

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 97-CV-3432, Division 3

RESPONSE TO CTR'S SEPARATE SUPPLEMENTAL MOTION TO DISMISS

STATE OF COLORADO, ex rel. GALE A. NORTON, ATTORNEY GENERAL,

Plaintiff,

v.

R.J. REYNOLDS TOBACCO CO.; AMERICAN TOBACCO CO., INC.; BROWN & WILLIAMSON TOBACCO CORP.; LIGGETT GROUP INC.; LORILLARD TOBACCO COMPANY; PHILIP MORRIS, INC.; UNITED STATES TOBACCO CO.; B.A.T. INDUSTRIES, P.L.C.; THE COUNCIL FOR TOBACCO RESEARCH--U.S.A., INC.; and TOBACCO INSTITUTE, INC.,

Defendants.

Plaintiff the State of Colorado, ex rel. Gale A. Norton ("the State"), hereby responds to the Separate Supplemental Motion to Dismiss the Amended Complaint submitted by the Council for Tobacco Research -- USA, Inc. ("CTR") as follows:¹

INTRODUCTION

In this action the State is suing the seven largest domestic tobacco companies, the foreign parent company of defendant Brown & Williamson (collectively the "Tobacco Companies") and two industry trade associations, CTR and the Tobacco Institute ("TI"), for violating the Colorado Consumer

¹ CTR also joins in Certain Defendants' Motion to Dismiss Plaintiff's Amended Complaint, to which the State has filed a separate response (the "Response"). The arguments contained in the State's Response apply with equal force to CTR. Therefore, the State's Response to Certain Defendants' Motion to Dismiss is incorporated herein by reference.

Protection Act (“CCPA”) (§§ 6-1-101 through 307, C.R.S. (1997)), the Colorado Antitrust Act (“Antitrust Act”) (§§ 6-4-101 through 122, C.R.S. (1997)), the Colorado Abatement of Public Nuisance Act (the “Public Nuisance Act”) (§§ 16-13-301 through 316, C.R.S. (1997)) and the Colorado Organized Crime Control Act (“COCCA”) (§§ 18-17-101 through 109, C.R.S. (1997)).²

Defendant CTR has filed a separate supplemental motion to dismiss in order to argue that the State’s case has little to do with it. As explained below, this argument mischaracterizes the State’s Amended Complaint.

BACKGROUND

A. Statement Of Facts.

The Amended Complaint describes in detail an unlawful conspiracy which the defendants -- including CTR -- have engaged in over the course of four decades to mislead the public about the adverse health effects of tobacco and to suppress competition to develop safer products. The overarching conspiracy, which forms the basis for much of the State’s case, began in the early 1950s, after two health studies revealed that tobacco use caused cancer. (Amended Complaint ¶¶ 43-51). To counter the adverse publicity and declining stock prices which followed the announcement of these studies, the Tobacco Companies agreed to mount a public relations campaign to spread misleading and false information in order to minimize public concern about the health hazards and addictiveness of tobacco. (Amended Complaint ¶¶ 2, 3, 9, 12, 38, and 48-51). The Tobacco Companies also agreed

² In the following argument the Tobacco Companies and their trade associations are referred to

to refrain from competing with each other on the basis of safety because such competition had undermined public confidence in the safety of their products in the past. (Amended Complaint ¶¶ 2(d), 3, 11, 38, and 48-51).

CTR and its immediate predecessor, the Tobacco Industry Research Committee (“TIRC”), have long been the centerpiece of this overarching conspiracy. (Amended Complaint ¶¶ 2(b), 12-13, 32 and 52-55). CTR, TIRC and TI were formed by the Tobacco Companies to create the appearance that the industry’s representations concerning tobacco and health were supported by independent and objective scientific research. (Amended Complaint ¶¶ 2(b), 9, 12-13 and 52-55). In reality, CTR, TIRC and TI have been fronts for the Tobacco Companies to mislead the public. (Amended Complaint ¶¶ 9, 12-13, 32 and 64-71).

In furtherance of the defendants’ conspiracy, CTR and TIRC issued numerous false statements which were designed to mislead the public about the health risks of tobacco use. (Amended Complaint ¶¶ 9, 13, 32, 57-58, 61, 63 and 64-71). They also sponsored and concocted research that falsely suggested that there is no connection between tobacco and disease. (Amended Complaint ¶¶ 12-13, 32 and 64-71). Among the facts about tobacco and health that defendants actively suppressed from the public were the following: tobacco use causes cancer, (Amended Complaint ¶¶ 98-102, 103(b)-(d) and 106-108); nicotine is an addictive drug, (Amended Complaint ¶¶ 103(a), 104 and 109-114); the Tobacco Companies actively manipulated nicotine levels in tobacco products, (Amended Complaint ¶¶ 115-120); and added chemicals to tobacco to enhance the effects of nicotine. (Amended Complaint ¶

collectively as “the defendants.”

8). These representations, which were intentionally misleading, were calculated to gain the trust of the public. (Amended Complaint ¶¶ 63, 71).

The Tobacco Companies also used CTR and TIRC to suppress competition for customers on the basis of health related claims. (Amended Complaint ¶¶ 55, 64). By manipulating public perception of the health risks posed by tobacco use and by serving as a single voice on behalf of the tobacco industry on issues concerning tobacco and health, CTR and TIRC enabled the Tobacco Companies to stop competing, as they historically had, on the basis of health claims.

As a direct consequence of this public deception and restraint of competition, consumers have used and continue to use products that make them seriously ill and even kill them, and the State of Colorado has spent and will continue to spend millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of state employees, the indigent and other eligible persons. (Amended Complaint ¶¶ 16, 146-148, and 162). As an active, necessary and intended partner in these conspiracies, CTR is liable for the statutory violations alleged in this case.

B. The Legal Standard.

CTR brings this Separate Supplemental Motion to Dismiss under C.R.C.P. 12(b)(5). The legal standards applicable to the Court's review of this motion are the same as those set forth in the State's Response to the Motion of Certain Defendants' to Dismiss (the "Response"). In order to avoid undue repetition, the State hereby incorporates the legal standards set forth in the Response into this response by reference. (See Response, Section B pp. 5-6).

ARGUMENT

I. CTR IS LIABLE FOR ALL STATUTORY VIOLATIONS AS A CO-CONSPIRATOR

CTR contends that because the State uses the phrase “Tobacco Companies” in some of its claims for relief and in its prayer for relief, and because CTR is not included in the definition of such term, the State has failed to state a claim against CTR. (CTR Br. 1, 2-3, 4, and 6). There are two fundamental problems with this argument. The first is that Colorado is a notice pleading state (see C.R.C.P. 8(a)) and numerous specific allegations concerning CTR’s unlawful conduct appear throughout the Amended Complaint. These allegations are more than sufficient to put CTR on notice of the State’s claims against it.³

The second problem with CTR’s argument in this regard is that it overlooks the conspiracy allegations which appear throughout the Amended Complaint. CTR is liable as a co-conspirator for all of the statutory violations alleged.

It is well established under Colorado law that a co-conspirator is liable for acts committed in furtherance of a conspiracy, even if he did not commit the specific act. Morrison v. Goodspeed, 68 P.2d 458, 464 (Colo. 1937); Western Homes, Inc. v. District Court, 296 P.2d 460, 464 (Colo. 1956). Furthermore, joint and several liability may be imposed on a co-conspirator for all acts committed in

³ As discussed in the Statement of Facts, the State has specifically alleged -- and such allegations must be accepted as true for purposes of CTR’s motion to dismiss -- that the defendants conspired to deceive the public about tobacco’s health risks and to suppress competition. The State has further alleged that CTR was an integral part of this overarching conspiracy.

furtherance of a conspiracy. Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977, 1005-1006 (Colo. 1951); Morrison, 68 P.2d at 464; § 13-21-111.5(4), C.R.S (1997).

It is not necessary that all defendants participate in all aspects of a conspiracy. Western Homes, 296 P.2d at 464. Rather, all that needs to be shown to hold a co-conspirator liable for a statutory violation is that: (1) there was an object to be accomplished; (2) a meeting of the minds between two or more persons on the object or the course of action; (3) an unlawful overt act; and (4) damages as a proximate result. Nelson v. Elway, 908 P.2d 102, 106 (Colo. 1995); Morrison, 68 P.2d at 464.

Here, the State has alleged that CTR not only knew of the Tobacco Companies' conspiracy, but that it was the vehicle that the Tobacco Companies used to perpetrate acts in furtherance of the conspiracy. Moreover, the State has further alleged that CTR and the other defendants committed unlawful overt acts in furtherance of the conspiracy through their numerous false public statements and that damages resulted from this conspiracy. Such allegations are plainly sufficient to state a claim against CTR in its capacity as a participant in the overarching conspiracy which has given rise to the State's claims. See Amended Complaint ¶35.

Finally, the remedy for CTR's definitional concern, if one is needed, is to allow the State leave to amend its Complaint to specifically identify CTR by name in the relevant claims and in the prayer for relief.

II. CLAIMS FOR RELIEF HAVE BEEN ADEQUATELY ASSERTED AGAINST CTR FOR EACH OF THE STATUTORY VIOLATIONS ALLEGED

A. The CCPA Applies To CTR.

CTR argues that the CCPA does not apply to it because the State has not alleged that CTR “sold or advertised tobacco products,” “dealt with the public,” or “tried to attract customers.” (CTR Br. at 3). There is no such requirement under the CCPA.

Courts take an expansive approach when interpreting the CCPA. May Dept. Stores Co. v. State ex rel. Woodard, 863 P.2d 967, 973 n.10 (Colo. 1993). The CCPA was enacted to control various deceptive trade practices in dealing with the public and to provide “prompt, economical, and readily available remedies against consumer fraud.” May Dept. Stores Co., 863 P.2d at 972; People ex rel. McFarlane v. Alpert Corp., 660 P.2d 1295, 1297 (Colo. App. 1982). Thus, when interpreting a provision of the CCPA, the entire statute must be considered, as must the statute’s overall legislative purpose. May Dept. Stores Co., 863 P.2d at 973 n.10.

The CCPA lists numerous acts which are considered deceptive trade practices. § 6-1-105(1), C.R.S. (1997). Under the CCPA’s civil penalty and damage provisions, any person “who violates or causes another to violate” these provisions or “has engaged in or causes another to engage in any deceptive trade practice” is liable under the CCPA. §§ 6-1-112 and 6-1-113, C.R.S. (1997). There is absolutely nothing in the CCPA which limits its scope to manufacturers, sellers, advertisers or other persons who attempt to attract customers. See §§ 6-1-105, 6-1-112 and 6-1-113, C.R.S. Indeed, the scope of the CCPA is so broad that liability attaches not only to those who directly violate its

provisions, but to any person who causes another to do so. This expansive language demonstrates that the CCPA is intended to reach any person who engages in a deceptive trade practice.

Here, the State has alleged that CTR directly violated subsections 6-1-105(1)(c), (e), (g) and (u), C.R.S. by disseminating false and misleading information about tobacco and health and by falsely holding itself out as an independent research organization.

These allegations -- which expressly implicate CTR in the dissemination of false and misleading information -- are sufficient to state a claim against CTR for violating the CCPA. Accordingly, CTR's argument concerning the State's CCPA claims must fail.

B. The Antitrust Act Applies To CTR.

CTR next argues that the State cannot properly allege a claim under the Antitrust Act against it because CTR has not "engaged in trade or commerce" and "does not manufacture, sell, or advertise any product or services." (CTR Br. at 4, 6). CTR has misconstrued the requirements of the Antitrust Act.

The Antitrust Act, like the Sherman Act, prohibits all contracts, combinations or conspiracies in restraint of trade or commerce. § 6-4-104, C.R.S. (1997); 15 U.S.C. § 1. Contrary to CTR's suggestion, the antitrust laws have never been limited in their scope to manufacturers and sellers of products. To the contrary, the Supreme Court has repeatedly recognized that other types of entities, including trade associations like CTR, can engage in anticompetitive conduct. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (recognizing that standard setting trade associations have the "serious potential for anticompetitive harm"); American Society of Mechanical

Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) (the opportunities are “rife” for an association to engage in anticompetitive conduct); National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978) (professional association held liable); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (same); Sugar Inst. v. United States, 297 U.S. 553, 599-600 (1936) (same).

CTR’s argument that the Antitrust Act does not apply to it because it is not engaged in trade or commerce is equally unpersuasive. The trade or commerce requirement of the Antitrust Act is not as narrow as CTR suggests. The phrase “trade or commerce” must be broadly construed, People v. North Ave. Furn. and Appl., Inc., 645 P.2d 1291, 1296 (Colo. 1982), “to embrace the widest array of conduct possible.” United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975)).

Although non-profit corporations which are engaged in purely non-commercial activities are not typically subject to the antitrust law, this exception is narrowly circumscribed. Brown Univ., 5 F.3d at 665-66. Where, as here, a non-profit organization engages in commercial activity, the antitrust laws apply. Id. In determining whether an activity is commercial, a court must analyze the nature of the conduct in light of the totality of the surrounding circumstances. Id., at 666. In this analysis, the court’s “principal focus must be on the nature of the activity, rather than the form or objective of the organization.” Hamilton Ch. of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 64 (2d Cir. 1997).⁴

⁴ In addition, an anticompetitive motive may trigger antitrust scrutiny even if the conduct is otherwise non-commercial. Brown, 5 F.3d at 666 n.7.

Here, the State alleges that CTR and TIRC were created for the purpose of manipulating public perception to allow the Tobacco Companies to suppress competition for safer tobacco products. CTR's and TIRC's activities were directed at the quintessentially commercial purpose of tobacco marketing. The fact that they are non-profit corporations and did not actually manufacture or sell the products is irrelevant. The totality of the surrounding circumstances demonstrates that their conduct was directed at a purely commercial purpose.⁵

Moreover, the cases on which CTR relies to argue that it is engaged in non-commercial activity are inapplicable. (CTR. Br., at 4-6.) In each case, the defendant was dedicated exclusively to some form of political, charitable or social activity. See DELTA v. Humane Society, 50 F.3d 710 (9th Cir. 1995) (nonprofit animal rescue organization); NOW v. Scheidler, 968 F.2d 612 (7th Cir. 1992), rev'd on other grounds 510 U.S. 249 (1994) (anti-abortion group); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (women's rights organization); Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (nonprofit educational association for accrediting colleges); Virginia Vermiculite v. W.R. Grace & Co., 965 F. Supp. 802 (W.D. Va. 1997) (nonprofit land and historic preservation organization). The same cannot be said of CTR, the very purpose of which is directed at commercial activity.

Finally, if CTR's conduct can somehow be described as non-commercial, CTR is still liable under the Antitrust Act by virtue of its participation in the conspiracy to restrain trade. The Supreme

Court has expressly held that a party which is otherwise exempt from the antitrust laws, forfeits this exemption by acting in concert with a nonexempt party. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). Because CTR conspired with the Tobacco Companies -- which are clearly not entitled to any form of exemption -- any protection from antitrust liability that CTR even arguably might have had has been lost.

The relevant inquiry under the Antitrust Act is whether the defendants conspired to unreasonably restrain trade. Standard Oil Co. v. United States, 221 U.S. 1, 60-61 (1911). As part of its antitrust claim, the State has alleged that CTR was a central participant in the unlawful conspiracy to suppress competition on the basis of the safety of tobacco products. These allegations, which must be accepted as true for purposes of CTR's motion, are sufficient to allege an antitrust claim against CTR. Accordingly, CTR's request that the State's Fifth Claim for Relief be dismissed against it must be denied.

C. The State Has Sufficiently Pled CTR's Involvement In Creating A Public Nuisance.

CTR argues that the State's public nuisance claims against it must be dismissed because: (1) the State has not specifically mentioned CTR by name in its Sixth and Seventh Claims for Relief and (2) the

⁵ Furthermore, even if it can be argued that they engaged in non-commercial activity, their patently anticompetitive motive subjects them to antitrust scrutiny. Brown Univ., 5 F.3d at 666 n.7.

State has not alleged that CTR sold or advertised tobacco products to minors. (CTR Br. at 6).⁶ For the reasons set forth below, these arguments are unavailing.

The State has alleged CTR's role in the overarching conspiracy to mislead the public about the health and safety of tobacco and to restrain competition into the development and marketing of safer tobacco products in extraordinary detail in its 196 paragraph Amended Complaint. As a logical outgrowth of this conspiracy, the defendants presented tobacco to the public in an attractive and positive way, by means of images which were calculated to appeal to young people. (Amended Complaint ¶¶ 2(b), 38, 63, 128-145). Without CTR's assistance in lending an air of "objective" scientific legitimacy to the tobacco industry's views regarding tobacco and health, their efforts to market tobacco to youths would not have been successful. As a co-conspirator, CTR is liable under the Public Nuisance Act.

The fact that CTR is not mentioned by name in the Sixth Claim for Relief is of little consequence since CTR is clearly implicated by the exhaustive facts alleged in the Amended Complaint.

Finally, CTR is incorrect in suggesting that the State must show that CTR illegally targeted minors for tobacco marketing and advertising in order to state a class 3 public nuisance claim. Any conduct deemed illegal under Colorado law may support a class 3 public nuisance claim. § 16-13-305(1)(a), C.R.S. The Sixth Claim for Relief expressly incorporates all of the previous allegations set forth in the Amended Complaint. (See Amended Complaint ¶186). Such allegations describe how the

⁶ The Amended Complaint does not allege that CTR engaged in a class 1 public nuisance act. (Amended Complaint, Seventh Claim for Relief, ¶¶ 190-192). The State, of course, reserves its right to seek to assert such a claim for relief against CTR at a later date if discovery reveals that CTR engaged in conduct actionable as a class 1 public nuisance.

defendants violated the CCPA, the Antitrust Act and COCCA. Having alleged that CTR was a co-conspirator in numerous and varied activities carried out in violation of Colorado law, the State has properly stated a class 3 public nuisance claim against CTR.

D. The State Has Sufficiently Pled CTR's Role As A Participant In Conducting A Pattern Of Racketeering Activity.

CTR's final argument is that the State's COCCA claims against it should be dismissed because the State has failed to plead the predicate acts supporting these claims with particularity. This argument must be rejected. The underlying predicate acts of mail and wire fraud alleged in the Amended Complaint have been pled with particularity.⁷

To state a claim under COCCA, a complaint must describe a defendant's pattern of racketeering. That is, that the defendant engaged in two acts of racketeering activity that are related to the conduct of an enterprise. § 18-17-103(3), C.R.S.; People v. Chaussee, 880 P.2d 749, 758 (Colo. 1994). Racketeering activity consists of violations of certain state and federal statutes, referred to as predicate acts. New Crawford Valley, Ltd. v. Benedict, 877 P.2d 1363, 1371 (Colo. App. 1993).

In this action, the State has alleged that CTR, along with the other defendants, engaged in a pattern of racketeering activities by repeatedly violating two federal criminal statutes -- mail fraud, (18 U.S.C. § 1341), and wire fraud, (18 U.S.C. § 1343). (Amended Complaint ¶ 157). The elements of mail fraud are: (1) a scheme to defraud; and (2) a mailing made for the purpose of executing the scheme. Schmuck v. United States, 489 U.S. 705, 710 (1989). The elements of wire fraud are almost

identical to mail fraud, with the only difference being that the fraudulent scheme must be facilitated by an interstate wire communication, typically by telephone, radio or television. 18 U.S. C. § 1343.

CTR correctly points out that if the acts underlying a plaintiff's COCCA claim are fraudulent acts, then the attendant circumstances must be pled with the particularity required by C.R.C.P. 9(b). New Crawford, 877 P.2d at 1371. The Amended Complaint meets this standard because it describes clearly and in detail the ongoing fraudulent schemes that the defendants, including CTR, utilized to market tobacco products and to maximize the tobacco industry's profits. The Amended Complaint specifically describes the defendants coordinated efforts, beginning in 1953, to form an enterprise comprised of the Tobacco Companies, a public relations firm and TIRC to disseminate misleading information about the health hazards of tobacco. (Amended Complaint, ¶¶ 9, 12-14, and 51-53). CTR and TIRC were central players in this conspiracy to defraud. The 196-paragraph Amended Complaint contains multiple references to specific false and misleading representations CTR and TIRC made to deceive the public. (Amended Complaint ¶¶ 2, 4, 12, 13, 32, 51-55, 57-58, 61, 64-71, and 154).

For instance, the Amended Complaint details the false and misleading statements contained in the January 4, 1954 "Frank Statement" sponsored by CTR and TIRC, and how publication of the Frank Statement was facilitated through use of the United States mail and interstate wire communications. (Amended Complaint ¶ 157). Such allegations, standing alone, are sufficient to state a COCCA claim against CTR.

⁷ The State's Response explains in detail that the COCCA predicate acts have been pled with particularity. (See Response, Section V.B., pp. 53-55). The recitation of facts set forth above highlights

However, the specific allegations of defendants' mail and wire fraud go well beyond the Frank Statement. The Amended Complaint also describes in detail other public representations made by all members of the COCCA enterprise that were facilitated through the mail and interstate wire communications, which were false and designed to mislead the public about the health risks of tobacco. (See Amended Complaint ¶¶ 59-71, 90-91 100, 109-114, 120-121, and 157). Among the facts misrepresented and concealed by the defendants were that: independent research found no link between smoking and disease (Amended Complaint ¶¶ 60-63, 100); TIRC and CTR were independent entities and dedicated to sponsoring objective research on tobacco and health (Amended Complaint ¶¶ 64-71); a safer cigarette could not be developed (Amended Complaint ¶¶ 90-91); nicotine was not addictive, and the Tobacco Companies did not manipulate the nicotine level of cigarettes (Amended Complaint ¶¶ 109-114, 120-121).⁸

These specific allegations of mail and wire fraud constitute a pattern of racketeering activity from which defendants derived proceeds for use in their enterprise. (Amended Complaint ¶¶ 154-160). As a result of this conduct, the State has incurred and will continue to incur millions of dollars each year in increased health care costs to treat tobacco related illnesses. (Amended Complaint, ¶ 163). These allegations are sufficiently specific to support the State's COCCA claims against CTR.

CTR also argues that the State's COCCA claims must be dismissed against it, because the State has not alleged that it relied upon the fraudulent statements or omissions made in furtherance of

CTRs and TIRCs involvement in this scheme to defraud.

⁸ Even if CTR and TIRC did not make some of these statements, they are imputed to them as co-conspirators in the scheme to defraud the public. See Section I, supra, pp. 5-6.

their conspiracy. (CTR Br. at 7). To assert a claim for damages under RICO,⁹ where the alleged predicate acts are mail or wire fraud, the plaintiff must establish detrimental reliance upon the allegedly fraudulent statements. Brandenburg v. Seidel, 859 F.2d 1179, 1188 (4th Cir. 1988); Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969, 972 (S.D.N.Y. 1989). However, while detrimental reliance is required, such reliance need not be that of the plaintiff. Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 482 (5th Cir. 1986). A plaintiff may assert claims under RICO for injuries caused by predicate acts of mail or wire fraud, even where the person actually deceived by the fraud was a third party. Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995); Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir. 1994), cert. denied, 513 U.S. 931 (1994); Prudential Ins. Co. of America v. United States Gypsum Co., 828 F. Supp. 287 (D.N.J. 1993).

In the present case, the State has unequivocally alleged detrimental reliance. Specifically, the State has alleged that the defendants intended for the public to rely on these false statements and that the public relied to its detriment on these misrepresentations. (Amended Complaint ¶¶ 58, 63). The State has further alleged that as a result of such conduct, tobacco users have become seriously ill and have died and the State has incurred millions of dollars in increased health care costs.

Because the State has adequately pled the necessary predicate acts under COCCA, as well as detrimental reliance, CTR's motion to dismiss the State's claims for damages under COCCA must be denied.

⁹ As Colorado courts have not yet spoken on the issue of standing and detrimental reliance under COCCA, federal cases interpreting RICO are instructive. See New Crawford, 877 P.2d at 1370.

CONCLUSION

For all of the reasons set forth above, CTR's Separate Supplemental Motion to Dismiss must be denied.

Respectfully submitted this 20th day of March, 1998.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONSE TO CTR'S SEPARATE SUPPLEMENTAL MOTION TO DISMISS** upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 20th day of March 1998, addressed as follows:

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