UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and CAMPAIGN FOR TOBACCO-FREE KIDS, *et al.*, Plaintiff-Intervenors, v. PHILIP MORRIS USA INC., *et al.*, Defendants. and ITG BRANDS, LLC, *et al.*, Post-Judgment Parties Regarding Remedies	)	Civil Action No. 99-CV-2496 (PLF)

PLAINTIFFS' 2018 SUPPLEMENTAL BRIEF ON RETAIL POINT OF SALE REMEDY

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INTRODUCTION

The D.C. Circuit affirmed this Court's corrective-statement remedy to prevent and restrain the cigarette manufacturers from continuing to violate RICO through fraud and deception. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1085, 1140 (D.C. Cir. 2009) (per curiam) ("*2009 Opinion*"). The D.C. Circuit found that the manufacturers will "be impaired in making false and misleading assurances . . . if they must at the same time communicate the opposite, truthful message about these matters to consumers." *Id*. The original remedy issued in 2006 called for the manufacturers to disseminate court-ordered statements via five of the many media channels they had used to communicate with consumers to that date.[1] The D.C. Circuit vacated one specific aspect, which had called for the manufacturers to disseminate the court-ordered statements at the point of sale through their contracts with retailers, and remanded for this Court to "craft[] a new version," if possible, "reflecting the rights of third parties." *Id*. at 1142 (citing RICO statute, 18 U.S.C. § 1964(a)); *see also id*. at 1150 ("we also vacate the remedial order as it regards point-of-sale displays and remand for the district court to make due provision for the rights of innocent third parties").

[1] To reduce confusion, this brief often refers to "court-ordered statements" rather than "corrective statements." "Corrective statements" initially referred to statements that were compelled in enforcement actions under the Federal Trade Commission Act, which "permits remedies intended to 'dissipate future effects of a company's past wrongful conduct.'" *United States v. Philip Morris USA, Inc.*, 801 F.3d 250, 262 (D.C. Cir. 2015) ("*2015 Corrective Statement Appeal*") (quoting *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 761 n.60 (D.C. Cir. 1977)). But the D.C. Circuit has explained that, for injunctions issued under the civil Attorney General provision of RICO, 18 U.S.C. § 1964(a), "[c]orrecting consumer misinformation . . . is an impermissible objective." *2015 Corrective Statement Appeal*, 801 F.3d at 262. Thus, the term "corrective statements," in this kind of RICO lawsuit, can cause unnecessary confusion.

This brief uses the term "the manufacturers" to refer to the entities subject to the Court's injunction. The term includes both "Defendants" who were subject to the Court's original post-trial injunction in 2006, and the "Post-Judgment Remedies Parties" (ITG Brands and its affiliates), which came into the case in 2015 and agreed to be subject to the Court's injunction.

The point-of-sale media channel is an "essential" and "vital" arena for the cigarette manufacturers to communicate to consumers. 2011 Martin Decl. at 5-6, ¶ 10 (ECF 5906-1); 2011 Boehm Decl. at 4, ¶ 12 (ECF 5906-2). To acquire and maintain control over this media channel, the manufacturers provide monetary benefits to "participating retailers" in exchange for extensive control over cigarette merchandising and promotions in and around the retailers' establishments. The retailers have criticized potential point-of-sale remedies that would require court-ordered statements to be displayed in fixed locations and sizes. *See, e.g.*, NATO 2018 Opening Br. at 3-4 (ECF 6269); NACS 2018 Opening Br. at 5 (ECF 6271). To provide for these concerns, Plaintiffs propose that the Court re-craft the point-of-sale remedy, by ordering the manufacturers to disseminate the court-ordered statements in a fixed percentage of the cigarette marketing space they control through their participating-retailer contracts.

Such a re-crafted remedy would impair no contract, property, or speech rights belonging to the retailers. Plaintiffs' earlier briefs detailed the infirmities in the retailers' arguments. As discussed below, the retailers' most recent briefs do not dispute that the manufacturers may modify their contracts unilaterally and terminate them without cause; as a result, participating retailers have "no reasonable, legitimate expectation that the program[s] would be worth any amount of money to them." *York Fuel, Inc. v. Lorillard Tobacco Co.*, No. 13-CV-7131 JG, 2014 WL 2865963, at *2 (E.D.N.Y. June 24, 2014). The retailers' claims to property rights are no more persuasive than in past years; but to whatever extent those arguments have merit, a "fixed-percentage" approach will amply provide for them, because dissemination of the court-ordered statements will occur in merchandising and promotional space that participating retailers already cede to the manufacturers in exchange for the monetary benefits they receive.

Moreover, a fixed-percentage approach will, by definition, be implemented at each retail establishment in direct proportion to the space the cigarette manufacturers control under the relevant participating-retailer contract. The manufacturers' implementation of the fixed-percentage approach would therefore apply uniformly to all retailers who are eligible to participate in those contracts. Thus, as explained by a leading economist who gave expert testimony at trial, Professor Frank J. Chaloupka, *see United States v. Philip Morris USA*, 449 F. Supp. 2d 1, 574 (D.D.C. 2006) ("*2006 Post-Trial Decision*"), a fixed-percentage approach will prevent participating retailers from experiencing any competitive harm; and retailers' concerns about other potential economic harms "are greatly overstated." Ex. 1 at ¶ 31 (Expert Declaration of Frank J. Chaloupka, Ph.D.). Further, because this approach would require the court-ordered statements to be displayed only in a subset of the space retailers voluntarily provide for promoting and selling the manufacturers' covered cigarettes, it would not implicate the safety and commercial concerns the retailers have expressed. Nor would it implicate any First Amendment concerns; indeed, the manufacturers' and retailers' latest arguments ask the Court to ignore the most recent law of the case and controlling First Amendment precedents from the D.C. Circuit.

In sum, by tying the dissemination of the court-ordered statements to merchandising and promotional space that retailers have contractually ceded to the manufacturers' control, a "fixed-percentage" point-of-sale approach makes more than "due provision for" whatever "rights" participating retailers might have. 18 U.S.C. § 1964(a).

Finally, this Court should manifestly not exempt the nation's third-largest cigarette company—Post-Judgment Remedies Party ITG Brands, LLC (ITGB)—from this critical aspect of the remedy. In June 2015, six years after the D.C. Circuit vacated and remanded the point-of-

sale media channel for further consideration, ITGB acquired Defendant Lorillard's cigarette business operations and assets, as well as its Maverick cigarette brand and three more cigarette brands from Defendant R.J. Reynolds Tobacco (RJRT) (Winston, Salem, and Kool). All together, ITGB's four "Acquired Brands" amounted to approximately 7% of the U.S. cigarette market. Wilkey Decl. ¶ 10 (ECF 6143-3). Pursuant to the requirements of Order #1015, ITGB asked the Court's permission to enter the case and agreed to be subject to any point-of-sale remedy, although it reserved the right to make arguments about the applicability of the remedy. Unopp. Mot. for Order (ECF 6142); Proposed Order, ¶ 10 at 12 (ECF 6142-1).

ITGB now asserts that the Court should exempt it from *any* point-of-sale remedy. ITGB 2018 Opening Br. at 6-7 (ECF 6273). Thus, if ITGB's argument prevails, Defendant Lorillard's cigarette sales operations and business would be removed entirely from the Court's crucial point-of-sale remedy, as would just over 7% of the U.S. cigarette market. Had that been the Court's intent when it allowed ITGB to acquire Lorillard's cigarette business operations and the Winston, Salem, Kool, and Maverick brands, it would have said so. Furthermore, a fixed-percentage corrective-statement remedy will ensure that ITGB disseminates its court-ordered statements in the same locations as, and strictly proportionate in size to, its participating retailers' merchandising and promotional displays for its Acquired Brands. The Court should hold ITGB to its past representations, prevent and restrain it from engaging in deceptive practices with regard to the cigarette operations and marketing of the cigarette brands it acquired from Defendants Lorillard and RJRT, and avoid giving it an undeserved windfall compared to its competitors.

The Court imposed its corrective-statement remedy because it was necessary and appropriate to prevent and restrain the manufacturers from continuing to violate RICO by

engaging in fraud and racketeering. *2006 Post-Trial Decision*, 449 F. Supp. 2d at 926, *aff'd in relevant part*, *2009 Opinion*, 566 F.3d at 1140. To disseminate the court-ordered statements, the Court prescribed just a subset of the media channels, including point-of-sale, that the manufacturers themselves have used. The manufacturers channel over 90% of their entire marketing expenditures through the point of sale, Ex. 1 at ¶ 11 (Chaloupka Decl.), and the manufacturers and retailers offer no principled basis for omitting this "essential" and "vital" media channel from the corrective-statement remedy. 2011 Martin Decl. at 5-6, ¶ 10 (ECF 5906-1); 2011 Boehm Decl. at 4, ¶ 12 (ECF 5906-2). For these reasons, and those set forth in prior briefing on this topic, this Court should reinstate the point-of-sale remedy and announce that it will adopt a fixed-percentage approach under which each manufacturer will be ordered to disseminate the court-ordered statements in a fixed percentage of the cigarette merchandising and promotional display space it controls in and around participating retailers' establishments.

FACTUAL BACKGROUND

I. The Deal between Cigarette Manufacturers and Retailers

The essential deal in the manufacturers' participating-retailer contracts is a trade of financial benefits for manufacturer control over cigarette merchandising, promotion, and display space at retail. As Defendant Lorillard's CEO explained it shortly before ITGB absorbed Lorillard's cigarette sales and business operations:

> Everybody understands [how] those [retailer merchandising plans] work. You sign. We will put you on promotion if you've signed a contract. In that contract, you agree to give us our fair share of space. You agree to put our new products in. You agree to put up our point of sale [advertisements]. And we pay you and you get RDA [retail display allowance] payments at the store level and you get our promotions. That's the bargain.

Ex. 3, Murray Kessler statement, Lorillard 2013 Investor Day at 6 (June 27, 2013). In exchange for those monetary benefits, participating retailers are required to give the manufacturers control

over space in and around their establishments for the merchandising and promotion of the manufacturers' cigarettes.

II. Benefits to Participating Retailers

Retailers benefit from participating in cigarette manufacturers' retail contracts in two ways: first, they gain access to "promotions" or "pricing discounts" that reduce the cigarette prices they charge their customers; second, they receive incentive payments or "promotional allowances" that bolster their bottom lines.

Promotions and pricing discounts reduce the prices that consumers pay to buy cigarettes from retailers who are under contract with a cigarette manufacturer, *i.e.*, "participating retailers." Participating retailers can therefore sell cigarettes more cheaply than their competitor retailers who are not under such contracts, and thus sell more cigarettes. In 2016, the country's major cigarette manufacturers spent $8.7 billion on cigarette advertising and promotions, of which 83.2%, over $7.2 billion, paid for price discounts for consumers at retail. Ex. 1 at ¶ 10 (Chaloupka Decl.); *see also Federal Trade Commission Cigarette Report for 2016*, at 1, 3-4 (2018) ("*FTC Cigarette Report for 2016*").[2] The manufacturers' participating-retailer contracts

[2] The overwhelming majority of the cigarettes made by the companies whose data are aggregated for the FTC Report are made by manufacturers subject to the injunction here. The figures in the FTC Report will be slightly higher than the sums of the present manufacturers' expenditures, because they also include data from RJRT's sister company, Santa Fe Natural Tobacco Company, and from Vector Group, which is the parent of former Defendant Liggett.

The $7.2 billion amount referenced in the text is the sum of $5.8 billion paid as price discounts to cigarette retailers to reduce the price of cigarettes to consumers, and $1.4 billion paid as price discounts to wholesalers for the same purpose. *FTC Cigarette Report for 2016*, at 3-4 & App. For participating retailers, the economic effect of the two forms of price discounts is the same, because both reduce the prices that their consumers pay; functionally, the only difference is that retailer price discounts pass through retailers' books, with the revenue from the manufacturers' price discount payments precisely making up for the discounted prices that are charged to consumers. *See* Ex. 1 at ¶ 10 (Chaloupka Decl.).

require their participating retailers to pass all such moneys through to consumers via reduced prices.[3]

In contrast, participating retailers are not required by contract to pass on to consumers "promotional allowance" payments that they receive from the manufactures. *FTC Cigarette Report for 2016*, at 4. These payments are generally calculated as a certain amount per cigarette carton[4]; but some incentives are paid as a fixed amount per time period.[5] In 2016, manufacturers spent about 2.6% of their total marketing expenditures, slightly under $229 million, on these payments. Ex. 1 at ¶ 10 (Chaloupka Decl.); *see also FTC Cigarette Report for 2016* at 4.

The manufacturers thus route some $7.43 billion of their marketing expenditures, 85.8% of the total, either to or through their participating retailers—retailers who acquire and maintain that status precisely in exchange for giving the manufacturers contractual control over marketing and promotional space for their cigarettes at their establishments. The lion's share of this money ($7.2 billion, 83.2% of total marketing expenditures) pays for consumer price discounts at

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[3] Ex. 9 at 28-29 (PM fixture plan at 5161328285-8286); Ex. 10 at 24-25 (PM display plan at 5161328254-8255); Ex. 11 at 4-5 (RJRT menthol outlet plan at RJRT_002644391); Ex. 12 at 4-5 (RJRT pack outlet plan at RJRT_002644377-4378); Ex. 13 at 4 (RJRT carton outlet plan at RJRT_002644363); Ex. 14 at 4 (RJRT cigarette tobacco outlet plan at RJRT_002644405); Ex. 16 at 1, ¶ A(10) (ITGB Plan 1-A at ITGB-DOJ000001); Ex. 17 at 1, ¶ A(11) (ITGB Plan 2-A at ITGB-DOJ000289); Ex. 18 at 1, ¶ A(11) (ITGB Plan 3-A at ITGB-DOJ000004); Ex. 19 at 1, ¶ A(10) (ITGB Plan 1-B at ITGB-DOJ000292); Ex. 20 at 1, ¶ A(12) (ITGB Plan 3-B at ITGB-DOJ000286).

[4] For example, retailers who agree to and comply with ITGB's Retail Partnership Plan Description Plan 3-A (Back Bar) receive 75 cents per carton (*i.e.*, 7½ cents per pack) on their qualifying purchases. Ex. 18 at 2 (ITGB-DOJ000005). The other companies' contracts say that per-carton rates will be paid to retailers, but do not specify the rates. *See, e.g.*, Ex. 10 at 1 (PM display plan at 5161328231); Ex. 12 at 8 (RJRT pack outlet contract, at RJRT_002644385) (stating that "Profitably Enhancement Payments" will be paid on an (unspecified) "Rate Per Carton").

[5] Ex. 11 at 9 (RJRT menthol outlet, at RJRT_002644396).

participating retail establishments. Such consumer discount expenditures benefit participating retailers only indirectly, by allowing them to reduce their prices, and thus sell more cigarettes and thereby (indirectly) increase their revenue. Ex. 1 at ¶ 15 (Chaloupka Decl.); Boehm Decl. at ¶ 10 (ECF 5906-2). By contrast, the much smaller amount—$229 million—that the manufacturers pay their participating retailers as promotional allowances directly increases retailers' revenues. Ex. 1 at ¶ 15 (Chaloupka Decl.). In total, over 90% of the manufacturers' marketing expenditures go through the point of sale. *Id.* ¶ 11.

Figure 1. Pole-mounted exterior posters outside cigarette retail establishment. See larger image as Ex. 5, at 7.

III. Manufacturers' Contractual Control over Space for Cigarette Marketing and Promotional Displays

As a result of these financial benefits, two-thirds of cigarette retailers across the country participate in the manufacturers' participating-retail programs,[6] and promotional displays for the manufacturers' cigarettes at retail establishments are as ubiquitous a part of the American scene as McDonalds restaurants.

A. The types of retail advertising and marketing space

The industry broadly identifies two kinds of space for such cigarette merchandising and promotion at retail: "on-set" and "off-set."[7] First, merchandiser units (also referred to as "sets") display promotional signage

[6] Ellen C. Feighery, Kurt M. Ribisl, Nina C. Schleicher et al., *Retailer Participation in Cigarette Company Incentive Programs Is Related to Increased Levels of Cigarette Advertising and Cheaper Cigarette Prices in Stores*, 38 Preventive Med. 876, 876 (2004).

[7] *See, e.g.*, Ex. 21 at 7 (*Territory Manager Playbook* (RAITMS 2017), at RJRT-002062018) ("Point-of-sale advertising, commonly called POS, is advertising that is placed

and also store, hold, and display cigarette packs for sale, generally on multi-shelf displays behind the counter. Some sets are large or semi-permanent "fixtures" that market multiple manufacturers' products; others are smaller and more portable "displays" that typically merchandise a single manufacturer's products. Promotional materials may be displayed at the top of a set, as "headers," as well as in "channels" below individual cigarette racks and as "cards" that can be lifted to retrieve stored product. Because self-serve cigarette displays are generally illegal, 21 C.F.R. § 1140.16(c)(1), these merchandising sets are accessible only by sales clerks, usually located behind the sales counter. Larger fixtures often stand on the floor and may reach nearly up to the ceiling. Low-profile "displays" may sit on a "back bar" behind the clerk.

Figure 2: Fixture form of set. (Base image from Sparrow Decl. (ECF 6273-1), at 46.)

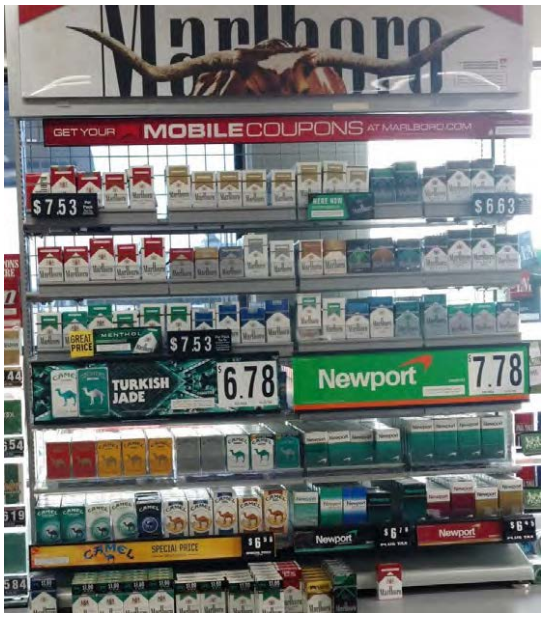

Figure 3: Low-profile display form of set. (Base image from Sparrow Decl. (ECF 6273-1), at 63.)

inside a retail outlet and can be either on the tobacco category merchandiser (on-set) or near the point of purchase area (off-set). POS can also be placed in other off-set, high-traffic areas that offer good opportunities to feature the desired message to ATCs, such as the point of entry to the outlet.").

Second, and by contrast, "off-set" point-of-sale materials advertise cigarettes in places *other* than on the merchandising "set," either inside or outside the retail outlet. "Off-set" formats include interior and exterior posters, door decals, counter mats, gasoline pump toppers, and ceiling hangings.

Thus, for present purposes, all cigarette marketing that occurs in or around a retail outlet is either "on-set" or "off-set." As explained by RJRT, "[r]etail contracts provide agreed-upon presence on the tobacco category merchandiser(s) and off-set signage as required for us to effectively communicate 4 of the 5 Ps to [adult tobacco consumers] (Product Availability, Pricing, Promotion, and Presence)." Ex. 21 at 9 (*Territory Manager Playbook* (RAITMS 2017), at RJRT_002062020).

B. The manufacturers' contractual authority over participating retailers' space

The manufacturers' form "participating retailer" contracts give them wide authority over how cigarettes are merchandised and displayed at retail.

1. The manufacturers have contractual authority over both "on set" merchandising units and "off-set" promotions elsewhere

For both merchandising sets and off-sets, the manufacturers' most recent form contracts give the manufacturers particular rights of contractual control, both over a defined amount of space *in* a merchandising set and to place or approve signage *off* the sets. Importantly, the contracts give the manufacturers contractual control over all marketing for their cigarettes, including marketing pieces that they do not themselves supply. This means that a manufacture can direct a participating retailer to remove or change marketing pieces for any of its cigarettes, regardless of whether the material was developed and supplied by the retailer itself, the manufacturer, or even a competitor. This authority guarantees the manufacturers contractual control over all promotions for their cigarettes at participating retailers' outlets. Accordingly, it is

unnecessary to determine whether a participating retailer's promotional displays for a given manufacturer's cigarettes is required, optional, or perhaps even (officially) prohibited under its contracts; even if the relevant manufacturers do not require or supply them, the fact that

Figure 4: Exterior poster at participating retailer, advertising retail price discounts for competing PMUSA and RJRT cigarette brands.

Both manufacturers' contracts give them contractual control to require participating retailers to remove marketing materials for their cigarettes, no matter who supplied the materials, and even if the participating retailer wants them to remain in place.

promotions for their cigarettes remain on display at a participating retailer means that they have authorized and permitted them.

Each manufacturer's form contracts specify which portions of the retailers' merchandising units must be devoted to merchandising and promotional displays for its

cigarettes. The resulting territories can be easily demarcated, as seen here:

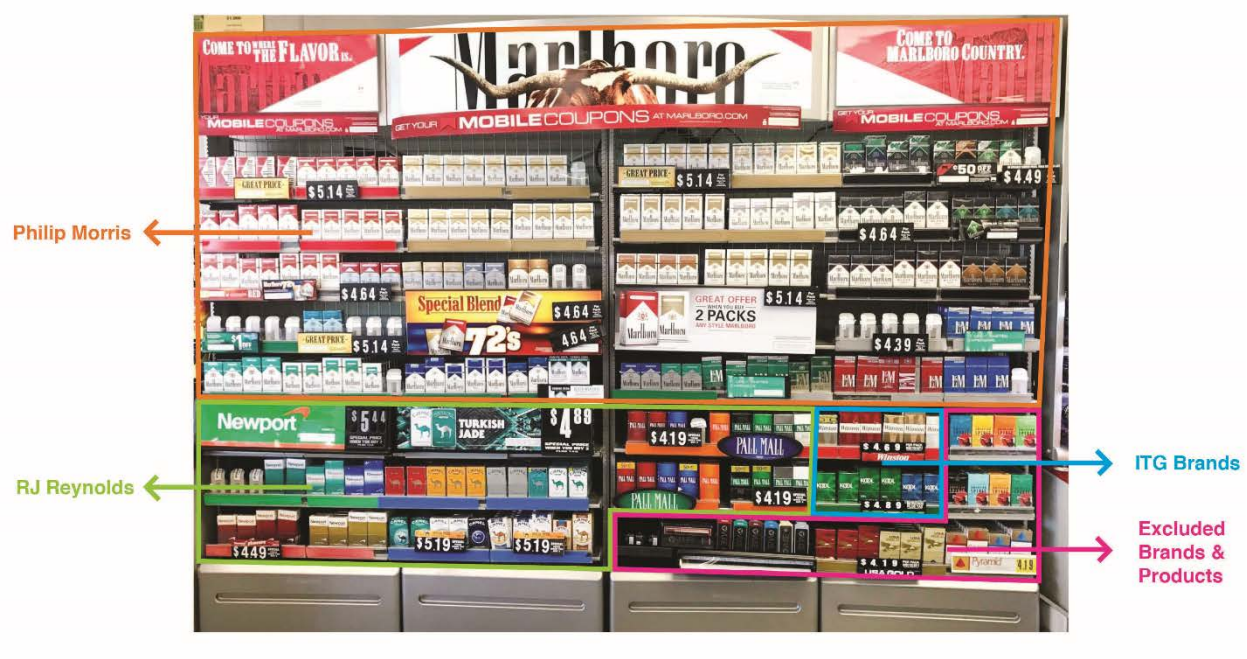

Figure 5: Fixture with manufacturers' boundaries labeled. Larger image available as Ex. 6, at 2. Base image from Sparrow Decl. (ECF 6273-1), at 24.

a) PMUSA contracts

Philip Morris USA (PMUSA) currently offers two types of participating-retailer contracts, one for retailers using stationary "fixtures" and the other for retailers using portable "displays."[8] The "fixture" plan defines PMUSA's rights within and around the "merchandising areas" consisting of the retailer's "fixtures."[9] The "display" plan specifies PMUSA's rights in the portable displays.[10] Under both types of contracts, retailers are required to cede contractual

[8] *See* Ex. 9 at 6-7 (PM fixture plan, internal Ex. B at 1-2, at 5161328263-64) (defining "fixture" and "display"); Ex. 10, at 5 (PM display plan, internal Ex. A at 1, at 5161328235) (same).

[9] *See* Ex. 9 at 5161328265-66 (defining "merchandising areas" in terms of fixtures and "PM USA Portion" in terms of space within the merchandising areas); *id*. at 5161328268-69 (defining PMUSA's rights in the merchandising areas).

[10] Ex. 10 at 5161328240 (specifying display requirements).

control over space to PMUSA.[11] In addition to merchandising space, the contracts also give PMUSA "the right to approve the position, number, location, and size of all signs for PM USA products that are displayed, including signs not supplied by PM USA, whether inside or outside a Store."[12] The contracts also authorize PMUSA to place signage off of the merchandising set, both inside and outside the retail outlet, if there are signs for competing cigarette brands.[13]

b) RJRT contracts

RJRT has delegated its trade marketing to a sister company, RAI Trade Marketing Services ("RAITMS"). RAITMS offers retailers four form contracts. Each form contract carefully specifies the amount and location of space for RAITMS products on the cigarette merchandising unit, as well as RAITMS' rights to place signage off of the merchandising units.[14] These provisions give RAITMS the right of final approval of its display and advertising types, sizes and locations; require the participating retailer to maintain the merchandising space in accordance with an RAITMS "plan-o-gram"—that is, a detailed schematic depicting how the merchandiser must be arranged; and provide that changes in location and percentage of advertising will not be made without RAITMS approval.[15] The first page of each contract form

[11] *See* Ex. 9 at 5161328278 (requiring each fixture to have a PMUSA-provided "Plan-O-Gram" and authorizing PMUSA to move items from PMUSA space in the fixture or that obstructs its space); Ex. 10 at 5161328248 (authorizing PMUSA to move any non-PMUSA items from its allocated space or that obstructs its space).

[12] Ex. 9, at 5161328269; Ex. 10, at 5161328241.

[13] Ex. 9, at 5161328270-71; Ex. 10, at 5161328241.

[14] *See* Ex. 11 at 2-3 (menthol outlet contract, at RJRT_002622389-2390); Ex. 12 at 2-3 (pack outlet, at RJRT_002644375-4376); Ex. 13 at 2-3 (carton outlet, at RJRT_002644361-4362); Ex. 14 at 2-3 (cigarette tobacco outlet, at RJRT_002644403-4404).

[15] See same exhibits and pages cited in previous note.

authorizes RAITMS to relocate any unauthorized items that are in or that obstruct the space that the contract allocates to RAITMS products.[16]

c) ITGB contracts

ITGB uses a single "Retail Partnership Agreement" form that incorporates one of several "Plan Descriptions." *See* Ex. 15. Those "plan descriptions" are adapted to different retail configurations: there is a "Back Bar" plan for retailers that use fixtures to merchandise ITGB cigarettes; a "Counter Display" plan for retailers that use portable displays to merchandise ITGB cigarettes; and a "Kiosk" plan for retailers whose premises cannot be entered by patrons.[17] Retailers choose a specific plan based on how much fixture or display space they agree to use for merchandising ITGB brands. In addition, all IGB plan descriptions require that it be allowed to place advertising materials in its merchandising space, as well as at least one advertising piece for each of its "focus brands" off of the merchandising set; in other words, ITGB requires its participating retailers to allow at least one "off-set" marketing piece for each ITGB "focus brand."[18] Each plan forbids the retailer from using any ITGB intellectual property, including brands or trademarks, without advance authorization.[19]

[16] *See* Ex. 11 at 1 (menthol outlet contract, at RJRT_002622388); Ex. 12 at 1 (pack outlet, at RJRT_002644374); Ex. 13 at 1 (carton outlet, at RJRT_002644360); Ex. 14 at 1 (cigarette tobacco outlet, at RJRT_002644402).

[17] *See* Exs. 16-18 (Back Bar plans 1-A, 2-A, and 3-A); Exs. 19, 20 (Counter Display plan 1-B; Kiosk Plan 3-B).

[18] *See* Ex. 16, at ITGB-DOJ0000001; Ex. 17, at ITGB-DOJ0000289; Ex. 18, at ITGB-DOJ0000004; Ex. 19, at ITGB-DOJ0000292; Ex. 20, at ITGB-DOJ0000286.

[19] *See* Ex. 16, at ITGB-DOJ0000001; Ex. 17, at ITGB-DOJ0000289; Ex. 18, at ITGB-DOJ0000004; Ex. 19, at ITGB-DOJ0000292; Ex. 20, at ITGB-DOJ0000286.

2. The manufacturers require participating retailers to make cigarette marketing for their cigarettes visible to consumers.

The manufacturers' form contracts generally require participating retailers to market cigarettes in space visible (even "clearly visible" or "highly visible") to consumers. In particular, PMUSA's contracts require that "[a]ll PM USA cigarettes in a Store must be merchandised such that they are clearly visible and proximate to adult tobacco consumers."[20] Most RAITMS contracts require that products occupy a certain amount of "Featured Space" that is required to be "highly visible from the point of purchase."[21] Finally, ITGB's current contracts generally require its merchandising space to be in the "primary visible Cigarette Merchandising Area."[22] Like RAITMS, for kiosks, ITGB requires that its cigarette advertising and merchandising space be in the front window of each kiosk.[23]

IV. The manufacturers may terminate the contracts without cause, and have the right to unilaterally modify the contracts.

While the participating-retailer contracts exchange cigarette promotional space for monetary benefits, they do not run for any specific period of time. Rather, as our prior briefs demonstrated, the participating-retailer contracts are terminable without cause, either with no

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[20] Ex. 9 at 1 (PM fixture plan, internal Ex. C, para. 1(B), at Bates 5161328268); Ex. 10 at 1 (PM display plan, internal Ex. B, para. 1(A)(2), at Bates 5161328240).

[21] Ex. 11 at 2 (RAITMS menthol outlet plan, at RJRT_002644389); Ex. 12 at 2 (RAITMS pack outlet plan, at RJRT_002644375; Ex. 13 at 2 (RAITMS carton outlet plan, at RJRT_002644361); Ex. 14 at 2 (RAITMS cigarette tobacco outlet plan, at RJRT_002644403). For "traditional pack and kiosk configurations" that do not have a backbar, RAITMS space must be on the kiosk window or counter. Ex. 11 at 2 (RAITMS menthol outlet plan, at RJRT_002644389-380); Ex. 12 at 2 (RAITMS pack outlet plan, at RJRT_002644375).

[22] Ex. 16 at 1 (ITGB Plan 1-A (Bar Bar), at ITGB-DOJ000001); Ex. 17 at 1 (ITGB Plan 2-A (Bar Bar), at ITGB-DOJ000289); Ex. 18 at 1 ITGB Plan 3-A (Bar Bar), at ITGB-DOJ000004; Ex. 19 at 1 (ITGB Plan 1-B (Counter Display), at ITGB-DOJ000292).

[23] Ex. 20 at 1 (ITGB Plan 3-B (Kiosk), at ITGB-DOJ000286).

notice or on very short notice. U.S. 4/1/2011 Br. at 15-16 (ECF 5905) (discussing form contracts as of 2011); U.S. 2014 Opening Br. at 7 (ECF 6100) (same, for contracts as of 2014). Neither the retailers nor the manufacturers have disputed that analysis, and the manufacturers' most recent form contracts reinforce the point: they are terminable without cause upon no notice,[24] 10 days' notice,[25] or at most 30 days' notice.[26]

In addition, the contracts give one party—the manufacturers—the unilateral right to modify the contract terms merely by notifying the other side, the participating retailers, that they are doing so. In particular, Philip Morris's contracts provide that "PM USA may amend the Agreement, in whole or in part, including any Exhibit, from time to time in its sole discretion by providing notice to Retailer in accordance with the terms of the Agreement" (*i.e.*, with 30 days' notice).[27] Similarly, the contracts used by RJRT's delegate, RAI Trade Marketing Services (RAITMS), provide that RAITMS "may amend this [contract] upon ten days written notice. Neither party shall be required to sign any such amendment. Retailer's continued participation in

[24] Ex. 15 at 1 (ITGB Retail Partnership Agreement) (either party may terminate the contract "at any time without cause upon prior written notice to the other party. ITG Brands reserves the right to cancel or refuse to enter into or renew this Agreement for any reason whatsoever, or no reason, at its sole discretion.").

[25] Ex. 11 at 13 (RJRT menthol outlet contract at RJRT_002644400) (either party may terminate the contract "without cause upon ten days' notice to the other party"); Ex. 12 at 12 (RJRT pack outlet contract, at RJRT_002644385) (same); Ex. 13 at 12 (RJRT carton outlet contract, at RJRT_002644371) (same); Ex. 14 at 12 (RJRT cigarette tobacco outlet contract, at RJRT_002644413) (same).

[26] Ex. 9 at 20 (PM Fixture Plan, internal ex. F, ¶ 1(B), at 5161328277) (either party "may terminate the Agreement in its entirety or with respect to one or more Stores effective 30 days after the delivery of a termination notice"); Ex. 10 at 17 (PM Display Plan, internal ex. E, ¶ 1(B), at 5161328247) (same).

[27] Ex. 9 at 25 (PM Fixture Plan, internal Ex. G, ¶ 37, at 5161328232); Ex. 10 at 22 (PM Display Plan contract, internal Ex. G, ¶ 37, at 5161328252 (same).

RAITMS's programs at the end of such ten days shall be deemed acceptance of the amendment."[28] And ITGB's contract specifies that "ITG Brands may issue periodic changes or addendums to these [Plan] Descriptions at any time under this Agreement."[29]

DISCUSSION

I. The Point-of-Sale Remedy Should Require the Manufacturers to Use a Percentage of the Space They Control at Retail to Display Court-Ordered Statements.

The logic of the corrective statement remedy, as articulated by the Court of Appeals—*i.e.*, to "impair" the manufacturers from again violating RICO by "making false and misleading assurances . . . [by] at the same time communicat[ing] the opposite, truthful message about these matters to consumers," *2009 Opinion*, 566 F.3d at 1140—dictates that the most important place for the corrective statements to appear is in direct juxtaposition to marketing for the manufacturers' covered cigarette brands.

A. Point-of-sale is the most important media channel for the Court's remedy.

In fact, the point-of-sale media channel is *the most important* of the five channels the Court ordered for the corrective-statement remedy in 2006. *See* US 2014 Opening Br. at 1-2 (ECF 6100). Indeed, there is no dispute that the participating-retailer contracts give the manufacturers expansive contractual control over cigarette merchandising and promotion space in, on, and outside retailers' establishments. U.S. 2014 Resp. Br. at 7-8 (ECF 6108). Clearly, the manufacturers consider their resulting contractual control over such point-of-sale cigarette marketing and promotional displays an essential aspect of their communication with consumers. As explained by PMUSA, its company's participating-retailer program "plays an essential role in

[28] Ex. 11 at 1 (RJRT menthol outlet, at RJRT_002644388); Ex. 12 at 1 (RJRT pack outlet, at RJRT_002644374); Ex. 13 at 1 (RJRT carton outlet, at RJRT_002644360); Ex. 14 at 1 (RJRT cigarette tobacco outlet, at RJRT_002640402).

[29] Ex. 15 at 1 (ITGB Agreement, at ITG-DOJ0000328).

PM USA's ability to promote its products and communicate with adult smokers in a meaningful way." 2011 Martin Decl. at 5-6, ¶ 10 (ECF 5906-1). RJRT's declarant likewise explained, "[t]he retail environment provides a vital opportunity for RJRT to communicate with adult consumers." 2011 Boehm Decl. at 4, ¶ 12 (ECF 5906-2). Therefore, it simply is not credible for the manufacturers now to claim that this "essential" and "vital" media channel is redundant. Defs.' Opening 2018 Br. at 15-16 (ECF 6272).

The manufacturers' spending confirms the importance of the point-of-sale media channel. During 2016, they channeled some $7.43 billion in marketing expenditures (85.8% of the total) either to their participating retailers as promotional allowances ($229 million, or 2.6% of the total) that directly increase retailers' revenues, or through their retailers as consumer price discounts ($7.2 billion, or 83.2% of the total). *FTC Cigarette Report for 2016* at 3-4), which only indirectly increases retailers' revenues. Ex. 1 at ¶ 15) (Chaloupka Decl.). The common feature of both types of spending is that they are made available only to retailers who sign contacts giving the manufacturers contractual control over retail space to market and promote the manufacturers' cigarettes. For the court-ordered statements to prevent and restrain future RICO violations as intended, they must have a robust presence alongside the cigarette merchandising and promotional space that the manufacturers control. *See 2006 Post-Trial Decision*, 449 F. Supp. 2d at 660 (finding that the manufacturers' "[i]n-store placement displays and signs" are "key methods" to "communicate brand information and communicate a brand's central message or image").

B. The Court should adopt a fixed-percentage point-of-sale display remedy.

The retailers have expressed a variety of concerns about fixed locations and sizes for the court-ordered statements. Their earlier briefs challenged the requirement, in the 2006 version of the remedy, for large (18" x 30") signs to stand vertically on countertops, both as a potential

safety issue and because it would interfere with selling space for high-profit goods. The United States' 2014 briefs therefore recommended looking to "point-of-sale display and placement options . . . beyond header and countertop displays," US 6/18/2014 Br. at 5 (ECF 6108), and provided mockups depicting numerous locations that would not implicate the retailers' safety and lost-sales concerns, *id*., Exhibits 1-5 (ECF 6108-1 to 6108-5). The retailers' most recent briefs raise new concerns; *e.g.*, floor clings do not adhere equally well to every kind of floorcovering, NATO 2018 Opening Br. at 4 (ECF 6269), and ceiling drops may interfere with security cameras, *id*. at 3.

The basis of the point-of-sale remedy can and should be simply to require the manufacturers to display the court-ordered statements—already found necessary to prevent and restrain further fraud-based RICO violations—in a fixed percentage of the merchandising and marketing space the manufacturers control at their participating retailers' establishments. Moreover, as discussed above, *see* pages 10-14, *supra*, the participating-retailer contracts include ample flexibility for the manufacturers to adapt to the variety of retail environments in which they arrange to sell cigarettes. A fixed-percentage requirement would simply build upon these existing arrangements.

Mockups of how this approach might appear in various retail contexts are attached as Exhibits 4 to 8, and an image is provided below. This approach would ensure that the court-ordered statements prevent and restrain the manufacturers from violating RICO by engaging in false or deceptive advertising, as the D.C. Circuit contemplated, while providing even greater assurance that the rights of innocent persons will not be unduly burdened.

Figure 6. Mockup of on-set court-ordered statements shown on merchandising fixture, with 25% of covered-brand merchandising space devoted to the statements. Larger images showing each manufacturer's territory and how excluded products and brands are dealt with are at Exhibits 6 and 7. A larger image of this figure is at Ex. 6, at 4. (Base image from Sparrow Decl. (ECF 6273-1), at 24. See also discussion at page 47 and Figure 10.)

Allocating a fixed percentage of cigarette promotional space under each manufacturers' contractual control will dovetail with the methods the manufacturers themselves use to define their rights to space at retail, including in their competition for positioning within merchandiser units. Each manufacturer's territory is easily demarcated (see Figure 5 at page **Error! Bookmark not defined.** above; this and another example are shown in larger sizes as Ex. 6 at 2 and Ex. 7 at 2).

It would also track the formats the manufacturers already use for merchandising and promotional displays in and around retail establishments, thereby putting to rest the

manufacturers' and retailers' concerns about "the widely varied layouts found in thousands of retail establishments across the country." NACS 2018 Opening Br. at 5 (ECF 6271); *see also* Defs.' 2018 Opening Br. at 5 (ECF 6272).

As discussed above, *see* pages 10-14, *supra*, the manufacturers' contracts with retailers give each manufacturer rights to space in merchandiser units and to place and approve signage elsewhere in the retail environment. It would be administratively simple and operationally effective to require that a fixed percentage of those total areas under contract be allocated to the corrective statements that this Court and the D.C. Circuit have found necessary and appropriate to prevent and restrain continued fraud and deception in violation of RICO. *2006 Post-Trial Decision*, 449 F. Supp. 2d at 926, *aff'd in relevant part, 2009 Opinion*, 566 F.3d at 1140.

Following the distinction the manufacturers make between space in the merchandiser units—"on-set"—and signage elsewhere in the retail environment—"off-set"—the Court can make different provisions respecting each. For merchandiser units, each manufacturer can be required to display court-ordered statements in a fixed percentage of the area used to merchandise or promote its covered brands. For off-set signage advertising cigarettes, each such sign—regardless of format—could be treated separately and a specified percentage of each sign contain a corrective statement. In this way, the manufacturers would "at the same time" be communicating a truthful statement about cigarettes, and thereby be prevented and restrained from communicating a false or misleading statement. *2009 Opinion*, 566 F.3d at 1140. The resulting displays, both on-set and off-set, are depicted in mockups (using Plaintiffs' suggested 25% allocation) as Exhibits 4 and 5. The corrective statements would appear on the same merchandising units, sets, and "off-set" promotional displays that the manufacturers already

require, locate, approve, or authorize in and around participating retailers' establishments to *market* their cigarettes.

C. Twenty-five percent is a reasonable proportion of the space to be devoted to the court-ordered statements.

As discussed above, *see* pages 18, 19, *supra*, Plaintiffs respond to retailers' most recent criticisms by recommending that the Court take a different approach than specifying a certain number of court-ordered statements to be posted in specific locations, as in the requirements in the Court's 2006 post-trial order for each Defendant to display two merchandising headers and 30" x 18" countertop displays. Indeed, Plaintiffs propose an approach even more flexible than the United States' 2014 suggestion to allow a combination of displays in other locations. US 2014 Opening Br. at 5 (ECF 6100); US 2014 Resp. Br. at 1, 5 & Exs. 1-5 (ECF 6108 & ECF 6108-1 to ECF 6108-5). Instead, Plaintiffs propose addressing the retailers' most recent criticisms by incorporating the court-ordered statements into whatever point-of-sale merchandising and promotional displays the manufacturers require, supply, authorize, or permit

Figure 8. Mockup of door cling, with 25% of area bearing court-ordered statement. Larger image is available as Ex. 5, at 4.

Figure 7. Mockup of ceiling drop display, with 25% of area bearing court-ordered statement. Larger image is available as Ex. 4, at 5.

to promote their cigarettes. For example, where the manufacturers authorize a door cling promoting their cigarettes, court-ordered language would appear on 25% of that marketing piece; where they permit a ceiling drop for their cigarettes, 25% of each side would display court-ordered language.

Because a fixed-percentage approach will not require mandatory countertop displays of the kind originally ordered in 2006, the approach must be robust. As NACS has told the D.C. Circuit, it considers countertop space at the point of sale "the most important space within a convenience store." *2009 Opinion*, 566 F.3d at 1141 (citing NACS brief). If the manufacturers arrange to use valuable countertop space to convey their promotional messages, so should they be required to use a specified percentage of that valuable space to convey the truthful messages mandated by the Court to impair them "in making false and misleading assurances" in their messages to consumers. *Id.* at 1140. Requiring each promotional display for the manufacturers' cigarettes to devote a fixed percentage of its display area to court-ordered statements will logically also reflect the manufacturers' own promotion display choices and priorities and necessarily be consistent with retailers' commercial and safety requirements. *See* NATO 2018 Opening Br. at 3-4 (ECF 6269); NACS 2018 Opening Br. at 5 (ECF 6271).

As shown in the mockups in Exhibits 4 and 5, 25% should provide adequate space for the manufacturers to "communicate . . . to consumers" the "truthful message[s]" about smoking, health, and nicotine already approved by this Court and the D.C. Circuit "at the same time" as their contracted marketing happens, thereby impairing their ability to continue or resume their previous deceptions. *See 2009 Opinion,* 566 F.3d at 1140. The remaining 75% provides ample space for the manufacturers to communicate their own chosen messages.

Requiring that corrective statements appear on a fixed percentage of contracted on-set space and off-set point-of-sale promotional displays also adapts the remedy to the size and configuration of each retailer's merchandising space. A point-of-sale remedy that requires the manufacturers to display corrective statements where—and only where—they merchandise and advertise cigarettes is precisely calibrated to prevent and restrain them from future fraud and deception in violation of RICO, while making due provision for the rights of retailers. *2006 Post-Trial Decision*, 449 F. Supp. 2d at 926, *aff'd in relevant part*, *2009 Opinion*, 566 F.3d at 1140. Thus, allocating 25% of all space on promotional displays to this particular remedy is an entirely appropriate part of any point-of-sale order.

II. Requiring a Percentage of the Manufacturers' Contracted Retail Space to Display Corrective Statements Would Not Unduly Burden Retailers' Rights.

A. The applicable legal standard requires avoiding unduly burdening rights of third parties, not avoiding any effect on third parties.

The retailers seemingly urge that injunctions with *any* effect on third persons are prohibited. NACS 2018 Opening Br. at 6 (ECF 6271). This simply is not the correct standard; the statute requires "making due provision for the rights of innocent persons," not "avoiding any effect on innocent persons." 18 U.S.C. § 1964(a); *see also 2009 Opinion*, 566 F.3d at 1142 (instructing that district court may "craft[] a new version *reflecting* the rights of third parties" (emphasis added), rather than "having *no effect upo*n third parties"). Therefore, just as with the due-process cases discussed *infra*, "impact" is not the same as "legal rights."

B. The Retailers' claims of potential financial loss are overstated.

The fears of potential business harms expressed by the retailers, *see* NACS 2018 Opening Br. at 3-4 (ECF 6271); *see also* Defs.' 2018 Opening Br. at 7-8 (ECF 6272), are overstated. Individual retailers will suffer no competitive harm, because the remedy will apply uniformly across all contracts offered by the manufacturers in this case. Each retailer will be free to decide

whether it is in its best interest to participate in a contract with each of the manufacturers. Retailers will continue to make these decisions on a level playing field. Therefore, the proposed form of the point-of-sale remedy will not advantage any retailer over any other.

A firm's profitability is defined as the difference between its revenues from sales and its costs of production. Ex. 1 at ¶ 12) (Chaloupka Decl.). Its revenues from sales are tightly tied to its ability to control market prices for its products. *Id.* A firm's ability to control market prices is in turn linked to the degree of competition in its market. *Id*. Highly competitive markets are "generally characterized by [1] many firms [2] producing relatively homogenous products [3] in a market with low entry barriers." *Id.* In such markets, retail prices reflect retailers' cost of production, including a "normal profit." *Id*. ¶ 13.

The retail cigarette market is highly competitive; there are hundreds of thousands of cigarette retailers, selling many of the same cigarette brands, and the costs of entry are low. *Id*. ¶ 14; *see also R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696 (7th Cir. 2006) (Easterbrook, J.) ("There are so many cigarette retailers, and entry into retail sales is so easy, that the [cigarette retail] market approximates economists' vision of perfect competition."). In that highly competitive market, individual retailers have relatively little control over the prices they charge because if they set prices significantly higher, they will lose customers to other retailers selling at a lower price. Ex. 1 at ¶ 14 (Chaloupka Decl.).

In that environment, retailers who participate in cigarette manufacturers' contracts gain a competitive advantage over those that do not. Ex. 1 at ¶ 15 (Chaloupka Decl.). First, participating retailers gain access to $7.2 billion of price discounts that directly reduce the price consumers pay for cigarettes: $5.8 billion in price discounts that are routed directly through retailers, and another $1.4 billion on price discounts to wholesalers that retailers are obliged to pass on to their

consumers. *FTC Cigarette Report for 2016*, at 3-4; Ex. 1 at ¶ 10 (Chaloupka Decl.). Access to these price discounts indirectly contributes to retailer profits by increasing their total sales. Ex. 1 at ¶ 15 (Chaloupka Decl.); *see also* Boehm Decl. ¶ 10 (ECF 5906-2) ("Participating Retailers receive indirect benefits in the form of access to special promotions or other marketing assistance that is not available to retailers who sell RJRT products but do not participate in RJRT's retail merchandising program."); Martin Decl. ¶ 14 (ECF 5906-01); Broviak Aff. ¶¶ 5-7 (ECF 5934-2); Richardson Aff. ¶¶ 6-7 (ECF 5934-3); Paduano Aff. ¶¶ 5-9 (ECF 5934-4) ("I estimate that without a contractual relationship with tobacco manufacturers, each Nice N Easy store would lose approximately 10-15 percent of tobacco sales" to other stores.). In addition, participating retailers received $229 million in direct payments made by the manufacturers for fulfilling various conditions of their participating-retailer contracts, *2016 FTC Cigarette Report* at 4; these payments directly benefit retailers' revenues. Ex. 1 at ¶ 15 (Chaloupka Decl.).

As Dr. Chaloupka explains, the competitive advantage that retailers gain through contract participation would not be altered by requiring manufacturers to display court-ordered statements in the retail space they control through those contracts. Retailers would only opt out of contracts if they determined that doing so was the more profitable option. *Id*. at ¶ 17; Boehm Decl. ¶ 13 (ECF 5906-2) (explaining that retailers would decide whether to opt out based on whether "they are better off not participating in RJRT's retail merchandising program"). However, because a requirement for court-ordered statements will apply uniformly to all retailer contracts, retailers would be likely to continue to participate in the manufacturers' contracts to avoid placing themselves at a competitive disadvantage to other retailers who continue to participate and have access to manufacturer promotions and other direct payments. Ex. 1 at ¶¶ 15, 20 (Chaloupka Decl.).

The manufacturers will also continue to have a strong incentives to offer participating-retailer contracts. The contracts contribute to the manufacturers' profits by helping them target discounts to particular geographies. *Id*. ¶ 16. The contracts also allow the manufacturers to enhance the display and promotion of their cigarettes at the point of sale relative to other manufacturers' cigarettes. *Id*. Furthermore, the manufacturers have been able to use the control and access their participating-retailer contracts provide to offset the effect of tax increases and tobacco control measures. *Id*. The value of that control is reflected in the fact that manufacturers collectively spend more than 90% of their marketing expenditures on marketing delivered through point-of-sale. *Id*. at ¶ 21. This makes it highly unlikely that manufacturers would discontinue retail merchandising programs in response to court-ordered statements. *Id*.

Moreover, Dr. Chaloupka explains, the retailers' continued participation and benefit from the manufacturers' contracts is even more likely under Plaintiffs' "fixed percentage" point-of-sale approach than it was under the original 2006 version of the remedy, which would have required placing court-ordered statements on countertop space. *Id*. at ¶¶ 18-19. As the retailers and their declarants expressed at length, they consider that location to be highly valuable, and consider its best use to be selling products other than cigarettes. NACS 2011 Br. at 9-11(ECF 5934); Broviak Aff. ¶¶ 16-23 (ECF 5934-2); Richardson Aff. ¶¶ 12-16 (ECF 5934-3); Paduano Aff. ¶¶ 14-18 (ECF 5934-4); NACS 2014 Br. at 5-14 (ECF 6101). A fixed-percentage approach will not require such placements unless that space is being used for the sale or promotion of the manufacturers' covered cigarettes. Crafting a new version of the point-of-sale remedy without the countertop placements that were mandatory in the 2006 version will therefore increase the likelihood of retailers' continued participation in manufacturer contracts. Ex. 1 at ¶¶ 18-19 (Chaloupka Decl.). Because a fixed-percentage approach will not require mandatory countertop

placements, it will not distort the market for such manufacturer contracts. *Id*. ¶ 20. Nor will the approach be likely to diminish manufacturers' incentives to offer such contracts. *Id*. ¶ 21.

The concerns that the retailers and manufacturers raise about potential business losses for retailers from a point-of-sale remedy are similar to concerns that tobacco companies and retailers, both in this country and others, have raised about various policy measures that affect the demand for tobacco products, such as the increases in tobacco taxes, bans on tobacco merchandising displays, requirements for plain packaging, and comprehensive smoke-free laws for bars and restaurants. Ex. 1 at ¶ 22. Peer-reviewed published studies that have examined the actual impact of smoke-free laws in multiple jurisdictions, tobacco tax increases in the United States, plain-packaging requirements in Australia, and bans on marketing displays in Ireland and New Zealand, have found that in fact such measures either had no negative economic effect or, in some cases, positive economic effects. *Id*. at ¶¶ 25-31. The empirical evidence of policies affecting demand for tobacco products "has demonstrated that fears about their negative economic impact are greatly overstated," Professor Chaloupka writes. *Id*. ¶ 31. Based on his experience and expertise, he concludes, "[t]he same will almost certainly be the case with the fears convenience store associations and officials are raising about the negative economic impact of point-of-sale court-ordered statements on their businesses." *Id*.

C. The Retailers Would Suffer No Cognizable Harm Were the Corrective Statements to Cause an Overall Decline in Cigarette Sales.

Furthermore, retailers would have no cause to complain even were overall cigarette sales affected by "[r]equiring [the manufacturers] to reveal the previously hidden truth about their products." *2009 Opinion,* 566 F.3d at 1140. First, the overall purpose of the court-ordered statements is, again, to impair the *manufacturers* in making false and misleading assurances about their products by requiring them, "at the same time," to "communicate the opposite,

truthful message about these matters to consumers." *Id*. The purpose is not "[c]orrecting consumer misinformation," because that "focuses on remedying the effects of past conduct." *2015 Corrective Statement Appeal*, 801 F.3d at 262 (internal quotation marks and brackets omitted). Nor is the purpose "to *prevent* consumer deception" by "arming consumers against misinformation," because that objective, "although forward-looking," would focus "not on restraining the RICO violator, but on safeguarding *consumers*." *Id*. at 262, 263. Instead, the purpose is solely to prevent and restrain the *manufacturers* from again violating RICO by engaging in deceptive practices in the future. Second, even if disseminating the court-ordered statements had effects on sales, it would not be because the statements allegedly "convey[ed] the unmistakable message that consumers should not purchase cigarettes," Defs.' Opening 2018 Br. at 10 (ECF 6272), but instead because the statements "revealed the previously hidden truth about Defendants' *products*," *2017 Corrective Statement Appeal*, 855 F.3d at 324 (internal quotation marks and brackets omitted).). Even if "reveal[ing] the previously hidden truth" about the cigarettes they sell did reduce the number of cigarettes they sell, neither the retailers nor the manufacturers could plausibly assert that such an effect was a cognizable harm.

III. The Retailers Have Not Identified Any Contractual or Property Rights Protected by the Due Process and Takings Clauses.

Contrary to arguments made by the retailers, NACS 2018 Opening Br. at 12-14 (ECF 6271)—the manufacturers are conspicuously silent on this point—the point-of-sale remedy will not interfere with participating retailers' contractual or property rights under the Due Process and Takings Clauses. The economic arguments that the manufacturers do muster on the retailers' behalf, Defs.' 2018 Opening Br. at 7-8 (ECF 6272), uniformly assert economic *interests*, not property or contract *rights* subject to the Due Process Clause, nor property subject to the Takings Clause.

A. Because the contracts are terminable without cause and are subject to unilateral modification, participating retailers have no contractual or property rights to the contracts' indefinite continuation.

The manufacturers and retailers assert that a point-of-sale remedy would impose various financial harms. NACS 2018 Opening Br. at 3-4 (ECF 6271); Defs.' 2018 Opening Br. at 7-8 (ECF 6272). However, especially with a fixed-percentage approach to the remedy, these assertions are likely overstated, as discussed at pages 24-28, *supra*. Nonetheless, even assuming, *arguendo*, that retailers would suffer some of the financial losses they fear, it would not be due to the disruption of any contractual or property rights. The Court would not itself order retailers to do anything. Instead, it would order the manufacturers to use their existing authority under their participating-retailer contracts to require their participating retailers to display the court-ordered statements at the point of sale alongside their merchandising and promotional displays for the manufacturers' own cigarettes. While it is commonly accepted that "[v]alid contracts are property," *Lynch v. United States*, 292 U.S. 571, 579 (1934), *quoted in* NACS 6/8/18 at 14 (ECF 6271), *Lynch* also explains that the contours of contractual property rights are to be found in their terms and background law. Therefore, *Lynch* held, a taking of contractual property occurred in that case when Congress repudiated beneficiaries' "vested *rights*" to payments under "outstanding contracts for yearly renewable term insurance." *Id*. at 577, 584 (emphasis added).

However, there are no comparable "vested rights" here. Instead, as detailed above, *see* page 16 & notes 24-26, *supra*, the participating-retailer contracts are terminable *without cause*, either immediately or with at most 30 days' notice. Thus, the retailers do not dispute that "there is no property interest in the *indefinite continuation of an at-will contract*." *Bishop v. Wood*, 426 U.S. 341, 347 (1976) (emphasis added), *quoted in* US Opening 2014 Br. at 8 (ECF 6100). Put simply, the holders of terminable-at-will contracts "have no property interest because there is no objective basis for believing that they will continue to be employed indefinitely." *Orange v.*

District of Columbia, 59 F.3d 1267, 1274 (D.C. Cir. 1995) (quoting *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988)); *see also Blackout Sealcoating, Inc. v. Peterson*, 733 F.3d 688, 690 (7th Cir. 2013) (holding that commercial entity has no property interest in a service contract that is terminable at will). Businesses do not have a property interest in their anticipated future revenues, nor is the Due Process Clause implicated when a regulation diminishes or even eliminates the business value of an existing contract. *Classic Cab, Inc. v. District of Columbia*, 288 F. Supp. 3d 218, 225 (D.D.C. 2018) (rejecting Due Process Clause challenge to requirement for taxis to adopt new fare metering system, even though taxi firm had entered 7-year contract to capitalize on earlier exclusive license to supply prior fare meter technology, and the new regulation "had the *effect* of reducing or eliminating the contract's value").

Participating retailers' lack of a *right* (distinct from a hope or expectation) to have the status quo persist indefinitely is further confirmed by the manufacturers' unilateral right to modify the participating-retailer contracts merely by providing notice, without any opportunity for participating retailers to contest the new terms. *See* page 17 & notes 27-29, *supra*. Therefore, where a cigarette manufacturer may "amend, modify or cancel [its participating-retailer] program at any time," its participating retailers "could have no reasonable, legitimate expectation that the program would be worth any amount of money to them." *York Fuel, Inc. v. Lorillard Tobacco Co.*, No. 13-CV-7131 JG, 2014 WL 2865963, at *2 (E.D.N.Y. June 24, 2014) (capitalization in first quotation altered). Indeed, any purported rights provided by a contract "so one-sided that it gives one party the power to unilaterally modify its provisions" are "meaningless and illusory." *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 18 (D.D.C. 2012), *appeal voluntarily dismissed sub nom. Abdah v. Obama*, No. 12-5350, 2013 WL 221445 (D.C. Cir. Jan. 11, 2013). Even if the retailers' economic fears were to be realized, they would

suffer losses only to their hopes and expectations, not to any "vested rights." *Lynch*, 292 U.S. at 577.

Indeed, the retailers' due-process arguments are similar to—although weaker than—objections that non-party pharmacies raised in *National Association of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30 (1st Cir. 2009). To settle a pair of class-action suits (the first of them brought under RICO, sounding in fraud), pharmacy benefit managers agreed to "rollback" the drug prices they published; because insurance payments were indexed to those drug price lists, the "rollback" would reduce the payments that the class-action plaintiffs (insurance companies and others) were obliged to make. *Id*. at 36-37. Non-party pharmacies, who received those same insurance payments indexed to the price lists, then asserted a due-process right to be heard and to object, emphasizing that the settlements' very purpose was to reduce how much money the insurers would pay the non-party pharmacies under their pre-existing contracts. *Id*. But the First Circuit decisively rejected those due-process claims. Despite acknowledging "the direct financial impact of the rollback" on the non-party pharmacies, that court explained that "[i]mpact and legal rights are not the same thing." *Id*. at 42 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968)). Accordingly, whatever financial effects the pharmacies might suffer did not represent Due Process violations. *Id*. The due-process objections raised by the retailers here are even weaker; unlike the direct reduction of insurance payments to pharmacies under the existing, term contracts occasioned by the settlements in that case, nothing in a point-of-sale remedy will directly affect the monetary benefits that the participating retailers obtain in exchange for giving cigarette manufacturers contractual control over merchandising and promotional space. Instead, the remedy would just

require the manufacturers to use a certain percentage of the space they control to display the court-ordered statements.

Therefore, as shown earlier, the retailers' asserted economic losses do not withstand scrutiny; but even accepting their economic assertions *arguendo*, they fail to identify any contractual or property rights that would be disrupted.

B. There is no violation of the Takings Clause because the Court's order will simply affect what is displayed in space that the retailers already contract away to the manufacturers.

The United States previously explained at length why a point-of-sale order would not be a "taking" under the Fifth Amendment. US Opening 2014 Br. at 8-12 (ECF 6100). The retail trade organizations' takings claims have challenged only a potential requirement to place signs with the court-ordered statements on countertops (or, as proposed in the United States' 2014 briefs, in the *area* of counters). The retailers have made no claim that a Fifth Amendment taking would arise by requiring the court-ordered statements to be displayed on the cigarette merchandiser units. Therefore, any takings arguments may be eliminated by crafting the point-of-sale order to require manufacturers to use 25% of the space over which they have contractual authority to display the corrective statements.

The retailers have set aside their earlier claims of a physical taking, and now make only regulatory-taking arguments. NACS 2018 Opening Br. 12-13 (ECF 6271). Moreover, the parties agree that *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), sets out the three criteria used to identify a regulatory taking. The swiftest analysis will be for the Court to address the second of these criteria, because the only "distinct investment-backed expectations," that the retailers assert, *id*. at 124, are "obtaining store properties and precisely arranging their products and advertisements." NACS 6/8/18 Br. at 13 (ECF 6271). But *all* retail operators make such investments and engage in such labor, as general investments in their

operations—these investments do not specifically pertain to their contracts. The retailers here have neither distinct investments, nor distinct investment-backed expectations. Participating retailers pay nothing for their contracts, and the contracts have no fixed terms, can be terminated without cause with limited or even no notice, and can be unilaterally modified.

Further, with respect to the first relevant factor, the "economic impact of the regulation on the claimant," *Penn Central*, 438 U.S. at 124, the discussion above demonstrates that the retailers overstate the potential economic impact of any point-of-sale order—especially an order that looks to a fixed percentage of merchandising and promotional displays for the manufacturers' cigarettes, rather than specifically requiring countertop or counter-area placements. *See supra* at 24-28. Moreover, as to the third and final applicable factor, "the character of the governmental action," *Penn Central*, 438 U.S. at 124, the suggested fixed-percentage approach would be even less intrusive from a takings vantage than mandatory communication at the point of sale, most of which specify precise sizes. *See, e.g.*, US 2014 Resp. Br. at 8-9 & nn.23-24, n.26 (ECF 6108) (citing and discussing dozens of mandatory point-of-sale warnings retailers must display concerning cigarettes, alcohol, and retail fraud). Moreover, as another judge of this Court observed in *Classic Cab*, "the scope of 'property' protected by the Takings Clauses is no broader than that protected by the Due Process Clause." *Classic Cab*, 288 F. Supp. 3d at 227. Especially where the retailers' fears about potential business harms are likely "greatly overstated," Ex. 1 at ¶ 31 (Chaloupka Decl.), and where potential business losses would in any event not be cognizable, *see supra* at 28-29, there also is no taking.

IV. The Retailers Allege No Credible Reputational Harm, Much Less One Rising to an Infringement of Protected Liberty Interests.

There is no merit to the retailers' assertions that the "most pernicious[]" harm is that the original statement language, ordered in 2012, would "poison retailers' reputation with their

customers." NACS 2018 Opening Br. at 5 (ECF 6271) (citing 2014 declarations discussing 2012 wording); *see also* Defs.' 2018 Opening Br. at 11 (ECF 6272) (citing 2014 brief, which quoted the same 2014 declarations based on the same 2012 wording). This argument was implausible when the retailers first made it, *see* US 2014 Resp. Br. at 9-10 (ECF 6108), but it is now wholly inapt, because the 2012 wording has since been modified twice—first to avoid disclosing that Defendants (not retailers) had "deliberately deceived" the American public, *United States v. Philip Morris USA, Inc.*, 801 F.3d 250, 262 (D.C. Cir. 2015) ("*2015 Corrective Statement Appeal*"), and second, to avoid any suggestion that the manufacturers have been less than truthful, *United States v. Philip Morris USA, Inc.*, 855 F.3d 321, 325-26 (D.C. Cir. 2017) ("*2017 Corrective Statement Appeal*").

The retailers provide no logical or evidentiary basis to believe that the 2017 language would harm their reputations. In particular, they do not explain how the statements could possibly stigmatize *retailers*—who are not even mentioned—while simultaneously referring to the *manufacturers* throughout, now without allowing "*any* inference of past misconduct" on the manufacturers' part. *2017 Corrective Statement Appeal*, 855 F.3d at 328 (emphasis added). Because the statements' current wording "no longer 'convey[s] a certain innuendo,' or 'moral responsibility'" regarding even the *manufacturers*, *id*. (quoting *AMI*, 760 F.3d at 27, and *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530), the same is surely even more so with respect to the retailers. As just observed, retailers in dozens of jurisdictions are already required by law to post mandatory point-of-sale disclosures concerning, *e.g.*, cigarettes, alcohol, and retail fraud. *See* US 2014 Resp. Br. at 8-9 & nn.23-24, n.26 (ECF 6108). The retailers identify no cognizable harm to their reputations from statements giving purely factual and uncontroversial information about products they choose to sell, and that do not attribute any conduct to *them*. Moreover, even if the retailers

could demonstrate that the 2017 language would harm their reputations, such harms, standing alone, do not constitute a deprivation of protected liberty interests. *Paul v. Davis*, 424 U.S. 693 (1976).

V. Prior D.C. Circuit Decisions in this Case Foreclose the Manufacturers' and Retailers' First Amendment Arguments.

A. *Zauderer* analysis is the law of the case.

Considerably more guidance is now available than in 2011 or 2014 as to how this Court should consider First Amendment challenges to the court-ordered statements at issue, due to the D.C. Circuit's 2015 and 2017 corrective-statement decisions in this case. In its 2017 decision, the D.C. Circuit expressly held that—as indicated by the *2009 Opinion*—First Amendment analysis of the corrective statements in this case is governed by the *Zauderer* standard for mandatory commercial disclosures, and not by the more demanding *Central Hudson* standard for restrictions on commercial speech urged (yet again) by the manufacturers and retailers. *2017 Corrective Statement Appeal*, 855 F.3d at 327-28 (referencing *2009 Opinion*, 566 F.3d at 1144-45; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); and *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)). On that most recent appeal, the Defendants cited a 2014 *en banc* decision, *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*) ("*AMI*"), but the D.C. Circuit held that, "[c]ontrary to Defendants' assertion, nothing in this Court's en banc decision in *AMI* compels a contrary result" concerning *Zauderer*'s applicability. *2017 Corrective Statement Appeal*, 855 F.3d at 328.

The manufacturers further urged the 2017 panel in this case to find that under an unrelated 2015 panel decision, *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *Central Hudson* scrutiny now applied; but the 2017 panel observed that the

determination that *Zauderer* controls, as indicated by the 2009 panel in this case, could be rejected only by the en banc court, and held that it had no authority to do anything other than apply *Zauderer* as the law of the case. *2017 Corrective Statement Appeal*, 855 F.3d at 328.

B. The proposed remedy comports with *Zauderer*

The D.C. Circuit has reviewed the court-ordered statements at issue here—more than once—and found that they satisfy scrutiny under *Zauderer*. In the *2015 Corrective Statement Appeal*, the D.C. Circuit found that, with one factual correction, the factual bullets provided "purely factual and uncontroversial information." *2015 Corrective Statement Appeal*, 801 F.3d at 260 (ordering a reference to "filtered" cigarettes to be changed to refer instead to "light" cigarettes; quoting *AMI*, 760 F.3d at 27 (in turn quoting *Zauderer*, 471 U.S. at 571)).

The *2017 Corrective Statement Appeal* found that, with their most recent modifications, the statement preambles were likewise "confined to 'purely factual and uncontroversial information.'" 855 F.3d at 328 (quoting *2009 Opinion*, 566 F.3d at 1144-45 (in turn quoting *Zauderer*, 471 U.S. at 651)).

The manufacturers now insinuate, without explanation, that the court-ordered statements are not "objective disclosures." Defs.' 2018 Opening Br. at 14 n.3 (ECF 6272). Given the D.C. Circuit's holdings, more is needed than insinuations. The manufacturers and retailers further contend that a point-of-sale remedy cannot satisfy *Zauderer* review, based on the self-serving grounds that the statements would stigmatize retailers, by somehow implying misconduct on the retailers' part. This allegation is rebutted above, *see* pages 34-36, *supra*; the statements do not even refer to retailers, will cause no reputational harms, and will not infringe upon any protected liberty interests, and in any event, have already been found to provide purely factual and uncontroversial information, *2017 Corrective Statement* Appeal, 855 F.3d at 328.

C. The cases relied on by retailers and defendants are inapposite because they don't apply *Zauderer*

Against this background, the manufacturers and retail trade organizations now urge this Court to conduct its First Amendment analysis under *Central Hudson* and not *Zauderer*, citing the same *en banc* 2014 *AMI* decision that the D.C. Circuit already considered in both the *2015 Corrective Statements Appeal*, 801 F.3d at 260, and the *2017 Corrective Statement Appeal*, 855 F.3d at 327-28, and citing the same 2015 *National Association of Manufacturers* panel decision that was likewise considered in the *2017 Corrective Statement Appeal*, 855 F.3d at 327-28.

The 2015 and 2017 *Corrective Statement Appeals* are controlling, both as law of the case and as D.C. Circuit precedents. But the manufacturers and retailers do not grapple with these precedents (or even mention them), much less explain why this Court has authority to determine that *Zauderer* does not apply when a D.C. Circuit panel lacks authority to make such a determination. *2017 Corrective Statement Appeal*, 855 F.3d at 328. In the meantime, the Supreme Court's most recent commercial-speech decision affirms that mandatory disclosures of purely factual and uncontroversial information related to goods or services offered remain subject to *Zauderer*'s "lower level of scrutiny." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

Although the *2017 Corrective Statement Appeal* rejected any suggestion that First Amendment analysis is required under *Central Hudson* rather than *Zauderer* due to the 2015 *National Association of Manufacturers* panel decision, NACS attempts to discern a "holding" in the latter panel's observation that, to date, the Supreme Court has not itself applied *Zauderer*'s mandatory-disclosure standards beyond the realm of "voluntary commercial advertising." NACS 2018 Opening Br. at 10 (ECF 6271) (quoting *Nat'l Ass'n of Mfgrs.*, 800 F.3d at 523). NACS then adds that participating retailers, "unlike Defendants, are not voluntary advertisers. They wish

simply to remain silent." *Id*. This argument is premised on a factual misapprehension. The core bargain in participating-retailer contracts is precisely retailers' voluntary agreement to give the manufacturers' cigarettes merchandising and promotional space in exchange for monetary benefits. With few exceptions, these voluntary agreements require participating retailers to make displays of the manufacturers' cigarettes visible to consumers (and sometimes "clearly visible" or "highly visible"). *See* page 15, *supra*. The manufacturers consider such merchandising displays essential to their advertising.[30] The retailers already willingly provide voluntary advertisers for the manufacturers' cigarettes, and requiring their voluntary advertisements for the manufacturers' cigarettes to include court-ordered statements to prevent and restrain the manufacturers' future RICO violations does not run afoul of the First Amendment.

In any event, the D.C. Circuit's *2009 Opinion* in this case found the "voluntary advertiser" argument to be "a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden," including for "the stand-alone corrective statements." *2009 Opinion*, 566 F.3d at 1143. Thus, even if retailers who trade promotional space for monetary benefits were "involuntary advertisers," the analysis would be the same because *Zauderer*

[30] Indeed, RJRT's current training materials are emphatic about the communicative function of the merchandiser unit itself, explaining that a "merchandiser should be thought of as a communication vehicle—not just a package display fixture. It is both an advertising message and a platform on which to gain brand exposure." Ex. 21 at 4 (*Territory Manager Playbook* 126 (RAITMS 2017), RJRT_002062015). In a First Amendment challenge to a ban on sales of cigarettes at pharmacies, Philip Morris argued vigorously that "*the product itself* is a form of advertisement." *Philip Morris USA v. City & Cty. of S.F.*, No. C 08-04482 CW, 2008 WL 5130460, at *2, 2008 U.S. Dist. LEXIS 101933, at *4 (N.D. Cal. Dec. 5, 2008), *aff'd*, 345 Fed. App'x 276 (9th Cir. 2009). Empirical research confirms that "[point-of-sale] tobacco displays act as a form of advertising even in the absence of advertising materials." O.B.J. Carter, B.W. Mills, & R.J. Donovan, *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases*, 18 Tobacco Control 218, 218 (2009).

applies not just to "voluntary advertisers," but also to compelled point-of-sale disclosures, such as the "mandate[d] disclosure of country-of-origin information about meat products." *AMI*, 760 F.3d at 20; *cf. Becerra*, 138 S. Ct. at 2372 (finding *Zauderer* inapplicable to involuntary disclosure of abortion-services information at pregnancy centers, not on grounds that pregnancy centers were "involuntary advertisers," but because the disclosure was "in no way relate[d]" to the services they provided). Here, the speech at issue is the compelled disclosure of point-of-sale factual information about cigarettes. Regardless of whether the requirement is viewed as binding manufacturers or as binding sellers who willingly contract to market and promote the manufacturers' cigarettes for sale, the requirement is a mandatory disclosure in the context of the proposed commercial sale of cigarettes. *N.Y. State Restaurant Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) (holding that mandatory calorie-disclosure requirement for restaurants "requires disclosure . . . in connection with a proposed commercial transaction—the sale of a restaurant meal"). It is well established that regulations "mandating that commercial actors disclose commercial information" concern commercial speech and are subject to rational-basis scrutiny under *Zauderer*. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001).

Nor do the manufacturers' other cases warrant applying *Central Hudson* review. In *POM Wonderful*, the D.C. Circuit evaluated an FTC order prohibiting a commercial drink manufacturer from making advertising claims that its product treated or prevented any disease unless the claims were substantiated by at least two randomized and controlled human clinical trials. *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 500-01 (D.C. Cir. 2015). In contrast, a point-of-sale remedy would not impose *any* restriction or preconditions on cigarette manufacturers' (or retailers') advertising claims; instead, it is a classic disclosure requirement. In addition, no party

in *POM* contended that *Zauderer* applied; instead, all parties accepted that the challenge "should be examined under the general test for commercial speech restrictions set out in *Central Hudson*." *Id*. at 501. Here, the D.C. Circuit has repeatedly held that *Zauderer* controls.

The final recent First Amendment case the manufacturers resort to, *Kimberly-Clark Corp. v. District of Columbia*, 286 F. Supp. 3d 128, 141 (D.D.C. 2017), is similarly inapplicable. The district court in that case issued a preliminary injunction against certain compelled product disclosures only after finding that the disclosures were "controversial" under *Zauderer*, and, moreover, that they did not survive *Central Hudson* review. In contrast, the D.C. Circuit here ruled in 2015 that, with one edit, the factual bullets at issue in this case are purely factual and uncontroversial under *Zauderer*, *2015 Corrective Statement Appeal*, 801 F.3d at 260-61; and it ruled in 2017 that the modified preambles satisfied *Zauderer* and that the panel had no basis (and no authority) to revisit the *2009 Opinion*'s indication that *Zauderer*, rather than *Central Hudson*, supplied the right standard, *2017 Corrective Statement Appeal*, 855 F.3d at 327-28.[31]

Accordingly, there simply is no sound basis for any of the manufacturers' or retailers' First Amendment arguments.

[31] Even if *Central Hudson* did apply, the approach proposed here would easily survive scrutiny. The first three elements of the analysis are undisputed: Preventing and restraining future RICO violations is a valid governmental purpose; it is a substantial purpose; and the manufacturers will be "impaired" from again violating RICO by "making false and misleading assurances" "if they must at the same time communicate the opposite, truthful message about these matters to consumers." *2009 Opinion*, 566 F.3d at 1140.

As to the fourth *Central Hudson* factor, narrow tailoring, the manufacturers themselves consider the point-of-sale channel "essential" to "communicate with adult smokers in a meaningful way" and "a vital opportunity" to "communicate with adult consumers." 2011 Martin Decl. at 5-6, ¶ 10 (ECF 5906-1); 2011 Boehm Decl. at 4, ¶ 12 (ECF 5906-2). No media channel is better tailored to prevent and restrain future RICO violations than this "vital," "essential" media channel, where the manufacturers channel over 90% of their cigarette marketing expenditures. Ex. 1 at ¶ 11 (Chaloupka Decl.).

VI. ITGB Is Properly Subject to the Point-of-Sale Remedy.

The Court should firmly reject ITGB's audacious bid to be excused from the point-of-sale remedy—a remedy it expressly agreed to be subject to in Order #56-Remand (ECF 6151). Even if it had not, it is the successor to the majority of the business assets and organization of Defendant Lorillard, and thus would have been subject to the final injunction in any case. Because ITGB is the successor to Lorillard's cigarette sales and business infrastructure, the rationale of the point-of-sale corrective statement remedy—to prevent and restrain likely future RICO violations through fraud and deception—applies with as much force to ITGB as to its competitors PMUSA and RJRT. Indeed, excluding ITGB from point-of-sale remedy would unfairly advantage ITGB and its retailers to the comparative detriment of PMUSA and RJRT and their retailers.

A. ITGB agreed to be subject to the point-of-sale remedy now before the Court.

First and foremost, ITGB expressly agreed that it "shall be subject to any order concerning the point-of-sale corrective-statement displays currently pending before the court and any appeals therefrom." Order #56-Remand, at 12, ¶ 10 (ECF 6151). ITGB now apparently takes the position that the very next sentence of the Order renders the first a nullity: "However, nothing in this Order waives, prejudices, or diminishes ITG Brands's right to be heard as to the applicability of any point-of-sale remedy." *Id*.

When Order #56-Remand was before the Court, counsel for ITGB assured the Court that a goal of the proposed order was "to make sure that not only [would] the sort of 'thou shall not' provisions of the order apply to the tobacco business in the United States of the acquiring companies, but also that it would not be a diminution in the kind of exposure to corrective statements that consumers would get." May 19, 2015, Hr'g Tr. at 12:12-17 (ECF 6145).

ITGB now wrongly insists that under Order #56-Remand, it can be required to disseminate court-ordered statements at the point of sale, if at all, only in the specific "header and countertop" formats that Order #1015 identified in 2006 and that the D.C. Circuit vacated in 2009. ITGB 6/8/18 Br., at 9 (ECF 6273). This is a radical rewriting of Order #56-Remand. Paragraph 10 of that Order refers generally to the point-of-sale corrective-statement display issue that was "currently pending" before the Court in 2014—*without* any limitation to the specific formats that had been ordered in 2006 and that the D.C. Circuit had vacated in 2009.

In particular, the *2009 Opinion* vacated the point-of-sale remedy and remanded "for the district court to evaluate and 'mak[e] due provision for the rights of innocent persons.'" *2009 Opinion*, 566 F.3d at 1142. The D.C. Circuit specifically left it open to this Court to "craft[] a new version" of the point-of-sale remedy. *Id*. The Court did not say, "pare down the old version." And indeed, the court filings that Order #56-Remand cited to illustrate the topic that was "currently pending" include explicit calls for "point-of-sale display and placement options . . . beyond header and countertop displays." US 6/18/2014 Br. at 5 (ECF 6108) (cited in Order #56-Remand at 12, ¶ 10); *see also* US 6/4/2014 Br. at 4-5 (ECF 6100) (similar; also cited in Order #56-Remand at 12, ¶ 10). Thus, there was no limit to the point-of-sale format options that were "pending" when ITG agreed to Order #56-Remand.

B. ITGB should be subject to the point-of-sale remedy because it is the successor to Defendant Lorillard's cigarette business.

Even if the Court had not already ruled that ITGB "shall be subject to any order concerning point-of-sale corrective-statement displays," Order #56-Remand, at 12, ¶ 10 (ECF 6151), ITGB's $7.1 billion acquisition of Defendant Lorillard's cigarette business and sales operations would fatally undermine its plea to be excluded from the point-of-sale remedy on grounds that it is itself innocent of the decades of wrongdoing found in this case. Because ITGB

is substantially a continuation of Lorillard's cigarette operation, it would be subject to the remedial injunction—even absent the specific provisions of Order #56-Remand, ¶ 10 (ECF 6151). As one court has explained, "[a]n injunction would be of little value if its proscriptions could be evaded by the expedient of forming another entity to carry on the enjoined activity. For that reason, courts have consistently held that 'successors' are within the scope of an injunction entered against a corporation and may be held in contempt for its violation." *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1354-55 (Fed. Cir. 1998) (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 91 F.3d 914, 919-20 (7th Cir. 1996)); *see also, e.g., Herrlein v. Kankakis*, 526 F.2d 252, 254-55 (7th Cir. 1975). The mere fact that ITGB is a distinct corporate entity cannot let it evade the injunction, because it is the successor to a defendant in this case. As the D.C. Circuit has explained, "identity—of the corporate or the flesh-and-blood variety—is not determinative under Rule 65(d)(2)." *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9-10 (D.C. Cir. 2015).

ITGB is a successor to Defendant Lorillard and therefore properly subject to the point-of-sale remedy along with the other Defendants. Before the merger, ITGB had just one cigarette brand, "Rave," with about 0.2% of the United States market. May 19, 2015, Hr'g Tr. at 13:21-23 (ECF 5455). The transaction ITGB proposed would immediately give it brands accounting for approximately 7% of the market—a 35-fold increase overnight. *Id*. at 15:15-21. Besides acquiring four cigarette brands, ITGB told the Court that after the transaction, it would "operate using Lorillard Tobacco's former manufacturing facilities, operational capacity and

infrastructure, and the majority of its management, sales and marketing, technical, and other employees." Wilkey Decl. ¶ 12 (ECF 6143-3).

As ITGB's CEO David Taylor summarized to investors and analysts after the transaction, "the ITG Brands organization *was built upon the strong backbone of the former Lorillard organization* and then supplemented by talent from Commonwealth-Altadis." Ex. 22, Full Year 2015 Imperial Tobacco Group PLC Earnings Presentation, at 9 (Nov. 3, 2015) (emphasis added). Indeed, as recently as last September, Oliver Tant, the CFO and Executive Director of Imperial Brands—the parent of ITGB and its sister Commonwealth Brands, LLC, which is also subject to this Court's authority—noted that Imperial had "put[] both Commonwealth and these assets [from Reynolds] and the former infrastructure of Lorillard together to support our current market activity." Ex. 23 at 9, Imperial Brands at Barclays Global Consumer Staples Conference (Sept. 5, 2017). Thus, ITGB's "current market activity" relies not just on the brands and manufacturing assets it acquired from Defendants Lorillard and RJRT, but also "the former infrastructure of Lorillard."

This Court found that as long as Lorillard and the other Defendants "are in the business of selling and marketing tobacco products, they will have countless 'opportunities' and temptations to take similar unlawful actions in order to maximize their revenues, just as they have done for the past five decades." *2006 Post-Trial Decision*, 449 F. Supp. 2d at 909. Therefore, especially because ITGB absorbed "the majority of [Lorillard's] management, sales and marketing, technical, and other employees," Wilkey Decl. ¶ 12 (ECF 6143-3), ITGB is subject to "judicial enforcement" because it is "the bona fide successor in this case" of Defendant's Lorillard's multi-billion-dollar cigarette business and sales operations. *Golden State Bottling Co.*, 414 U.S. at 179.

C. ITG's share of a fixed-percentage approach would be proportional to the Acquired Brands' share of cigarette merchandising and promotional space; any other approach would give it and its retailers an unfair competitive advantage.

ITGB must also be included in the remedy to ensure uniformity of treatment across the major manufacturers and brands. As noted above, the point-of-sale remedy will not burden participating retailers precisely because it will apply uniformly to *all* retailers. Exempting ITGB and its substantial share of the market would undermine that uniformity of application.

If ITGB's Acquired Brands were exempted from the remedy, it would be unfairly advantaged versus its competitors. Excluding ITGB's Acquired Brands from the remedy would increase the likelihood that those brands would receive disproportionately more display space at retail than competing brands, further raising their prominence. Ex. 1 at ¶ 34 (Chaloupka Decl.). That would introduce a market distortion favoring ITGB's Acquired Brands over competing brands at the point of sale. *Id*. Conversely, ITGB will not be disproportionately burdened by the remedy as now proposed, because the amount of space devoted to the statements is strictly proportional to the amount of space each manufacturer controls in the retail setting. *Id*. ¶ 34.

Requiring each manufacturer to devote a fixed percentage of its promotional space to display the court-ordered statements will ensure that ITGB and its retailers bear exactly their proportionate burden from the remedy. ITGB proffered various images of merchandising fixtures and off-set displays to show how much less merchandising space it has than PMUSA and RJRT. *See* Sparrow 6/8/2018 Decl. at A-1 to A-62 (ECF 6273-1, at PDF pp.10-72). Illustrative are the images at pages A-10 and A-15 (PDF pages 19 and 24). The first of these shows only ITGB Acquired Brands in ITGB's merchandise space (with the bottom-right shelf, 14 pack-facings wide, devoted to pack facings, mini headers, and cost displays for Kool, Winston, and Maverick). *Id*. at A-10 (ECF 6273-1, at PDF p.19).

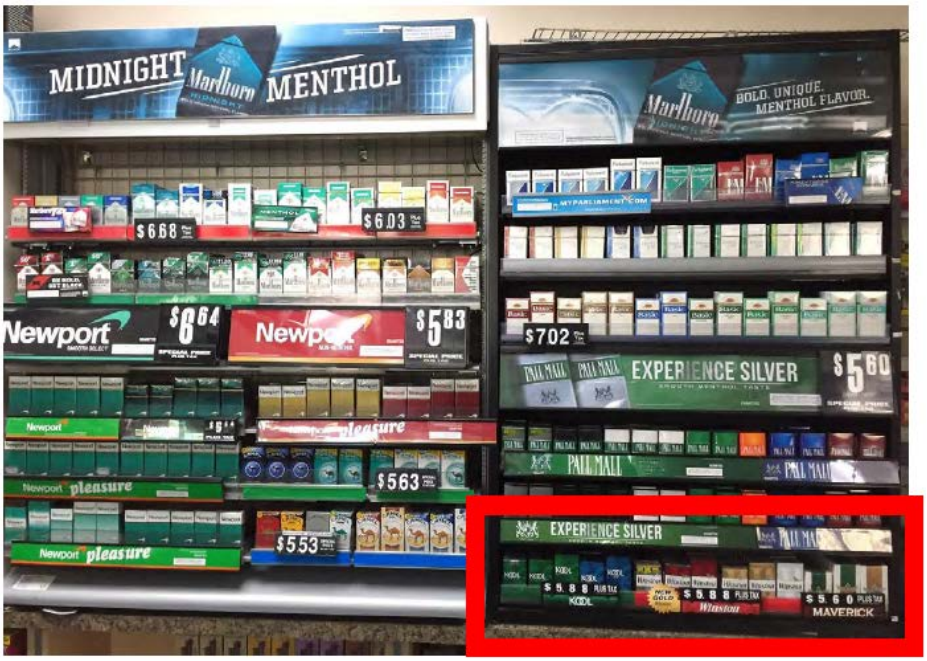

Figure 10: Sparrow Decl. A-10 (ECF 6273-1, at 19). The red box depicts 14 pack facings for ITGB brands, all of them covered brands.

Under a 25% fixed-percentage approach, 25% of that area would be devoted to disseminate the court-ordered statements.

The second illustration shows eighteen ITGB pack facings: six Winston and six Kool pack facings (both Acquired Brands); and beneath them, six USA Gold pack facings (not an

Figure 9. Sparrow Decl. A-15 (ECF 6273-1, at 19). The red box depicts 18 pack facings: 12 packs of covered ITGB brands in the top two rows (Winston and Kool), and 6 packs of an uncovered brand in the bottom row (USA Gold).

Under a 25% fixed-percentage approach, 25% of the area in the top two rows within the red box would be devoted to disseminate the court-ordered statements; but not the bottom row within the red box, because that is an uncovered brand.

The 25% approach is illustrated over 4 images within Ex. 6.

Acquired Brand, as ITGB's declarant emphasizes). *Id*. at A-15 (PDF p. 24); *see also id*. at 6, ¶ 17 (PDF p.7 of 72) (discussing this image).

All that the Court's point-of-sale remedy needs to do to address this issue is exclude USA Gold and any other non-Acquired Brands from the total area subject to the fixed-percentage corrective statement. Exhibit 4, at 1, shows court-ordered statements on 25% of the area of the first of these merchandise units, Figure 9, with 14 pack facings devoted to the Kool, Winston, and Maverick Acquired Brands fixtures). By contrast, Exhibit 4, at 2, and even more helpful, Exhibit 6, at 3-4, all based on Figure 10, show court-ordered statements only on 25% of the area used for the twelve pack facings for ITGB's Winston and Kool Acquired Brands, and no statement on, or based on the area of, the six pack facings on the bottom shelf, which are used for ITGB's USA Gold non-acquired brand.

VII. Due Process Does Not Require Each Separate Retailer to Be Heard.

Just as NACS urged the D.C. Circuit leading up to the *2009 Opinion*, the effects of a re-crafted remedy on retailers are being heard. NACS is, by its reckoning, "the preeminent representative of the interests of convenience store operators." NACS 2018 Opening Br. at 1 (ECF 6271). Over the past four years, the National Association of Tobacco Outlets, Inc., has doubled the 30,000 tobacco stores, convenience stores, service stations, grocery stores, and liquor stores it represented in 2014 to 60,000 member tobacco stores, convenience stores, service stations, grocery stores, and liquor stores now. NATO 2014 Opening Br. at 1 (ECF 6096); NATO 2018 Opening Br. at 1 (ECF 6269). By the end of the 2018 briefing, these retail trade organizations will have submitted a total of eight briefs to the Court on behalf of the retailers they represent. NACS is mistaken to insist that the Due Process Clause further requires that every retailer must receive its own individualized hearing. NACS 6/8/18 Br. at 14-15. The point-of-sale remedy would merely direct the *manufacturers* to use their contractual authority to terminate the contracts without cause (or, alternatively, to make unilateral modifications) and impose the requirements the Court orders. The retailers' hopes and desires that the manufacturers

would never be ordered to use their participating-retailer contracts to require point-of-sale displays of court-ordered statements is at most "no more than an expectancy, the loss of which does not constitute a deprivation of property within the meaning of the due process clause of the Constitution." *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 316 (D.C. Cir. 1987). Accordingly, individual retailers' absence from the lawsuit cannot prevent the Court from proceeding. *Id*. In contrast, the cases NACS cites uniformly address non-parties holding indisputable property rights[32]—not mere expectancies, which, as discussed above, *see* pages 30-32, *supra*, is all that the retailers have.

As the manufacturers note, the Court has already considered and rejected Defendants' proposal to hear from individual retailers. *See* Defs.' 6/8/18 Br., at 6 (ECF 6272) (citing Defs.' Praecipe (ECF 5887); Order #19-Remand (ECF 5916)). If a court were required to hear from every person who might be indirectly affected by its judgments, then every case ever brought would have to join every person in the world. "A decision in a contract dispute or antitrust case can have drastic effects on suppliers, stockholders, employees and customers of the company that loses the case; no one thinks the Constitution requires all of them to be parties." *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 42 (1st Cir. 2009).

NACS's arguments echo objections that were raised by the non-party pharmacies in *National Association of Chain Drug Stores*, discussed above (*see* page 32, *supra*), in which the First Circuit pointedly observed that "[i]mpact and legal rights are not the same thing. . . . Due process 'obviously does not mean . . . that a court may never issue a judgment that, in practice,

[32] *See Richards v. Jefferson Cty.*, 517 U.S. 793, 803-05 (1996) (holding that taxpayers' constitutional challenge to tax could not be precluded by previous judgment in case to which they had not been parties); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that no trial-like hearing was required before termination of disability benefits, where retroactive benefits were available in case of erroneous deprivation).

affects a nonparty." *Id*. at 42 (quoting *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 110). The settlements affected the pharmacies' "purely practical" "interests," but *not* their "*[l]egal rights*." *Id*. at 40, 41. Affected pharmacies' interests were sufficiently protected by other means—in that case, the fairness hearing required by Rule 23(e)(2). *Id*. As in *National Association of Chain Drug Stores*, the retailers' interests here "are amply represented" by their trade organizations, which have had ample opportunity to present their concerns for consideration. *Id*. at 41.

CONCLUSION

The Court should reinstate the point-of-sale media channel for the corrective statements.

Dated: August 3, 2018

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and CAMPAIGN FOR TOBACCO-FREE KIDS, *et al.*, Plaintiff-Intervenors, v. PHILIP MORRIS USA INC., *et al.*, Defendants. and ITG BRANDS, LLC, *et al.*, Post-Judgment Parties Regarding Remedies	)	Civil Action No. 99-CV-2496 (PLF)

EXHIBITS IN SUPPORT OF PLAINTIFFS' 2018 SUPPLEMENTAL BRIEF ON RETAIL POINT OF SALE REMEDY

Exhibit	Description
1	Declaration of Frank Chaloupka
2	Curriculum Vitae of Frank Chaloupka
3	Transcript of Lorillard 2013 Investor Day (June 27, 2013)
4	Mockups of Court-Order Statements in Retail Merchandiser Units
5	Mockups of Court-Order Statements on Off-Set Advertising Pieces
6	Demonstration of Calculation of Court-Ordered Statement Space in Retail Merchandiser Fixture, Version B
7	Demonstration of Calculation of Court-Ordered Statement Space in Retail Merchandiser Fixture, Version C
8	Mockup of Color Schemes for Successive Waves of Court-Order Statements
9	Philip Morris USA 2015 Retail Leaders Program Agreement (Fixture Plan) (Dec. 31, 2017 amendment), Bates Nos. 5161328258/8288
10	Philip Morris USA 2015 Retail Leaders Program Agreement (Display Plan) (Oct. 20, 2016 amendment), Bates Nos. 5161328231/8257
11	RAI Trade Marketing Services Co., Retail Partners Marketing Plan Contract, 2017 Menthol Outlet Plan (Apr. 4, 2018 amdt.), Bates Nos. RJRT_002644388/4401 ("RJRT Menthol Contract")
12	RAI Trade Marketing Services Co., Retail Partners Marketing Plan Contract, 2017 Portfolio Pack Outlet Plan (Apr. 4, 2018 amdt.), Bates Nos. RJRT_002644374/4387 ("RJRT Pack Contract")

13	RAI Trade Marketing Services Co., Retail Partners Marketing Plan Contract, 2017 Portfolio Carton Outlet Plan (Apr. 4, 2018 amdt.), Bates Nos. RJRT_002644360/4373 ("RJRT Carton Contract")
14	RAI Trade Marketing Services Co., Retail Partners Marketing Plan Contract, 2017 Portfolio Cigarette Tobacco Outlet Plan (Apr. 4, 2018 amdt.), Bates Nos. RJRT_002644402/4414 ("RJRT Cigarette Tobacco Contract")
15	ITG Brands Retail Partnership Agreement, Nov. 16, 2015, Bates No. ITG-DOJ0000328/0328
16	ITG Brands Retail Partnership Plan Description, Plan 1-A (Back Bar), July 1, 2016, Bates Nos. ITGB-DOJ0000001/0003
17	ITG Brands Retail Partnership Plan Description, Plan 2-A (Back Bar), July 1, 2016, Bates Nos. ITGB-DOJ0000289/0291
18	ITG Brands Retail Partnership Plan Description, Plan 3-A (Back Bar), July 1, 2016, Bates Nos. ITGB-DOJ0000004/0006
19	ITG Brands Retail Partnership Plan Description, Plan 1-B (Counter Display), July 1, 2016, Bates Nos. ITGB-DOJ0000292/0294
20	ITG Brands Retail Partnership Plan Description, Plan 3-B (Kiosk), July 1, 2016, Bates Nos. ITGB-DOJ0000286/0288
21	Territory Manager Playbook (RAI Trade Marketing Services 2017)
22	Transcript of Full Year 2015 Imperial Tobacco Group PLC Earnings Presentation (Nov. 3, 2015)
23	Transcript of Imperial Brands at Barclays Global Consumer Staples Conference (Sept. 5, 2017)