UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and TOBACCO-FREE KIDS ACTION FUND, *et al.*, Plaintiff-Intervenors, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., *et al.*, Defendants.	)	Civil Action No. 99-CV-02496 (GK) Next scheduled appearance: None Scheduled

UNITED STATES' MEMORANDUM IN OPPOSITION TO
CERTAIN DEFENDANTS' MOTION FOR CLARIFICATION
OR IN THE ALTERNATIVE FOR RELIEF UNDER RULES 52, 59 AND 60
WITH RESPECT TO THE COURT'S AUGUST 17, 2006 ORDER

The Court should deny Certain Defendants' Motion for Clarification, because there is no legal basis for their request that the Court restrict the scope of the injunctive relief imposed by Order #1015, which was entered after five years of discovery, a nine-month trial, and thousands of pages of post-trial submissions from the parties. Specifically, the Court should not limit the meaning or application of Sections II.A.1 and II.A.3 of Order #1015, and it should not permit defendants to engage in prohibited conduct or escape affirmative obligations overseas unless compliance with the Court's order would interfere with the sovereignty of another nation. Granting defendants' request that the Court hold that an injunctive decree must describe every single act it prohibits would not only be contrary to well-established precedent, but would also

eviscerate the effectiveness of the Court's injunction by allowing defendants to continue to engage in fraudulent conduct of the type that has had a devastating impact on the American public for the past 50 years. Similarly, there is no legal basis for defendants' request that they be allowed to continue to deceptively market "light" cigarettes overseas in an effort to put profits over health through fraudulent means.

I. ARGUMENT

A. No Clarification Or Restriction Of The Injunctive Provisions In Sections II.A.1 And II.A.3 Of Order #1015 Is Warranted

The language contained in Sections II.A.1 and II.A.3 of Order #1015 has been imposed by other courts and proven both specific enough to satisfy the requirements of Fed. R. Civ. P. 65(d), yet also necessary for preventing defendants from continuing their ongoing fraudulent conduct. Nevertheless, in a supposed refutation of what they falsely describe as the "government's interpretation,"[1] defendants point out the absurdity of an overly broad interpretation of the injunction. To wit, they contend that "18 U.S.C. § 1961(1) defines 'racketeering activity' to mean any act indictable under any of more than sixty listed federal statutory provisions, including (to name a few) not only the mail and wire fraud statutes at issue in this case, but also statutes ranging from those governing extortionate credit transactions, to financial institution fraud, to immigration fraud, to obscenity laws, to false statements in application and use of passports, to copyright infringement, to unauthorized trafficking in sound

[1] Not only do defendants falsely attribute to the United States the position that the Court's injunctive decree prohibits defendants from engaging in things like extortionate credit transactions, but they also imply that the Court must choose between defendants' restrictive reading of the Court's injunction and the alternative they ascribe to the United States. Defendants offer a false choice based on their erroneous description of the United States' position.

recordings, and to laws governing reporting or currency and foreign transactions. On top of these sixty-plus federal statutory provisions, 'racketeering activity' can also include broad categories of criminal offenses chargeable under *state* law." Defs.' Mem. at 6-7.

The United States agrees. Of course, there has never been any suggestion, by the Court or otherwise, that the injunction at issue bars all illegal racketeering activity. Rather, the Court specifically limited it to enjoining defendants "from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States," Final Order § II.A.1., and "from making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." Final Order § II.A.3. The Court then provided several examples of material statements. *Id*. Defendants ignore, however, the well-established principal in this Circuit that all injunctions must be read in the context of the case in which they were brought and the findings of the court related thereto. *Common Cause v. Nuclear Regulatory Comm'n*, 674 F2d 921, 927 (D.C. Cir. 1982).

As such, the Court's injunctive relief is not overly broad because it does not bar all possible racketeering activity by these defendants, but rather is limited to the type of conduct for which the defendants have here been found liable, as is explicitly detailed in the Court's findings of fact. The Court's injunction is standard and enforceable in civil RICO cases and, when read in the context of the Court's extensive findings of fact, as it must be, complies fully with Federal Rule of Civil Procedure 65. Just as significantly, defendants' fraudulent conduct over the past

50 years and the likelihood of future unlawful activity makes it critically important that the Court deny defendants' motion, so as to prevent defendants from taking advantage of an unduly narrow interpretation of the Court's order to pursue their fraudulent objectives.

1. The Injunctive Language Used by the Court is Standard and Enforceable in Civil RICO Cases

Defendants' request that the Court restrict the scope and meaning of the language contained in Sections II.A.1 and II.A.3 of Order #1015 should be rejected because the language has been imposed and made enforceable in civil RICO actions ruled on by other courts. For instance, in *United States v. Local 1804-1, Intern. Longshoremen's Ass'n*, 831 F.Supp 177 (S.D.N.Y. 1993), *aff'd in part, vacated in part, U.S. v. Carson*, 52 F.3d 1173 (2d Cir. 1995) (affirming the validity of the district court's injunctive language in light of appellant's claim that injunction was overbroad), defendants were permanently enjoined from, among other things, "committing any acts of racketeering activity, as defined in Section 1961 of Title 18 of the United States Code." In that case, the court held that "[w]e believe that this injunction is narrowly tailored to avoid any interference with the defendants' constitutional rights. We also believe that it will ensure that the defendants will commit no further racketeering acts on the Waterfront." *Id*. at 191-92.

Similarly, in *United States v. Mason Tenders District Council of Greater New York*, 1995 WL 679245 (S.D.N.Y. 1995), the Court held that

> [t]he Government's First Proposed Injunction asks this Court to enjoin the Six Individual Defendants from: 1. Committing any act of racketeering activity, as defined in Section 1961 of Title 18 of the United States Code. Such an injunction is appropriate within the meaning of § 1964, in that it constitutes a 'reasonable restriction on future activities.' § 1964(a). As in *Carson*, there is a 'reasonable likelihood that the wrong will be repeated' without

> such an injunction. The likelihood of repetition can be inferred from the Six Individual Defendants' acts of past misconduct founded on the systematic wrongdoing that underlay the January 13 Order. Though somewhat tautological, no injunction could be more exactly tailored to prevent the recurrence of such racketeering acts than an injunction against racketeering. Such an injunction is neither vague or overbroad. The RICO statute sets forth in detail the type of activity that constitutes its violation, and ample case law exists interpreting the statute.

Id. at *11.

The United States is unaware of any civil RICO actions in which the language forming the basis of defendants' motion has been held unenforceable or in violation of the Federal Rules of Civil Procedure or the United States' Constitution. For this reason, and the reasons that follow, defendants' motion should be denied.

2. Injunctions Must Be Read in the Context of the Entire Record, Including a Court's Findings of Fact

Defendants' suggestion that Sections II.A.1 and II.A.3 of Order #1015 "impose additional, impossible-to-define burdens on defendants in violation of Rule 65 and longstanding Supreme Court and D.C. Circuit precedent," Defs. Mem. at 4, is wrong. It is well-established that injunctions cannot be analyzed in a vacuum, but rather must be considered in light of the context in which they arise. The D.C. Circuit has held that

> [w]e recognize that the fair notice requirement of Rule 65(d) must be applied 'in the light of the circumstances surrounding [the injunctions's] entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent.' *United States v. Christie Industries, Inc.*, 465 F.2d 1000, 1007 (3d Cir. 1972). In the context of the litigation, an injunction's language might be sufficiently specific to notify the parties of the acts the court seeks to restrain. *See, e.g.*, *Williams v. United States*, 402 F.2d 47, 48-49 (10th Cir. 1967) (sustaining injunction in light of defendant's subjective knowledge).

Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927 (D.C. Cir. 1982); *see also Sucrs. De A. Mayol & Col., Inc. v. Mitchell*, 280 F.2d 477, 481-82 (1st Cir. 1960) (where the district court's supporting opinion makes clear what activities are covered by injunction, it is not too vague to be understood).

In *Landmark Legal Foundation v. EPA*, 272 F.Supp.2d 70 (D.D.C. 2003), the court noted, in quoting *Common Cause*'s admonition that an injunction must be understood in light of the circumstances surrounding its entry, "[t]he D.C. Circuit has taken a practical approach to Rule 65(d)." *Id.* at 74-75. As such, the injunctive relief here at issue must be understood in light of the RICO violations for which the defendants have been found liable, as explicitly articulated by this Court. As described in further detail below, *infra* at 15-17, the Court found defendants liable for seven specific categories of fraudulent conduct. Given the nine-month trial and over fourteen hundred pages of factual findings, defendants' complaint that they fail to comprehend the parameters of the injunctive provisions imposed to enjoin them from continuing their fraudulent conduct is misguided, at best. *See also Reliance Ins. Co. v. Mast Construction Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998) (terms of injunctive relief must be "read in light of the injunctive order as a whole").

3. The Injunctive Relief Ordered Here Complies With Fed. R. Civ. P. 65(d)

It is clear that a court need not detail every possible infraction in drafting its injunctive language. *Medtronic, Inc. v. Benda*, 689 F.2d 645, 649 (7th Cir. 1982) (holding that "[i]t would be impossible for any court to identify every conceivable act that would be covered by the restrictive covenant. All that is required under Fed. R. Civ. P. 65(d) is for the language of the injunction to be as specific as possible under the totality of the circumstances, such that a

reasonable person could understand what conduct is proscribed.”). Here, given the totality of the circumstances, including the Court’s detailed findings of fact, defendants ought to know what conduct is proscribed by the Court’s injunction.

Consistent with the foregoing principle, in *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001), the Second Circuit considered whether the district court ran afoul of Fed. R. Civ. P. 65(d) in ordering that “[i]f Clorox wants to pursue this subject, there should be an attempt to make a clean break with false and misleading depictions and portray something that indicates the degree of risk of leakage without portraying the leakage as simply an ever-present characteristic of the Slide-Loc bags.” The Court reasoned that

> Rule 65(d) does not require the district court to ‘predict exactly what [Clorox] ‘will think of next’ or to describe all possible, permissible future commercials that Clorox may produce involving Ziploc Slide-Loc storage bags. *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748 (2d Cir. 1994). As this court has held before, the district court can do no more to assist Clorox in determining whether a proposed advertisement conveys a message that is literally false with regard to a depiction of Ziploc Slide-Loc bags. *See American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 171 (2d Cir. 1978).

Id. at 241. The Second Circuit thus held that “Clorox is therefore on notice that other advertisements that similarly fail to accurately depict the risk of leakage from Ziploc Slide-Loc storage bags will violate section 43(a) of the Lanham Act under the district court’s injunction. This Order is hardly so broad as to be considered a mere obey-the-law order of the sort that this court has condemned in the past.” *Id.*

Similarly, in *Professional Ass’n of College Educators, TSTA/NEA, v. El Paso County Community College District*, 730 F.2d 258 (5th Cir. 1984), the Fifth Circuit, although remanding to the district court for findings to support certain aspects of the injunction at issue, determined

that the injunction, at least in relevant part, was adequately specific and not overbroad. There, the district court had enjoined "retaliation or discrimination against employees due to their membership or association with PACE or other lawful employee associations." *Id.* at 273. The Fifth Circuit held that

> [t]he standards requiring specificity in injunctions are fully met here. These rules do not require "unwieldy" specificity, but only that the injunction "be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369, 373 (5th Cir. 1981). . . . It is difficult to understand how the defendants could have legitimate difficulty understanding what they are forbidden to do, or to imagine how the injunction could be more specific without attempting to catalog every conceivable means by which an employer might retaliate or discriminate against an employee. Nor is the injunction too broad, in the sense of unduly prohibiting conduct dissimilar to the violations established. The district court has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB v. Express Publishing Co.*, 312 U.S. 426, 435 (1941).

Id. at 273. Likewise, in the instant matter, given the nine-month trial of the issues and the Court's 1653 page opinion containing exceptionally detailed findings of fact and conclusions of law, it is difficult to imagine that defendants have a legitimate inability to understand the prohibition imposed on them by the Court's injunction. Thus, the injunctive relief at issue does not violate Rule 65.[2]

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[2] *See also, Jeneric/Pentron, Inc. v. Dillon Co, Inc.*, 259 F.Supp.2d 192, 198 (D. Conn. 2003) (the court found "that the use of the word 'infringement' is not overly broad in light of Federal Circuit precedent and the detailed record that exists in th[e] case"); *Movie Systems, Inc. v. MAD Minneapolis Audio Distributors, Inc.*, 717 F.2d 427, 432 (8th Cir. 1983) (holding that "[t]he order prohibits 'all sales by defendants of equipment having [the] capability' of receiving HBO programming, and thus gives explicit notice of precisely what conduct is forbidden. That is all that is required."); *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 85 (2d

There is no dispute that simple "obey the law" injunctions or those so broad as to cover activity distinct and removed from the conduct originally charged are unenforceable. Defendants cite a whole line of cases holding as much. Those cases, however, are factually distinguishable from the injunction here at issue, which – in the context of the Court's trial of the issues and detailed findings of fact and conclusions of law – is far more specific than an "obey the law" or overly broad injunction.

For example, in *Schmidt v. Lessard*, 414 U.S. 473 (1974), the district court entered an opinion concluding that appellee and the other members of her class "are entitled to declaratory and injunctive relief against further enforcement of the present Wisconsin scheme against them." *Id.* at 474, Thereafter, the court entered a judgment, which stated only that "It is Ordered and Adjudged that judgment be and hereby is entered in accordance with the Opinion heretofore entered." *Id.* The Supreme Court held that "[t]he order here falls far short of satisfying the second and third clauses of Rule 65(d). Neither the brief judgment order nor the accompanying opinion is specific in outlining the 'terms' of the injunctive relief granted; nor can it be said that the order describes in reasonable detail . . . the act or acts sought to be restrained. Rather, the defendants are simply told not to enforce the present Wisconsin scheme against those in the appellee's class." No such overbroad and unrestricted injunction was entered in this case.

Cir. 1982) (holding that an injunction "rendering any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiff's copyrighted musical compositions" is "sufficiently clear to notify Gap Stores that broadcasting radio programs as it does now is forbidden."); *CF&I Steel Corp. v. United Mine Workers of America*, 207 F.2d 170, 173-74 (10th Cir. 1974) (injunction restraining defendants "from engaging in a strike, work stoppage, interruption of work, or picketing at the Allen Mine of the CF&I Steel Company at Weston, Colorado, over disputes arising from employee suspensions, employee discharges, and work assignments, during the remaining life of the national Bituminous Coal Wage Agreement of 1971" was found not to be vague or overbroad).

Even further removed from the facts of the instant injunction, in *Gunn v. University Comm'n to End the War in Viet Nam*, 399 U.S. 383, 388-89 (1970), the Court dismissed the case for lack of jurisdiction. There was, in fact, no injunction at all issued there. The issue was whether the Supreme Court had jurisdiction to hear a case where no injunction had issued.

In *Int'l Longshoremen's Ass'n., Local 1291 v. Phila. Marine Trade Ass'n.*, 389 U.S. 64 (1967), a union and employer arbitrated an issue of work set-backs and the arbitrator ruled in favor of the employer. When the issue of work set-backs subsequently arose, the district court ordered that the arbitration award be specifically enforced and that the union abide by the arbitration award. During the hearing, the union attorney asked the district court several times for clarification of its order, explaining that the initial arbitration award was rendered upon specific facts and that it was unclear how the arbitration award could apply to wholly different factual scenarios. The court provided no clarification. With respect to a subsequent issue relating to work set-backs, the employer sued the union for contempt of the court's order. The district court found the union liable for contempt. *Id.* at 65-73. The Supreme Court held that

> On its face, the decree appears merely to enforce an arbitrator's award. But that award contains only an abstract conclusion of law, not an operative command capable of enforcement. When counsel for the union noted this difficulty and sought to ascertain the District Court's meaning, he received no response. Even at the contempt hearing on March 1, the union was not told how it had failed to comply with and * * * abide by the (Arbitrator's) Award, in accordance with the District Court's original order. That court did express the view on March 1 that the February walkouts had been illegal * * * under the circumstances. But such strikes would have been illegal-in the sense that they would have been violative of the collective bargaining agreement-even if the District Court had entered no order at all, *Local 174, Teamsters, Chauffeurs, etc. v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593, and the record does not reveal what further circumstances the court deemed relevant to the conclusion that the union had violated its

> decree. Thus the September 15 decree, even when illuminated by subsequent events, left entirely unclear what it demanded. Rule 65(d) of the Federal Rules of Civil Procedure was designed to prevent precisely the sort of confusion with which this District Court clouded its command. The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. Because the decree of this District Court was not so framed, it cannot stand. And with it must fall the District Court's decision holding the union in contempt. We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

Id. at 74-75. Again, given this Court's trial of the issues and its extensive findings, the injunctive decree here at issue is far more specific and clear than that in *Local 1291*.

Likewise, in *Gulf Oil Corp. v. Brock*, 778 F.2d 834 (D.C. Cir. 1985), pursuant to a FOIA complaint, the district court enjoined disclosure not only of the affirmative action plan requested, but also of all "substantially similar" documents. *Id.* at 842. In analyzing the effect of that injunction, the D.C. Circuit held that "the injunction arguably forbids the disclosure of information that is plainly disclosable under FOIA and DOL regulations" and determined that the injunction would, in effect, bar release of all information in all affirmative action plans. *Id.* at 842-43. No such sweeping result could be effected by enforcement of the injunction issued in this case. *See also Cobell v. Norton*, 392 F.3d 461, 475 (D.C. Cir. 2004) (Court found that specific injunction at issue subjected defendants to – without specific findings of unreasonable delay – "contempt charges for every legal failing, rather than simply to the civil remedies provided in the [applicable statute]" and that it was inappropriate to enjoin future violations

"unlike and unrelated" to the original conduct); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) (injunction seeking to enjoin a city from "discriminating on the basis of race" in its annexation decisions is an inappropriate "obey the law" injunction); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978) (the portion of the injunction that was rejected was because it was found to be "more specific than Title VII only in that it did not prohibit discrimination on basis of religion or national origin"); *United States v. Vitasafe Corp.*, 345 F.2d 864, 871 (3d Cir. 1965) (injunction that prohibits the distribution of literature which contains certain specified statements and misrepresentations "or which is otherwise false and misleading" lacked the specificity to be enforceable). All of these situations presented far more broad and unwieldy provisions of injunctive relief than that at issue here.

Interestingly, defendants also rely on cases that while striking down at least portions of the disputed injunctions pursuant to Rule 65, explicitly make clear the distinctions between the factual scenarios at issue in those matters, as opposed to the relevant facts here. For example, in *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310 (D.C. Cir. 1981), the D.C. Circuit, in striking down only one clause of a lengthy injunction because that clause could potentially reach "nearly any sort of violation of the securities laws, and possibly reach out even beyond the securities area," *id*. at 1318, held that

> [i]t does not follow, however that a broadly-phrased injunction may never be valid, nor that a prohibition of future transgressions, even in relatively wide-ranging terms, of a law already broken by the defendant is necessarily invalid. For example, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), the Supreme Court upheld an injunction which "[b]y its terms. . . enjoined any practices which were violations of [particular] statutory provisions," recognizing that "[d]ecrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown." As the Court has stated

> elsewhere, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past."

Id. at 1317-18 (internal citations omitted). *See also Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733 (2d Cir. 1994) (noting that Bayer AG had not shown "the kind of 'proclivity for unlawful conduct' that might justify a more general decree," *id.* at 749, n.11, in rejecting portions of the injunction, the Court indicated that "an injunction that follows the language of the statute at issue may be appropriate in some cases where the context clarifies the scope of the injunction," *id.* at 748, and held that " [t]he decree that the District Court devises on remand need not be so precise as to predict exactly what Bayer AG 'will think of next,' Brief for Appellee at 35, in using the "Bayer" mark. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193, 69 S.Ct. 497, 500, 93 L.Ed. 599 (1949) (noting 'necessity of decrees that are not so narrow as to invite easy evasion'), *id.* at 748-49).

4. Injunctions that are Broad Enough to Properly Restrain Likely Future Wrongdoing are Legitimate and Enforceable

The narrow interpretation of the Court's injunctive decree advocated by defendants not only fails to find support in case law addressing the requirements of Rule 65, but there are important, practical reasons to reject defendants' arguments. If the Court were required to specifically detail each and every act that could violate an injunction, it would leave defendants free to work their way around the specific limitations to achieve their fraudulent aims. Indeed, the conduct of a defendant that leads to the imposition of injunctive relief bears heavily on the proper scope of an injunction.

In *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), the Supreme Court noted that "[b]y its terms it enjoined any practices which were violations of those statutory provisions. Decrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown." *Id.* at 192. The Court went on to recognize the "necessity of decrees that are not so narrow as to invite easy evasion." *Id.* at 193. Likewise, in *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), the Ninth Circuit held that "[i]n light of the overwhelming evidence of appellants' deliberate violations of Transgo's interest, the injunction was not overbroad." *Id.* at 1022. *See also Interstate Commerce Comm'n v. Keeshin Motor Express Co.*, 134 F.2d 228, 231 (1943) (while it is inappropriate to order injunctive relief that enjoins all violations of a statute merely because a violation has been found, violations that "bear some resemblance to that which the [defendant] has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past" can properly be enjoined).

Here, defendants' past and continuing fraudulent conduct, as explicitly found and detailed by this Court, warrants imposition of the injunctive relief ordered. The Court specifically found that this case

> is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and

> to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

Final Op. at 3-4. More specifically, the Court made individual findings for each of the categories of alleged frauds:

- [c]igarette smoking causes disease, suffering, and death. Despite internal recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades. The scientific and medical community's knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964. However, even after 1964, Defendants continued to deny both the existence of such consensus and the overwhelming evidence on which it was based.

Final Op. at 219;

- [d]espite the extensive and detailed knowledge possessed by Defendants for decades about the addictive qualities of nicotine and smoking, Defendants have publicly made false and misleading denials of the addictiveness of smoking, as well as nicotine's role in causing that addiction, and have suppressed the research results and data they produced and possessed contradicting such denials.

Final Op. at 445-46;

- [g]iven the importance of nicotine to the ultimate financial health of Defendants, they have undertaken extensive research into how nicotine operates within the human body and how the physical and chemical design parameters of cigarettes influence the delivery of nicotine to smokers. Using the knowledge produced by that research, Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery.

Final Op. at 515;

- [d]efendants made, and continue to make, false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting. These actions include: assertions that low tar cigarettes deliver "low," "lower," or "less" tar and nicotine than full-flavor cigarettes; claims that low tar cigarettes are "mild" or deliver "clean" taste; and use of brand names with descriptors such as "light" and "ultra light," with full knowledge that consumers interpret these claims and descriptors to convey reduced risk of harm. . . . It is clear, based on their internal research documents, reports, memoranda, and letters, that Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes. It is also clear that while Defendants knew that the FTC Method for measuring tar and nicotine accurately compared the nicotine/tar percentages of different cigarettes, they also knew that the Method was totally unreliable for measuring the actual nicotine and tar any real-life smoker would absorb because it did not take into account the phenomenon of smoker compensation. Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.

Final Op. at 877, 970;

- [t]he evidence is clear and convincing – and beyond any reasonable doubt – that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so. . . . In fact, the overwhelming evidence. . . proves that, historically, as well as currently, Defendants do market to young people, including those under twenty-one, as well as those under eighteen. Defendants' marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-cause illnesses) or quit. Defendants intensively researched and tracked young people's attitudes, preferences, and habits. As a result of those investigations, Defendants knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive. Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts.

Final Op. at 1207-08;

- [d]espite the fact that Defendants' own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers,

> Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized "friendly" scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those "friendly" scientists, without revealing their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers. Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as BATCo, R. J. Reynolds, and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it's still "an open question"; and others, such as Philip Morris, say that they don't take a position and that the public should follow the recommendations of the public health authorities. To this day, no Defendant fully acknowledges that the danger exists.

Final Op. at 1407; and

- over the course of approximately fifty years, different Defendants, at different times, took the following actions in order to maintain their public positions on smoking and disease-related issues, nicotine addiction, nicotine manipulation, and low tar cigarettes, in order to protect themselves from smoking and health related claims in litigation, and in order to avoid regulation which they viewed as harmful: they suppressed, concealed, and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in smoking and health related litigation and to federal regulatory agencies, and to shield those documents from the harsh light of day. While it is true that some of these efforts were unsuccessful and some of the elaborate document "retention" policies were either not fully implemented or not implemented at all, the fact remains that many were fully complied with. Consequently, we can never know the full extent of the evidence destroyed and lost to public view.

Final Op. at 1477-78.

The Court supported these broader findings with hundreds of pages of specific findings of fact, citing to voluminous testimony and documentary evidence. Finally, the Court found that "[t]he evidence in this case clearly established that Defendants have not ceased engaging in

unlawful activity. Even after the Complaint in this action was filed in September 1999, Defendants continued to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day." Final Op. at 1604.

Moreover, this Court concluded that there is a continuing likelihood that defendants will further engage in future RICO violations. Final Op. at 1601-13. In so doing, the Court noted that "as long as Defendants are in the business of selling and marketing tobacco products, they will have countless 'opportunities' and temptations to take similar unlawful actions in order to maximize their revenues, just as they have done for the past five decades." Final Op. at 1603.

The circumstances of this case, *i.e.*, that defendants engaged in a calculated, well informed, 50-year conspiracy to commit fraud and that they have overcome any barriers heretofore erected to limit their wrongful conduct, must be considered in evaluating the appropriateness of this injunction. Courts have recognized that the nature and the breadth of injunctive relief must be fashioned to meet the circumstances of each case. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Bowles v. Leithold*, 60 F.Supp. 909, 913 (E.D. Pa. 1945), *aff'd, 155 F.2d 124 (3d Cir. 1945)* ("a court of equity may mould its decree to suit the circumstances of the case and the needs of the public interest"); *SEC v. Hillsborough Investment Corp.*, 176 F.Supp. 789, 790 (D. N.H. 1959) (quoting *Nat'l Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 436) ("the breadth of the injunction 'must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts' which have been found to have been committed in the past.").

It is thus imperative that the relief not be limited in a way that will allow Defendants to continue their illegal activity. Defendants' motion to limit the injunction should be denied.

B. The Court's Final Order Should Not Be Limited To Defendants' Domestic Activities

1. The Court's Injunction Must Be Read to Prohibit Overseas Conduct

The injunctive provisions in the Court's Final Order should prohibit certain unlawful activities overseas that would undermine the health and safety of the American public. The Court made extensive findings concerning international activities that defendants' viewed as essential to the successful implementation of their fraudulent scheme, making it clear that defendants' fifty-year conspiracy to defraud the American people respected no geographic boundaries. For example, the Court found that "the Tobacco Institute worked closely and consistently over a lengthy period of time with overseas and international tobacco organizations to present a unified front on issues of common concern; to influence public opinion; to convince government officials to adopt the public positions of the United States tobacco industry; to maintain the Defendants' open question position on the relationship between smoking and adverse health effects; to avoid adverse liability verdicts in lawsuits brought around the world; and as an overarching goal to preserve and enhance Defendants' profits." Final Op. at 201, ¶ 444. Other international organizations, including but not limited TMSC, TRC, TAC, INFOTAB, TDC and CORESTA, have been a critical part of defendants' fraudulent scheme. *Id.* at 170-200.

Among other findings concerning international activity, the Court detailed the extensive efforts by defendants, including particularly BATCo and Brown & Williamson, to engage in worldwide destruction of documents to avoid damaging defendants' public relations and litigation positions. On the specific subject of light cigarettes, the Court made findings of fact

concerning, *inter alia*, Philip Morris's use of its overseas INBIFO research facility for cigarette testing and design (*id.* at 778-79, ¶¶ 2152-55), BATCo's recognition of the importance of developing the market for light cigarettes as health reassurance brands in developing nations, test marketing efforts for light cigarettes in Belgium (*id.* at 550-51, ¶ 1466 and 838, ¶ 2282) and Ireland (*id.* at 838, ¶2283), light cigarette packaging in the Netherlands (*id.* at 860-61, ¶ 2337) and extensive coordination amongst defendants concerning public positions on the health effects of cigarettes. *See generally* Final Op.

In light of these and other findings, there is plainly no basis for defendants' assertion that the Final Order contravenes the "jurisdictional reach of the RICO statute." Defs. Mem. at 10. To the contrary, the Final Order is a proper exercise of this Court's broad equitable authority to prevent and restrain defendants from perpetuating their fraudulent scheme to profit at the expense of the American public.

2. The Court Has the Authority to Prohibit Overseas Activity

A federal district court in the United States has the authority to prohibit a party properly before it from taking actions overseas, so long as the prohibition will not intrude upon the sovereignty of another nation. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (federal district court has the ability in exercising its equity powers to command parties properly before it to cease or perform acts outside its territorial jurisdiction). Moreover, the cases cited by defendants in support of their argument are wholly distinguishable from the facts present here.

In *McColloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963), the Supreme Court enjoined the National Labor Relations Board from conducting a representation election on a Honduran ship where the crew, whose members were all Honduran,

was already represented by the Honduras National Maritime Labor Union ("Sociedad Nacional de Marineros des Honduras). In 2005, the Supreme Court distinguished *McCulloch*'s narrow holding in *Spector v. Norwegian Cruise Line Ltd.*, noting that the *McCulloch* decision "held the National Labor Relations Act (NLRA) inapplicable to labor relations between a foreign vessel and its foreign crew not because foreign ships are generally exempt from the NLRA, but because *that particular application* of the NLRA would interfere with matters that concern *only* the ship's internal operations. These cases recognized a narrow rule, applicable only to statutory duties that implicate the foreign vessel's internal order rather than the welfare of American citizens." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S.Ct. 2169, 2171 (U.S. 2005) (emphasis added). *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945), also cited by defendants, is similarly inapplicable, because the Second Circuit's conclusions about the Sherman Act are fact-specific, based on "international complications" which do not exist here.

Indeed, the only specific argument that defendants advance for modifying the Final Order — that the order might somehow be read to prescribe entirely foreign conduct, lacking any nexus to the United States — is plainly a red herring. As defendants themselves recognize, the Court's order does not expressly seek to regulate such conduct. The Court should reject defendants' effort to seize upon such a strained interpretation of the Court's order and, by that tactic, secure limitations on the injunctive relief in this case that would effectively allow defendants to perpetuate their fraud on the American public from abroad.

II. CONCLUSION

For the foregoing reasons, defendants' motion should be denied.

Respectfully submitted,

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