UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ELLIS SIMON et al.,

Plaintiffs

PRELIMINARY
MEMORANDUM AND ORDER
99 CV 1988 (JBW)

v.

PHILIP MORRIS, INC. et al.,

Defendants.
----------X

Appearances:

For the Plaintiffs:

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For the Defendant:

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WEINSTEIN, Senior District Judge:

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I. INTRODUCTION

This case raises the question of when a foreign nation holding company can shield itself against a mass tort suit in New York. In this instance it cannot. It may not hide behind narrow jurisdictional concepts created for another day when its own acts and those of its affiliates and co-conspirators have allegedly caused great harm in this state.

Plaintiffs sue various tobacco industry defendants in a nationwide smoker personal injury class action. They allege that for decades the tobacco industry, in the face of what it knew was overwhelming evidence of the addictiveness of nicotine and of the adverse health consequences of smoking, has conspired to deceive the American public, including the plaintiffs, on both counts.

B.A.T. Industries, p.l.c. ("BAT"), a British holding company parent of a United States defendant, Brown & Williamson Tobacco Corp. ("B&W"), has moved to dismiss for lack of personal jurisdiction. It claims that it is a passive stockholding parent corporation with no connection to the fraud and conspiracy alleged by the plaintiffs.

BAT's motion was denied by order dated July 19, 1999. This memorandum explains the basis for the denial.

BAT is a quintessential example of a sophisticated international holding company that supervises the operations of its subsidiaries and related companies across national and state

lines. Through the promulgation and enforcement of Group-wide policies and long distance active participation in the large-scale marketing, and research and development of cigarettes, it is regnant in the cigarette industry in the United States and throughout the world. Its sway is an aspect of today's global technological-commercial community, in which the click of a mouse may affect events unfolding thousands of miles away and concepts of sovereignty for jurisdictional purposes have eroded. BAT's conduct has supranational effects. It must accept the price of its international ascendancy by defending suits here in the United States, where it has allegedly been responsible for massive damage.

II. STANDARD OF PROOF

Predicating subject matter jurisdiction on diversity of citizenship, plaintiffs' Amended Complaint alleges causes of action sounding in negligence, strict product liability, fraudulent concealment and civil conspiracy.

The instant motion challenging personal jurisdiction was filed pursuant to Rule 12(b)(2). Plaintiffs presented over five hundred exhibits from prior litigations in opposition. BAT responded with more documents. Given the voluminousness of the submissions, the motion was converted to one for summary judgment with the parties' consent.

The burden of establishing personal jurisdiction is the

plaintiffs'. The extent of this obligation depends both upon whether discovery has taken place and upon the nature of the jurisdictional challenge. See generally Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir.), cert. denied 498 U.S. 854 (1990). "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith legally sufficient allegations of jurisdiction." Id. (citation omitted). Where relevant discovery has been extensive, the plaintiff's allegations must be supported by "an averment of facts that if credited by the trier, would suffice to establish jurisdiction over the defendant." Id.

If personal jurisdiction is, as here, contested via a summary judgment motion, "the court proceeds, as with any summary judgment motion, to determine whether undisputed facts exist that warrant the relief sought." Id.; see also Fed. R. Civ. P. 56. Ultimately, the plaintiff bears the burden of establishing personal jurisdiction over the defendant by a preponderance of the evidence, either at an evidentiary hearing or at trial. See, e.g., Credit Lyonnais Securities (U.S.A.), Inc. v. Alcantara, 183 F.3d 151 (2d Cir. 1999); Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 366 (2d Cir. 1986). Short of such a hearing or a trial, "the showing required of the plaintiff remains prima facie." Tilyou v. Carroll, No. 92 CV 0750, 1992 WL 170916, at *3 (E.D.N.Y. July 2, 1992).

Since there has been neither a factual hearing nor a trial, but discovery has been substantial, plaintiffs must establish a factually supported prima facie case of jurisdiction. They have done so, as the following discussion demonstrates.

III. FACTS

A. BAT's Organization

BAT is a holding company based in London, England and incorporated under the laws of England and Wales. Its existence dates to 1976, when it became the controlling parent corporation of the British American Tobacco Company, Ltd. ("BATCo"). BAT currently has over five hundred subsidiaries in some forty countries primarily engaged in the tobacco and financial services businesses. The majority of BAT's revenues derive from its tobacco-related activities. See, e.g., Pls.' Ex. 165 at 14 (BAT Director's Report and Accounts 1995). In 1994, BAT produced 572 billion cigarettes. See Pls.' Ex. 166 (Facts and Figures 1995). A substantial percentage of these were likely sold in the United States. BAT grossed over $25 billion in tobacco revenues in 1995. See Pls.' Ex. 165 at 14.

In public filings and promotional documents, BAT sometimes refers to itself as the "BAT Group," the "B.A.T. Industries Group," or "the Group." This term is used by BAT to collectively describe the entire family of its affiliated companies.

BATCo is a United Kingdom-based corporation that sells

tobacco products and conducts tobacco-related scientific research. From 1902 until its 1976 acquisition by BAT, it was the controlling parent company for the BAT Group which consisted of hundreds of tobacco subsidiaries. BATCo acquired the stock of B&W in 1927. Since 1976, BATCo has continued to operate as a BAT Group tobacco company. In 1998, BATCo changed its name to British American Tobacco (Investments) Limited.

BATUS, a Delaware corporation based in Louisville, Kentucky, is a wholly owned subsidiary of BAT. It holds the shares of B&W and BAT's other United States interests.

B&W is a Delaware Corporation based in Louisville Kentucky. It is the third largest cigarette company in the United States market. Its domestic brands include Kool, Carlton, Pall Mall and Viceroy. B&W exports such leading international brands as Kent, Lucky Strike, Barclay and Capri. See Pls.' Ex. 166 at 12 (BAT Industries Facts and Figures 1995). Since 1976, B&W has been an indirect wholly-owned subsidiary of BAT.

B. The 1976 "Scheme of Arrangement"

On July 23, 1976, as part of what is known in the United Kingdom as a "Scheme of Arrangement," the Tobacco Securities Trust Company ("TST") became the sole ordinary shareholder of BATCo. TST then changed its name to B.A.T. Industries Limited, which was ultimately changed to B.A.T. Industries, p.l.c. in 1981. The Scheme of Arrangement was undertaken to "facilitate

the development of the divisional organisation begun by BAT in 1973." See Pls.' Ex. 24 at 1.

At the time of its acquisition by BAT, BATCo produced over 300 cigarette brands worldwide and produced the leading cigarette in forty countries. See Pls.' Ex. 25 at 15. Its most profitable area of operation was North America. Id. BATCo also "devote[d] considerable resources to research and development relating to tobacco" and "played a prominent part in research associated with problems of smoking and health." Id. at 16.

C. BAT's New York Contacts

BAT has no New York office, mailing address, phone listing, or bank account and pays no New York taxes. It does not directly own, use or possess any New York real estate.

BAT neither manufactures, distributes nor sells cigarettes. These functions are carried out by its tobacco subsidiaries, one of which is B&W. B&W currently has a United States market share of eighteen percent. See Pls.' Ex. 167 at 13 (BAT Industries Facts and Figures 1996). Since 1987, the BAT Group has earned billions in pre-tax dollar profits from its United States tobacco operations. See Plaintiffs' Proffer of Facts at B-2. While the percentage of these profits ultimately traceable to New York is unclear, B&W's strong market presence and the size of the New York population strongly support the inference of substantial New York cigarette sales roughly proportional to the percentage of

New York residents in the total United States population -- somewhere in the neighborhood of seven percent. Thus, for purposes of this jurisdiction motion, it can be inferred that BAT's earnings in New York through B&W in the last decade were measured in eight figures.

Some of BAT's major institutional investors have been based in New York. See, e.g., Pls.' Ex. 207 (listing among BAT's largest creditors or equity holders Lazard Frères & Co., Oppenheimer Capital Management, Chancellor Capital Management and Manufacturers Hanover Trust, all New York-based). BAT Board Members and other representatives have visited New York frequently in connection with BAT's solicitation of investors. See, e.g., Pls.' Ex. 204 (suggested program for June 1990 visit to United States featuring group and one-on-one investor meetings in New York and a "Dinner for Friends of B.A.T. in New York"); Pls.' Ex. 213 (report on October 1990 meetings in New York with six or seven key investors); Pls.' Ex. 226 (itinerary for BAT Chairman's visit to New York in August 1991); Pls.' Ex. 241 (invitation to BAT luncheon hosted by First Boston Corp. on October 1, 1992 in New York).

D. Tobacco Industry Conspiracy

Plaintiffs allege that BAT participated in a conspiracy to manufacture hazardous products and deceive American consumers about the adverse health consequences of using them. The

available evidence on the existence of such a conspiracy is substantial.

The exhibits submitted in opposition to BAT's motion to dismiss focus largely on the conduct of BAT itself. For purposes of this memorandum, they are supplemented by widely publicized B&W documents -- now posted on the website of the University of California at San Francisco's Library and Center for Knowledge Management -- demonstrating the existence of an industry-wide conspiracy with significant links to New York. See www.library.ucsf.edu/tobacco; see also, Brown and Williamson Corp. v. Regents of the University of California, No. 967298, (Cal. Super Ct. May 25, 1995) (UCSF could make anonymously sent B&W documents accessible to the public). Stanton A. Glantz et al., The Cigarette Papers (1996); Lisa Bero et al., Lawyer Control of the Tobacco Industry's External Research Program: The Brown and Williamson Documents, 274(3) JAMA (July 19, 1995). Documents from this website are referred to by document number using the notation, "Doc. No." Any objection to the court's reliance on them has been waived by BAT. See Transcript of hearing dated Dec. 23, 1999 at 39-40.

The modern era of smoking and health research is generally said to have begun around 1900 with observations by vital statisticians of an increased incidence of lung cancer. See Susan Wagner, Cigarette Country 68 (1971). Yet, it was not until

the early to mid-1950's, when a series of important studies linking smoking to cancer in humans and animals was published, that the health consequences of smoking became a public issue in the United States. See id. at 76-78. In response, the United States tobacco companies jointly formed the Tobacco Industry Research Committee ("TIRC"). A January, 1954 newspaper advertisement published nationwide announced TIRC's formation. Entitled "A Frank Statement to Cigarette Smokers," the advertisement was signed by the heads of most of the major tobacco companies, including B&W. See Pls.' Ex. 1. This original tobacco industry "position paper" playing down the connection between cigarettes and disease is worthwhile quoting at length:

> Recent reports on experiments with animals have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.
>
> Although conducted by doctors of professional standing these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.
>
> At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments. Distinguished authorities point out:
>
> 1. That medical research of recent years indicates many possible causes of lung cancer.
>
> 2. That there is no agreement among the authorities regarding what the cause is.

3. That there is no proof that cigarette smoking is one of the causes.

4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists

We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years, tobacco has given solace; relaxation and enjoyment . . . . At one time or another . . . critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of serious disease is a matter of deep concern for us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.

2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as the Tobacco Industry Research Committee.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable

> integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science and education will be invited to serve on this Board. These scientists will advise the committee on its research activities.
>
> This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

Pls.' Ex. 1 (emphasis added).

The documents reveal that TIRC was the product of the tobacco industry's public relations, legal and political needs rather than of any publicly proclaimed concern for public health. A memorandum by B&W's general counsel, Ernest Pepples, describes the multiple functions of TIRC, later renamed the Council for Tobacco Research ("CTR"):

> Originally CTR was organized as a <u>public relations effort</u>. The industry told the world CTR would look at the diseases which were being associated with smoking. There was even a suggestion by our political spokesmen that if a harmful element turned up the industry would try to root it out. The research of CTR also discharged a <u>legal responsibility</u>. The manufacturer has a duty to know its product. The Scientific Advisory Board, composed of highly reputable independent scientists constitute a place where the present state of the art is constantly being updated. Theoretically SAB is showing us the way in a highly complex field.
>
> There is another <u>political need for research</u>. Recently, it has been suggested that CTR or industry research should enable us to give quick responses to new developments in the propaganda of the avid anti-smoking programs. For example, CTR or someone should be able to rebut the suggestion that smokers suffer from a peculiar disease, as widely alleged in the press some few months ago .

Doc. No. 2010.01 at p.2 (emphasis added); see also Doc. No. 2010.02 (memorandum by Mr. Pepples to B&W's then Chairman and CEO discussing "two aspects of particular value in CTR: (1)the direct legal protection derived by Brown & Williamson and (2) the political and public relations advantage accruing to the industry"). In another memorandum, Mr. Pepples elaborated on the "litigation value" of CTR:

> [CTR] avoids the research dilemma presented to the responsible manufacturer of cigarettes, which on the one hand needs to know the state of the art and on the other hand cannot afford the risk of having in-house work turn sour.
>
> . . . .
>
> The point here is the value of having CTR doing work in a nondirected or independent fashion as contrasted with work either in-house or under B&W contract which, if it goes wrong, can become the smoking pistol in a lawsuit.

Id.; cf. Doc. No. 2029.02 (memorandum dated Mar. 11, 1982 from Mr. Pepples to B&W's head smoking and health researcher) ("I have asked that all recent proposals for industry funding of scientific work be directed to you for a review. As you know these projects arise out of a law concern. However, it is also most important that we voice any 'scientific' objection to them early on in the initiation of the process.") (emphasis added).

Four years after it created TIRC, the tobacco industry established the Tobacco Institute ("TI") as its lobbying and public relations arm. TI served as the industry's "focal point for criticism of research that indicates a connection between

smoking and health." Doc. No. 2029.02. The New York public relations firm of Hill & Knowlton ("H&K") appears to have been instrumental in the formation of TIRC and TI and to have played a dominant role in both organizations for at least some period of time. An undated memorandum characterizes H&K as "so intimately involved in the affairs of both [the TI and TIRC] that a proper separation of functions . . . is virtually impossible in this brief summary." Doc. No. 1902.05. (quoted in Glantz, supra, at 39-40). The memorandum also discusses staff overlap between TIRC, TI and H&K and states that an H&K employee served as both the executive director of TIRC and the secretary of its Scientific Advisory Board, making him "without question, the administrative head of TIRC." Id.

During the early 1960's, both the British Royal College of Physicians and the United States Surgeon General published reports identifying cigarette smoking as a cause of lung cancer. The British report was issued in 1962. See Smoking and Health: A Report of the Royal College of Physicians on Smoking in Relation to Cancer of the Lung and Other Diseases (1962). The Surgeon General's report on smoking and health followed two years later. See Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service. Washington, D.C.: U.S. Department of Health, Education and Welfare, 1964. Public Health Service Publication No. 1103. It concluded that "smoking

is causally related to lung cancer in men," that the "magnitude of the effect of smoking far outweighs all other factors," and that the "data for women, though less extensive, point in the same direction." Id. The report also named cigarette smoking as the prime cause of chronic bronchitis in the United States. See Id.

Available documents indicate that the industry acting as a whole and with the implicit cooperation with all its members, reacted to the rising tide of public concern resulting from the publication of these reports by embarking on an advertising campaign designed, among other things, to discredit the evidence of a causal link between smoking and disease. In 1967, for example, the Tobacco Institute reprinted as an advertisement an editorial that had appeared on the front page of Barron's several weeks before. See Glantz, supra. The advertisement characterized the Surgeon General's report as "a seemingly well-intentioned, if disturbing effort to brainwash the citizenry into kicking the habit" and of seeking to condemn smoking by "a kind of guilt by statistical association." Id. It stated:

> "Smoking and Health" failed to prove that cigarets [sic.] cause lung cancer or any other of the many ills to which flesh is heir. With the passage of time, its findings have grown increasingly suspect.

Id.

In a letter to the public relations firm which prepared the Barron's advertisement, B&W's president expressed satisfaction

with the result and states that "perhaps the most important thing about this ad was that for the first time we have gotten the industry to take a step forward together, and it was a great opportunity to get them together." Doc. No. 2101.06 (emphasis added).

Individual companies participated in the public relations effort to undermine the scientific evidence on causation. In 1969, for example, B&W's advertising agency developed a series of advertisements focusing on the individual's right to smoke. See Doc. No. 2110.10. One belittles the evidence of a causal link by equating it with other supposed "cancer scares":

> Ten years ago, there was a cancer scare over the wax in milk cartons. And over using iodine to get a suntan. These theories were about as valid as the one that says toads cause warts.
>
> And they're about as valid as today's scare-tactics surrounding cigarettes. Because no one has been able to produce conclusive proof that cigarette smoking causes cancer. Scientific, biological, clinical, or any other kind.

Id.

Additional B&W documents refer to "Project A" and "Project B" two "public issue" advertising campaigns developed in 1970. See Doc. No. 1001.01 at p. 12 (Definition of the Brown & Williamson Subjective Coding Taxonomy). "Project A," apparently proposed by R.J. Reynolds but ultimately rejected by the networks, consisted of three television advertisements on smoking and health which were to have been produced and supplied to the

six tobacco companies through TI and substituted for the companies' own prime time commercials. See Doc. No. 2112.04, at p. 1. "Project B" was comprised of two short advertisements seeking to undercut evidence of the health dangers of cigarettes by portraying them as overblown and exaggerated. The first, for example, declared:

> You've seen the anti-smoking commercials. Dramatic and frightening, they do not appeal to your reason, but rather to your emotions. The fact is, a clear and consistent picture does not emerge from research findings concerning smoking and health. Many statistical connections have been cited against smoking--but these figures work both ways. Some figures which are as questionable any others, for instance, indicate that people who smoke moderately are actually healthier than non smokers.

Doc. No. 2112.02 (emphasis added); see also Doc. No. 2112.05 (comments by B&W executives on Project B).

In addition to research grants awarded by its Scientific Advisory Board, the CTR funded "special projects" designed largely to generate research data and witnesses for use in defending lawsuits and opposing tobacco regulation. See Doc. No. 2010.02 at 2 (memorandum by Mr. Pepples to B&W's chairman and CEO) ("the industry research effort has included special projects designed to find scientists and medical doctors who might serve as industry witnesses in lawsuits or in a legislative forum"); see also, e.g., Doc. Nos. 2048.13-2048.23 (Special Project Lists from 1978-90 and 1983-84).

Many CTR "special projects" appear to have been intended

either to refute evidence of the health consequences of smoking or to divert attention from this evidence by providing alternate explanations for tobacco-related diseases. Research conducted by "special projects" grantees included: "A continuing critical review of the major factors in the etiology of lung cancer and other lung disease emerging from statistical studies," see id.; "A study of the models used in the analysis of certain medical data (review of the appropriateness of treating biomedical data with the multivariate techniques of assumed normality)", see id.; "(1) Preliminary study of interrelationships and causal paths linking smoking, personality and health variables; and (2) Assessment of the relationship between methodological quality of previous smoking and health studies and their results," see id.; "The study of architectural, ventilation and lighting factors in relation to office building illness," see id.; "Genetic aspects of lung cancer" see id.; "Retrospective analysis of environmental contacts of patients with respiratory cancer, other cancers, and other diseases," see id.; and "Autopsy study designed to examine accuracy of lung cancer diagnoses (investigators checking autopsy records of university hospitals for period extending from 1948 to 1974 for errors in diagnoses)," see id.

The documents reveal that tobacco industry lawyers were heavily involved in the selection and funding of CTR "special projects." Timothy Finnegan of the New York law firm of Jacob

Medinger & Finnegan ("JM&F") appears to have played a particularly prominent role. For example, in a letter dated July 2, 1985, Mr. Finnegan recommends approval of a $275,000 grant to doctors Seltzer and van den Berg whose prior CTR-funded work had focused on "various characteristics of children prior to their making a decision of whether or not to smoke" and was thus "directly related to the constitutional or genetic hypothesis." Doc. No. 2004.29; see also Doc. No. 2031 at 3 (Dr. Carl Seltzer listed as "special project" grant recipient for "Continuation of work on constitutional differences in between smokers and non smokers); Doc. No. 2034.02 (letter from Mr. Finnegan dated May 16, 1983 recommending funding Dr. Henry Rothschild's research into possible genetic markers associated with lung cancer "as a CTR special project"); Doc. No. 2032.01 (letter from B&W "agreeing with [Mr. Finnegan's] recommendation"); Doc. No. 2015.02 (letter from Mr. Finnegan dated Feb. 15, 1982 recommending awarding a CTR "special project" grant of $25,000 to Dr. Rothschild for research on genetic aspects of lung cancer); Doc. No. 2034.06 (letter from B&W agreeing with Mr. Finnegan's recommendation); Doc. No. 2031.01 (Special Projects List showing $25,000 grant to Dr. Rothschild for work on "Genetic Aspects of Lung Cancer"); Doc. No. 2024.02 (letter from Mr. Finnegan, dated June 29, 1981 recommending a $20,000 grant to Dr. Schrauzer for research on the concentration of selenium -- a possible

anticarcinogen – in tobacco products).

Mr. Finnegan's involvement appears to have gone well beyond funding recommendations to monitoring ongoing research. See, e.g.,Doc. No. 2017.17 (letter to Dr. Blass of the Burke Rehabilitation Center reporting to Mr. Finnegan that "we now have evidence that appropriate doses of nicotine can benefit animals with experimental diseases affecting the brain"); Doc. No. 2034.18 (letter from Dr. Rothschild to Mr. Finnegan enclosing a penultimate draft of a paper for submission to the New England Journal of Medicine and requesting his comments prior to submission: "I would appreciate if you could let us have your comments by the 24th or 25th so that we can send it off before the end of the month."); Doc. No. 2017.06 (internal B&W memorandum to B&W's general counsel: "At your request, Tim [Finnegan] visited Dean Sullivan. It was a cordial meeting and Tim believes he has persuaded them to take a new thrust with their research. The new thrust will have questionable value but no negative.").

The Kansas City firm of Shook, Hardy & Bacon ("SH&B")was also active in the "special projects" area. See, e.g., Doc. No. 2022.03 (letter dated April 22, 1981 from William Shinn of SH&B recommending funding of Drs. T.D. and Elia Sterling for investigation of "Office Building Syndrome," which "could be useful with respect to the controversial issue of restriction of

smoking in the workplace"); Doc. No. 2004.01 (letter from Donald K. Hoel of SH&B stating firm's view that Dr. Seltzer's "contributions to the world literature warrant continued support of his work as a CTR Special Project.").

Such extensive lawyer involvement is in sharp contrast to the tobacco industry's announcement at CTR's inception that its research activities would be overseen by an advisory board of "disinterested scientists." See Doc. No. 1903.03 ("Tobacco Industry Research Committee, Organization and Policy"; "The Scientific Advisory Board has full responsibility for research policy and programming.").

Many "special projects" recipients were also awarded funds through "Special Account 4." See Doc. No. 2042.01 (listing as "Special Account Number 4 Recipients" Drs. Rothschild, Seltzer, Sterling and Schrauzer). This account, administered by JM&F, see Doc. No. 2010.01, was apparently one of two "special accounts" devoted to such matters as witness preparation and funding of research by expert witnesses. See Doc. No. 1000.01 (Master Summary for B&W Subjective Document Review; description of "special accounts"). Some of these "special projects" and "special accounts" scientists appear to have had retainer-like relationships with their tobacco industry sponsors. The tobacco companies' investment in the work of Dr. Carl Seltzer, whose view was that a causal connection between smoking and coronary heart

disease had not been proved, seems to have been particularly fruitful. For example, in 1979, Dr. Seltzer traveled to Australia and New Zealand, where he related his views on smoking and heart disease to industry representatives and science writers. See Doc. No. 2004.12. After an interview on the Framingham heart study was aired on the MacNeil/Lehrer News Hour, Dr. Seltzer was requested to and did write a letter to Mr. MacNeil taking issue with the interviewee's presentation of the data linking smoking to heart disease and stating his own position that causation had not been proved. See also Doc. No. 2004.21 (letter dated April 4, 1983 recommending "special projects" funding for Dr. Seltzer and listing the preparation of a statement on smoking and heart disease for a congressional subcommittee and meetings with smoking and health researchers among his activities during the previous year).

A 1980 letter to the general counsel of the tobacco companies from SH&B discusses the helpfulness of Dr. Sterling, another "special projects" and "special account 4" recipient:

> Dr. Sterling has continued to be helpful in frequent consultations about the smoking and health controversy. He testified at Congressional hearings on public smoking in October, 1978; he has given technical papers at professional meetings recently; and he has prepared a number of manuscripts, some of which have been published.

Doc. No. 2020.06; see also Doc. No. 2022.06 (1981 letter from SH&B to tobacco companies' general counsel; "As in the past, Dr.

Sterling has used the support received from his grant to develop proposals on other projects. The flexibility inherent in the current arrangement has also provided Dr. Sterling with the ability to respond quickly to new scientific developments."); see also Doc. NO. 2022.03 (letter recommending funding for Dr. Sterling's research on "Office Building Syndrome" and noting Dr. Sterling's other activities, including a presentation entitled "Job Discrimination Based on Exposure Considerations and Smoking" at an occupational health meeting).

E. New York as a Situs of the Tobacco Conspiracy

Multiple events and actors link the tobacco industry conspiracy alleged by the plaintiffs to New York. First, Philip Morris, Inc. and Lorillard Corp., co-defendants and alleged co-conspirators of BAT, have their principal places of business in New York City. See Amended Complaint at ¶¶ 20, 25. Both companies have apparently been headquartered in New York for many years. See, e.g., Doc. No. 2017.04 (letter dated Aug. 22, 1978 on Lorillard letterhead bearing a New York City address); Doc. No. 1905.01 (letter from CTR dated December 28, 1970 addressed to Philip Morris, Inc. in New York).

The available evidence implicates Lorillard and Philip Morris in industry activities aimed at promoting the deceptive notion of a smoking and health scientific "controversy." Both companies have been members of CTR from its inception. See Pls.'

Ex. 1; Doc. Nos. 1902.02-03. Over the years, numerous law firm letters seeking approval for CTR "special projects" and reporting on grant recipients' activities were directed to Arthur J. Stevens and Thomas F. Ahrensfeld general counsel of Lorillard and Philip Morris, respectively. See, e.g., Doc. Nos. 2004.01 (seeking approval of "special project" funding for work on "constitution and disease"); Doc. No. 2004.05 (recommending that a study of former smokers' coronary heart disease rates be funded as a "special project"); Doc. No. 2022.03 (requesting "special project" funds for study of "Office Building Syndrome"); Doc. No. 2004.12 (letter enclosing newspaper articles on Dr. Seltzer's trip to Australia and New Zealand to discuss his views on smoking and heart disease); 2007.05 (status report on Dr. Domingo Aviado); Doc. No. 2034.09 (letter enclosing progress report on work of Dr. Rothschild); Doc. No. 2009.05 (letter enclosing copy of Dr. Rothschild's article entitled "The Bandwagons of Medicine"). These documents support an inference of ongoing New York activities in furtherance of the alleged conspiracy.

CTR and TI, major vehicles for perpetuating the tobacco industry's stance on smoking and health, were both incorporated in New York. CTR's offices in New York City generated critical data with which to dispute the evidence linking smoking to lung cancer, heart disease and other illnesses.

H&K, the public relations firm instrumental in the formation

of both CTR and TI, was as already discussed deeply involved in the operation of both these organizations. H&K is a New York corporation with its principal place of business in New York.

JM&F, the law firm which administered “special account 4" and played an important role in CTR “special projects” is located in New York City. Many of the “special projects” and “special account 4" funding recommendations were written on JM&F’s New York letterhead. Approvals of funds were apparently transmitted to the firm in New York. See, e.g., Doc. No. 2040.02 (letter dated July 9, 1985 from B&W’s general counsel to JM&F approving “special project” funding for Dr. Seltzer); Doc. No. 2034.06 (letter dated March 10, 1982 from B&W’s general counsel to JM&F approving “special project” funding for Dr. Rothschild).

The involvement of CTR, JM&F and H&K further root the alleged tobacco industry conspiracy in New York.

F. BAT’s Tortious Conduct in Furtherance of the Conspiracy

BAT contends that the conduct complained of in the instant case is that of its subsidiaries and that the plaintiffs have produced no evidence of independent wrongdoing on its part. The plaintiffs argue that BAT itself participated in the tortious conduct that forms the basis of their suit. Specifically, they allege that BAT instructed its subsidiaries to perpetuate its fraudulent smoking and health position and prohibited them from designing and manufacturing a less harmful product even though

they had the technical capability to do so. Plaintiffs also allege that BAT directed BAT Group companies to enhance the nicotine content of their products.

1. Perpetuation of False Smoking and Health Scientific "Controversy"

In March 1984, BAT distributed to the heads of its operating groups a memorandum containing the "Group Policy on Smoking and Health Issues," instructing that it be given the "widest possible circulation." See Pls.' Ex. 40. Entitled "Legal Considerations on Smoking & Health Policy," it stated BAT's position that there was a "genuine scientific controversy" respecting the harmful effect of smoking, imposed this view on all subsidiaries, and instructed them to consult their legal departments or BAT if "in doubt." It read:

> This note summarises the policy of the BAT Industries Group in relation to smoking & health issues. Although primarily the concern of the Group's tobacco interests, it is important for senior executives in other parts of the Group to be aware of the stance taken. This is because the spread of 'strict' or 'no fault' liability in the USA, Europe and other industrialised parts of the world may in the future result in the attribution to the Group's tobacco companies of statements made or decisions taken by other BAT Industries subsidiaries.
>
> For this reason, it is essential that statements about cigarette smoking or the smoking and health issue generally must be factually and scientifically correct. The issue is controversial and there is no case for either condemning or encouraging smoking. It may be responsible for the alleged smoking related diseases or it may not. No conclusive scientific evidence has been advanced and the statistical association does not amount to proof of cause and effect. Thus a genuine

> scientific controversy exists.
>
> The Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products. Consequently, the Group cannot participate in any campaigns stressing the benefits of a moderate level of cigarette consumption, of cigarettes with low tar and/or nicotine deliveries or any other positive aspects of smoking except those concerned with the dissemination of objective information and the right of individuals to choose whether or not they smoke. However, the Group encourages constructive dialogue with the authorities, the dissemination of information about the smoking and health controversy and research and new product development.

Id. This policy was binding on all BAT Group companies:

> Non-tobacco companies in the Group must particularly beware of any commercial activities or conduct which could be construed as discrimination against tobacco or tobacco manufacturers (whether or not involving companies within the Group), since this could adversely affect the position of Brown & Williamson in current US product liability litigation in the US. If in doubt, companies should not hesitate to consult their in house counsel, or BAT Industries Legal Department, who have up-to-date information on the legal situation affecting the tobacco companies.

Id. (emphasis added).

At the time this policy statement denying proof of tobacco-caused disease was issued, BAT had apparently long known that it was highly probable that smoking did cause disease. The same year BAT was formed, Dr. Sidney J. Green, head of Research and Development at BATCo stated his opinion that "it may . . . be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be." Pls.' Ex. 28 at 4.

Two years later, in 1978, Dr. Green wrote: “The statement[] [is] made that ‘studies have shown that the lung-cancer death rate is almost directly related to the number of cigarettes consumed’ . . . [That] statement is clearly true . . . .” Pls.’ Ex. 355. BAT Group scientists attending a research conference that same year apparently agreed with Dr. Green’s assessment. According to the conference minutes, they concluded:

> There has been no change in the scientific basis for the case against smoking. Additional evidence of smoke-dose related incidence of some diseases associated with smoking has been published. But generally, this has long ceased to be an area for scientific controversy.

In “Smoking, Associated Diseases and Causality,” an undated document written sometime after the issuance of the 1979 Surgeon General’s report, to which it refers, Dr. Green described the tobacco industry as having “publicly retreated behind the impossible, perhaps ridiculous demands for what in their public relations is called ‘scientific proof.’” Pls.’ Ex. 406 at 1. He further stated: “The position of the industry might call for some sympathy, on the other hand there is a great deal more against smoking than the epidemiological evidence.” Id. at 2. Dr. Green then provided the following assessment of the tobacco industry’s position:

> [T]he argument that since there are heavy smokers who do not have lung cancer (and, of course, the majority do not) and because there are some rare cases of non-smokers who do have lung cancer then smoking does not cause lung cancer, is totally fallacious. From all the

> evidence that smoking is a factor in multiple correlations and is strongly associated with some diseases then after meticulous experimentation by selecting otherwise comparable populations the claim that smoking causes some diseases (i.e. causes the incidence of the diseases in the population to increase) may well be proven. If it can be reliably predicted that if smoking is decreased in a population that the incidence of this or that disease will be decreased than the decrease demonstrates the causal relationship. Thus for male smokers in the U.K., the U.S.A., and several other countries from the epidemiological evidence alone it can be concluded that smoking cigarettes causes lung cancer and some other respiratory diseases.

Id. at 4-5.

Dr. Green, as BATCo's head of Research and Development was technically not a BAT employee. Thus, in the absence of an agency relationship or a basis for piercing the corporate veil, his actions and those of other BATCo scientists may arguably not be attributed to BAT. Nevertheless, the knowledge of BATCo and its research and development staff, under whose auspices Group tobacco research was conducted for hundreds of subsidiaries for decades before the BAT acquisition, see Pls.' Exs. 2-16, 341, and whose central research role for the BAT Group continued afterwards, see Pls.' Ex. 126-27, 132, 135, 339, is properly imputed to BAT. The fact that during the first few years of BAT's existence, its Board and the BATCo Board were essentially identical, see Pls.' Ex. 64, and that its first two Chairmen, were former BATCo Chairmen, creates an especially strong basis for ascribing to BAT BATCo's knowledge that smoking causes human

disease.

This knowledge was based on research dating back to the early 1960's, when the Royal College of Physicians issued its report linking cigarette smoking to lung cancer, bronchitis and heart disease. In 1962, the British tobacco industry, through its joint research organization, the Tobacco Manufacturers' Standing Committee, set up a laboratory in Harrogate, England. Harrogate was designed for large scale biological research on the toxicity of cigarette smoke, with a focus on mouse skin painting experiments and studies on the irritation of the respiratory passages. See generally Pls.' Ex. 104 (Report on 1962 Southampton Research Conference); Griffith Report on visit to UK laboratories. By 1962, tobacco smoke condensate painted onto the skin of mice had been shown to be carcinogenic, and respiratory irritation was being hypothesized as a potential cause of both chronic bronchitis and cancer in people. See Pls.' Ex. 104. BATCo's in-house research program during the 1960's was designed to complement and capitalize on the biological research being done at Harrogate. Its research and development laboratories, located in Southampton, England, focused on the chemistry and physics of tobacco smoke, that is to say, on the isolation, enhancement and suppression of individual smoke components. See Pls.' Ex. 104. Efforts were directed towards the design of a "safe" cigarette. See File Note of B&W scientist on BATCo's

Southampton Research, 1967.

In addition, a number of BAT research projects were performed under contract at other laboratories. See, e.g., Pls.' Exs. 2, 4 (Final Reports on Projects Hippo I and II) (nicotine studies); Pls.' Ex. 108 (Project JANUS Quarterly and Annual Reports 1969-1971) (mouse skin painting experiments).

At annual research conferences during the 1960's, including the Montreal Conference of 1967, BAT Group scientists discussed the possibility of producing a "cigarette with lower biological activity on mouse skin painting." See also Pls.' Ex. 106 at 1 (Hilton Head Conference, 1968). Also considered was the manipulability of the "biological activity" of cigarettes. See id. ("It is clear that a number of features of cigarettes can modify the biological activity of smoke condensate. These include the incorporation of [different parts of the tobacco leaf], the form of the smoking vehicle, the type of tobacco, the presence of additives and the volume of puff taken in smoking the cigarette."). Conference participants distinguished between "health-image (health reassurance)" cigarettes and "health-oriented (minimal biological activity)" ones. Id. Scientists attending BATCo's 1969 research conference concluded:

> [A]t the present time the Industry ha[s] to recognise the possibility of distinct adverse health reactions to smoke aerosol:
>
> (a) Lung Cancer

(b) Emphysema and bronchitis

> and present and future bioassay test could usefully be classified according to their applicability to one or other or to both.

Pls.' Ex. 107 at 3 (Kronberg Research Conference, 1969).

BAT Group efforts to make a less harmful cigarette continued throughout the 1970's. See Pls.' Exs. 109, 117, 112. By the mid-1970's, a safe product appeared to be a possible long range goal secondary to the more immediate objective of meeting regulatory and public relations requirements. See Pls.' Ex. 121 (Merano, 1975). BAT Group scientists appear nonetheless to have viewed production of a safe cigarette as feasible. See Pls.' Ex. 129 (Sydney, 1978) ("Cigarettes acceptable on all counts can probably be achieved by research and indeed, may in fact be available."). At the close of the 1970's the biological testing program at Southampton was spending £910,000 a year on its biological testing program. See Pls.' Ex. 133.

Despite its knowledge to the contrary, almost a decade after it first issued its "Legal Considerations" memorandum, BAT continued to adhere to its position that the causal link between smoking and disease had not been proved. In December 1993, the 1984 memorandum was circulated anew, along with BAT's 1993 Statement of Business Conduct ("SBC"). See Pls.' Ex. 66. In addition, a "Guidance Note for the Implementation of the Statement of Business Conduct" set forth -- under the subheading

"Smoking and Health Policy" -- "the considered view of the [BAT] Group that . . . scientific causation between smoking and diseases allegedly related to smoking has not been established." Id. at 14.

The binding effect of BAT's official "Smoking and Health" line on its subsidiaries is revealed by the record. A cover letter from BAT's CEO accompanying the SBC states:

> B.A.T. Industries has for many years maintained policies and standards covering various aspects of business conduct and has required their adoption by all B.A.T. Group companies. In order to bring together the underlying principles, the B.A.T. Industries Board has adopted a Statement of Business Conduct which is of general application and which is enclosed. We will also be issuing some guidance in the form of Guidance Notes.
>
> . . .
>
> The Statement and the Guidance Notes clearly reaffirm where the B.A.T. Group stands on key issues . . . . You will see that the [BAT] Board has authorised a simple system of assurance of compliance throughout the Group which builds upon current practice.
>
> I believe that the Statement and Guidance Notes will be of use to employees in their day to day work . . . .

Pls.' Ex. 290 (emphasis added).

The SBC provides that it "applies to all directors, offices and employees of B.A.T. Industries, p.l.c. and its principles apply to all directors, officers and employees of every company within the B.A.T. Industries Group of companies." Pls.' Ex. 66. The policy was enforceable by discipline against subsidiary employees. BAT did not conceal its warning "that any exception

to or breach of the principles encompassed by this Statement will usually be dealt with by immediate management disciplinary action (which may include dismissal in an appropriate case . . . .).” Id.

To help implement the uniform BAT stance on the healthfulness of its product, a consumer helpline manual was distributed to BAT Group tobacco companies to be used in answering consumers’ questions about smoking and health. It instructed:

> All companies considering introduction of a consumer helpline must contact Smoking Issues Department, Millbank for advice on how to handle questions relating to the product and to smoking and health.
>
> . . . .
>
> ‘Type A’ markets assume a high public awareness of smoking and health issues and a strong possibility that users of the helplines will ask questions relating to smoking or product issues.
>
> . . . .
>
> In Type A markets, telephone operators may be dealing regularly with people who are asking questions about tobacco or health. Although a more detailed Q&A document is provided for those operators, in all circumstances the operators should receive background training. . . . This training must be provided in collaboration with the Smoking Issues Department, Millbank . . . .

Pls.’ Ex. 323. Under the heading “Questions About Smoking and Health,” the following sample questions and answers intended to reassure “Type A” callers about the lack of evidence of adverse health consequences and addicting qualities were provided:

> Knowing how many other people die every year from causes related to smoking, do you consider that it is 'common sense' to launch into the markets products that poison the consumer?
>
> > I would like to clarify that it is not scientifically feasible to attribute specific numbers of deaths to cigarettes. We do not understand the mechanisms underlying the diseases claimed to be associated with smoking, and so neither can we fully understand the causes.
>
> . . . .
>
> Do you think that tobacco is a drug?
>
> > We believe that it is not, which is in agreement with the legislation on such matters in force throughout the world.
> >
> > There are many difference between cigarettes and drugs. For example, cigarettes do not cause people to become intoxicated, like so-called "hard" drugs do.
>
> If this is not so, what can you say about the addiction produced by cigarettes?
>
> > The mere fact that people say it is difficult to stop doing something, such as stopping smoking, does not mean that behavior constitutes an addiction. Millions of smokers all over the world have stopped smoking voluntarily without any help at all.
>
> . . . .
>
> What is nicotine?
>
> > It is a substance that occurs naturally in the tobacco plant.

Id.

Numerous meetings and conferences among BAT and its subsidiaries provided a context for the implementation of BAT's

"Smoking and Health" policy. The agendas and meeting minutes of BAT's Tobacco Strategy Review Team ("TSRT") are illustrative. Formed in 1984 and chaired by BAT's Chairman, the TSRT's principal aim from its inception was "to ensure that the Group mounts a coherent strategic thrust in Tobacco, that there is effective technical and marketing co-operation between the Group's Tobacco Interests and that there is a unified approach on Smoking Issues." Pls.' Ex. 271.

Initially, the TSRT had been composed of selected members of the BAT Board. In 1988, however, its membership was expanded to include the heads of tobacco operations in each of BAT's Operating Groups, including those in the United States. See Pls.' Ex. 282. The record reflects that "Smoking Issues," a euphemism for matters relating to the public's perception of the health consequences of smoking, were a regular agenda item at TSRT meetings. See, e.g., Pls.' Ex. 91 at ¶ 21 (noting presentation of collection of abstracts of scientific papers demonstrating "anomalies and inconsistencies in the published work on epidemiology, relating to smoking and health"); Pls.' Ex. 94 at ¶ 15 (discussing upcoming availability and likely annual review and update of two new "Smoking Issues Documents," "Smoking: Habit or Addiction?" and "Smoking: The Scientific Controversy"); Pls.' Ex. 96 at ¶ 6 (Chairman noted U.K. Sunday Times article critical of the apparent strength of BAT cigarettes

sold in certain African countries and stressed importance of being able to defend sale of cigarettes in Africa with higher tar levels than those sold in Europe and North America). "Smoking Issues" were also a recurring topic at the annual Chairman's Advisory Conferences, gatherings hosted by BAT's Chairman and attended by the top brass of its tobacco operating groups from the United States and elsewhere.

To bolster the BAT position on smoking and health, BATCo was assigned the task of compiling a "Compendium of Epidemiological Studies." See Pls.' Ex. 271. The purpose of this project was to attack the mounting epidemiological evidence that smoking causes disease by "illustrat[ing] the range of material which supported the controversy on smoking issues." Pls.' Ex. 327. The record reflects the ongoing involvement of Pat Sheehy, BAT's Chairman from 1982 through 1995 (and prior to that Chairman of BATCo), in the development and dissemination of the Compendium as well as in the perpetuation of the "debate" on causation. See, e.g., Pls.' Ex. 326 (note on behalf of Mr. Sheehy requesting a meeting to discuss the Compendium); Pls.' Ex. 327 (minutes of meeting convened by Mr. Sheehy to discuss the compendium); Pls.' Ex. 91 (minutes of October 1988 TSRT meeting; Mr. Sheehy emphasized the importance of maintaining pressure on smoking issues and stressed the need to have the Compendium translated into German, Spanish and Portuguese); Pls.' Ex. 92 (minutes of March 1989 TSRT

meeting; Mr. Sheehy instructed companies to start using the Compendium in appropriate circumstances).

A 1986 “Smoking and Health” memorandum from Mr. Sheehy to “All No. 1's of Tobacco Companies” begins: “You will know that I believe we have a strong case, both as an industry and as a company, in refuting the highly emotive claims made by the anti-smoking lobby regarding the dangers of smoking. I have a continuing active involvement in this debate . . . .” See Pls.’ Ex. 419. Attached is a paper entitled “Can Epidemiology Becomes a Rigorous Science? How Big is The Big Kill?,” refuting United Kingdom Health Education Council findings on the number of deaths attributable to smoking. Recipients of the paper are encouraged to use it paper “in discussions with the authorities and in a more general public relations context in showing that although the alternative view may not be as attractive to the media, the extreme claims made by our opponents can and should be challenged.” See id.

2. Suppression of a Safer Cigarette

In 1978, BAT Group scientists concluded that the production of safer cigarettes was possible. See Pls.’ Ex. 129 at 1 (minutes of 1978 Group Research and Development Conference; “The meeting affirmed that cigarettes acceptable on all counts can probably be achieved and, indeed, may in fact be available.”); id. at 6 (“Cigarettes of substantially reduced biological

activity (SRBA) can be made by product modification . . . . By SRBA is meant cigarettes where epidemiology would show no greater incidence of disease for smokers than for non-smokers.”). Some years later, a Canadian affiliate, Imasco, broached the possibility of making a greater effort to develop a “safe” cigarette. BAT actively discouraged it from doing so. After the matter was taken up at a TSRT meeting, see Pls.’ Ex. 276 at 2, BAT’s Chairman, Mr. Sheehy, wrote to Imasco explaining why he could not approve this type of research. One important objection was that “in attempting to develop a ‘safe’ cigarette, you are, by implication in danger of being interpreted as accepting that the current product is ‘unsafe’ and this is not a position that I think we should take.” Pls.’ Ex. 386. Production of a “safe” cigarette, he explained, would undermine what had become BAT’s chief objective: “mak[ing] the whole subject of smoking acceptable to the authorities and the public at large since this is the real challenge facing the industry.” Id. (emphasis in original). To promote this broader “BAT objective” the Group had adopted an “integrated approach” featuring sponsorship of research on alternative mechanisms of disease, such as psychological or genetic predisposition, “as well as probing the simple conclusions of what is probably rather poor epidemiology.” Defendants argue that Imasco was only an affiliate of BAT to which Mr. Sheehy was dispensing advice. Given that BAT had a

forty percent interest in Imasco, it is highly unlikely that the latter would ignore such “advice.”

Jeffrey Wigand, B&W’s chief researcher during the early 1990's, testified at a deposition in connection with earlier tobacco litigation that he was prohibited from pursuing development of a safer cigarette. Shortly after a meeting of BAT Group research managers, Mr. Wigand testified, B&W’s president instructed him to cease all safety activities in this area:

> Sandefur [B&W’s president] called me to his office and told me there would be no further discussion or efforts on any issues related to a safer cigarette, even though there was research being conducted in both Canada and in the U.K. in removing [tar].
>
> . . . .
>
> And that any activity or elusion [sic.] to a <u>safer cigarette would be deathly contrary to the company’s position</u> relative to liability issues associated with smoking and health issues and that the matter would not be pursued any further and I was not to discuss it anymore. He also told me at that time that there will be no scientific and medical advisory committee to provide direction or support to the development of a safer cigarette.

Wigand Dep. at 59-60, Pls.’ Ex. 505 (emphasis added).

3. Manipulation of Nicotine

During the early 1960's, BATCo commissioned a series of research projects on nicotine to be performed by the Battelle Laboratory in Geneva, Switzerland. These included “Project Hippo I,” a study on the effect of nicotine on stress reduction, weight loss, and other hypothalamic functions, “Project Hippo II,” a

comparison of nicotine and the tranquilizer, reserpine, and a study of nicotine absorption, distribution and elimination. This latter project engendered a report entitled “The Fate of Nicotine in the Body,” which concluded that nicotine “appears to be intimately connected with the phenomena of tobacco habituation (tolerance) and/or addiction.” Pls.’ Ex. 5.

During the summer of 1963, BATCo research facilities, in consultation with the president and general counsel of B&W, decided against disclosing the results of its nicotine studies to the United States Surgeon General’s Advisory Committee on Smoking and Health. See Pls.’ Ex’s 6 (Correspondence on Non-Disclosure of Nicotine Studies, June 16, 1963-July 31, 1963).

Nicotine was a recurring topic at annual BAT Group research conferences during the 1960's and 70's. See, e.g., Pls.’ Ex. 110 (Minutes of Montreal Research Conference, 1967; discussion of filter additives which would boost the level of “extractable” nicotine); Pls.’ Ex. 106 (Minutes of Hilton Head Research Conference, 1968; emerging evidence of nicotine’s adverse cardiovascular effects); Pls.’ Ex. 109 (Minutes of St. Adele Research Conference, 1970; importance of nicotine and likelihood that a minimum level would be necessary for consumer acceptance); Pls.’ Ex. 117 (Minutes of Duck Key Conference, 1974; discussion of smoker compensation).

Increased awareness of “smoker compensation,” the phenomenon

of adaptive smoking of “low delivery” cigarettes to ensure sufficient dosage of nicotine, made nicotine a focal point of BAT Group research in 1983. See Pls.’ Ex. 139. At a research and development conference held that year, the conferees declared “an urgent need to prepare a status review on all major aspects of the pharmacological influences of nicotine in the smoking process.” Pls.’ Ex. 139 at 14. They agreed that as much as possible had to be known about “the site and mechanisms of absorption of nicotine within the human system;” “the way nicotine stimulates both the central nervous system and the peripheral organs (e.g.[,] heart and lungs);” and “the metabolism of nicotine within the body, including rates and equilibrium levels.” Id. at 13. To that end, a senior researcher at the Group Research and Development laboratory in Southampton assumed responsibility for coordinating all relevant work in this area. See id. at 14.

The biological activity of nicotine was also on the agenda of a Biological Conference held in April of the next year, 1984. See Pls.’ Ex. 140. A three-day Nicotine Conference was held several months later. Those in attendance concluded that “[i]ntuitively it is felt that ‘satisfaction’ must be related to nicotine” and that “[m]any people believe it a ‘whole body response’ that involves the action of nicotine in the brain.” It was also noted that “although many smokers appear to approach a

plateau . . . of nicotine in the blood, it [was] not known . . . whether a smoker feels the need for another cigarette when his blood level falls significantly below this plateau level or . . . whether the smoker is seeking the more transient peak levels super-imposed upon the general plateau level." Id.

The author of an undated memorandum emanating from "R&D, Southampton" characterizes a cigarette as "a 'drug' administration system for public use" and noted speed, i.e. the fact that "[w]ithin ten seconds of starting to smoke, nicotine is available in the brain," as one of its advantages. Pls.' Ex. 400 (emphasis in original). The memorandum continues:

> Thus we have an emerging picture of a fast, highly pharmacologically effective and cheap 'drug,' tobacco, which also confers flavour and oral satisfaction to the user. There are other things about tobacco, though. It is legal (as is alcohol but not marijuanha [sic.] and LSD), and the articles themselves are eminently portable. It can be used freely in public places in most countries.
>
> So all in all, it is a relatively cheap and efficient delivery system, legal, and easily usable.
>
> However, it has drawbacks. The major one is that it has a 'health shadow' over it which is not easy to dispel . . . .

After discussing at length consumer satisfaction and the benefits and drawbacks of lower tar and higher nicotine content, the author cynically concludes:

> So -- give them what they seem to want taste and value. And always remember that, while King James I issued his famous 'Counterblaste to Tobacco,' in 1604, it is nicer from our point of view to remember Oscar Wilde's words

in ‘The Picture of Dorian Gray’ in 1891:

> ‘A cigarette is the perfect type of a perfect pleasure. It is exquisite, and it leaves one unsatisfied. What more can one want.’
>
> Let us provide the exquisiteness, and hope that they, our consumers, will remain unsatisfied. All we would want then is a larger bag to carry the money to the bank.

Id. at 10 (emphasis added).

The above documents pertain to research done under the auspices of BATCo, much of it well before BAT’s formation in 1976. Nonetheless, they strongly support an inference of awareness on the part of BAT that nicotine was the active ingredient in cigarettes. BATCo, as already pointed out, was BAT’s chief research subsidiary until Group research and development was reorganized in 1985. See Pls.’ Ex. 341. Even after the reorganization, BATCo retained a central coordinating role in this area. See id. The knowledge of BATCo researchers and a basic awareness of matters discussed at BATCo conferences over the years, may be imputed to BAT. BAT’s probable reliance on BATCo for scientific information relevant to marketing and product development, the overlapping BAT and BATCo Boards, see Pls.’ Ex. 64, and the fact that BAT was chaired, through 1995 by former BATCo Chairmen makes BAT’s acquaintance with these scientific matters highly likely.

There is evidence in the record from which it can be inferred that tobacco with higher nicotine content and tobacco

treatment processes that enhanced nicotine delivery were strongly encouraged. For example, the use of Y-1 tobacco, a low-tar high-nicotine strain of tobacco developed by B&W was urged on the heads of the tobacco operating groups. See Pls.' Ex. 93 at ¶ 16; Pls.' Ex. 94 at ¶ 4. After limited progress was reported in developing uses for Y-1, BAT's Chairman asked that Y-1 use be given a higher priority. See Pls.' Ex. 96 at ¶ 9. The Chairman also stressed the importance of ammonia processing, see Pls.' Ex. 93 at ¶ 8l; Pls.' Ex. 94 at ¶ 6, a taste-enhancing procedure resulting in "[i]mproved nicotine transfer." Pls.' Ex. 357 (Minutes of Ammonia Technology Conference Hosted by B&W); see also Pls.' Ex. 360 (Blenders Handbook; "Ammonia, when added to a tobacco blend, reacts with the indigenous nicotine salts and liberates free nicotine. As a result . . . the ratio of extractable to bound nicotine in the smoke increases."). B&W's Chairman was charged with ensuring that all Group blenders "were fully conversant with the techniques of ammonia treatment." Pls.' Ex. 94 at ¶ 7. Pursuant to this BAT mandate, a blender's conference was held and a blender's handbook compiled. See Pls.' Ex. 98 at ¶ 63-65; Pls.' Ex. 99 at ¶ 49.

4. Acting in Concert with B&W to Hide Information

BAT and B&W appear to have worked together to prevent damaging smoking and health information generated by BAT Group research from reaching United States product liability plaintiffs

and the general American public. The documents reflect tension between B&W and other BAT affiliates due to B&W's greater vulnerability to product liability litigation. See, e.g., Pls.' Ex. 281 (1986 Draft of Note to Tobacco Strategy Review Team; "Brown and Williamson now believe that parts of the Group Research and Development Programme are not acceptable. BATCo believe that the Programme reflects a responsible commercial attitude which takes due account of legal obligations. B.A.T. Industries have been asked for a ruling."); Pls.' Ex. 36 ("The only way BAT can avoid having information useful to plaintiffs found at B&W is to obtain good legal counsel and cease producing information in Canada, Germany, Brazil and other places that is helpful to plaintiffs.").

Of particular concern was the potential admissibility in suits against B&W of unfavorable smoking and health statements by BAT scientists. Also presenting a problem was the presence of BAT Group Research reports in B&W's files. The record contains a series of internal B&W memoranda and file notes written during the 1970's and 80's by B&W's corporate counsel, Mr. J.K. Wells, on how to handle these reports. The first of these is a memorandum to Mr. Pepples, who, as already noted, was then B&W's vice president and general counsel. In it Mr. Wells notes that he has not been able to improve upon Mr. Pepples' proposed method of handling BAT scientific materials: "The material should come

to you under a policy statement between you and [BAT research and development in] Southampton which describes the purpose of developing the documents for B&W and sending them to you as use for defense of potential litigation." Pls.' Ex. 29. A subsequent memorandum from Mr. Wells to Mr. Pepples discusses various "alternatives for handling BAT scientific reports which come to B&W in a way that would afford some degree of protection against discovery." Pls.' Ex. 30. The author recommends a procedure whereby BAT scientific reports would be shipped for "special handling" directly to a Dr. Esterle, who would be designated as Mr. Pepples' "agent for the acquisition of scientific materials in anticipation of litigation." Pls.' Ex. 30. The memorandum continues:

> Regardless of the initial recipient of the documents, in order to be covered by the rules of civil procedure they must be "prepared in anticipation of litigation." Appropriate paper work should be established with BAT, including any amendments to the cost sharing agreement to establish that documents of a certain nature are prepared for B&W in anticipation of litigation. I have in mind paper work which would make this statement as a policy between the parent and sibling . . . .

Id.

A "File Note" on "Document Retention" records a conversation between Mr. Wells' and B&W's vice president for research and development, Earl Kohnhorst. It discusses the removal of sensitive smoking and health information deemed "deadwood in the behavioral and biological studies area" from B&W's files. See Pls.' Ex. 38. Mr. Wells explained that

documents marked with an “X” as well as “B” series documents relating to Project Janus (mouse skin painting experiments) should be considered deadwood, pulled from the files and stored in the basement for possible later shipment to BAT in England. See id. Mr. Wells then suggests that Mr. Kohnhorst tell his employees “that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.” Id. A 1986 memorandum documents a meeting between Mr. Wells and B&W research and development personnel regarding receipt of “BAT Science.” The memorandum indicates that B&W had arranged to limit its receipt of BAT Group scientific reports to concise bi-annual summaries in connection with those specific projects it chose to follow in order to reduce the potential for receiving information useful to plaintiffs. See Pls.’ Ex. 43.

BAT appears to have taken a number of specific measures in response to B&W’s litigation predicament. Its adoption of the “genuine scientific controversy” stance as official policy for its subsidiaries has been described in detail. In addition, BAT created a detailed set of procedures for sending information and written materials to the United States. A 1985 document sets out these procedures. Research and development reports destined for countries other than the United States were to be routed through Group research and development headquarters, where a recipient

list, which "must not contain the name of any B&W person," would be compiled. See Pls.' Ex. 450. Research and development materials to be sent to the United States were to be addressed to a Robert L. Maddox. "The covering letter should simply say that BATCo Millbank has asked that he, Maddox, receive the documents." Id. These arrangements were apparently in keeping with a long history of vigilance over the exchange of sensitive scientific information produced by BAT's research and development program. See, e.g., Pls.' Exs. 12-14 (correspondence between BAT and B&W from November and December 1968 addressing difficulties of exchange of smoking and health information). See also File Note of June 1984 recording a meeting between B&W and "BAT Legal" on "United States Product Liability Litigation" ("[I]t is fair to say that BAT Legal are informed about the danger of the admissibility of BAT statements on smoking and health in U.S. products liability litigation. BAT Legal will offer counsel to BAT activities which pertain to smoking and health.")

Taken together, the above evidence reveals the dilemma created for B&W by decades of BAT Group research demonstrating the health hazards and addictiveness of smoking. B&W's attempt to solve its potential litigation discovery problems by controlling the flow of information into the United States and BAT's collaboration in this process are also reflected in the record.

G. BAT's Extensive Participation in the Marketing and in Research and Development of Cigarettes

The record contains evidence of BAT's involvement in numerous aspects of the marketing, research and development of BAT Group cigarettes. These activities were jointly coordinated through BATCo's Group Research and Development Centre, which functioned as the central research unit of the BAT Group until 1985. See Pls.' Ex. 341. Pursuant to a 1985 reorganization, this entity was assigned the task of coordinating fundamental research to be conducted by all of BAT's major operating companies including BATCo. The reorganization contemplated "[a] comprehensive, co-ordinated BAT Industries/BATCo R&D programme." Pls.' Ex. 341.

Through the membership of its Chairman, Deputy Chairman, and Finance Director on the TSRT, BAT actively participated in the research, development and marketing of cigarettes. The mandate of the TSRT, it will be recalled, was to formulate Group tobacco strategy and to ensure cooperation on all matters among BAT's tobacco operating companies. Some of the matters addressed by the TSRT, such as "Smoking Issues" and the use of nicotine-enhanced products and processes, have already been adverted to. Additional examples are: group-wide tobacco strategies and policies and cooperative research and development efforts, see, e.g., Pls.' Ex 91 at ¶ 2; Pls.' Ex. 270 at ¶¶ 1(xii), 2(ix);

marketing strategies to compete with Marlboro and Camel, see, e.g., Pls.' Ex. 273 at ¶¶ 14-17; Pls.' Ex. 274 at ¶ 18, Pls.' Ex. 433 at ¶ 16, Pls.' Ex. 102 at ¶¶ 7-8; acquisition analyses of new nicotine delivery systems, see, e.g., Pls.' Ex. 279 at ¶ 88; directions to be followed on the Barclay filter and the development of a new "ultra" filter to meet FTC requirements, see, e.g., Pls.' Ex. 272 at ¶¶ 1-3; Pls.' Ex. 273 at ¶¶ 2, 4, 6, 9; initiatives to fight those viewed as anti-tobacco, see, e.g., Pls.' Ex. 471 at ¶¶ 4, 7; and, plans to create and become competitive in the smokeless cigarette area, see, e.g., Pls.' Ex. 473 at ¶ 23.

The specific and detailed input of BAT's Chairman is also evident from the record. In addition to Mr. Sheehy's promotion of ammonia processing, Y-1 tobacco and the "Smoking Issues Compendium," as already discussed, the TSRT minutes abound with examples of the Chairman's intervention across the full spectrum of marketing and product development matters discussed at TSRT meetings. See, e.g., Pls.' Ex. 274 at ¶ 9 (Chairman suggested immediate change in the rating printed on Barclay packets to reflect lower deliveries being achieved); id. at ¶ 29 (Chairman asked that companies test samples involving new APEX process for tobacco expansion); Pls.' Ex. 277 at ¶ 7 (Chairman stated importance of positioning Barclay as a premium brand in a forum where it could be promoted unequivocally as a low delivery

product); Pls.' Ex. 278 at ¶ 36 (Chairman emphasized need to achieve competitive or better quality with regard to Lucky Strikes, perhaps by using more imported leaf, and to reduce the price differential to Marlboro with goal of being not more than one price point below Marlboro in all markets by the end of 1992); id. at ¶ 30 (Chairman asked that further pressure be applied to solve problem of companies which were either below or above the agreed stock duration targets); Pls.' Ex. 96 at ¶ 17 (Chairman asked that BATCo and Souza Cruz give further consideration to adoption of the "sheet process"); id. at ¶ 20 (Chairman suggested that Souza Cruz should consider development of "low-sidestream" papers, possibly by producing an existing paper of this type under license); id. at ¶ 41 (Chairman asked for a specific program to re-launch Kent in Europe showing three years from 1991 and analysis of the costs and benefits of the program proposed). These documents suggest comprehensive involvement and intervention by BAT in the areas of marketing and research and development affecting New York's smokers.

IV. NEW YORK STATUTORY BASES FOR JURISDICTION

In a diversity suit, personal jurisdiction is determined in accordance with the law of the forum state. See, e.g., Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986); Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (en banc). Plaintiffs assert jurisdiction over BAT on the

basis of both systematic and continuous New York contacts and specific acts by BAT itself and by its agents and co-conspirators. The record contains overwhelming support for the exercise of jurisdiction based on the in-state tortious acts of BAT'S co-conspirators. See N.Y. CPLR § 302(a)(2). It is this basis that furnishes the most obvious basis for the exercise of jurisdiction. See Part IV A, infra. Nevertheless, there are other adequate grounds for finding that New York courts have personal jurisdiction. See Part IV.B, infra.

A. Conspiracy Theory of Jurisdiction

1. Law

New York's CPLR 302(a)(2) confers jurisdiction over anyone who "in person or through an agent . . . commits a tortious act within the state." It is a single act provision, which, like the others enumerated in CPLR 302 requires "a substantial relationship between the [act] and the claim asserted." Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467,527 N.Y.S.2d 195, 522 N.E.2d 40 (1988).

The term "agent" under CPLR 302(a)(2) has been read to include co-conspirators. See, e.g., American Broadcasting Cos. v Hernreich, 338 N.Y.S.2d 146, 146, 40 A.D.2d 800, 801 (1st Dep't 1972); Cleft of the Rock Foundation v. Wilson, 992 F. Supp. 574, 581 (E.D.N.Y. 1998); Chrysler Capital Corp. v. Century Power Corp., 778 F. Supp. 1260, 1266 (S.D.N.Y. 1991) (citing Lehigh

Valley Indus., Inc. v. Birenbaum, 389 F. Supp. 798, 806-07 (S.D.N.Y.), aff'd, 527 F.2d 87 (2d Cir. 1975)). "It is well settled that acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under CPLR 302(a)(2)." Chrysler Capital Corp., 778 F. Supp. at 1266; see also Andre Emmerich Gallery v. Segre, No. 96 Civ. 889, 1997 U.S. Dist. LEXIS 16899 (S.D.N.Y. Oct. 29, 1997) (asserting jurisdiction over non-domiciliary father on basis of fraudulent art sale carried out in New York by co-conspirator son); Hade v. Kott, No. 91 Civ. 5897, 1993 U.S. Dist. LEXIS 2714 (S.D.N.Y. Mar. 8, 1993) (personal jurisdiction exercised over Canadian individual and corporation based on co-conspirator's tortious conduct in New York); Gudaitis v. Adomonis, 643 F. Supp. 383 (E.D.N.Y. 1986) (co-conspirators' commission of tortious acts in New York conferred jurisdiction over Massachusetts resident).

To establish jurisdiction over a nonresident defendant on the basis of the New York acts of a co-conspirator, the plaintiff must: (1) establish a prima facie case of conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) demonstrate the commission of a tortious act in New York during, and pursuant to, the conspiracy. See Allstate Life Ins. Co. v. Linter Group, Ltd., 782 F. Supp. 215, 221 (S.D.N.Y. 1992); Chrysler Capital Corp., 778 F. Supp.

at 1266.

Under New York law a prima facie showing of a conspiracy entails allegation of the primary tort and the following four elements:

> 1. a corrupt agreement between two or more parties;
> 2. an overt act in furtherance of the agreement;
> 3. the parties' intentional participation in furtherance of the plan or purpose; and
> 4. resulting damage or injury.

Kashi v. Gratsos, 790 F.2d 1050, 1055 (2d Cir. 1986); Chrysler Capital Corp., 778 F. Supp. at 1267.

The requisite relationship between the defendant and its New York co-conspirators is established by showing that

> (a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of state defendant.

Chrysler Capital Corp., 778 F. Supp. at 126 (citations and internal quotation marks omitted).

2. Application of Law to Facts

First, it should be noted that New York state and federal courts have recognized the applicability of the conspiracy theory of jurisdiction to BAT in cases analogous to the instant one. See Laborers Local 17 Health & Benefit Fund v. Philip Morris, 26 F. Supp.2d 593, 601 (S.D.N.Y. 1998), vacated on other grounds 191 F.3d 229 (2d Cir. 1999); Small v. Lorillard Tobacco Co., 252

A.D.2d 1, 679 N.Y.S.2d 593 (1st Dep't 1998), vacated on other grounds, No. 154, 1999 WL 976090 (N.Y. Ct. App. Oct. 26, 1999). In Laborers Local 17, the court recognized "significant support in the New York case law . . . for the exercise of jurisdiction based on conspiracy," id. at 601, but granted BAT's motion to dismiss on the ground that all of the plaintiffs' allegations of conspiracy concerned activities which took place before BAT's 1976 formation. Plaintiffs were granted leave to file an Amended Complaint to plead additional facts connecting BAT to the alleged conspiracy. See id. at 604. In Small, the appellate division approved in dictum the trial court's exercise of conspiracy jurisdiction, finding that plaintiffs had created an issue of fact as to BAT's participation in a conspiracy. 252 A.D.2d at 17, 679 N.Y.S.2d at 605. The major impact that BAT's actions could have had on the manner in which cigarettes were sold in New York, was deemed sufficient to substantially connect the conspiracy to the forum. See id.

Courts of a number of other jurisdiction have also exercised conspiracy-based jurisdiction over BAT. See, e.g., Arkansas Blue Cross and Blue Shield, No. 98 C 2612, 1999 WL 202928, (N.D. Ill. March 31, 1999) (finding a prima facie case of conspiracy and substantial act in furtherance by sale of cigarettes in Illinois); Washington v. American Tobacco Co., No. 96-2-15056-88 SEA, slip op. at 10-12 (Wash. Super. Ct. June 9, 1998)

(plaintiffs sufficiently alleged conspiracy intended to mislead and injure persons in Washington).

Defendant contends that a parent and its subsidiary cannot civilly conspire. Even were this contention true, it would not affect BAT's jurisdictional status since, as already demonstrated, it also conspired with non-BAT Group entities comprising essentially the entire United States tobacco industry. In any event, research uncovers no rule in this circuit such as defendant professes outside the special antitrust context. Cf. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) (a parent and its wholly owned subsidiary could not conspire for purposes of section 1 of the Sherman Act; "perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.").

The relevant policies under the Sherman Act can be appropriately enforced by treating an integrated entity composed of different corporations as one body even though its component corporations commit separate acts cooperating within the entity designed in total to frustrate the Act; it is the cooperation of one whole integrated entity with another external entity that

creates the dangers to the free market posed by conspiracies in restraint of trade. See Copperweld, 467 U.S. at 775 n.24 (conspiracies between a corporation and its own employees under other statutes); but see id. at 786-87 (Stevens, J., dissenting) (corporation can conspire with its employees and subsidiaries even in Sherman section 1 violation). By contrast, in the mass-product-tort area, the dangers to be deterred can be created when one corporation cooperates with another corporation that is part of the same entity to harm the public -- an outside corporation is not required to do the damage; each part of the entity can be treated separately for some purposes; as a matter of policy, for jurisdictional purposes, it is appropriate to treat different corporations, which are part of an integrated, multi-corporate entity, as separate and capable of conspiring with one another. The nature of the dangers determines the policy and its application by way of specific substantive and jurisdictional rules. In this jurisdictional context, the hub cannot deny its relationship to the integrated spokes and rim. Intracorporate RICO conspiracies have properly been recognized. See, e.g., Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1167 (3d Cir. 1989) ("Group" of integrated companies conspired) Rouse v. Rouse, No. 89 CV 597, 1990 WL 160194, at * 14 (N.D.N.Y. Oct. 17, 1990); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989) (recognizing "intra-corporate conspiracies is more

faithful to the broad purpose of RICO than a narrow reading which is modeled on antitrust law”).

a. Prima Facie Showing of Conspiracy

Plaintiffs have alleged the primary tort of fraudulent concealment. Its elements are material false representation, intent to defraud, reasonable reliance, damages and a duty to disclose on the part of the misrepresenting party. See Banque Arabe et Internationale d’Investissement v. Maryland National Bank, 57 F.3d 146 (2d Cir. 1995). The tobacco industry’s repeated assertions that a causal link between smoking and disease had not been established were, plaintiffs contend, material, false and made with the intent to defraud and conceal from them research data confirming the health risks of cigarettes. Plaintiffs further allege that their reliance on these misrepresentations was reasonable in view of the industry’s (including BAT’s as a leading member) superior resources and knowledge and its public promise to fund and disseminate the results of objective smoking and health research. These same factors, it is plausibly argued, also gave rise to a duty on the part of the industry, including BAT, to disclose all relevant information. Plaintiffs claim to have suffered substantial personal injuries and damages as a result of this fraud.

A corrupt agreement, the first element of a conspiracy, may be readily inferred from the tobacco companies’ formation of and

membership in CTR. The 1953 “Frank Statement to Cigarette Smokers” signed by, among others, the American Tobacco Company, B&W, Philip Morris, and R.J. Reynolds, informed the American people that out of its concern for their welfare, the tobacco industry would provide “aid and assistance to the research effort into all phases of tobacco and health.” Pls.’ Ex. 1. Yet, as revealed by the documents, CTR’s purpose was to place the industry in a positive light while at the same time generating research for use in supporting its fraudulent position that the health hazards of smoking were unproven.

The remaining elements of a conspiracy are also satisfied. There is evidence of multiple overt acts by the tobacco companies in furtherance of the alleged conspiracy both in and outside of New York. New York acts include the formation of CTR and the covert distribution of funds through CTR “special projects” and “special account 4." See Doc. Nos. 2048.06-08, 2048.13-23. Since CTR was incorporated and located in New York and many of the acts instrumental to the operation of CTR and other “special” funding mechanisms were carried out here, these acts also satisfy the requirement of the commission of a tortious act in New York.

Another example of an overt New York act is the industry’s republication of the Barron’s editorial already referred to, which denied proof that smoking was dangerous and characterized the evidence to the contrary as part of a regulatory “crusade” by

"witch doctors" and "medicine men." See Glantz, supra, at 177. ("The Tobacco Institute believes every thoughtful adult American will want to read every word of this front-page editorial in Barron's-one of America's most responsible publications"); see also Doc. No. 2101.06 (letter from B&W's vice president for advertising stating that "perhaps the most important thing about this ad was that for the first time we have gotten the industry to take a step forward together, and it was a great opportunity to get them together"). The Barron's advertisement was prepared by Tiderock Corporation, a New York advertising agency, see id., and was available to New York readers.

The overt acts enumerated above also support an inference of intentional participation in furtherance of a plan or purpose. See, e.g., Cleft of the Rock Foundation, 992 F. Supp. at 582; Andre Emmerich Gallery, 1997 WL at *5.

The proposed plaintiff class is composed of individuals who smoked one package of cigarettes or more per day over a twenty-year period. Their claims to have developed lung cancer as a result of the tobacco industry's conduct satisfy the final element of a prima facie case of conspiracy.

It should be emphasized that a determination that sufficient color of a conspiracy exists for jurisdictional purposes does not control the issue of whether plaintiffs will ultimately adduce sufficient evidence to prevail on the merits of their conspiracy

claim at trial.

b. BAT's Relationship to the Tobacco Conspiracy and the New York Acts of its Co-Conspirators

The record is replete with evidence of what arguably were tortious acts by BAT in furtherance of the tobacco industry conspiracy. See, e.g., Pls.' Ex. 40 (BAT's 1984 "Legal Considerations" memorandum imposing a "genuine scientific controversy" stance on its subsidiaries); Pls.' Ex. 66 (BAT's 1993 reassertion of this policy); Pls.' Ex. 276 (1988 letter from BAT's Chairman to Canadian affiliate stating that it could not support development of a safe cigarette since this would imply the view that cigarettes are dangerous); Pls.' Ex. 36 (1984 file note documenting meeting between B&W and "BAT Legal" regarding product liability litigation in the United States: "BAT Legal will offer counsel to BAT activities which pertain to smoking and health."); Pls.' Ex. 450 (January 1985 memorandum describing special stealthy procedure for distributing smoking and health documents to B&W).

These acts were a continuation of a long strategy of hiding inculpatory BAT Group research data to safeguard BAT's United States business interests. See, e.g., Pls.' Ex. 6 (BATCo's 1963 decision not to disclose results of nicotine research to United States Surgeon General's Advisory Committee on Smoking and Health); Pls.' Ex. 13 (1968 letter from BATCo

informing B&W general counsel that certain information "can be made known in confidence to the rest of your Group in the U.S. Industry, if you so wish. We would not, however, wish the source of this information disclosed -- although admittedly it would not be very difficult for others in your Group to guess this."). BAT's knowledge of and access to over thirty years of detailed information on the health hazards of smoking, makes its coverup actions, if proven, particularly egregious.

Awareness on the part of BAT of the effects of its acts in New York may be inferred. BAT's concealment of information and enforcement of a code of silence on its subsidiaries were undertaken to protect its American subsidiary, B&W. To accomplish this, it knowingly supported the efforts of the United States tobacco industry as a whole to attempt to make cigarette smoking palatable to the American regulatory authorities and general public while hiding from smokers and potential smokers around the country, including New York, what it knew about the dangerousness of cigarettes.

Many of the tortious New York acts of BAT's co-conspirators were committed subsequent to BAT's formation in 1976. Earlier activities were ratified by BAT when it joined the conspiracy. See Cleft of the Rock Foundation, 992 F. Supp. at 584 (New York acts of co-conspirators are a proper basis of personal jurisdiction even where defendant may have joined alleged

conspiracy after overt New York acts were committed since "'joining of the conspiracy, adoption of its goals, and action in furtherance of it, thus constituted a ratification of those acts already committed with the purpose of accomplishing the same goal.'" quoting Dixon v. Mack, 507 F. Supp. 345, 350 (S.D.N.Y. 1980)). New York acts were committed on behalf of and for the benefit of all participants in the United States tobacco industry, including BAT. That BAT did intend to, and did in fact benefit from these New York activities is adequately supported by the evidence.

In sum, plaintiffs have met the requirements for the exercise of personal jurisdiction over BAT under CPLR 302(a)(2).

CPLR 302(a)(2), it will be recalled, confers jurisdiction "[a]s to a cause of action arising from . . . [the] commi[sion of] a tortious act within the state." Nothing in this language either expressly or impliedly excludes claims connected to injuries incurred outside the state. The aim of CPLR 302(a)(2) is to subject to the personal jurisdiction of the New York courts those non-resident defendants who engage in tortious conduct in the state. See Feathers v. McLucas, 15 N.Y.2d 443, 460, 209 N.E.2d 68, 77, 261 N.Y.S.2d 8, 21 (1965) (purpose of section 302's draftsmen "was to confer on the court 'personal jurisdiction over a non-domiciliary whose act in the state gives rise to a cause of action' or, stated somewhat differently, 'to

subject non-residents to personal jurisdiction when they commit acts within the state.'" (quoting N.Y. Advisory Comm. Rep. (N.Y. Legis. Doc., 1958, No. 13), pp. 37, 39)). The claims of all proposed class members may be said, at least in part, to "arise from" tortious acts committed in New York; all of the plaintiffs -- whether resident in or outside New York -- may rely on CPLR 302(a)(2). Even if this were not the case, the factual and jurisdictional links of those plaintiffs who suffered New York injuries suffice to support the claims of the entire nationwide class. The New York class members -- whether named or unnamed -- are considered the jurisdictional representatives of the class in much the same way as the named plaintiffs are its citizenship representatives for purposes of determining diversity competence of the federal court.

B. Other Theories of Personal Jurisdiction

Because the case for conspiracy jurisdiction is so strong, detailed consideration of plaintiffs' other theories supporting the exercise of personal jurisdiction is unnecessary. It bears noting, however, that jurisdiction may also be appropriate under CPLR 301 and 302(a)(3)(ii).

1. CPLR 302(a)(3)(ii)

CPLR 302(a)(3)(ii) renders amenable to suit any nondomiciliary who commits an out-of-state tortious act causing in-state injury in a case arising out of that act provided that

the nondomiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ." Jurisdiction under this section entails a showing that (1) the defendant committed a tortious act outside New York (2) this act caused injury in New York to a person or property (3) defendant reasonably should have expected its tortious act to have New York consequences, and (4) defendant derives substantial revenue from interstate or international commerce. See Fantis Foods, Inc. v. Standard Importing Co., 49 N.Y.2d 317, 325, 425 N.Y.S.2d 783, 402 N.E.2d 122 (1980). There is abundant evidence as to each of these elements to support the exercise of jurisdiction in connection with the claims of proposed class members injured in New York. The New York contacts of at least some plaintiffs who are members of the class may, as already pointed out, support the jurisdictional claims of those who were injured in other states.

2. CPLR 301

Jurisdiction theory and practice, like other areas of the law, evolves to meet political, economic, social, and technological changes. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hamilton v. Accu-Tek, 32 F. Supp.2d 47 (E.D.N.Y. 1998); In re DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992); Bulova Watch Co. v. K. Hattori, 508 F. Supp. 132 (E.D.N.Y. 1981); Harold L. Korn, Rethinking Personal Jurisdiction

and Choice of Law in Multistate Mass Torts, 97 Colum. L. Rev. 2183 (1997).

The common law and equitable continuing development of traditional jurisdictional bases argue in support of the exercise of jurisdiction pursuant to CPLR 301. This provision permits the court to exercise "such jurisdiction . . . as might have been exercised heretofore." (emphasis added). In considering the effect of the CPLR, "the drafters' stated objectives are well worth consideration." Harold L. Korn et al., New York Civil Practice ¶ 301.06 (1995). Chief among these were "to make it possible, with very limited exceptions, for a litigant in the New York courts to take advantage of the state's constitutional power over persons . . ." Id. Limitations in CPLR 302 did not change that primary thrust. As commentators have pointed out:

> The word "might" in CPLR 301 is properly construed to cover the principles applicable to any line of New York cases, even if no prior court had dealt with the precise situation at hand. It permits the courts to develop prior concepts used in New York without the limitations of statutory language.

Id. at ¶ 301.10.

One relevant well accepted concept strongly favoring the exercise of jurisdiction under CPLR 301 is basic fairness of the forum choice as between plaintiff and defendant. See, e.g., Hutchinson v. Chase & Gilbert, 45 F.2d 139, 142 (2d Cir. 1930) (Learned Hand, J.) (relevant question is whether it is fairer for

defendants to come to New York or for plaintiffs to go to Massachusetts). Another relevant factor is the interest of New York in reducing transaction costs to its residents in mass tort cases by bringing together in one case all related New York and non-New York plaintiffs and all defendants relevant to the litigation.

V. DUE PROCESS

A. Law

The Due Process Clause of the Fourteenth Amendment has been interpreted to protect individual liberty interests by limiting state courts' exercise of personal jurisdiction over non-resident defendants. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 & n.13 (1985); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982).

First, the defendant must have purposefully established sufficient contacts with the forum state to justify the personal jurisdiction of its courts. This first prong of the bifurcated due process test -- the "minimum contacts" prong -- has been described as a "fair warning" requirement. It "focuses on 'the relationship among the defendant, the forum and the litigation,'" Calder v. Jones, 465 U.S. 783, 788 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)), and is satisfied by a determination that "the defendant has 'purposefully directed' his activities at the forum," Burger King Corp., 471 U.S. at 473

(quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)), and that the litigation arises out of or relates to those activities. See id. (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). The Supreme Court has reasoned:

> By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Id. (citations and internal quotation marks omitted).

The second phase of the due process inquiry assesses the reasonableness of exercising jurisdiction once "minimum contacts" have been established. See Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 114 (1987).

The purpose of both the "minimum contacts" and "reasonableness" prongs of the analysis is to ensure that jurisdiction comports with "traditional notions of fair play and substantial justice." See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("minimum contacts" requirement protects against assertions of jurisdiction which would "offend . . . fair play and substantial justice"); Burger King Corp., 471 U.S. at 476-77 (reasonableness inquiry serves to ensure that the exercise of jurisdiction is consistent with "fair play and substantial justice"); see also Metropolitan Life Ins. Co. v. Robinson-Ceco

Corp., 84 F.3d 560, 568 (1996).

Since these two prongs point to the same end, the stronger the showing as to one, the weaker the showing necessary to satisfy the other. Metropolitan Life Ins. Co., 84 F.3d at 568. Consideration of reasonableness factors can sometimes "establish . . . jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Burger King at 477 (citing Keeton, 465 U.S. at 780; Calder, 465 U.S. at 788-89; McGee v. International Life Ins. Co., 355 U.S. at 223-24 (1957)). By the same token, where activities are purposefully directed towards state residents, the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King at 477; see also Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) ("the weaker the plaintiff's showing [on minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true; an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].").

1. Minimum Contacts

a. Membership in a Conspiracy

Under a traditional analysis, whether the conspiracy theory of jurisdiction comports with due process depends in the first instance upon whether, in a given case, the defendant has

"purposely availed himself of the privilege of conducting activities in the forum state." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See Small v. Lorillard Tobacco Co., 672 N.Y.S.2d 601, 608 (Sup. Ct. N.Y. Cty. 1997) (rejecting argument that the conspiracy theory of jurisdiction violates the Due Process Clause); see also Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 18, 679 N.Y.S.2d 593, 606 (1st Dep't 1998) (dismissing entire action on other grounds but noting that, had it reached the issue, it would have upheld the trial court's determination of conspiracy jurisdiction over BAT).

Of those few New York courts which have directly addressed the due process implications of the conspiracy theory of jurisdiction, two have found the "purposeful availment" requirement satisfied by a showing that the defendant chose to participate in the conspiracy in question with the knowledge that overt acts in furtherance of it had been committed in New York. See Cleft of the Rock Foundation, 992 F. Supp. at 584-85; Dixon v. Mack, 507 F. Supp. 345, 352 (S.D.N.Y. 1980). Compare Stauffacher v. Bennett, 969 F.2d 455 (1st Cir. 1992) (court found it difficult to understand why personal jurisdiction should be an exception to the general rule of attributing the acts of one conspirator within the scope of the conspiracy to the others) with Ann Althouse, The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis, 52 Ford. L. Rev.

234, 253 (1983) (criticizing automatic attribution of the in-state acts of a co-conspirator to non-resident defendants on the ground that it “avoids consideration of the individual defendant’s contact with the forum state -- the very essence of jurisdiction” and urging an approach which focuses on the actual relationship between the conspiracy’s resident and non-resident members).

b. Intentional Tortious Acts Causing Effects in the State

Jurisdiction on the basis of the in-state effects of intentional out-of-state conduct was held by the Supreme Court in Calder v. Jones, 465 U.S. 783 (1984), to be consistent with the requirements of the Due Process Clause. In Calder, a professional performer, who lived and worked in California, brought suit in connection with a National Enquirer article alleging libel, invasion of privacy and intentional infliction of emotional distress. The National Enquirer is a Florida corporation with its principle place of business in Florida, where the article in question was written and edited. Petitioners, the writer and editor of the article, argued that its foreseeable circulation in California, a process in which they had no input and over which they had no control, was an insufficient basis for the exercise of personal jurisdiction. Their situation, they argued, was like that of a hypothetical

welder who works on a boiler in Florida which then explodes in California. Id. at 789 The Court disagreed, distinguishing for purposes of the minimum contacts analysis, between "mere untargeted negligence" and "intentional, and allegedly tortious, actions . . . expressly aimed at California." Where defendants engaged in intentional misconduct in Florida knowing that this would cause serious harm in California, jurisdiction in California was proper "based on the 'effects' of [petitioners'] Florida conduct in California." Id. at 789; see also Restatement (Second) of Conflicts of Law § 37 ("A state has the power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable.").

c. Adaptation of Due Process to Mass Tort Context

Continued reliance on defendant-forum contacts as a precondition for the exercise of personal jurisdiction is, in any event, being abandoned as detrimental to the fair resolution of mass tort cases. Effective adjudication requires the presence of essentially all plaintiffs and all major defendants. The New York Civil Practice Law and Rules and the Federal Rules of Civil Procedure require that both the basic state jurisdictional

provisions and the federal jurisdictional provisions be construed to enhance litigation efficiencies. See, e.g., CPLR 104 ("The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil proceeding."); CPLR 301, 302 (jurisdictional bases); Fed. R. Civ. P. 1 (the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"); Fed. R. Civ. P. 4(k)(1)(A) ("jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located"). These goals are impeded by the requirement of a territorial nexus as a necessary prerequisite for the assertion of in personam jurisdiction.

Jurisdictional due process has evolved over time from a strict geographical sovereignty-based doctrine into one rooted in the protection of individual liberty interests. The idea of defendant-forum contacts as a jurisdictional prerequisite was developed in Pennoyer v. Neff, 95 U.S. 714 (1877). That case held that state courts could exercise personal jurisdiction only over those defendants who either consented to jurisdiction or were present in the state. This strict territorial nexus requirement was justified as a necessary accommodation of and check upon the sovereignty interests of the several states, id. at 722, and was held to be required by the Due Process Clause of

the Fourteenth Amendment, id. at 733. But see Borchers, The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again, 24 U.C. Davis L. Rev. 19, 38-43 (1990).

The doctrinal twists and turns necessitated by such a rigid conception of due process limits on personal jurisdiction ultimately culminated in the somewhat relaxed "minimum contacts" formulation of International Shoe Corp. v. Washington. See 326 U.S. 310, 316 (1945) ("due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The International Shoe Court grounded its due process test on considerations of both fairness and state sovereignty, see id. at 317 (the requirements of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there"), a dual justification which also finds expression in some subsequent Supreme Court cases. See, e.g., World-Wide Volkswagen Corp., 444 U.S. 286, 294 (1980), (characterizing the Due Process Clause as an "instrument of

interstate federalism that may sometimes act to divest the State of its power to render a valid judgment" even where other factors weigh strongly in favor of the exercise of jurisdiction); Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("[Due process] restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states.").

More recent Supreme Court case law appears to reject this restrictive territorial nexus view, positing the protection of individual liberty interests as the primary rationale for due process limits on personal jurisdiction. In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, for example, the Court stated:

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

456 U.S. at 702-03 (1982). The Court recognized that restrictions on state sovereignty described in earlier cases as an independent justification for jurisdictional limits,

> must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he

may otherwise be protected.

Id. at 703 n.10; see also Burger King, 471 U.S. at 471-72 & n.13 (jurisdictional due process protections serve to protect the liberty interests of the individual, rather than those of federalism); Keeton, 465 U.S. at 776 (characterizing the "state interest" element of the due process analysis as a "surrogate" for the individual's underlying liberty interests).

When jurisdictional due process is analyzed in terms of the protection of the liberty interests of absent defendants, retention of a defendant-forum territorial nexus as a jurisdictional prerequisite becomes difficult to justify. To the extent that individual liberty interests are protected by fair warning of possible assertions of jurisdiction, it is the forum state's jurisdictional law interpreted in light of the Due Process Clause, rather than defendant-forum contacts, which provides notice that a defendant should reasonably anticipate defending a suit in that state. See In re DES Cases, 789 F. Supp. at 557 and articles cited therein.

To the extent that the imposition of an undue burden on out-of-state defendants is a concern, it must be appreciated that defendant-forum contacts are a notoriously weak indicator of the inconvenience of being forced to litigate in a foreign forum. See id. at 585 ("Examples of the poor fit between territorial nexus and fairness are staples of first-year Civil Procedure.

The lack of a territorial nexus is often no indication of inconvenience . . . .”). The inadequacy of purely geographically based protections of absent defendants is even more apparent in the modern information age, in which technological developments have dramatically decreased the difficulties of long distance litigation. See, e.g., World-Wide Volkswagen, 444 U.S. at 293 (noting that the “fundamental transformation in the American economy,” first observed in McGee v. International Life Ins. Co., 355 U.S. at 222-23, as having made defending a suit in a foreign forum much less burdensome, “ha[s] only accelerated in the generation since that case was decided”); Metropolitan Life, 84 F.3d at 574 (“the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago”); In re DES Cases, 789 F. Supp. at 586 (modern transportation and communications technology “continue[] to ‘shrink’ the country”). In mass litigations, defendant-forum contacts are even less relevant to the question of a defendant’s burden and inconvenience:

> Mass tort suits typically are brought against groups of corporate defendants. In these cases the intuition linking territorial and convenience concerns -- that a defendant in a civil case must travel to the forum to defend him-, her- or itself -- is factually least plausible. As a rule, local counsel rather than defendants appear for motion and trial practice. Discovery need not and often will not take place in the forum. In federal court, moreover, discovery is subject to Federal Rule of Civil Procedure 26(b)(1)(iii), which now requires the district courts to take account of burdens on the parties in setting discovery parameters.

. . . .

> The actual litigation costs per case of defendants in mass cases is also likely to be lower than the costs to defendants appearing alone. To the extent permitted by professional ethical rules, defendants often can cooperate to defray cost by effecting a division of labor. Even where defendants do not explicitly cooperate, in many mass cases some defendants will rely on the work of the defendants with the greatest potential exposure in the case and therefore the greatest interest in litigating effectively. In almost all mass torts, much of the cost of litigation is eventually paid by national insurance companies.

789 F. Supp. at 586. Parallel protections already afforded defendants by the law of venue and forum non conveniens provide additional arguments against the retention of a territorial nexus requirement as a protection of individual liberty interests. See id., 789 F. Supp. at 552.

2. Reasonableness Analysis

Once minimum contacts have been determined to exist, the reasonableness of exercising jurisdiction must be assessed. The analysis entails the consideration of five factors: (1) the burden on the defendant, (2) the interest of the forum state in adjudicating the controversy, (3) the interest of the plaintiff in obtaining convenient and effective relief, (4) the interest of the interstate judicial system in obtaining the most efficient resolution of the dispute, and (5) the shared interest of the states in furthering fundamental social policies. See Asahi Metal Indus., 480 U.S. at 113; see also Burger King Corp., at 471 U.S. at 477; Worldwide Volkswagen Corp. v. Woodson, 444 U.S. at

286, 292 (1980).

Where personal jurisdiction is sought over an alien defendant, consideration of “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [state] court,” substitutes for the final two factors, and ”the Federal interest in Government’s foreign relations polices” also may be a factor. Asahi Metal Indus., 480 U.S. at 115.

B. Application of Law to Facts

Foreseeability or territorial nexus are not useful tests that BAT can rely upon in resisting personal jurisdiction. If the law holds, as it does here, that certain activities, wherever conducted, subject the doer to jurisdiction, then committing those acts makes amenability to jurisdiction foreseeable. Foreseeability in this case is merely a synonym for reasonableness, which in turn is defined in terms of the hardship to the prospective defendant, the needs of the plaintiffs and the interests of the forum in complete and efficient adjudication. Other factors include the interests of other nations in international commerce and comity. In this case the facts all point to forum jurisdiction over BAT.

1. Minimum Contacts

The evidence of BAT’s contacts with New York is more than sufficient to support the exercise of personal jurisdiction.

When BAT joined the alleged tobacco industry conspiracy it either knew or should have known that substantial acts in furtherance of it had already occurred in New York and more were likely to take place in that state. In view of the fact that a number of the large New York tobacco companies and the CTR were headquartered here, further New York conspiratorial conduct was foreseeable.

The requirement of "minimum contacts" is also satisfied by the New York effects of what could be construed as intentional and purposeful acts by BAT in furtherance of the alleged conspiracy to mislead and addict the plaintiffs. That BAT trained its sights on a larger, more diffuse target -- smokers and their families in all fifty states as opposed to only one -- does not render the test inapplicable. Calder's reasoning does not hinge on the fact that only one plaintiff living in only one state was involved. The main point of the case is the distinction between intentional and negligent wrongdoing for purposes of assessing minimum contacts. Where intentional misconduct is at issue, the wrongdoer should reasonably anticipate being called to answer for its conduct wherever the results of that conduct are felt.

Even were the traditional minimum territorial contacts standard to be applied in its most pristine and cramped version, the substantial harm produced in each of many potential fora permits exercise of jurisdiction in any of them. Cf. 28 U.S.C. §

1391(a) (venue in any district “in which a substantial part of the events or omissions giving rise to the claim occurred”). Once jurisdiction over part of the case and a defendant is acquired by a state, it is up to the state, not the defendant, to decide how much of the total controversy affecting other states and residents of other state it will try in one litigation. From the point of view of prospective litigants and the world at large, the United States court system is an integrated and cooperative entity. That the reality often does not measure up to that perception cannot be used as an excuse for a defendant’s utilization of jurisdiction theory to manipulate itself out of an effective litigation process.

2. Reasonableness

Reasonableness factors militate heavily in favor of the exercise of personal jurisdiction over BAT. First, no appreciable hardship is suffered by BAT’s defending in New York rather than in London. BAT is not some “mom and pop” tobacco shop in the suburbs of London, but a multibillion dollar international enterprise whose executives regularly traveled to New York seeking capital and for other business reasons. It has all the resources and connections providing capability of adequately defending this suit in New York with relative ease.

New York has a decided interest in a total resolution of related claims in one litigation against this defendant and

related defendants. The interest of all the plaintiffs, whether New Yorkers or non-New Yorkers, in obtaining convenient and effective relief is obvious. New Yorkers and other Americans should not be forced to sue some defendants in the United States and then sue others abroad, repeating the same evidence and theories at great expense and inconvenience.

Finally, the procedural and substantive policies of other nations whose interests are implicated by the exercise of jurisdiction in this country should be considered. See Asahi Metal Indus., 480 U.S. at 115 (where jurisdiction is sought over a defendant from outside the United States, World-Wide Volkswagen's injunction to consider the interests of the several states in the efficient judicial resolution of the controversy and the advancement of substantive policies "calls for the court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [state] court") (emphasis in original). These global interests are best assessed in the instant case by determining, to the extent practicable on this motion, whether the courts of other countries would be likely to deny jurisdiction on policy grounds over an American corporation alleged to have inflicted large-scale tortious injury in a way similar to BAT. A preliminary survey of the law in this area suggests that many United States trading partners would not deny

jurisdiction over an American version of BAT. See, e.g., Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette, Inc., 1 Q.B. 391 (1990) (Court of Appeal) (jurisdiction over American holding company was proper even though it "it carrie[d] on no business of its own"; "Bearing in mind the enormous size of the plaintiffs' claims against the London subsidiary and the very substantial costs of fighting the action which must have been appreciated, it would be surprising in the extreme if the parent company of the group had not been intimately concerned. The financial fate of the English subsidiary . . . in turn would affect D.L.J.'s accounts and the value of the group."); Code Civil, art. 14 (Fr.) ("An alien even if he does not reside in France, may be brought before a French tribunal for the enforcement of obligations into which he contracted in France with a Frenchman. In addition, he may be brought before a French tribunal for obligations into which he contracted in a foreign country with a Frenchman."); Henry P. de Vries & Andreas F. Lownfeld, Jurisdiction in Personal Actions: A Comparison of Civil Law Countries, 44 Iowa L. Rev. 306, 316-329 (1959) ("obligations" under Article 14 has been interpreted to cover tort actions); Christopher B. Kuner, Personal Jurisdiction Based on the Presence of Property in German Law: Past Present and Future, 5 Transnat'l L. 691 (1992); Takahashi v. The Reader's Digest Association, translated in 33 Japanese Annual of Int'l Law 199, 200-201 ("[A]ccording to the

assertion of the plaintiffs, the primary issue in this case will be whether the concealed purpose of the dissolution of the Japanese company is in fact to wreck the labor union. It is proper to suppose that the evidence[] on this issue and on the damage of the plaintiffs are to be found in Japan, where the plaintiffs and the process of the dissolution of the subsidiary is underway. Besides, considering that the defendant is a world-scale company and has a subsidiary in Japan, it is sufficiently possible for the defendant to prepare its defense through adequate attorneys in Japan."); Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters, art. 5(3) (statute covering member states of European Union; "A person domiciled in a Contracting State may, in another Contracting State, be sued . . . in matters relating to tort, delict, or quasi-delict, in the court of the place where the harmful event occurred); Bier v. Mines de Potasse d'Alsace, 1976 E.C.R. 1735 (the words "the place where the harmful event occurred" may mean "the place where the damage occurred (the place where the damage took place or became apparent)").

In sum, consideration of all factors bearing on the reasonableness of personal jurisdiction over BAT strongly favor its exercise. There is no persuasive argument of mutuality, of foreign policy, or of comity with other nations suggesting that jurisdiction should be denied in the instant case.

VI. Conclusion

The facts and law leave little doubt that there is personal jurisdiction over the defendant. Any other result would fly in the face of developing jurisdictional doctrine in this country and would, contrary to the policy of the Federal Rules of Civil Procedure and New York's CPLR, substantially increase the burdens of this litigation on all the other litigants. Considerations of fairness and due process support denial of defendant BAT's motion to dismiss for lack of personal jurisdiction.

SO ORDERED

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Jack B. Weinstein
United States Senior District Judge

Dated: Brooklyn, N.Y.
January 4, 2000