UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., *et al.*, Defendants.	)	Civil Action No. 99-CV-02496 (GK) Next scheduled appearance: Trial (ongoing)

UNITED STATES' MEMORANDUM REGARDING NON-DISGORGEMENT
<u>EQUITABLE REMEDIES PURSUANT TO ORDER #875</u>

In Order #875, the Court asked that the United States outline "(1) the scope and meaning of the Court of Appeals' decision regarding non-disgorgement remedies in civil RICO cases and (2) the Government's current request for postponement of its evidence on remedies." As to the first issue, nothing in the ruling by the Court of Appeals restricts or limits this Court's ability to order any of the other non-disgorgement equitable relief sought by the United States, all of which is designed to prevent and restrain these Defendants from the commission of future unlawful activity and to eradicate the ongoing and future ill effects of their RICO violations. Similarly, the Court retains its full equitable power to order any relief, other than disgorgement, that it concludes will prevent and restrain future RICO violations by the Defendants and will "cure the ill effects" of their past unlawful conduct.

As to the second issue, the Court of Appeals' ruling on disgorgement has, at least temporarily, fundamentally changed the law that has governed this case for the past four and half years. The Office of the Solicitor General has authorized the United States to seek <u>en banc</u>

rehearing of the decision of the Court of Appeals. Until the matter is ultimately resolved, the elimination of disgorgement as a remedy under Section 1964(a) forces the United States to substantially revise and alter its remedies presentation, and justifies postponing the presentation of all remedies-specific evidence until after Defendants present their defense to liability.

I. The United States' Non-Disgorgement Remedies Are Forward-Looking Remedies Permissible under RICO Section 1964(a).

A. RICO's Equitable Remedies, Which Were Patterned After Equitable Remedies Available Under the Antitrust Laws, Broadly Encompass Remedies Designed to Cure the Ill Effects of Defendants' Fraudulent Conduct

1. In United States v. Philip Morris USA Inc., __F.3d __, 2005 WL 267948 (D.C. Cir. Feb. 4, 2005), the majority stated:

> Section 1964(a) provides jurisdiction to issue a variety of orders "to prevent and restrain" RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations.

2005 WL 267948 at *7.

Consistent with a long-established line of precedent, including Supreme Court cases, interpreting the scope of district courts' authority to impose remedies to "prevent and restrain" unlawful conduct, the Court has jurisdiction to order Defendants to fund future activities that are designed to cure the ill effects of Defendants' past unlawful conduct. The Supreme Court has repeatedly observed that RICO's civil remedies provision, 18 U.S.C. § 1964, was patterned after the equitable relief provisions of the antitrust laws.[1] In that regard, the statutory provision

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[1] See, e.g., Holmes v. Securities Investor Protection, 503 U.S. 258, 267-68 (1992); Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997); Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150-152 (1987); Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 486-490 (1985). See also S. Rep. No. 91-617, 91st Cong. 1st Sess, at 81 (1969) (RICO's Section 1964 "brings to bear. . . the full panoply of civil remedies . . . . now available in the anti-trust area.").

originally enacted as Section 4 of the Sherman Act provided that:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [P]ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

26 Stat. 209-210.[2]

The "prevent and restrain" language under the antitrust laws is identical to the "prevent and restrain" language under RICO's Section 1964(a).[3] As the Supreme Court has observed, when Congress has used the same words in RICO's Section 1964 as in the corresponding relief provision of the Sherman Act that later was enacted in the Clayton Act, "we can only assume it intended them to have the same meaning that courts had already given them." Holmes, 503 U.S. at 268. In fact, even Defendants concede that the equitable remedies available under the antitrust law are available under RICO's Section 1964(a), since Section 1964(a) was patterned after the antitrust equitable remedies provisions.[4] Therefore, this Court should interpret the scope of its equitable authority under RICO to be at least as broad as the scope of its equitable authority

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[2] Section 4 of the Sherman Act was reenacted as Section 15 of the Clayton Act. See 15 U.S.C. § 4; California v. American Stores Co., 495 U.S. 271, 287 (1990).

[3] 18 U.S.C. § 1964(a) provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[4] See e.g., Appellants' Brief, United States v. Philip Morris USA Inc., et al., No. 04-5252, at 28-29 (July 23, 2004); Certain Defendants' Memorandum of Law in Support of Motion to Dismiss at 80 (Dec. 27, 1999).

under the antitrust laws. Indeed, Congress indicated that it intended the scope of RICO's equitable relief to be even broader than that available under the antitrust laws. In that respect, Senator McClellan, RICO's principal sponsor, stressed that the references to antitrust precedents were not meant to "limit the remedies available [under RICO] to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill." 115 Cong. Rec. 9567 (1969).

The Supreme Court and the lower courts have consistently interpreted the "prevent and restrain" language of the antitrust laws to broadly encompass orders designed to ameliorate ongoing and future ill effects of defendants' past violations. For example, in United States v. United States Gypsum Co., 340 U.S. 76 (1950), the Supreme Court ruled that:

> **A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance**. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. **The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct**.

Id. at 88-89 (emphasis added).

Accordingly, in that case the Supreme Court sanctioned a variety of equitable relief that went "beyond the narrow limits of the proven violation," including ordering the defendants to undertake actions in the future that would cure the ill effects arising from the defendants' past

proven violations.[5] Consistent with the Supreme Court's decisions in this area, the Eighth Circuit has stated:

> Upon finding an antitrust defendant guilty of a violation of the Sherman Act, **a district court is "empowered to fashion appropriate restraints on [the defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences.** National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697 (1978). In fashioning a remedy, a district court should endeavor to ensure that the conspirators "so far as practicable, be denied future benefits from their forbidden conduct" [quoting Gypsum]. Thus, the **district court may consider both the "continuing effects of past illegal conduct**," [citation omitted], and the possibility of "'lingering efforts'" by the conspirators to capitalize on the benefits of their past illegal conduct. [citation omitted].

ES Development, Inc. v. RWM Enters., 939 F.2d 547, 557 (8th Cir. 1991) (emphasis added).[6]

2. The foregoing authority conclusively demonstrates that the district court's equitable powers under the antitrust laws encompass issuing orders to cure the ongoing and future ill effects arising from a defendant's past violation of the antitrust laws. The expansive remedial purposes of RICO's equitable remedies likewise make clear that the Court's equitable

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[5] See also United States v. United Liquors Corp., 352 U.S. 126 (1956) ("The defendants have been found to have violated the anti-trust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful"); United States v. Ward Baking Co., 376 U.S. 327, 331-334 (1964) (holding that the government should not be foreclosed from offering evidence at trial justifying its request for relief to "cure the ill effects of the illegal conduct" that violated antitrust laws where the sought relief was "'connected' with and 'related' to practices which the companies may in the past have followed."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 726 (1944) ("Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. . . [this Court's precedents] "uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. . . . The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. **Doubts are to 'be resolved in favor of the government and against the conspirators'**") (emphasis added) (collecting cases). Accord, United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973).

[6] See also Wilk v. American Med. Ass'n, 895 F.2d 352, 367-370 (7th Cir. 1990) (affirming district court's grant of injunction against antitrust defendant on several grounds, including "lingering effects" of unlawful conduct); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) ("affirmative equitable remedies may be granted to eliminated the harmful residual effects of past [antitrust] violations . . . ."); United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d 222, 229, 231 (9th Cir. 1978).

powers under RICO also include issuing appropriate orders designed to address the ongoing and future ill effects of Defendants' fraudulent conduct. In the Senate and House Reports accompanying the RICO statute, Congress emphasized the expansive and flexible nature of the available equitable relief, noting that "[a]lthough certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons." See S. Rep. No. 91-617, at 160 (1969); accord H.R. Rep. No. 91-1549, at 57 (1970). As the Senate Report explained, RICO provided the courts with authority to craft "equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity" and to "prohibit[]" persons who committed a pattern of racketeering activity "from continuing to engage in this type of activity in any capacity." S. Rep. No. 91-617, at 79, 82.

Congress further directed that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). Congress also stated that RICO was designed to provide "enhanced sanctions and new remedies." 84 Stat. 922-23. The Supreme Court has characterized Section 1964 as a "far-reaching civil enforcement scheme," Sedima, 473 U.S. at 483, and has explained that "if Congress' liberal-construction mandate [that RICO be "liberally construed to effectuate its remedial purposes"] is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident," id. at 492 n.10. The Senate Report also explained a central purpose of civil RICO as follows:

> What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic

> well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. Rep. No. 91-617, at 79 (1969) (emphasis added). And the Supreme Court has likewise observed that a clear "aim" of RICO's civil remedies provisions is "to divest the [enterprise] of the fruits of its ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981). These statements underscore the breadth of authority conferred on district courts to fashion remedies to prevent and restrain ongoing and future misconduct, including remedies that will adversely affect wrongdoers' ability to obtain and maintain economic power through racketeering activity and which will cure the ill effects of Defendants' violations.

Moreover, as noted above (supra pp. 2-4 and n.1), Congress intended the district court's equitable powers under civil RICO to be at least as broad as, and indeed even broader than, the district court's equitable powers under the antitrust laws. Therefore, RICO's grant of authority to "prevent and restrain" unlawful conduct necessarily includes the broad equitable authority available under the antitrust laws to impose orders to cure the ongoing and future effects of Defendants' unlawful conduct.

B. The Court Should Admit Evidence of the Sought Equitable Remedies that Are Designed to Address the Ill Effects of Defendants' Fraudulent Conduct and to Prevent Future Violations

In numerous submissions throughout the past five and half years, beginning with the initial Complaint filed on September 22, 1999, the United States has identified the equitable remedies it seeks in this action. The issue of the nature and scope of non-disgorgement remedies the United States seeks in this action was not before the Court of Appeals. Indeed, such remedies were not addressed **at all** in the briefs or at oral argument. Therefore, the district court should

not read the passage quoted supra, p. 2, out of its context – a ruling on the nature and purposes of RICO disgorgement. That passage does not constitute a "holding" on an issue that was not before the court and that was not even discussed; rather it clearly is dictum insofar as it is sought to be applied to non-disgorgement remedies.[7] In any event, all of the non-disgorgement remedies sought here are forward-looking in nature. They are therefore permissible under Section 1964(a), and the Court should admit all relevant evidence to support the claims for this relief.[8]

First, as laid out in the Complaint, the United States seeks a permanent injunction with several components, each of which relates directly to the United States' interest in preventing and restraining Defendants from engaging in the fraudulent and unlawful course of conduct alleged and proven by the United States in this case. The United States will focus here on a few particular aspects of the sought injunctive relief.[9]

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[7] See, e.g., Bennis v. Michigan, 516 U.S. 442, 450 (1996)("It is to the holdings of our cases, rather than their dicta, that we must attend.") (citation omitted); United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 463 n. 11 (1993)(holding that a statement in a prior decision "is obviously not controlling coming as it did in an opinion that did not present the question we decide in these cases.").

As noted above, the Court of Appeals' ruling may be the subject of further appellate review. Whatever the ultimate resolution of that issue, the non-disgorgement remedies sought by the United States are indisputably forward-looking in nature. This Court has previously held that the non-disgorgement relief sought by the United States is equitable in nature. United States v. Philip Morris, 273 F. Supp. 2d 3, 10-11 (D.D.C. 2002).

[8] As requested in Order #875, this submission demonstrates why the Court should admit evidence to support the various forms of the United States' non-disgorgement relief. This submission is not intended to provide an argument on the sufficiency of the evidence to support such remedies; rather, we address only admission of the evidentiary justification for remedies. The Court should decide the appropriate remedies at the end of the trial in light of the totality of the evidence.

[9] Several of the components of the injunction – including a prohibition on engaging in future racketeering activity; preventing Defendants or their agents from making false or misleading statements about the health effects of smoking and secondhand smoke, the addictiveness of smoking and nicotine, and the marketing of cigarettes; and ordering Defendants to make affirmative corrective statements in future cigarette advertising, marketing, and promotional materials – are plainly aimed at preventing and restraining Defendants from engaging in precisely the same fraudulent conduct that lies at the heart of the United States' claims.

Similarly, sought relief aimed at disclosure of certain of Defendants' internal scientific and marketing research documents would allow appropriate health authorities access to information critical both to product-oriented public health efforts and to educational efforts. For example, disclosure of detailed marketing expenditure data would enable greater understanding, evaluation, and response to Defendants' sophisticated marketing to young

As one major equitable remedy, the United States seeks an order requiring Defendants to fund sustained smoking cessation programs that have been scientifically proven effective, including such features as national quit-assistance phone lines and medically approved smoking cessation therapies for dependent smokers. For example, on the issue of Defendants' marketing of certain brands of cigarettes with descriptors such as "light" or "low tar," the Court has received substantial evidence from fact witnesses (including Jeanne Bonhomme, Denise Keane, and Dr. William Farone) and expert witnesses (Drs. Robert Dolan, David Burns, and Jack Henningfield) that Defendants have designed and marketed "light" cigarettes to keep smokers smoking and to discourage quit attempts (including targeting "former smokers" to get them to re-start smoking, as Carolyn Levy specifically admitted); and that substantial percentages of smokers perceive brands with such descriptors to be "safer" or an acceptable alternative to quitting (as the Court has heard from United States' expert Dr. Neil Weinstein), in large part because Defendants have implicitly marketed them as such. Defendants continue to market "light" cigarettes, even though, as Defendants have long known, including from their internal research, "light" cigarettes provide smokers no meaningful reduction in adverse health consequences relative to their full flavor counterparts.[10]

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people under 21 and those under 18, the age at which the majority of people start smoking and choose a brand.

Numerous courts have found, in both civil RICO and antitrust cases, that requiring proven wrongdoers to provide access to records, and to pay for a monitorship to oversee compliance with the injunctive relief imposed, to be permissible components of forward-looking equitable relief to prevent and restrain ongoing and future unlawful activity. See, e.g., United States v. Sasso, 215 F.3d 283, 291-92 (2d Cir. 2000); U.S. Gypsum Co., 340 U.S. at 95; United States v. Local 30, United Slate, Tile, et al., 871 F.2d 401, 404, 409 (3d Cir. 1989). The concurring opinion in the Court of Appeals' decision agreed that a district court may order such "transparency-enhancing" relief under Section 1964(a). Philip Morris USA, 2005 WL 267948 at *12 (J. Williams, concurring).

[10] As the evidence has shown low-tar brand descriptors to be deceptive and misleading, the United States also seeks an order barring Defendants from using such descriptors. Such an order will directly prevent and restrain Defendants from continuing to engage in the deceptive and misleading labeling and marketing of cigarettes as "light," because as designed they present no meaningful reduction in adverse health consequences when smoked by human smokers.

Requiring Defendants to fund expanded access to smoking cessation programs that have proven to be effective will deprive Defendants of the incentive to continue their approach to the design and marketing of "light" cigarettes, and thereby tend to prevent future unlawful conduct. Further, improving the ability of smokers to quit successfully will reduce the economic benefit to Defendants from continuing to engage in the types of fraudulent marketing of light and low tar cigarettes alleged and proven by the United States in this case. And it will help cure the ongoing and future untoward consequences of Defendants' unlawful conduct, which was aimed at keeping smokers using cigarettes by designing and marketing cigarettes that maintained smoking addiction, even as Defendants publicly denied for decades that smoking was addictive or proven to cause any disease at all.

It is critical to give smokers access to resources that offer the best chance of quitting successfully and permanently. The Court will also hear shortly from additional witnesses, including Surgeon General Carmona, Dr. Eriksen, Dr. Ockene, and Dr. Bunn, about the impact of tobacco use on our society and about the importance of early intervention and cessation to prevent lifelong addiction to smoking and to minimize the adverse health consequences to smokers.[11]

In short, this remedy is intended to, and will, prevent and restrain future violations by Defendants, as well as contribute to the eradication of the ongoing and future ill effects of their

[11] As a related remedy to eradicate the ongoing and future effects of Defendants' fraudulent scheme, the United States also asks that Defendants be required to fund research into the prevention, early detection, and treatment of smoking-related illnesses such as lung cancer.

unlawful conduct.[12]

A second major equitable remedy sought by the United States is an order requiring Defendants to fund a sustained public education campaign, administered and controlled by an independent third party, relating to the adverse health effects of smoking, nicotine addiction, "light" cigarettes, and ETS. This relief is important because it will tend to prevent the public from being adversely affected by any future fraudulent or misleading public relations efforts by Defendants. For example, the Court has received extensive testimony from United States' expert Dr. Henningfield, Philip Morris Senior Vice President and General Counsel Denise Keane, Reynolds American CEO Susan Ivey, and others, showing that Defendants continue even today in their public statements – including on websites, package onserts, and other communications – to purposefully avoid informing smokers what they have known for decades: that smoking is addictive primarily because cigarettes deliver the drug nicotine. Similarly, Defendants continue to publicly equivocate about whether ETS is a proven cause of harm to nonsmokers.

A third related but distinct remedy sought by the United States is the requirement that Defendants fund a long-term, sustained youth smoking prevention campaign including communications and other programs. As the Court will hear presently from Dr. Eriksen, and has

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[12] In Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984), the Court of Appeals ruled that imposition of an injunction requiring a wrongdoer to create a fund to pay for diagnostic examinations was proper because it, in part, served the purpose of "deterrence of misconduct."

Consistent with that authority, this Court has previously held that "the [non-disgorgement] injunctive relief the Government seeks, including establishment of several medical and treatment funds and funding for research and development of treatment and education programs, is . . . equitable in nature." Philip Morris, 273 F. Supp. 2d at 11.

As the Court noted in that decision, courts have also held that a district court's equitable powers include the imposition of court-supervised medical monitoring funds to be paid for by wrongdoers to address the ongoing ill effects arising from the wrongdoers' misconduct. Id. See also, e.g., Dimich v. Med-Pro Inc., 304 F. Supp. 2d 517, 519 (S.D.N.Y. 2004); Katz v. Warner Lambert Co., 9 F. Supp. 2d 363, 364 (S.D.N.Y. 1998); Gibbs v. DuPont DeNemours & Co., 876 F. Supp. 475, 481 (W.D.N.Y. 1995); Day v. NLO, 851 F. Supp. 869, 886 (S.D. Ohio 1994).

heard from Dr. Biglan, some multifaceted counter-marketing campaigns have proven effective at changing attitudes, norms, and behavior toward tobacco use. According to these experts, it is critical that all of the remedial programs sought as relief in this case be adequately funded for a sufficient period of time and integrated into a comprehensive tobacco control program. Such adequate funding is necessary to allow ongoing evaluation and updating of the program's elements in order to ensure continued effectiveness. The youth smoking prevention campaign would address Defendants' marketing to adolescents and counter Defendants' marketing aimed at people under age 21.

Additionally, the United States may also seek an injunction aimed at preventing and restraining Defendants' continued marketing to young people, including those under 21. Under the remedy, the Court would order specific reductions in youth smoking on a pre-determined schedule. The Court would monitor and evaluate Defendants' conduct in complying with the Court's injunction and impose appropriate sanctions, including monetary sanctions, should the goals not be met and should the Court determine that Defendants' conduct was inadequate in complying with the injunction. This remedy would establish an economic disincentive for Defendants to continue their wrongful conduct of marketing cigarettes to young people and publicly denying that they do so and publicly denying that their marketing has any effect on youth smoking behavior.

Thus, the non-disgorgement equitable remedies sought by the United States constitute forward-looking relief that the Court has full equitable authority to impose under Section 1964(a). The Court should proceed to allow the United States to introduce evidence to support these non-disgorgement remedies according to the trial presentation described below.

II. The United States' Presentation Regarding Non-Disgorgement Remedies Should Be Postponed Until After Defendants' Conclude Their Defense to Liability

The February 4, 2005 ruling of the Court of Appeals has dramatically changed any assessment of the overall remedial scheme necessary to prevent and restrain future wrongful conduct by Defendants. At the time that the United States filed expert reports in this action, the Court had ruled that disgorgement is available under 18 U.S.C. § 1964(a). United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 134-35 (D.D.C. 2000). That was the law of the case, and remained so through years of pretrial discovery, the United States' trial preparation, and the first four months of trial. Accordingly, major decisions about the presentation of evidence on remedies were made in reliance on the legal standards then controlling this action.

The absence of disgorgement as an available remedy necessitates broadening the presentation of evidence supporting other remedies in order to attempt to fashion a meaningful remedial structure. While the United States has identified the non-disgorgement remedies that should be permitted under the February 4 appellate decision, it should come as no surprise that time is necessary to evaluate the testimony and exhibits that are necessary to support a remedial scheme that excludes disgorgement.[13] The question of what comprehensive collection of equitable remedies is necessary to prevent and restrain future wrongful conduct by the major cigarette manufacturers in the multi-billion dollar tobacco industry is a significant one. Arguments supporting certain equitable relief – such as the need to prevent the use of deceptive descriptors such as "light" and "medium" – can be made based on testimony presented in the

[13] In Order #871, the Court indicated that the Court of Appeals' decision and/or logistical considerations could warrant revisiting the timing of trial presentations of specific evidence on non-disgorgement remedies. The United States respectfully suggests that such reconsideration is warranted in light of the Court of Appeals' decision.

liability phase of trial. Other relief requires that the testimony of the United States' remedies experts and fact witnesses offering remedies testimony – Drs. Ockene, Bunn, Eriksen, Healton, Wyant,[14] and Surgeon General Richard Carmona – be carefully reviewed and structured so as to fit within the structure of non-disgorgement relief permitted under the Court of Appeals' decision.

The mid-trial change in the law governing the permissible scope of relief is a compelling reason for the Court to alter the order of presentation of remedies evidence by the parties. In light of the Court of Appeals' decision, the Court should permit the United States an opportunity to reevaluate whether the experts it identified over three years ago under the previously governing legal standard – and the Rule 26 disclosures these experts made between November 2001 and September 2003 – are able to provide adequate testimony to support the relief available under the limitation imposed by the Court of Appeals. The United States may need to move for leave to identify a few additional experts to narrowly address certain limited remedies, or to recall one of the experts who has previously testified, such as Dr. Biglan, to offer focused testimony on issues that bear on sought relief. If the schedule for the presentation of evidence does not provide time for the United States to present or the Court to consider such a motion, the United States will be prejudiced by its inability to tailor its presentation of evidence under the standard set on February 4, 2005, by the Court of Appeals. Such a change is warranted to avoid a manifest injustice to the United States. Cf. Fed. R. Civ. P. 16(e) (pre-trial orders may be modified to present "manifest injustice"); Watkins v. Peterson Enters., 57 F. Supp. 2d 1102,

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[14] In Order #235, the Court found Dr. Wyant's testimony relevant, inter alia, to assist the Court in evaluating whether any imposed remedy – not just disgorgement – would be proportionate to the harm caused by the unlawful conduct.

1107 (E.D. Wash. 1999) (permitting defendant to add affirmative defense after pre-trial order, where decision of the state supreme court on a question of state law that was certified while the case was pending had "a profound impact" on the case). There would be no prejudice whatsoever to Defendants by the allowance of additional expert testimony in narrowly defined areas, since Defendants would have the opportunity to depose the experts on the topics at issue prior to the experts' trial testimony.[15]

For these reasons, the United States renews its request that the Court separate the presentation of evidence on liability from that on remedies by requiring Defendants to present their case in chief on liability issues at this time. As soon as Defendants complete their liability case, each side will continue with those witnesses addressing remedies. This schedule will allow the parties and the Court to take full account of the import of the Court of Appeals' decision for remedies issues, including potentially significant changes to the breadth of the testimony of remedies witnesses. At the same time, the requirement in Order #875 that Defendants file the testimony of two witnesses on February 22, 2005, and be prepared to begin their liability case, insures that there will be no interruption in trial proceedings by the alteration in the schedule for the presentation of evidence.

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[15] As the authority cited by the United States in the briefing that lead to Order #871 makes clear, the Court has broad authority, both under Fed. R. Evid. 611 and its inherent powers, to control the mode and order of the presentation of evidence at trial in order to avoid prejudice and promote justice and efficiency. See United States' Expedited Motion and Memorandum in Support of its Motion to Adjust the Presentation of Evidence at 5-8. Moreover, any minimal discovery that could be occasioned by the Court's grant of a motion to supplement the testimony of United States' experts on non-disgorgement remedies could be undertaken while Defendants' liability case is proceeding, avoiding undue delay or interruption in this lengthy trial.

Respectfully submitted,

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February 16, 2005