[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, & 07-5103 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

TOBACCO FREE KIDS ACTION FUND, et al.,
Intervenors,

v.

PHILIP MORRIS USA INC., et al.,
Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROOF REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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GLOSSARY

CIAR	Center for Indoor Air Research
CORESTA	Cooperation Centre for Scientific Research Relative to Tobacco
ETS	Environmental Tobacco Smoke
FTC	Federal Trade Commission
IAI	Indoor Air International
ICOSI	International Committee on Smoking Issues
INFOTAB	International Tobacco Information Center
ISBE	International Society for the Built Environment
JD Reply	Joint Defendants' Reply Brief
MSA	Master Settlement Agreement
RICO	Racketeer Influenced and Corrupt Organizations Act
TAC	Tobacco Advisory Council
TMA	Tobacco Manufacturers Association
TDC	Tobacco Documentation Centre

INTRODUCTION AND SUMMARY

As we showed in our opening brief, the district court erred in concluding that public education and smoking cessation remedies are foreclosed as a matter of law by this Court's disgorgement ruling. See Order #886 (DN4906), Op.1646, Op.1652. In the view of the prior panel, the remedy of disgorgement is unavailable because it is entirely "backward-looking" and "duplicative" of RICO's damages and forfeiture provisions. United States v. Philip Morris USA Inc., 396 F.3d 1190, 1198, 1201 (D.C. Cir. 2005). That reasoning does not extend to the public education and smoking cessation programs proposed by the government, or to the use of a monitor to oversee compliance with the court's decree. Such remedies are not measured by past conduct, are not "duplicative" of a damages or forfeiture remedy, and are necessary to prevent the future victimization of consumers. The remedies would prevent defendants from reaping future profits from their past and continuing deceptions, including future profits obtained from smokers who have become addicted to nicotine through defendants' fraud. Neither RICO nor this Court's disgorgement decision strips the district courts of the equitable tools necessary to combat such pervasive and obdurate fraud.

Defendants urge, nevertheless, that the relief sought by the government — as well as most of the relief actually imposed by the district court — is necessarily "backward-looking" and thus unavailable as a matter of law. Although defendants

couch this contention as a legal proposition, their argument is largely predicated on the assertion that they have never misled consumers and that, in any event, they "already face extensive prohibitory injunctions and judicial oversight" under the Master Settlement Agreement (MSA). JD Reply 94.

These contentions fail at every level. Their contention that "there is no evidence of lingering confusion that requires correction," JD Reply 97, asks the Court to disregard the voluminous factfindings detailing the extent of their misrepresentations. Even if defendants had abandoned their past conduct, an order designed to remedy the ongoing effects of past misrepresentations — including help for smokers presently addicted through defendants' fraud — would be both forward-looking and fundamental to the court's equitable authority. Warner-Lambert Co. v. FTC, 562 F.2d 749, 769 (D.C. Cir. 1977).

In any event, by claiming that they have "irreversibly abandoned the conduct upon which the judgment was based," JD Reply 20, defendants would have this Court ignore the district court's finding that defendants have not ceased to engage in unlawful conduct. Defendants can urge that the MSA "abolished all of the organizations through which defendants could operate a RICO enterprise," JD Reply 22, only by disregarding an array of contrary findings of fact. Their insistence that they "have admitted publicly for years that cigarette smoking is

addictive," JD Reply 27, merely reflects their longstanding public position that cigarettes are no more "addictive" than "hamburgers" (FF1210) or "Gummi Bears" (FF1161) — a position that, even now, defendants conspicuously fail to disavow. Defendants barely mention nicotine manipulation except to assert that their denials are "true," JD Reply 27, ignoring the extensive findings demonstrating their sophisticated efforts to optimize nicotine delivery to smokers. See FF1371-FF1704.

As the Supreme Court has explained, Congress established "new remedies" in RICO to combat the unique threats posed by sophisticated and enduring criminal enterprises. United States v. Turkette, 452 U.S. 576, 589 (1981). Congress enacted a "far-reaching civil enforcement scheme," Sedima, SPRL v. Imrex Co., Inc., 473 U.S. 479, 483 (1985), because it recognized that the flexibility inherent in equitable remedies often will be instrumental in uprooting organized criminal conspiracies that have embedded themselves in the national economy. See S. Rep. No. 91-617, at 82-83 (1969). Today as in 1953, defendants are engaged in such an enterprise, and the district court erred in concluding that RICO does not permit the remedies that the government proposed to uproot it.

ARGUMENT

THE EQUITABLE REMEDIES PROPOSED BY THE GOVERNMENT ARE "FORWARD-LOOKING" AND AUTHORIZED UNDER RICO

A. This Court's Disgorgement Opinion Does Not Preclude The Public Education And Smoking Cessation Remedies Proposed By The Government.

As part of RICO's "far-reaching civil enforcement scheme," Sedima, 473 U.S. at 483, Congress broadly granted the district courts jurisdiction in equity to "prevent and restrain violations" of the Act through "appropriate orders." 18 U.S.C. § 1964(a). Congress further directed that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). As the Supreme Court has stressed, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Sedima, 473 U.S. at 491 n.10.

Defendants nevertheless contend that, as a matter of law, the district court lacks the authority to order the public education and smoking cessation remedies proposed by the government, urging that any such relief would be impermissibly

"backward-looking." As discussed in our opening brief, the panel's reasoning does not support this extension of its holding.[1]

The prior panel rejected disgorgement because the remedy is not merely crafted with reference to past conduct, but "both aimed at and measured by" such past conduct. Philip Morris, 396 F.3d at 1198 (emphases added). The Court did not have occasion to address, and plainly did not foreclose, equitable remedies aimed at and measured by future conduct. And it manifestly did not hold that RICO precludes all remedies that "would make future violations less likely by reducing defendants' incentives to commit fraud[.]" JD Reply 93.

As we explained in our opening brief, public education is necessary to prevent defendants from defrauding consumers in future sales. Absent correction, the fraud continues because consumers will "continue to make purchasing decisions based on the false belief." Novartis Corp. v. FTC, 223 F.3d 783, 787 (D.C. Cir. 2000). Smoking cessation programs likewise do not fall within the scope of the panel's reasoning. As detailed by the district court, defendants for decades have fully understood the addictive nature of their product and have consistently misrepresented its addictive properties, even as they have

[1] As stated in our opening brief, the government believes that the panel majority erred in concluding that disgorgement relief is categorically unavailable under 18 U.S.C. § 1964(a).

systematically designed their products to manipulate nicotine delivery. The success of the enterprise has created a captive market of addicted consumers. A requirement that defendants take corrective action in the future to preclude future profits based on their fraud cannot logically be equated with the disgorgement remedy addressed by the prior panel. See Warner-Lambert, 562 F.2d at 757 n.33 ("Ordering refunds to past consumers is very different from ordering affirmative disclosure to correct misconceptions which future consumers may hold").

Even if the record supported defendants' contention that they have "irreversibly abandoned" their unlawful conduct, JD Reply 20, the district court plainly would have statutory authority to weigh the propriety of the relief sought by the government. Given the protracted and pervasive nature of defendants' fraud, it cannot plausibly be assumed that customers will no longer be influenced by the misleading information they have already received. See Novartis, 223 F.3d at 787. Even if future advertisements are not deceptive "when viewed in isolation," "they must be seen against the background" of deception. Warner-Lambert, 562 F.2d at 769. "When viewed from this perspective, advertising which fails to rebut the prior claims ... inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly." Ibid. It is thus "well-established" that "affirmative disclosure" may be required "for the

purpose of preventing future deception." Id. at 760 (quotation marks and citation omitted). The protracted nature of defendants' fraud belies the assertion that "there is no evidence of lingering confusion that requires correction, much less that supports an extensive public education campaign[.]" JD Reply 97.

Attempting to distinguish Novartis and Warner-Lambert, defendants note that those decisions sustained corrective disclosures ordered by the Federal Trade Commission (FTC), and assert that the FTC Act grants broader equitable authority to the FTC than a district court has under RICO. See JD Reply 95-96. But as this Court explained, by its terms, the FTC Act merely authorizes the Commission to issue "cease and desist" orders against violators "and does not expressly mention any other remedies." Warner-Lambert, 562 F.2d at 756. Accordingly, the Supreme Court initially took a narrow of view of the Commission's authority, noting that it has not "'been delegated the authority of a court of equity.'" Ibid. (quoting FTC v. Eastman Kodak Co., 274 U.S. 619, 623 (1927)). Subsequently, the Supreme Court revised its view, concluding that the authority of an agency "'to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees,'" ibid. (quoting Pan American World Airways, Inc. v. United States, 371 U.S. 296, 311-312 & n.17 (1963)), a principle that it applied to the FTC. See id. at 756-757 (citing FTC v. Dean Foods Co., 384 U.S. 597 (1966)).

Defendants are thus wrong to suggest that the FTC's authority to order corrective communications is somehow broader than that of the district court sitting in equity under RICO.

At bottom, defendants' insistence that the remedies proposed by the government would be impermissibly "backward-looking" simply restates their position that there was never any RICO violation to remedy. That argument, which ignores the thousands of factfindings to the contrary, cannot be used to contract the remedial scope of § 1964(a).

B. Defendants Have Not "Irreversibly Abandoned The Conduct Upon Which The Judgment Was Based."

Defendants alternatively contend that, whatever their past misdeeds, they have now abandoned those practices and no longer have the means to continue the enterprise. They insist that no equitable remedy can be regarded as "forward-looking" because they have "irreversibly abandoned the conduct upon which the judgment was based." JD Reply 19, 20.

This assertion asks the Court to ignore the district court's finding that "[t]he evidence in this case clearly establishes that Defendants have <u>not</u> ceased engaging in unlawful activity." Op.1603 (emphasis added). Defendants do not attempt to

show that this finding was clear error and, as discussed in our opening brief, any such contention would be implausible.

1. The MSA has not "abolished all of the organizations through which defendants could operate a RICO enterprise."

The linchpin of defendants' "irreversible abandonment" argument is their contention that the MSA both "prohibit[ed] future frauds and required the dissolution of the joint organizations that allegedly were the vehicles for the enterprise." JD Reply 20-21. For the reasons set out in our opening brief, the highly balkanized and soon-expiring provisions of the MSA would not warrant restriction of the district court's equitable authority under RICO even absent the evidence demonstrating that defendants have not abandoned their unlawful conduct. See Gov't Br. 194-195. Defendants make no serious effort to address these arguments. Even on its own terms, however, defendants' account of their conduct subsequent to the MSA is flatly at odds with the factfindings of the district court and the underlying record.

The assertion that the MSA "abolished all of the organizations through which defendants could operate a RICO enterprise," JD Reply 22 (defendants' emphasis), is simply inaccurate. As the district court found, defendants have established "an astonishing array of international entities" designed to maintain

their "united front," FF364, many of which were still in existence as of the 2000 discovery deadline set by the court. See FF364-FF443; see also FF403 (noting the discovery deadline).

For example, the district court specifically found that "Defendants continue to participate . . . even today" in the Tobacco Documentation Centre (TDC), the Cooperation Centre For Scientific Research Relative to Tobacco (CORESTA), and the Tobacco Advisory Council (TAC) (now named the Tobacco Manufacturers Association (TMA)). Op.1535. The district court found, and defendants do not dispute, that TDC – known in its previous incarnations as the International Committee on Smoking Issues (ICOSI) and then as the International Tobacco Information Center (INFOTAB) – was formed for the express purpose of allowing Philip Morris, RJR, BAT and other companies to "meet discreetly to develop a defensive smoking and health strategy for major markets" including the United States. FF3456 (quoting US20407). Defendants do not take issue with the description of these organizations set out in the government's opening brief, see Gov't Br. 98-103; nor do they contend that TDC has been dismantled.

Defendants do not even mention CORESTA, which has long played a pivotal role in maintaining their unified front. For instance, as discussed in our opening brief, CORESTA (in conjunction with INFOTAB) restored unity when

Philip Morris briefly broke ranks regarding the efficacy of "light" cigarettes in connection with the marketing of Barclay cigarettes. See Gov't Br. 102. As BATCo later observed, CORESTA is "unique and very valuable" because it is "perceived as being objective, technical and independent," FF442 (quoting US21788_1), even though every major tobacco company and organization is a member. US21788_1. See also, e.g., US28286 (BAT document explaining that CORESTA is "an international organization to which tobacco companies belong and undertake co-operative work on tobacco science"); FF443 (citing US086527) (describing a 2001 meeting of CORESTA's ETS Sub Group attended by representatives of Lorillard, Philip Morris, and RJR); FF443 (citing US86528) (describing a 2001 meeting of CORESTA Sidestream Taskforce attended by representatives from BATCo, RJR, and Philip Morris).

Likewise, as the district court explained in detail, TMA and its organizational predecessors, including TAC, have engaged in close cooperation with American manufacturers. See, e.g., FF391 (explaining that various members of the Enterprise participated in TAC, including BATCo, RJR, and Philip Morris, as well as John Rupp of Covington & Burling and Don Hoel of Shook, Hardy & Bacon). Indeed, a BAT document stressed the "similarities" between TMA and CORESTA and explained that BAT has "undertaken joint projects through the

TMA, e.g. on vent blocking in low tar cigarettes" and is "about to start a study on the effect of pH on nicotine uptake." US28286. Defendants' terse response typifies their disregard for the record. Ignoring the district court's findings, defendants merely state: "'The 'Tobacco Manufacturers Association' is a trade association of British tobacco manufacturers (and therefore does not include most of the defendants), and the most recent mention of it in the opinion concerned conduct that occurred eight years ago." JD Reply 21. This statement pays no heed to the relationship between defendants and the TMA and glosses over the fact that "eight years ago" was "the date of the discovery deadline established in this case." FF403. Here, as elsewhere, defendants labor to create the mistaken impression that the district court's failure to cite specific conduct subsequent to 2000 indicates that the conduct has ceased.[2]

As defendants do not dispute, Indoor Air International (IAI) still exists under the name the International Society of the Built Environment (ISBE). See FF3662. As discussed in our opening brief, although IAI held itself out as an international "learned scientific society" for researchers on indoor air quality issues, FF3655, it was actually founded by defendants' paid consultants, organized

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[2] Even a cursory Google search confirms that defendants have not dismantled the organizations cited by the district court. See, e.g., www.coresta.org; www.tma.org; www.the-tma.org.uk (visited April 14, 2008).

and run by Covington & Burling, and funded by Philip Morris and BATCo to provide ammunition for the fraud relating to ETS. FF3656; see Gov't Br. 110-111. By the same token, although ISBE holds itself out as a "learned society" of scientists, US65083_1, it is actually "run by industry ETS consultants," FF3662 (citing US75250) — a fact ISBE's publications do not disclose. See, e.g., US65083. Defendants' sole response is to declare that they are not "members" of ISBE. JD Reply 21. This statement mirrors defendants' general strategy of seeking to distance themselves from the purportedly independent scientific organizations that they fund and direct, so as to ensure that the publications of these groups can be used as "marketable science." FF3637.

That these entities are headquartered in Europe, rather than the United States, does not alter their usefulness to defendants in perpetuating the enterprise. As an INFOTAB (now TDC) working group on the "Global Argumentation Project" observed in 1990, "most members of the Working Group are already in, or need to be in, the States (i.e., 8 out of 11)." FF432 (quoting US62874_3). Defendants can conspire from London as readily as they can conspire from New York. And the impact of their activities on American consumers is the same, regardless of where a particular entity is housed.

Defendants' ability to sustain the enterprise notwithstanding the MSA is illustrated by their relocation of the functions of the Center for Indoor Air Research (CIAR), despite its abolition by the MSA. See Gov't Br. 107-110. Only two days after the MSA was signed, Lorillard's general counsel sent a letter to his counterparts at Philip Morris, B&W, and RJR, urging the group to "discuss the status of the plan to reinstate CIAR." FF3849 (quoting US22164); see also US75412_2 (Covington & Burling letter to CIAR consultants explaining that "[t]he members of CIAR have decided to create a new organization to continue the work [of CIAR]").

As the district court found, Philip Morris did indeed establish a new organization, named the External Research Program, with the same structure and purpose as CIAR, run by the former director of CIAR, employing many of the same individuals as CIAR, occupying the same offices that CIAR occupied, and using the same telephone numbers as CIAR. See FF3851. As the court also found, this new organization has funded many of the same "contract scientists" who received funding through CIAR. FF3856, FF3852; see US75412_2.

Defendants do not take issue with any of these factfindings. Instead, in a carefully worded paragraph, defendants declare that the External Research Program is "not a successor to CIAR" because it is structured as an entity within

Philip Morris, rather than as a jointly managed organization. JD Reply 22. That defendants can (they believe) so easily avoid the restrictions of the MSA only underscores the extent to which that agreement cannot plausibly be thought to constrict the district court's RICO authority. Defendants can exploit the "marketable science" of the External Research Program as readily as they exploited the "marketable science" produced by CIAR. Indeed, as this Court's cases illustrate, RICO enterprises commonly assign specialized roles to individual participants for the benefit of the enterprise as a whole. See, e.g., United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999); United States v. White, 116 F.3d 903, 924-25 (D.C. Cir. 1997). The MSA required defendants to shut down CIAR as a joint organization. That defendants immediately conspired to "reinstate" the functions of that organization through a different formal structure is not proof of defendants' reformation but of their sophistication.

Defendants' reliance on National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286, 1309 (8th Cir. 1988), see JD Reply 95, highlights the error of their position. In that case, the Eighth Circuit held that the plaintiff was not entitled to an injunction that duplicated exactly the provisions of existing consent decrees, stressing that the decrees provided for "full and complete private enforcement" and thus could be enforced by the plaintiff itself. 850 F.2d at

1309. Under those circumstances, the court observed, "'one injunction is as effective as 100.'" Ibid. (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972)).

By contrast, the remedies at issue here do not duplicate the relief provided under the MSA, and the federal government has no power to enforce the MSA's provisions. Indeed, the states themselves are prohibited from addressing violations of the MSA that occur outside their respective borders. See MSA § 7(b), (c)(1). Plainly, the possibility of disparate state enforcement actions under the MSA does not displace the power of the Attorney General to protect the American public from an ongoing racketeering enterprise of national (indeed, international) dimension. See Gov't Br. 195-196; see also Amicus Brief of the National Association of Attorneys General, at 9-10 (discussing the time-consuming and burdensome nature of enforcement actions under the MSA).[3]

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[3] Defendants also cite Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644-45 (1974), see JD Reply 95, which held that school boards could not, consistent with due process, establish a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing to work. See id. at 644. The relevance of this decision is unclear. The remedies sought by the government do not rest on an "irrebuttable presumption" that defendants will violate the MSA, but on the evidence of defendants' ongoing unlawful conduct and on the substantive and procedural inadequacies of the MSA for preventing future RICO violations. See Op.1601-1612 (finding that defendants are likely to commit future RICO violations).

2. Defendants have not "irreversibly abandoned" their fraudulent misrepresentations.

Defendants alternatively contend that public education and smoking cessation remedies would be impermissibly "backward-looking" because defendants have "irreversibly abandoned" the fraudulent misrepresentations on which the judgment is based. JD Reply 20, 27. Even a cursory review of the record belies this contention.

Defendants insist, for example, that they "have admitted publicly for years that cigarette smoking is addictive[.]" JD Reply 27. They declare that "[e]ven the government's selective quotations reveal that defendants always conceded that withdrawal from smoking 'can cause sleeplessness, irritation, depression and other uncomfortable symptoms.'" JD Reply 65 (quoting Gov't Br. 44) (quoting US65625_ TIMN0120730) (1982 Tobacco Institute press release).

Yet the quoted press release – cited by defendants as an example of their candor – placed the "attachment" to smoking in the same category as the attachment to "tennis, jogging, candy, rock music, Coca-cola, members of the opposite sex and hamburgers," and went on to say that "removal of these activities, persons or objects can cause sleeplessness, irritation, depression and other uncomfortable symptoms, similar to those felt by some with abstinence from

tobacco." FF1210 (quoting US65625_TIMN0120730). Likewise, the 1994 Tobacco Institute statements that defendants cite, see JD Reply 66 (citing Gov't Br. 129), were specifically designed to trivialize the addictive properties of cigarettes: "When we use the term addiction, there are two meanings. There's an everyday meaning – when we talk about being 'news junkies' or 'chocoholics,' that people have adopted into their every day language. You know, under that, all kinds of habits become 'addictions.' And so if it's a habit, then, yes, smoking can be a habit." US89300_9-10 (1994 appearance on the "MacNeil/Lehrer Newshour").

Defendants' brief does not disavow this view, or suggest that defendants' current statements on addiction are substantively different from those underlying their past campaign of deception. To the contrary, B&W's 2005 website stated that cigarette smoking is addictive by "current definitions of the term 'addiction,'" but denied that smoking creates a chemical addiction, stating: "[W]e do not believe that the term 'addiction' should be used to imply that there is anything in cigarette smoke that prevents smokers from reaching and implementing a decision to quit." FF1250 (quoting US87157). Similarly, Lorillard's president testified at trial that Lorillard has recently "accepted" that cigarette smoking is addictive, but only because, in Lorillard's view, "[i]n recent years the term 'addiction' has been

broadened to a point where it can now be said to describe any number of repetitive pleasurable activities that can be difficult to stop, including cigarette smoking." Orlowsky_WD_116; see also FF1202 (quoting this testimony). As of 2002, Philip Morris admitted that smoking (but not nicotine) was "addictive," but only based on a broad definition of "addiction" that includes anything that is habit-forming. FF1164 (citing Merlo_PD, 6/12/02, at 500-503).

As the district court recognized, these distinctions are not merely "semantic." JD Reply 66. The fundamental point about nicotine addiction — the mechanics of which defendants have intimately understood for decades — is that it does "prevent[] smokers from reaching and implementing a decision to quit." US87157. And the very purpose of defendants' misrepresentations is to persuade consumers that this is not the case.

Nor would remedies addressed to defendants' deceptions regarding nicotine manipulation be "backward-looking." As of 2004, defendants continued to deny any sort of nicotine manipulation – whether by "spiking" cigarettes with additional nicotine or otherwise affecting the form or delivery of nicotine.[4] Far from

[4] Philip Morris's 2004 website stated that: "[S]ome have alleged that we use specific ingredients to affect nicotine delivery to smokers. That is simply not true." FF1751 (quoting US88058_ARG0540406). RJR's 2004 website stated that it "do[es] not add nicotine or any nicotinic compounds to any of our cigarettes, nor do we do anything to enhance the effects of nicotine on the smoker." FF1752

disavowing these statements, defendants' brief insists that their "statements denying nicotine manipulation are true." JD Reply 27. But they make no attempt to demonstrate clear error in the district court's finding that defendants have "researched, developed, and implemented many different methods and processes to control the delivery and absorption of the optimum amount of nicotine which would create and sustain smokers' addiction." FF1759; see also, e.g., FF1573-FF1591 (describing how defendants manipulated the physical cigarette design to deliver a greater proportion of nicotine); FF1592-FF1695 (describing defendants' use of ammonia compounds to lower smoke pH and produce more "freebase" nicotine).

Defendants' ongoing deceptions regarding the addictiveness of nicotine and their efforts to enhance its addictive properties underscore the forward-looking nature of the proposed smoking cessation program. For many beginning smokers – most notably young smokers – death by cancer seems improbable and distant, a consequence that can be avoided through the simple expedient of quitting early, before lasting damage is done. See FF2699-FF2716. Young people "do not

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(quoting US86942_ TLT1020067). B&W's 2004 website stated that: "Brown & Williamson does not in any way control the level or nature of nicotine in cigarettes to induce people to start smoking or to prevent people from quitting." FF1753 (quoting US86656_TLT0770044).

adequately understand and appreciate the cumulative risk that smoking entails," FF2700, or "the unlikelihood of their being able to quit smoking at some future time." FF2716. "Many young smokers tend to believe that smoking the 'very next cigarette' poses little or no risk to their health." FF2701. "Most smokers only begin to think of risk after they have started to smoke regularly and have already become addicted." FF2700. "At that point, more than 80% of smokers wish they had never begun to smoke." Ibid. The proposed smoking cessation program would prevent defendants from continuing to profit from smokers they entrapped in the past, and diminish both the incentive for and the effectiveness of future deceptions. Cf. 396 F.3d at 1203 (Williams, J., concurring) (noting that the likelihood of future violations depends on a defendant's expected returns from a violation).

In short, defendants' submission leaves no doubt that public education and smoking cessation programs are permissible remedies tailored to preventing future RICO violations. The district court should be permitted to consider these remedies on remand. Likewise, the court plainly has the authority to consider whether some form of monitoring is appropriate in implementing the equitable remedies that it determines to be appropriate. Defendants do not dispute that monitoring is a common feature of RICO decrees. See Gov't Br. 225-226. Given

defendants' "established record of resistance" to compliance with the law, Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 482 (1986), some form of monitoring is not only justified but essential in this case, and the government should have the opportunity on remand to address the form of monitoring needed to eradicate defendants' racketeering enterprise.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the Court should sustain the judgment of liability, uphold the relief ordered by the district court, and remand for consideration of the remedies addressed in our cross-appeal.

Respectfully submitted.

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APRIL 2008

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that the foregoing Proof Reply Brief for the United States of America contains 4,588 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2), according to the count of WordPerfect 12.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2008, I caused copies of the foregoing Reply Brief for the United States of America to be to be filed with the Court by hand delivery, and served upon the following counsel in the manner indicated

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