Indeed, the Record is replete with evidence that the defendants themselves candidly refers to these addicted consumers as revenue generating "assets" that produce valuable long-term "dividends." See Int. Br. at 10-11. Accordingly, under the plain language of Section 1964(a), this Court may impose remedies that will "divest" the defendants of this interest, as is also made clear by the legislative history of RICO and the Supreme Court case law construing both RICO and the analogous antitrust laws. See Int. Br. at 33-41.[6]

In response, defendants do not address any of this legislative history, nor do they address the extensive Supreme Court "prevent and restrain" jurisprudence relied on by the Public Health

[5] The addictive nature of the defendants' products makes a critical difference. In a typical RICO case, an order to cease wrongful behavior will immediately change the circumstances of impacted victims. Smokers who say they want to quit, however, keep smoking because they are addicted.

[6] See also, e.g., Int. Br. at 10-11; US FF § II(E) (quoting (US 20711) (A); (US 85235) (O) (noting in memorandum to RJR CEO Martin Orlowsky that then when "the 18-year-olds which they have previously attracted" move "into the older age brackets," they "pay a consumption dividend of up to 30%," and that "a strategy which appealed to older smokers would not pay this dividend") (emphasis added); (US 20151) (O) (reporting as "assets" the increase of smokers in the 17-24 year old age group); (US 20520) (A) (explaining that Marlboro's "share of the young adult smokers coupled with its ability to retain the loyalty of smokers as they age are Marlboro's largest assets and the foundation of its growth") (emphasis added).

Intervenors.[7] Instead, defendants insist that the Court may not impose the remedies proposed by Intervenors because those remedies would do nothing to divest the defendants of any interest in "the enterprise" as defined by the Government in this case for purposes of formulating the violations of Section 1962 of RICO, 18 U.S.C. §§ 1962(c), (d). Defs.' Br. at 7.

However, the defendants' argument cannot be squared with the plain language of the statute, which states that a defendant may be divested of any interest in "any enterprise," 18 U.S.C. § 1964(c) (emphasis added), not just an interest in "the" enterprise that has committed the unlawful acts. In addition, the term "enterprise" is defined to include "individuals." 18 U.S.C. § 1961(4). Therefore, under the plain language of Section 1964(a), this Court may fashion remedies that will divest the defendants of their future interests in the millions of consumers who continue to become addicted and stay addicted to their products as a result of the defendants' wrongful conduct, without such consumers also being part of the "enterprise" that has violated RICO here.

Thus, it is true, as defendants point out, that each member of "the enterprise" for purposes of violating Section 1962(c)'s prohibition against engaging in an "enterprise's affairs through a pattern of racketeering," must "purposeful[ly]" engage in such affairs to be found liable under the statute. Defs.' Br. at 7. However, that requirement has no relevance to the reach of remedies in Section 1964(a) to any interest in "any enterprise," regardless of whether that enterprise is also engaged in a "pattern of racketeering," since that provision of the statute contains no such limiting language. See, e.g., Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("[w]here Congress includes particular language in one section of a statute

[7] The sole exception is the defendants' novel suggestion that the Supreme Court's decision in United States v. Turkette, 452 U.S. 576 (1981), was somehow overruled by the 2-1 Court of Appeals decision in this case. See Defs.' Opp'n Br. at 8, note 9.

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely . . .."); see also Philip Morris, 396 F.3d at 1200 (if Congress had wanted the statute to read as plaintiffs suggest, it would have written it that way).

Indeed, the legislative history makes clear that one of Congress' main concerns in enacting RICO was to address the problem of organized crime infiltrating legitimate businesses. See, e.g., Statement of Findings and Purpose, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970) (purpose of statute was to address problem of organized crime using its money and power "to infiltrate and corrupt legitimate business"). Thus, for example, under Section 1964(c) a court may require the wrongful defendant to divest itself of any interest it may have acquired in a legitimate business, without having to find that the business was also guilty of wrongdoing.

Furthermore, even if this Court were to accept the defendants' reading of Section 1964(a) – i.e., that the Court may only require the divestment of an interest in "the" Enterprise that has committed the unlawful acts at issue here, Defs. Br. at 7, the Record unequivocally demonstrates that the defendants participate as members of the Enterprise precisely so that they can secure and maintain, through the agreed-upon deceptive practices, a certain percentage of addicted consumers who, because of brand loyalty, will guarantee the defendants a steady flow of revenue in the future. See e.g., US FF §§ I(A) through I(L).[8]

[8] See also, e.g., US FF § III(E), ¶ 4484 (quoting (US 22363) (A); (US 21610) (O)) (1974 memorandum discussing targeting the "14-24 age group," who, "[a]s they mature, will account for key share of cigarette volume for next 25 years. Winston has 14% of this franchise, while Marlboro has 33% - SALEM has 9% – Kool has 17%"); (US 23907) (O) (Philip Morris executive explaining in speech that "[b]ecause brand loyalty in the industry is high and adult smokers tend to retain their brand as they age, the ability to attract and retain [18-24 year old smokers] signals the industry's leaders in future years," and that "Marlboro is the clear segment leader with a young adult smoker share of over 62% . . . Newport is the #2 [young adult smoker] brand, with a smoker share of 13.1%, Camel is # 3, at a 10% share of YAS"); (US 20763) (O) (noting in March 1988 RJ Reynolds report that "[y]ounger adult smokers drive the growth of

Therefore, under the plain language of the statute, this Court may impose remedies that "divest" the defendants of this interest which they continue to foster through their deceptive practices, by making the defendants fund public education and countermarketing programs that will prevent young smokers from beginning to smoke, and by funding an effective cessation program that will help those smokers who want to quit from falling prey to the defendants' deceptions. For the same reasons, the defendants' argument that the only kind of "interest" that can be divested under Section 1964(a) is a "property" interest, Defs.' Br. at 7-8, is not supported by the plain language of the statute, which states that the Court may require the defendants to "divest" themselves of "any interest, direct or indirect," but is also of no moment here, since the defendants' interests in securing long-term "dividends" from young smokers who become addicted to their products are "property" interests. See, e.g., 18A Am. Jur. 2d, Corporations, § 749 ("dividends" constitute a "property interest"); 1 Am. Jur. 2d, Uniform Unclaimed Property Act § 1(10)(I) ("intangible property" includes "monies, checks, drafts, deposits, interest, dividends, and income").[9]

The defendants' insistence that the Public Health Intervenors' divestment approach nevertheless fails because it "focuses on the effects of Defendant's *past* conduct," Defs. Opp'n Br. at 9 (emphasis in original), is also wrong. As the Public Health Intervenors explained in their opening brief, at 35-36, note 5, although the legislative history and Supreme Court cases construing both RICO and the antitrust laws would allow this Court to impose remedies that

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two major competitors [Marlboro and Newport]," which were "capturing an ever increasing share of younger adult smokers").

[9] Indeed, when one manufacturer sells a brand to another, it transfers its extremely valuable property interest in all of the consumers who are loyal to that particular brand. See also, Keane TT, 1/18/05, 10458:6-17 (noting that Philip Morris bought three Liggett cigarette brands in 1999).

divest the defendants of the future interests gained from their *past* violations, see, e.g., Turkette, 452 U.S at 585 n.6 (explaining that the purpose of Section 1964(a) is to "divest the association of the fruits of its ill-gotten gains") (emphasis added), in light of the Court of Appeals' statement that the "prevent and restrain" language of Section 1964(a) "indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations," 396 F.3d at 1198, the Public Health Intervenors are not at this juncture requesting such remedies. However, because nothing in the majority's opinion foreclosed the Court from fashioning remedies that will deprive defendants of the revenue generating assets – i.e., addicted consumers – they continue to secure and keep as a result of their continuing and future violations of RICO, all of the remedies proposed by the Public Health Intervenors are clearly permitted.[10]

C. The Public Health Intervenors' Remedies Will "Prevent And Restrain" Further RICO Violations By Rendering Such Practices Unprofitable.

The Public Health Intervenors also demonstrated, Int. Br. at 29-32, that the remedies they propose will also necessarily "prevent and restrain" future violations of RICO by significantly altering the cost-benefit ratio for defendants to continue to engage in those practices. As Judge Williams emphasized in his concurring opinion, "ordinarily the forces most affecting the likelihood of criminal actions are . . . truly forward-looking conditions: the returns to crime versus the possible costs." Philip Morris USA, Inc., 396 F.3d at 1203 (emphasis added). As the Public Health Intervenors have explained, Int. Br. at 6, all of their non-injunctive remedies implement this precise calculus.

[10] Indeed, many of the youth smokers that the defendants will continue to recruit, while denying that they do so, have not yet reached the age at which defendants begin targeting youth. Therefore, clearly remedies aimed at preventing violations of RICO premised on those deceptive practices cannot possibly be based on past violations.

The proposed remedies require the defendants to fund cessation, public education and countermarketing programs if certain benchmarks are not reached. Based on the evidence, the specific benchmarks are directly impacted by the defendants' behavior. Thus, the benchmarks will provide a specific incentive and a direct indication of whether the defendants are continuing to engage in deceptive practices. By imposing costs on the defendants, the Court would create a system whereby the benefits of compliance with the Court's Order would outweigh the financial benefits of continuing such unlawful acts. See WD Bazerman, 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").

While the defendants argue that this theory is no better than the "deterrence" theory proffered in defense of the Government's disgorgement remedy and rejected by the Court of Appeals, Defs. Opp'n Br. at 11, this simply is not true. The remedies advocated here do not act as a general deterrence in the sense of disgorgement – i.e., punishing the defendants for their past violations in the hope that this will "deter" them from engaging in the same practices in the future. Rather, the Public Health Intervenors' remedies are carefully crafted to ensure that the costs of violation outweigh the benefits. Therefore, unlike the disgorgement remedy rejected by the Court of Appeals, the deterrence aspect of the remedies proposed here is focused on concrete future behavior.

In this regard, it is important to stress that there is solid evidence in the Record that the defendants' wrongful behavior directly affects the number of children who smoke, as well as the number of adults who say they want to quit, but do not. See, e.g., US FF § III(C). Therefore, the

benchmarks proposed by the Public Health Intervenors – i.e., the points at which the defendants will no longer have to fund these various programs – are inextricably tied to the defendants' own behavior. Accordingly, because the cost of continuing to fund these programs, and the cost of failing to end deceptive practices that continue to attract young people to smoke, will eventually outweigh the financial benefits that the defendants continue to reap from the concomitantly reduced pool of potential and existing smokers (as the cessation, public education and countermarketing programs prove effective in reducing the number of people who smoke), these remedies will necessarily "prevent and restrain" further such practices. In other words, at some point, it simply will not make economic sense for defendants to continue to engage in these unlawful practices. This kind of economic deterrence, based on the future marketing choices of the defendants, is far different than the kind of deterrence based on fines for past behavior that was ruled insufficient by the Court of Appeals. Hence, for this additional reason, the Public Health Intervenors' remedies are also permissible.

These remedies will also make it more difficult for the defendants to defraud the target audiences. Once those target audiences receive and digest the countermarketing and public education, the defendants will not be able to mislead them about the related topics anymore. Therefore these remedies will prevent the defendants from engaging in certain types of future violations because the acts that constitute the violations will no longer be able to accomplish the defendants' goals.

D. The Intervenors' Proposed Remedies Are All Supported By The Record And Narrowly Tailored To Prevent And Restrain Further Violations Of RICO.

1. The Proposed Remedies Are Not "New" And Do Not Violate the Defendants' Due Process Rights.

The defendants object to virtually every one of the Public Health Intervenors' proposed remedies on the grounds that that these "new remedies . . . were not the subject of evidence at trial," that the remedies are not "closely related to the alleged RICO violations," that the proposed remedies are not achievable or attainable, and that "the proposed remedies do not even arguably 'prevent and restrain' RICO." Defs.' Opp'n Br. at 2, 13. These blanket objections are wrong both factually and legally.

Each of the remedies advanced by the Public Health Intervenors were "the subject of evidence at trial." Defs.' Br. at 2. Indeed, the evidentiary foundations for each aspect of the proposed remedies appear in the Public Health Intervenors' opening brief. See Int. Br. at §§ IV(A) – IV(E). That evidence will not be repeated here, except to address specific factual contentions raised by the defendants – none of which rise to the level of "factual disputes" requiring further evidentiary hearings. See Defs.' Br. at 6.

As will be discussed *infra*, each of the proposed remedies also closely addresses specific violations that were the subject of substantial evidence at trial, and, as explained *supra* at 5-6, a number of the differences between the Public Health Intervenors' proposed remedies and those previously proposed by the Government specifically address the defendants' assertions that the Government's proposals are not forward-looking because they continue for a predetermined period of time.

In addition, the defendants' assertions ignore the equitable authority of the Court to tailor the remedies "to fit the exigencies of the particular case." Int'l Salt Co., 332 U.S. at 400. As the

Government points out, see Pl.'s Reply Br. at 76-77 n.67, this authority vests the Court with the ability to order any relief supported by the evidentiary record, including relief not proposed by any party. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982), quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (emphasis added) ("[t]he essence of equity jurisdiction has been the power of the [court] . . . to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it").

Therefore, the same broad-based equitable authority that enables a Court to craft evidence-based remedies regardless of the parties' specific proposals, necessarily includes the discretion to specify the operative details by which each remedy will be implemented. Indeed, in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), the Supreme Court "pointed out that it had regularly reviewed antitrust decrees requiring divestiture or other remedies prior to formation of the precise decretal details, and had never been bothered with successive appeals." 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3909, n.30-31 (2005) (emphasis added). Therefore, as long as the Record supports the basic foundation or rationale for each remedy, due process does not require the Court to endure extensive evidentiary proceedings on every detail related to the implementation of the remedy.

2. The Record Demonstrates That the Proposed Remedies Are Feasible, Effective, Narrowly Tailored, and Forward Looking.

(a) Cessation

The defendants urge the Court to reject the Public Health Intervenors' proposed cessation remedy on the grounds that: (1) no cessation remedy can be deemed forward-looking or designed to prevent and restrain future violations; (2) both the concept of continuing the cessation program until a benchmark has been achieved – in this case until 10% or fewer of smokers who say they want to quit are still smoking – and the specific benchmark proposed by the Public Health

Intervenors, are not specifically "mentioned" in the Record; and (3) the 10% benchmark is unattainable. See Defs.' Br. at 3-4. However, none of these contentions has merit.

First, the Public Health Intervenors' proposal will specifically deter and therefore prevent and restrain future actions by the defendants that are designed to, or have the impact of, wrongfully discouraging smokers who want to quit from doing so. See Int. Br. at 40-53. At trial the Government presented substantial evidence that many smokers who say that they want to quit were dissuaded from doing so by the defendants' false and deceptive low-tar marketing, and by product designs that contributed to both consumers' false beliefs that some cigarettes were safer than others and to the products' addictive nature. See US FF §§ III(A), III(C). Given the evidence that the defendants' behavior directly impacts the number of smokers who say they want to quit but cannot, the benchmark-based cost and duration of the cessation remedy creates a situation whereby the costs and duration of the cessation program are tied directly to the defendants' behavior. In other words, if the defendants continue to find ways to wrongfully discourage these smokers from quitting, they will increase the costs of compliance with the Court's Order, since it will take longer to reach the requisite benchmark.[11]

Second, Dr. Fiore testified that a well-run cessation program can reduce the number of smokers who say they want to quit to a level below the benchmark proposed by the Public Health Intervenors. See Fiore TT, 21350:10-23 (detailing remedy that would allow "virtually

[11] Thus, for example, the defendants' behavior can be compared to a situation where a group of companies conspires to fraudulently increase the rents in apartment buildings they own, in violation of the RICO statute. Upon a finding that the companies violated RICO in order to deceive tenants and charge the higher rents, the Court could relieve the tenants of their obligations under those contracts, since, absent such relief, the defendants would not only continue to reap the benefit of their past wrongdoing, but, employing the cost-benefit ratio posited by Judge Williams, 396 F.3d at 1203, the defendants would also realize more gain by continuing their unlawful actions and risking getting caught. The need to assist smokers to break the addictive power of the defendants' products is no less than the need to sever the legal obligations of the defrauded tenant.

everyone" who seeks to quit to do so successfully) (emphasis added). The defendants introduced no evidence to the contrary. See Defs.' Opp'n Br. at 3. Therefore, while it is accurate that no witness specifically cited the 10% benchmark recommended by the Public Health Intervenors, the percentage reflects a reasonable, more achievable goal than the goal that Dr. Fiore testified was obtainable – i.e., "everyone" who wants to quit. Further, as a matter of law, as explained *supra*, the trial record need not contain every operational detail by which an equitable remedy is implemented. The defendants need only have notice and an opportunity to litigate the remedy "as a whole" see Pl.'s Reply Br. at 75-76, and the totality of the evidence must support the remedy. See Int. Br. at 40-53.

Third, the Public Health Intervenors' cessation program was the subject of substantial testimony. Thus, in critical part it accurately reflects the recommendations of Dr. Fiore and the Interagency Committee on Tobacco and Health Subcommittee on Cessation. In proposing the amount to be spent on the public education component of the cessation program, the Public Health Intervenors recommend $600 million a year, an amount less than recommended by Dr. Fiore, and within the range specified by Dr. Eriksen, who cited the 1999 CDC Best Practices as the most authoritative source for the total amount necessary for a comprehensive tobacco prevention and cessation program. See Int. Br. at 55-56. Dr. Eriksen noted that the CDC recommended $300 million to $900 million in 1999 dollars, or $375 million to $1.125 billion when adjusted for inflation. See id. This recommendation, however, includes the CDC's recommendations for both preventive public education and for cessation. Id. Therefore, the Public Health Intervenors' recommendations for the public education component of the cessation remedy, when combined with their recommendations for the three separately-funded components

of the public education programs, see id. at 57, equal $1.2 billion per year, and are consistent with the evidenced based, scientifically supported recommendations of the CDC. Id. at 55-56.

(b) Public Education and Countermarketing

The defendants' objections to the Public Health Intervenors' proposed public education and countermarketing remedy are likewise meritless, as they rest on mischaracterizations of the Public Health Intervenors' proposed remedies and distortions of the trial Record. In addition to alleging that this remedy does not prevent and restrain future violations, the defendants assert that: (1) the proposed funding level exceeds the monetary figures presented at trial; (2) the benchmark figures that measure the achievement of the equitable remedy – namely, the points at which 5% or fewer of youth continue to smoke, and 90% of consumers understand the comparative health risks of tobacco products, as well as the disease risks of secondhand smoke – are not specifically "mentioned" in the trial Record; and (3) the benchmark figures are not feasible. See Defs.' Br. at 3-4. These assertions are inaccurate.

First, and contrary to the defendants' protestations, as discussed *supra*, the $600 million annual funding level is supported by the record. It is consistent with the CDC Best Practices recommendations – Dr. Eriksen testified that the CDC recommended a public education funding level of $375 million to $1.125 billion. See Int. Br. at 55. Thus, the $1.2 billion total public education funding level recommended by the Public Health Intervenors, including $600 million for the cessation program and a total of $600 million for the three components of the public education remedy, accords with the CDC recommendations. See Int. Br. at 55-56.

The defendants also misstate that the Public Health Intervenors' proposed funding level would be increased based on changes in the defendants' marketing expenditures. See Defs.' Br. at 3 n.2. The Public Health Intervenors only contend that, due to recent increases in the

defendants' marketing expenditures, the recommendations of Dr. Eriksen are, if anything, low. See Int. Br. at 55-56. Therefore, the defendants' marketing figures were used simply to provide context for why the upper end of Dr. Eriksen's range would most effectively accomplish the equitable goal. The remedy does not tie the funding to the defendants' marketing expenditures.

Second, record evidence demonstrates that percentage-based benchmarks are both feasible and within the defendants' control, and that the current level of consumer misunderstanding as to relative health risks is directly related to the defendants' behavior. Drs. Viscusi and Weinstein both provided examples demonstrating that a 90% knowledge level of the relative health risks of tobacco products is achievable. See, e.g., Weinstein WD at 23 (explaining that "'concern for your own current or future health' was cited by over 90% of respondents" in a survey); Viscusi TT, 4/6/05, 17875:13 – 17876:4 (testifying that "in the year 1954 we have the Gallup poll where 70 percent of the public said smoking is harmful to health, and by 1999 we have 95 percent"); see also Weinstein WD at 23-24, 31-32 (explaining that perceptions of risk are related to the decision to smoke light or ultralight cigarettes, and that smokers do not understand the risks of smoking when they begin); Slovic WD at 38-39, 44 (noting that consumer misperceptions are due to the defendants' sophisticated marketing techniques).

There is also a solid evidentiary basis for continuing to fund the youth-oriented public education campaign until youth smoking rates decline to 5%. For forty years the defendants have publicly represented that they do not market to youth, and have also acknowledged that youth should not smoke and should be discouraged from using tobacco. See US FF §§ III(E)(4), III(E)(8). However, the Surgeon General and the Public Health Service have concluded, on multiple occasions, that the defendants' marketing has contributed to increased smoking rates

among youth. See, e.g., Int. Br. at 13 (citing (US 64316) (A)). After four decades of such marketing, it is no surprise that more than ninety percent of long-term smokers today begin as youth. See (JD 054452) (A). Therefore, the only way to ensure that the market incentives are adequately shifted so that the defendants truly perceive that their economic interests will be consistent with this Court's Order is if they are required to fund the youth public education campaign until youth smoking rates are drastically reduced. Third, it does not matter that the percentage-based, goal-oriented endpoints were not specifically suggested at trial. There is substantial evidence in the Record to support these benchmarks. See Int. Br. at 54-68.[12]

Lastly, the Public Health Intervenors' proposal to gear the duration of remedies to criteria that are directly impacted by the defendants' behavior strengthens the conclusion that these remedies are forward-looking. If the defendants continue to misinform the public as to the true health risks of their products, this will make it more difficult for them to achieve these benchmarks, and will thereby force them to pay for these programs for a longer duration, once again changing the cost-benefit ratio of engaging in this activity. The public education programs will also inoculate the public to the type of messages and actions that the defendants have used and may use in the future to continue to mislead the public, further decreasing the incentive to engage in these activities. In sum, given the broad basis of Record support, the Public Health Intervenors' public education remedy unquestionably withstands the defendants' attacks.

[12] The defendants erroneously state that the public education remedy proposed by the Intervenors will continue "until 90% of children under the age of 12 understand the 'comparative health risks' of various tobacco products." Defs.' Br. at 4 (citing Int. Br. at 60) (emphasis added). The passage in question actually states that the remedy "should continue . . . until such time as more than ninety percent of the public over the age of twelve are fully informed concerning the comparative health risks . . . ." Int. Br. at 60.

(c) Youth Smoking Reduction

The defendants' objections to the Public Health Intervenors' proposed youth smoking reduction remedy are likewise easily dispensed with. Namely, the defendants assert that: (1) the shortened time periods for the targets are unsupported by the Record; (2) the "past month" measure of youth smoking is unsupported by the Record; and (3) the monetary assessment exceeds the $3000 per youth smoker figure to which Dr. Gruber testified. See Defs.' Br. at 4. However, these arguments either mischaracterize the Public Health Intervenors' proposals or completely ignore evidence admitted at trial.

First, the Public Health Intervenors' opening brief provides ample Record support for shortening the target time periods proposed by the Government. See Int. Br. at 69-80. Indeed, under the Public Health Intervenors' proposal, these goals would have to be met by 2010. Yet, in 1997 the defendants said that they could achieve these very same goals by 2007. See Gruber WD 15-16; (US 18263) (A). It is irrelevant that the 1997 Proposed Resolution was the product of "political horse-trading." Defs.' Br. at 4 n.3. The time period selected is well within any time period contemplated in the trial Record, and is therefore a reasonable index by which the success of the equitable goal can be measured. Moreover, the benchmark figure of 10.5% annual smoking reduction is clearly attainable. See, e.g., (US 64316) (A) (documenting Florida statewide program that achieved a 40% reduction in smoking among middle school students after two years); Eriksen TT, 5/16/05, 21056:3-24 (same).

Second, the Public Health Intervenors have already substantiated the "past month" smoking measure as opposed to the daily prevalence rate when calculating progress toward the reduction remedy's equitable goals. See Int. Br. at 74-75 (quoting Eriksen WD, 39:2-14). In fact, the "past month" smoking measure also serves to narrowly tailor the remedy, as it provides

a fuller and more accurate picture of the correlation between youth smoking rates and the use of marketing approaches that appeal to youth, and it ties the remedy directly to the defendants' unlawful behavior.

Third, and contrary to the defendants' intimations, there is Record support and a reasonable basis for a higher monetary assessment than the $3,000 figure proposed by Dr. Gruber. The Gruber remedy was designed only to strip the defendants of the profit per person they would make over the lifetime of a youth-addicted smoker, thereby resulting in neither net gain nor net loss of profits. See Gruber WD 8:9-11; Gruber TT 20606:24 – 20607:23. However, to have a truly preventive effect, the remedy must result in a higher cost to the defendants than if they had engaged in deceptive youth marketing practices and lied about doing so. See Int. Br. at 76-77. Accordingly, and based on Record testimony regarding prices, price increases, and the correlation between price and youth smoking rates, see id., a price-per-pack calculation that actually results in a net cost to the defendants is required. For this reason, the youth smoking reduction remedy is also narrowly tailored, and directly related to the prevention of future RICO violations.[13]

(d) Prohibited Practices

Each of the defendants' primary objections to the Public Health Intervenors' proposed prohibited practices – namely, that (1) the record does not support these additional prohibited

[13] The defendants correctly note that the price elasticity figure cited by the Intervenors was incorrectly cited. The same figure also appears in Table 6.9 of the 2000 Surgeon General's Report, which was admitted into evidence. See (US 64316) (A). The defendants also rightly point out that the publication Tax Burden on Tobacco, JD 013285, was not admitted into evidence. The Intervenors apologize for this oversight and wish to direct the Court and the parties to the written direct testimony of Dr. Frank Chaloupka, which refers to the cigarette price data from Tax Burden on Tobacco. See Chaloupka WD, 93:21; see also Chaloupka, TT, 12/09/05, 8189:1-8192:5 (defense counsel extrapolating data from Tax Burden on Tobacco to create a price graph).

practices; (2) the application of certain remedies to foreign entities violates Fed. R. Civ. P. 65(d); (3) the advertising restrictions violate the First Amendment; and (4) the advertising restrictions are pre-empted by FTC regulation – are inaccurate, as the Public Health Intervenors discussed in their opening brief, and, with regard to the last three points, has been adequately addressed by the Government. See Pl.'s Reply Br. at 80-81, 91-92, 95-99. The Public Health Intervenors will address only the First Amendment argument here, since the precise speech restrictions advanced by the Public Health Intervenors vary from those proffered by the Government.

The proposed Prohibited Practices set forth in Section V of the Public Health Intervenors' Proposed Order restrain the defendants from continuing to distort the information available to the American public by making false and deceptive statements of fact, by failing to disclose or suppressing the disclosure of material information, and by engaging in and lying about marketing activities that appeal to youth. See Int. Br. at 81-94. Not only are such restraints compatible with the First Amendment, but they serve the overarching purpose of the First Amendment's "commercial speech" doctrine, which is to ensure that "the stream of commercial information flow[s] cleanly as well as freely." Edenfield v. Fane, 507 U.S. 761, 768 (1993); In re R.M.J., 455 U.S. 191, 201 n.12 (1982); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976).

Moreover, even if the proposed remedies reach speech that, under normal circumstances, would be entitled to some measure of First Amendment protection, none of the Public Health Intervenors' proposals would infringe the defendants' First Amendment rights here. Thus, as the Court explained in Edenfield, the government may restrain commercial speech if the restraint advances a "substantial" government interest, and the government "demonstrate[s] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 507 U.S.

at 771. Here the governmental interest at stake is not simply "substantial," but is compelling, and the restrictions proposed by the Public Health Intervenors are narrowly tailored. Indeed, the substantiality of the interest at stake here is established by the Supreme Court's ruling in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), which invalidated Massachusetts regulations that effectively banned outdoor advertising of tobacco products because they were not narrowly tailored.

In Lorillard, the Court found that the record in support of the regulations was inadequate and that in urban areas, "these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." Id. at 561. Although the Court ultimately held that the regulations swept too broadly, the Court nonetheless concluded that the regulations directly and materially advanced Massachusetts' substantial and legitimate interest in addressing "the problem with underage use of smokeless tobacco and cigars." Id. at 555-61. Therefore, a more targeted set of regulations would clearly have passed muster.[14]

Moreover, there are sharp distinctions between Lorillard and the remedies proposed by the Public Health Intervenors. First, Record evidence detailing the defendants' continued wrongdoing is voluminous in this case. See, e.g., US FF §§ III(A)(2)(m) (secondhand smoke);

[14] The Court's ruling in Lorillard that the Massachusetts' regulations served a substantial governmental interest is important for another reason — it shows that the Court is sensitive to public health imperatives in weighing the substantiality of the asserted governmental interest. In this respect, Lorillard contrasts sharply with Pearson v. Shalala, 164 F. 3d 650 (D.C. Cir. 1999), where the D.C. Circuit set aside Food and Drug Administration rules restricting health claims made by a dietary supplement manufacturer on the ground that an outright ban on such claims could not be sustained where information-providing disclaimers could be added to such claims to ensure that the claims were not misleading. Central to Pearson was the Court's understanding that the only governmental interest at stake was avoiding economic injury to consumers who might be bilked by ineffective supplements. The Court noted that "the government does not assert that appellants' dietary supplements in any fashion threaten consumer health and safety." Id. at 656 (emphasis in original; footnote omitted).

II(C)(1)(d) (misrepresentations regarding nicotine); III(E)(7) (youth marketing). Second, the evidence demonstrates that past restrictions, such as those contained in the MSA, have been inadequate to solve the problem. See Int. Br. at 18-22. Indeed, the Record reflects unsuccessful effort after unsuccessful effort to change the defendants' behavior. Id. Third, the proposed remedies take into account the ability of the defendants to continue to communicate truthful information to adults, for example, by permitting the defendants to say what they want in text only advertisements. See Int. Proposed Ord. at 50. Finally, each of the proposed remedies is based on Record evidence, not "speculation or conjecture," that the harms the Public Health Intervenors seek to address "are real," and the proposed "restriction[s] will in fact alleviate them to a material degree." Edenfield, 507 U.S. at 770. Thus, it is impossible to imagine a more compelling case for the type of remedial measures proposed here.[15]

(e) Monitoring Requirements

With respect to the IO and IHO, the defendants raise the same broad-based objections they presented in response to the Government's proposed monitoring requirements, see Defs.' Br. at 17 (citing JD Post-Trial Br. at 214-16), most of which were thoroughly rebutted by the Government, and warrant no further discussion here. See Pl.'s Reply Br. at 78-84. As the Public Health Intervenors have already explained, see Int. Br. at IV(F), they have crafted their IO provisions to lessen, not increase the burden on the Court.

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[15] It is far too late for the defendants to argue that non-speech restraints will achieve the same equitable goals. See Defs.' Br. at 16-17 n.15 The evidence in this case overwhelmingly shows that the defendants' marketing efforts are at the core of their success in enticing youth to begin smoking and in persuading older, addicted smokers to continue to smoke. It also shows that nearly all new customers are youth, and that the defendants – by their behavior – have concluded that unless they attract youth, the will be injured financially. The Record also shows that other measures have been tried for decades and proven unsuccessful. There can be no legitimate claim that either the Government or the Intervenors have rushed to impose speech restraints without first looking to non-speech means to reduce tobacco use.

Respectfully submitted,

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