

Company, Inc. (“Lorillard”); Liggett & Myers Tobacco Company (“Liggett”); Liggett Group Inc. (“Liggett Group”); and United States Tobacco Company (“UST”) (collectively, “Tobacco Companies”). (Compl. ¶¶ 17-27.) The second category comprises non-profit organizations which purport to support objective research, but which allegedly operate as public relations and lobbying arms, agents, and employees of the Tobacco Companies: the Tobacco Institute, Inc. (“Tobacco Institute”); the Council for Tobacco Research - U.S.A., Inc. (“CTR”); and Smokeless Tobacco Council, Inc. (“STC”). (Compl. ¶¶ 28-30.) The third category comprises only one Defendant, Hill & Knowlton, Inc. (“H&K”), a public relations firm. (Compl. ¶ 31.) Each of the Defendants is sued as a primary violator, aider and abettor, and co-conspirator, and they are collectively called herein “Defendants,” or “Tobacco Industry.” (Compl. ¶¶ 32-34.) The term “mentholated tobacco products” refers to mentholated cigarettes and mentholated smokeless tobacco, such as mentholated chewing tobacco and snuff. (Compl. ¶ 35.)

In their Second Amended Complaint (“Complaint”), Plaintiffs allege that Defendants have for many years targeted African Americans and their communities with specific advertising to lure them into using mentholated tobacco products, and each year, they spend millions of dollars on advertising designed exclusively to appeal to African Americans. (Compl. ¶ 6.) Plaintiffs further allege that consumer publications oriented toward African Americans such as Jet and Ebony magazines and the Philadelphia Tribune newspaper receive proportionately more revenue from Defendants than do other consumer publications. (Compl. ¶ 44.) Similarly, Plaintiffs allege that low income African American communities in major United States cities have more tobacco billboards than do neighboring more affluent white communities. (Id.) Plaintiffs claim that Defendants have also developed “designer” products specifically targeting African American consumers, such as a high tar, high nicotine, mentholated cigarette called “Uptown,” a product that was withdrawn in 1990

in the wake of negative national publicity. (Id. ¶¶ 45, 51.) In the late 1970's an advertising agency stated: “While Blacks represent only 10.3% of the total U.S. population, they account for 18% of all smokers and 31% of all menthol smokers.”¹ (Id. ¶. 52.)

A recently released Report of the Surgeon General entitled, “Tobacco Use Among U.S. Racial/Ethnic Groups” documents the targeting of the African American community by Defendants (id. ¶ 51.), and Plaintiffs quote it extensively, especially its Appendix, which is entitled, “A Brief History of Tobacco Advertising Targeting African Americans.” (Id. ¶¶ 51, 52.) Plaintiffs allege that, as part of its overall scheme, the Tobacco Industry intentionally replaces thousands of African American users who die each year by unfairly and illegally targeting young African Americans on the basis of their race. (Id. ¶ 53.) Plaintiffs allege that African American daily smokers begin smoking when they are young: 82% of them had their first cigarette before the age of 18, 62% before the age of 15, and 32% before the age of 14. “Thus, a Black person who does not begin smoking in childhood or adolescence is unlikely ever to begin,” and the younger an African American person begins to smoke, the more likely he or she is to become a heavy smoker, and to die of lung cancer. (Id. ¶¶ 53, 54.) Over half of the African American teenaged smokers have made a serious effort to stop smoking, but have failed. Smoking among African American children and teens is on the rise, and a National Institute of Drug Abuse study found that, between 1991 and 1994, smoking among eighth graders had increased by 30%. (Id. ¶¶ 55, 56.)

¹ Elsewhere in the Complaint, Plaintiffs cite incompatible figures. They note that a 1982 Brown and Williamson survey stated that, while African Americans' market share for tobacco products in the United States is 10%, their market share for mentholated tobacco products is 61.5%. (Compl. ¶ 45.) It appears, however, that Plaintiffs accept the figure of approximately 30%. At oral argument, Defendant said several times that Plaintiffs conceded in their Complaint that the majority of users of mentholated cigarettes are white. (Tr. at 6, 8.) Plaintiffs did not contest that statement. In addition, Plaintiffs' counsel stated that, “[w]hile the black community may represent 10 percent of the smokers in this country, they represent over 30 percent of the menthol smokers in this country.” (Tr. at 32.)

Cigarettes are among the most promoted consumer products in the United States. Plaintiffs allege that spending on cigarette advertising and promotion in this country rose from \$4 billion in 1990 to more than \$6 billion in 1993. (Id. ¶ 57.) Plaintiffs allege that the proffered reason for this advertising is to maintain brand loyalty, and further that while Defendants claim no role in encouraging adolescents to experiment with tobacco use, their use of a cartoon character, Joe Camel, which is as familiar to six-year old African American children as Mickey Mouse and which has caused a dramatic surge in the popularity of Camel mentholated cigarettes among African American teenagers, illustrates Defendants' targeting of minors. (Id. ¶ 58, 59.) The Surgeon General's Report concluded that, "Among Adolescents, cigarette smoking prevalence increased in the 1990's among African Americans after several years of substantial decline among adolescents." (Id.) ¶ 63.

Plaintiffs allege that Defendants pursued a course of intentional conduct and a conspiracy of deception and misrepresentation against the African American public to promote and maintain sales of mentholated tobacco products in order to maximize the profits therefrom. (Id. ¶ 67.) The alleged conspiracy consists of three strategies: (1) acting in concert to represent falsely that their mentholated tobacco products are safe for African Americans to use; (2) engaging in a concerted campaign to saturate the African American community with dangerous, defective and hazardous products which they know cause harm, in violation of the civil and Constitutional rights of African Americans; and (3) misrepresenting, suppressing, distorting, and confusing the truth about the health dangers of mentholated tobacco products. (Id. ¶ 68.)

Plaintiffs further describe the health effects of smoking on African Americans. Plaintiffs allege that smoking-related illnesses account for one of every five deaths of African Americans each year in the United States. (Id. ¶ 75.) Similarly, Plaintiffs allege that cigarette smoking causes more than 85% of all lung cancer, which is now the primary cause of death from cancer among African

American women. (Id. ¶ 76.) Plaintiffs claim that the health consequences of smoking among African American women are of special concern because of the negative effects on reproduction. (Id. ¶ 79.) Finally, Plaintiffs allege that 66% of all African American smokers smoke mentholated cigarettes, which are more harmful than non-mentholated cigarettes.² (Id. ¶ 80-87.)

In their Complaint, Plaintiffs describe Defendants' response to the body of scientific literature that began to emerge in the 1940's suggesting the relationship between smoking and health problems. Plaintiffs allege that Defendants saw the problem as one of public relations rather than of public health, and that they developed a program to counter the effects of the scientific reports. Plaintiffs allege that the Tobacco Industry's plan was to fund research through the Tobacco Industry Research Committee, and later the Counsel for Tobacco Research, which purported to be unbiased, independent, and scientific, but which masked Defendants' knowledge that smoking was harmful and often lethal. (Id. ¶¶ 92-134.)

Plaintiffs allege that one method of hiding negative research findings suggested by Brown & Williamson's counsel general called the “deadwood” method consisted of declaring some of the company's biological research “deadwood” and shipping it to England. Plaintiffs allege that Counsel recommended that no notes, memos, or lists be made about the documents. In addition, scientific documents were stamped “attorney/client, work product,” even though they were not prepared in anticipation of litigation. (Id. ¶¶ 135-36.) Plaintiffs allege that Defendant Brown & Williamson developed this method to avoid discovery in personal injury lawsuits.

Similarly, Defendant Reynolds allegedly disbanded a research project and fired all the scientists because the project was revealing the mechanism by which smoking caused emphysema.

²Plaintiffs allege that mentholated cigarettes cause users to sustain higher serum nicotine level than non-mentholated cigarettes; such smokers suffer more of the adverse effects of nicotine and, in addition, are exposed to the highly toxic substance of menthol. (Compl. ¶81-82).

To date, the research has not been disclosed. (Id. ¶¶ 137-39.) Plaintiffs allege that the Tobacco Companies knew how to make less harmful cigarette, but they kept the knowledge secret and failed to market the prototype cigarettes developed on the basis of this information. (Id. ¶¶ 140-54.) Likewise, Plaintiffs allege that the Tobacco Industry did not want to compromise its consistent position that there was no alternative design for cigarettes. (Id. ¶ 162.)

According to Plaintiffs, tobacco companies understood early on that nicotine was the key to their success. (Id. ¶ 155.) Plaintiffs claim that Philip Morris internal reports characterized the cigarette pack as “a storage container for a day's supply of nicotine.” (Id. ¶ 156.) Despite their extensive knowledge of the harmful properties of nicotine and menthol and the critical role of those substances in smoking, Plaintiffs contend that the Tobacco Companies have to this day concealed their knowledge from the public and public health officials. (Id. ¶ 159.) Plaintiffs further allege that the Tobacco Companies have long understood that reducing or eliminating nicotine from tobacco products would hurt sales; therefore, instead of reducing the amount of nicotine in the products, Plaintiffs claim that the Tobacco Companies tried to develop ostensibly safer ways of delivering nicotine, such as adding more nicotine and masking its harsh taste with higher amounts of menthol. (Id. ¶ 160.)

Plaintiffs allege that the Tobacco Companies adjust the amount of menthol to mask the harsh flavor of cigarettes high in nicotine content. The Tobacco Industry also allegedly controlled the nicotine content of their products through selective breeding of tobacco plants, increasing nicotine levels in the most widely grown American tobaccos from 10 to 50 % between 1955 and 1980. (Id. ¶ 172.) Brown & Williamson allegedly doubled the amount of nicotine occurring naturally in cured tobacco by selective breeding, and took out a Brazilian patent on the plant, although the company initially tried to hide the plant from federal investigators. (Id. ¶¶ 165, 170.)

In addition to breeding tobacco with increased levels of nicotine, Plaintiffs allege that the Tobacco Companies have found other ways to manipulate the level of nicotine smokers receive when smoking a cigarette. For example, Plaintiffs contend that the Tobacco Companies have added several ammonia compounds during the manufacturing process knowing that those compounds almost double the nicotine transfer efficiency of cigarettes, while denying that the compounds had that effect. (Id. ¶¶ 173-73.) The Tobacco Companies allegedly have the ability to remove all or virtually all of the nicotine from their tobacco products using technology now in existence. (Id. ¶¶ 172-79.)

The Complaint alleges that the Tobacco Companies intentionally deceived smokers in their marketing of “light” mentholated or low-tar and low-nicotine mentholated cigarettes. Those cigarettes allegedly have higher concentrations of nicotine, by weight, than non-light cigarettes. (Id. ¶¶ 183, 191.) For example, Plaintiffs claim that the Tobacco Companies designed a technique called filter ventilation in which the filters are porous, ostensibly to allow tars and nicotine to escape before reaching the smoker's lungs, and that is the result shown when measured by the Federal Trade Commission's (“FTC”) smoking machines. However, Tobacco Companies allegedly know that smokers manipulate the amount of nicotine they received by covering ventilation holes or taking longer puffs in order to meet their own nicotine requirements. (Id. ¶¶ 184-86.) Plaintiffs further claim that the use of ammonia also reduces the FTC-measured nicotine, although not the amount that smokers receive. (Id. ¶ 188.) Finally, in making low tar cigarettes, Plaintiffs allege that the Tobacco Industry uses tobacco with a higher nicotine content. (Id. ¶ 189.)

With respect to relevant statutes of limitations, Plaintiffs contend that Defendants' intentional acts of fraudulent concealment tolled any such statutes. Until 1997, when Defendants released some thirty-nine thousand documents, Plaintiffs were not aware of the successful concealment of a

massive conspiracy to mislead the American public regarding the safety of mentholated tobacco products and the Tobacco Companies' successful effort to conceal the defective, harmful and hazardous nature of those products. Upon release to the public of the Surgeon General's Report in 1998, the African American public realized for the first time the true extent of the Industry's pattern of targeting the African American community with mentholated tobacco products and the harmful health effects of those defective products on Plaintiffs and the proposed class members. (Id. ¶¶ 193-94.) In the alternative, Plaintiffs argue that Defendants are estopped from relying on any statutes of limitations because of their fraudulent concealment. (Id. ¶ 195.)

Plaintiffs bring this action pursuant to four civil rights statutes, 42 U.S.C.A. §§ 1981, 1982, 1983, and 1985. Plaintiffs seek class certification, and injunctive and declaratory relief

(a) [r]equiring Defendants to disclose, disseminate, and publish all research previously[] conducted directly or indirectly by themselves and their respective agents affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to Black menthol smokers and issues of smoking and health of Blacks;

(b)[r]equiring Defendants to immediately cease and desist from either manufacturing, selling, or promoting menthol tobacco products and the targeting of such products to Black Americans[;]

(c) [r]equiring Defendants to cease advertising and promotion campaigns that target and attract Blacks to begin smoking menthol tobacco products; [and]

(d) [e]njoining Defendants and their respective successors, agents, servants, officers, directors, employees and all persons acting in concert with them, directly or indirectly, from engaging in conduct violative of 42 U.S.C. Sections 1981, 1982, 1983, and 1985(3).

(Id. Prayer for Relief.) In addition, Plaintiffs seek punitive damages. Plaintiffs, however, do not seek compensatory damages.

II. LEGAL STANDARD

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In considering such a motion, a court must accept all of the facts alleged in the complaint as true and must liberally construe the complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The question is not whether the plaintiff will ultimately prevail, but whether he is entitled to present evidence in support of his claims. Scheuer v. Rhodes, 416 U.S. at 236, 94 S. Ct. at 1686.

III. DISCUSSION

Defendants move to dismiss on several grounds³. First, Defendants argue that neither Section 1981 or 1982 prohibit discriminatory advertising. Defendants further argue that Plaintiffs have not alleged the deprivation of any interest protected by these statutes. Furthermore, with respect to Plaintiffs's Section 1983 Claim, Defendants contend that Plaintiffs have failed to allege sufficient governmental action. The Court will address each argument in turn.

A. COUNTS I AND II

In Count I, Plaintiffs bring a claim pursuant to 42 U.S.C. §1981. Section 1981 provides in relevant part as follows:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

³As a preliminary matter, Defendants raise a question of standing. In a footnote, Defendants argue that the Complaint should be dismissed because no named Plaintiff has standing: the Complaint fails to allege that any of the individuals were African Americans or that they used tobacco products. (Def. Mem. p. 8 n.6). In response, Plaintiffs note that they identified themselves as African Americans in the first numbered paragraph of the Complaint. There, they state that Defendants conspired to deceive “Black Americans including Plaintiffs and the Class” regarding the dangers of mentholated tobacco products. (Compl. ¶ 1.) With respect to the question whether the named Plaintiffs had ever purchased or used mentholated tobacco products, Plaintiffs attached affidavits to their Response to the Motion to Dismiss indicating that they had. The Supreme Court has stated that,

for purposes of a motion to dismiss, . . . it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Warth v. Seldin, 422 U.S. 490, 501 (1975). In Warth v. Seldin, the trial court had allowed the plaintiffs to submit affidavits relating to standing in response to the defendants' motion to dismiss. See id. at 504 n. 14. The Court finds that Plaintiffs' affidavits sufficiently demonstrate standing.

42 U.S.C. §1981. To state a claim under Section 1981, a plaintiff must allege (1) that he is a member of a racially cognizable group; (2) the defendant's intention to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute, that is, making and enforcing contracts. Wood v. Cohen, Civ. A. Nos. 96-3707, 97-1548, 1998 WL 88387, *5 (E.D. Pa. Mar. 2, 1998)(Padova, J.). In Count I, Plaintiffs allege that

[t]he Tobacco Companies' discriminatory targeting of menthol tobacco product sales to Black American[s] impairs the ability of Plaintiffs and the Class to make contractual arrangements for the sale and purchase of tobacco products and violates Section 1981 because of the intentionally discriminatory nature of the Tobacco Companies' policies and practices.

(Compl. ¶ 200.) In Count II, Plaintiffs bring a claim under 42 U.S.C. §1982 which provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C.A. § 1982. To state a claim under Section 1982, a plaintiff must allege an intent to discriminate on the basis of race with respect to property rights. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). In Count II, Plaintiffs alleges that

The Tobacco Companies' discriminatory targeting of menthol tobacco product sales to Black Americans denies the contractual rights of Plaintiffs and the Class to express and implied warranties of fitness for use and consumption in the sale and purchase of tobacco products and violates Section 1982 because of the intentionally discriminatory nature of the Tobacco Companies' policies and practices in the sale and distribution of menthol tobacco products to Black Americans.

(Compl. ¶ 204.)

Defendants advance related arguments concerning Plaintiffs' claims under Sections 1981 and 1982. First, Defendants contend that neither section provides a remedy for discriminatory advertising practices. Similarly, Defendants submit that Plaintiffs have failed to allege a deprivation of either

contractual rights protected under Section 1981, or property rights protected under Section 1982. Finally, Defendants argue that Plaintiffs have not pleaded intentional racial discrimination.

Several cases have considered whether discriminatory advertising claims are cognizable under Sections 1981 and 1982. These courts have uniformly held that such claims are not actionable under these statutes. Saunders v. General Services Corp., 659 F. Supp. 1042 (E.D. Va. 1987) (declining to apply §§ 1981 or 1982 to racially discriminatory advertising for rental housing); Ragin v. Steiner, Clateman and Assocs., 714 F. Supp. 709, 713 (S.D.N.Y. 1989) (dismissing §§ 1981 and 1982 claims where complaint was “directed solely to defendants' advertising” of cooperative apartment complex); Ragin v. New York Times Co., 726 F. Supp. 953, 965 (S.D.N.Y. 1989) (same) (“The [Supreme] Court's statement in Jones [v. Alfred H. Mayer Co.] may arguably be regarded as dictum; however, given the source, it is persuasive.”). Others cases Defendants cite draw the same conclusion in dicta. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 88 S. Ct. 2186, 2189 (1968) (noting that, unlike the Fair Housing Act, § 1982 “does not prohibit advertising or other representations that indicate discriminatory preferences”); Louisiana Acorn Fair Housing v. Quarter House, 952 F. Supp. 352, 357 (E.D. La. 1997) (noting that discriminatory advertising practices are not covered by §§ 1981 and 1982, but holding that the plaintiffs also alleged discrimination in leasing and sales of property); Span v. Colonial Village, Inc., 899 F.2d 24, 35 (D.C. Cir. 1990) (holding case was not time-barred and noting §§ 1981 and 1982 do not prohibit real estate advertisements indicating discriminatory preferences).

The Court finds these cases persuasive, and agrees that Sections 1981 and 1982 do not encompass discriminatory advertising. Plaintiffs, however, contend that this action is not just a matter of discriminatory advertising, but of “targeting,” which is intensive advertising involving a “very invidious scheme of racial discrimination which has existed for a long time [and] has resulted

in a disparate impact of African Americans who are dying at greater rates and who suffer diseases caused by smoking mentholated cigarettes than in the white community.” (Oral Arg. Tr. Aug. 7, 1999 (“Tr.”) at 23-24). Plaintiffs cite Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978), and Hampton v. Dillard Department Stores, 18 F.Supp.2d 1256 (D. Kan. 1998), in support of this theory.

In both Hall and Hampton, however, the defendants were offering the African American plaintiffs different and less favorable contractual terms than they offered white consumers, something the Plaintiffs in the instant case have not alleged. In Hall, the United States Court of Appeals for the Third Circuit (“Third Circuit”) stated:

Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers “as is enjoyed by white citizens.” Here, plaintiff asserts that upon entering the [bank], his photograph was taken for the police by bank employees pursuant to a racially based surveillance scheme. This was . . . the implementation of a policy deliberately adopted by the bank management to offer its services under different terms dependent on race.

Id. at 92. In Hampton, an African-American woman, Paula Hampton, and her niece were put under surveillance when they entered a department store. When Hampton bought an outfit for her son, the two women were given coupons for free samples of fragrance. They went to redeem the coupons, and the store security officer demanded that they show their purchases and receipts. The court sustained a verdict that Hampton's Section 1981 rights had been violated only after deciding there was evidence that the coupons were truly benefits of the contractual relationship with the store and were not given out indiscriminately to customers whether or not they made purchases. Hampton, 18 F. Supp. 2d at 1263-64.

In this case, Plaintiffs do not claim Defendants offered them different contractual terms than they offered to white smokers, but rather that responding to Defendants' intensive advertising, they chose to use the defective mentholated tobacco products, and thereby suffered serious injury. At oral

argument, Plaintiffs stressed that the targeting was with “dangerously defective products,” and cited the following two cases as the best support for their theory: Roper v. Edwards, 815 F.2d 1474 (11th Cir. 1987), and Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975).

In Roper, the parents of a deceased white man brought a civil rights action against the supplier and manufacturer of burial vaults, alleging they had been the unintended victim of a conspiracy to sell defective vaults to African Americans. They had bought such a vault for their son and found it to be leaking when the body was later exhumed in connection with another civil suit. Id. at 1476. Plaintiffs' counsel argues that this case is directly on point because it held that sales of a defective product on the basis of race to African Americans stated a claim under Section 1982. (Tr. at 25-26.)

However, for the instant case to be parallel to Roper, Plaintiffs would have to contend that the tobacco products Defendants offer for sale to African Americans were defective in a way that the products they offer for sale to whites were not. Plaintiffs do not contend that; the mentholated products Defendants sell to African Americans are just as defective and dangerous as the mentholated products they sell to whites. Furthermore, Plaintiffs evidently concede that, while a much higher percentage of African American smokers than white smokers use mentholated cigarettes, African Americans still comprise the minority of users of mentholated tobacco products.⁴ Plaintiffs do not allege that Defendants are offering the defective mentholated products only to African Americans; rather, Plaintiffs contend that Defendants are targeting African Americans with advertisements for mentholated tobacco products and, as a result, African Americans are more likely to chose mentholated products than are whites. Roper does not provide precedent for this case.

Similarly, Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975), does not provide legal

⁴See supra note 1.

support for Plaintiffs' action. Scott involved a classic refusal to deal. In the instant case, Plaintiffs allege an aggressive attempt to deal in the form of intensive advertising by which Plaintiffs claim Defendants are “compelling African Americans to purchase defective products to their. . . detriment.” (Tr. 26-27). Defendants' actions, however, are not coupled with a refusal or even a reluctance to sell non-mentholated tobacco products to Plaintiffs, or even with a refusal or reluctance to sell mentholated tobacco products to whites.

Plaintiffs have not cited any authority holding that the type of “targeting” alleged in this case violates Sections 1981 or 1982. Plaintiffs have cited no case law, and the Court can find no basis for creating a cause of action under these Sections to fit this case. Holding that Defendants could limit Plaintiffs freedom to contract or to own property simply by targeting Plaintiffs with intensive advertising that caused Plaintiffs to choose Defendants' dangerously defective mentholated tobacco products would require a radical departure from the jurisprudence of Sections 1981 and 1982, a departure this Court is not prepared to make.

Plaintiffs further suggest that the gravamen of their Complaint is racially discriminatory sales of a defective and hazardous product to African Americans, and that the advertising and marketing strategies are evidence of the discriminatory sales. (Plf. Resp., p. 13, 27). Plaintiffs extrapolate from Clarke v. Universal Builders, Inc., 501 F.3d 324, 334 (7th Cir. 1974), to suggest an exploitation theory. (Plf. Resp., p. 21-22). In Clarke, realtors exploited the existence of a dual market for African Americans and whites, a market they did not create, by demanding prices and terms from African Americans in excess of those they demanded from whites. Plaintiffs contend that Defendants similarly exploited African Americans' initial preference for mentholated tobacco.

Even assuming that the thrust of Plaintiffs' Complaint is the sales of a defective and hazardous product, Plaintiffs have failed to allege intentional racial discrimination in the sales of

mentholated cigarettes. Defendants correctly point out that in the Second Amended Complaint, Plaintiffs concede that Defendants advertise their products to both African American and white consumers (Second Amd. Compl. ¶52), and that Defendants sell their products to both African American and white smokers. (Second Amd. Compl. ¶74). Indeed, Plaintiffs expressly state in their Response that “[t]he nature of Plaintiff’s [sic] §1982 claim is not that Defendants sold mentholated cigarettes to African Americans at unfavorable prices or terms compared to those sold to whites.” (Plf. Resp., p. 41). Unlike Clarke, the actual products and terms of sale are the same for African American and white consumers.⁵

In accordance with the foregoing, the Court will grant Defendants' Motion to Dismiss with respect to Counts I and II of Plaintiffs' Second Amended Complaint.

B. COUNT III

In Count III, Plaintiffs allege a violation of 42 U.S.C. § 1983 with respect to the Fifth and Fourteenth⁶ Amendments to the United States Constitution. Plaintiffs further allege direct violations

⁵Plaintiffs advance one final argument in an attempt to salvage their §1981 claim. Plaintiffs argue that Defendants' racially discriminatory policies and practices have “impaired Plaintiffs' capacity to form and enter contracts” (Plf.' Resp. at 29.) in that Defendants' advertisements constituted express warranties and Defendants fraudulently misrepresented their products as safe. These claims of breach of warranty or fraud and misrepresentation are essentially state law claims, and not civil rights claims. Upon review of the case law cited by Plaintiffs, the Court concludes that this theory does not provide a basis for this civil rights action.

⁶The Fourteenth Amendment provides, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, § 1. The Fifth Amendment provides in pertinent part: “nor shall any person be . . . deprived of life, liberty, or property, without due process of law” U.S. Const. amend V. This clause has been construed to include equal protection of the law. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

of the Fifth and Fourteenth Amendment. Specifically, Plaintiffs invoke the guarantees of the Equal Protection Clause and the Due Process Clause. Count III states,

The Tobacco Companies' discriminatory targeting of menthol tobacco product sales to Black Americans denies Plaintiffs and the Class equal protection of the laws and violates Section 1983 because of the intentionally discriminatory nature of the Tobacco Companies' sales campaigns, policies and practices.

The Tobacco Companies also rely upon the Federal Cigarette Labeling and Advertising Act . . . , 15 U.S.C. Section 1331 et seq. to shield them from any liability to consumers who have not been informed of the dangers of consuming menthol tobacco products, since the provisions of the Act specifically pre-empt all civil actions under state law based upon the Defendant's breach of the duty to provide information about the dangers of smoking menthol cigarettes through clear and adequate warning labels and advertising. As a result of such preemption under Federal law, Defendants' actions of failing to adequately warn or inform the public were “under color of federal law” and thus in violation of 42 U.S.C. Section 1983, the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

(Id. ¶¶ 208-09.)

Defendants move to dismiss Count III on three grounds. First, Defendants argue that Plaintiffs' Complaint fails to allege that Defendants acted “under color of state law.” Second, Defendants contend that Plaintiffs' claims do not support a Bivens⁷ action. Finally, Defendants argue that Plaintiffs have failed to allege that Defendants acted “under color of federal law.”

1. Section 1983

Section 1983 provides a cause of action against any “person who, under color of any statute, ordinance, regulation, custom, or usage, of any State” causes the deprivation of a right protected by federal law or the United States Constitution. 42 U.S.C. §1983. Plaintiffs contend that it is “premature” to determine whether or not Defendants are “state actors.” (Resp., p. 73). Nevertheless,

⁷In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971), the Supreme Court recognized a cause of action against federal actors for violations of an individual's constitutional rights.

at the same time, Plaintiffs repeatedly emphasize that the question before the Court is whether Defendants may be considered “federal actors.” (Resp., p. 73-74). Indeed, the only reference to governmental action in Plaintiffs' Second Amended Complaint states that “Defendants' actions of failing to adequately warn or inform the public were under color of federal law.” (Plf. Sec. Amd. Compl. ¶207)(emphasis added).

Liability under Section 1983 law will not attach for action taken under color of federal law. See Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir. 1971). Plaintiffs have not alleged, and do not argue that Defendants were state, rather than federal actors. Accordingly, the Court will grant Defendants' Motion to Dismiss on Plaintiffs' Section 1983 Claim in Count III.

2. Bivens/ Direct Constitutional Claims

In their Response, Plaintiffs state that Count III asserts claims “directly under the United States Constitution as well as separately under Bivens.” (Plf. Resp., p. 43). In both instances, the limitations of the Fifth⁸ Amendment to the U.S. Constitution restrict the actions of the federal government, not the action of private entities. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982); Nguyen v. United States Catholic Conference, 719 F.2d 52, 54 (3d Cir.1983). Accordingly, the discussion herein concerning whether there has been governmental action relates to both a Bivens claim as well as a direct constitutional claim.

The standards used to determine whether conduct is federal action subject to the Fifth Amendment are identical to those used to determine whether conduct is state action subject to the

⁸The Court notes Plaintiffs' citation of the Fourteenth Amendment in both their Complaint, and their Response to Defendants' Motion to Dismiss. By its terms, the Fourteenth Amendment only applies to the actions of the states, not the federal government. Moose Lodge No. 107 v. Irvig, 407 U.S. 163, 172-73 (1973). As discussed supra, Plaintiffs' focus remains on the federal nature of Defendants' conduct. Thus, to the extent Plaintiffs' invoke the guarantees of the Fourteenth Amendment, the Court will grant Defendants' Motion to Dismiss.

Fourteenth Amendment. Warren v. Government Nat'l Mortgage Ass'n, 611 F.2d 1229, 1232 (8th Cir.1980). To determine whether the conduct of a private entity should be attributed to the federal government, the Court employs the two-part “state action” analysis set forth by the Supreme Court in Lugar v. Edmondson Oil Co., 457 U.S. at 937-42. See Edmonson v. Leesville Concrete, 500 U.S. 614, 620 (1991). The Lugar framework requires that this Court ask “first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in [federal] ... authority; and second, whether the private party charged with the deprivation could be described in all fairness as a [federal] ... actor.” Leesville Concrete, 500 U.S. at 620 (applying Lugar).

In their Complaint, Plaintiffs claim that Defendants are federal actors because

The Tobacco Companies also rely upon the Federal Cigarette Labeling and Advertising Act, (hereinafter referred to as the “Act”), 15 U.S.C. §1331 et seq. to shield them from any liability to consumers who have not been informed of the dangers of consuming menthol tobacco products, since the provisions of the Act specifically pre-empt all civil actions under state law based upon the Defendant's [sic] breach of the duty to provide information about the dangers of smoking menthol cigarettes through clear and adequate warning labels and advertising. As a result of such preemption under Federal law, Defendants' actions of failing to adequately warn or inform the public were “under color of federal law.”

(Compl. ¶209). As to the first part of the Lugar analysis, Plaintiffs claim that Defendants, admittedly private entities, should be held subject to the restraints of the federal Constitution because their alleged activities have been countenanced by the federal government through Defendants' compliance with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331, et seq. With respect to the second prong of the Lugar analysis, Plaintiffs assert that Defendants can be fairly considered governmental actors under four theories: (1) the public function doctrine; (2) the symbiotic relationship/ joint participation test; (3) close nexus test; and (4) the “totality of the circumstances” test.

Under the “public function” test, the Court inquires into whether the government is using the private party to avoid constitutional obligations or to engage in activities that were the exclusive prerogative of the state. Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982); Evans v. Newton, 382 U.S. 296, 301 (1966). The “symbiotic relationship” approach examines the overall relationship between the state and the defendants to discern whether or not the state has “insinuated itself into a position of interdependence with [the acting party]” sufficiently to be recognized as a joint participant in the challenged activity. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). Instead of looking at the entire relationship between the state and the defendants, the “close nexus” focuses on the connection between the specific conduct that allegedly violates plaintiff’s rights, and the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); see also American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 986 (1999).

In the final analysis, the test to be applied depends upon the circumstances of the case. The Supreme Court has counseled lower courts to investigate carefully the facts of each case. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Community Med. Center v. Emergency Med. Services, 712 F.2d 878, 880 (3d Cir.1983) (citations and footnotes omitted). The heart of the inquiry is “to discern if the defendant exercised power possessed by virtue of [federal] law and made possible only because the wrongdoer is clothed in the authority of [federal] law.” Groman v. Township of Manalapan, 47 F.3d 628, 639 n. 17 (3d Cir. 1995)(internal quotation and citation omitted).

Plaintiffs argue that Defendants are “federal actors” under these tests for four reasons: (1) Defendants undertook the governmental task of testing for and disseminating tar and nicotine ratings through its labeling of cigarette packages, a role “akin to that of the Surgeon General. . . the FDA”, and the Federal Trade Commission (Plf. Resp, p. 60-62); (2) Defendants' compliance with the

Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 et seq., and the Labeling Act's preemption of certain types of claims; (3) the federal government's receipt of tax revenues for cigarette sales; and (4) the Labeling Act's preemption of state law with respect to advertising or promotion of cigarettes labeled in conformance with the statute.

The Court cannot conclude that Defendants are state actors and that their conduct constituted state action. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). The Tobacco Company Defendants are private, for-profit corporations with no ties to any governmental entity. Similarly, Defendant H&K is a private, for-profit public relations firm. Finally, the remaining Defendants are non-profit research organizations, again with no ties to any governmental entity.

First, the public function test does not apply to the allegations in this Complaint. The public function doctrine asks whether “the private entity has exercised powers that are traditionally the exclusive prerogative of the state.” Blum v. Yaretsky, 457 U.S. at 1004-05 (emphasis added) (internal citation omitted). As the Third Circuit Court of Appeals explained in Mark v. Borough of Hatboro, 51 F.3d 1137, 1142 (3d Cir. 1995), the Supreme Court emphasizes the “exclusivity” aspect of the test, and rarely finds that plaintiffs have met that rigorous standard. Plaintiffs' theory suggests that the testing, labeling and marketing of cigarettes is the exclusive prerogative of the federal government. This assertion simply is not so.

Secondly, Congress' demand that the Tobacco Industry comply with various labeling requirements does not transform the marketing and sales practices of these Defendants into a governmental decision. Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 547 (1987)(Congress's conferral upon private entity of exclusive right under trademark laws to use of term "Olympic" not enough to make private entity's choice of how to enforce that right

a governmental decision). In essence, Plaintiffs claim that Defendants' actions should be attributed to the federal government solely because the federal government regulates the Tobacco Industry under the Labeling Act. Such reasoning, however, has been flatly rejected by the Supreme Court: “In cases involving extensive [governmental] regulation of private activity, we have consistently held that [t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.” American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 986 (1999); see also Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)(“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.”); Blum, 457 U.S. at 1004 (private nursing homes were not state actors despite extensive government regulation).

Plaintiffs' further suggest that because the Government collects tax revenue from the sale of cigarettes, Defendants can fairly be considered state actors. (Plf. Resp., p. 69-70). If this link were sufficient to forge a symbiotic relationship between Defendants and the Government, however, the actions of every tax paying corporation in the country would qualify as state action. See Hedges v. Yonkers Racing Corp., 918 F.2d 1079, 1082 (2d Cir. 1990)(receipt of substantial tax revenue by state from private actor's business does not create symbiotic relationship between private actor and state).

Finally, Plaintiffs contend that the Labeling Act encourages Defendants' discriminatory sales and marketing of mentholated cigarettes to African American consumers. The Court rejects this argument. Plaintiffs have failed to allege anything in the Labeling Act that coerced or encouraged Defendants' allegedly discriminatory practices. The mere allegation that the Labeling Act influences the Tobacco Industries advertising practices alone is insufficient.

Based on the extensive body of case law governing this topic, the Court finds that none of Plaintiffs' proffered reasons, alone or in combination, render Defendants federal actors. Accordingly, the Court will dismiss Count III.

C. COUNT IV

In Count IV, Plaintiffs bring a claim under 42 U.S.C. § 1985(3). Count IV states,

The defendants['] conduct of concealment and disinformation regarding the use of menthol and other additives as well as their conspiring to suppress the development and marketing of safer menthol tobacco products or less hazardous menthol products deprived African-Americans, on the basis of race, [of] the equal protection of the law and caused injury to their person and property.”

(Plf. Sec. Amend. Compl. ¶ 211.) Defendants move to dismiss Count IV on two grounds. First, Defendants argue that Plaintiffs have failed to allege a protected interest under Section 1985(3). Second, Defendants contend that Plaintiffs' allegations do not show an “invidious discriminatory animus.”

Section 1985(3) provides in pertinent part:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of the damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 1985(3). Section 1985(3) itself does not create any substantive rights. It “merely provides a remedy for violation of the rights it designates.” Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979). Thus, Section 1985(3) provides a limited cause of action, targeting only those conspiracies which deprive victims of constitutionally protected rights, privileges, and immunities. See Libertad v. Welch, 53 F.3d 428, 446-50 (1st Cir.1995). In order to

effect this “intended, constitutional purpose and prevent its use as a 'general federal tort law,' ” Libertad, 53 F.3d at 447 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)), a plaintiff alleging a private conspiracy to deprive him of his civil rights must demonstrate that the conspiracy is “aimed at interfering with rights that are protected against private, as well as official, encroachment.” Libertad, 53 F.3d at 446. To date, the Supreme Court has recognized only two rights protected under section 1985(3): the right to be free from involuntary servitude and the right of interstate travel. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993).

Plaintiffs allege that the Defendants conspired to deprive them of property rights and contractual rights based on Plaintiffs' race. Because the rights asserted by plaintiff here--to be free from discrimination by a private actor--is a creature of statutory enactment, it is not a right to which §1985(3) extends protection. Even if the Court were to accept Plaintiffs' construction that violations of Sections 1981 and 1982 support a claim under Section 1985(3), the Court has found that Plaintiffs failed to state a claim under either of those section. Thus, Plaintiffs' Second Amended Complaint fails to state a claim under §1985(3). Accordingly, the Court will dismiss Count IV.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|------------------------------|---|--------------------------|
| REV. JESSE BROWN, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | CIVIL ACTION No. 98-5518 |
| |) | |
| PHILIP MORRIS, INC., et al., |) | |
| |) | |
| Defendant. |) | |

ORDER

And now this day of September, 1999, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (docket no. 21), Plaintiffs' Response thereto (docket no. 29), Defendants' Reply Memorandum (docket no. 32), and oral argument held on April 7, 1999,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (docket no. 21) is **GRANTED**.

IT IS FURTHER ORDERED that the above styled action is **DISMISSED**.

IT IS FURTHER ORDERED that this case is **CLOSED** for statistical purposes.

BY THE COURT:

John R. Padova