UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 99-CV-2496 (GK)**
v.	)	
	)	**Next Scheduled Court Appearance:**
PHILIP MORRIS USA INC. (f/k/a	)	**None**
PHILIP MORRIS INCORPORATED), et	)	
al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO AMENDED BRIEF OF ESSENTIAL ACTION, THE CITY AND COUNTY OF SAN FRANCISCO, THE ASIAN-PACIFIC ISLANDER AMERICAN HEALTH FORUM, THE SAN FRANCISCO AFRICAN AMERICAN TOBACCO FREE PROJECT AND THE BLACK NETWORK IN CHILDREN'S EMOTIONAL HEALTH TO APPEAR AS AMICI CURIAE IN SUPPORT OF THE POSITION OF THE PLAINTIFF UNITED STATES OF AMERICA REGARDING REMEDIES

Four organizations and a governmental body -- Essential Action, the City and County of San Francisco, the Asian-Pacific Islander American Health Forum, the San Francisco African American Tobacco Free Project, and the Black Network in Children's Emotional Health (the "Putative Amici") -- seek to appear as amici curiae in support of the Government's proposed remedies. Their purported purpose in doing so is to provide "insight into how remedies designed by this Court should take into account the multinational character of certain of the defendants and how certain remedies should be given explicit extraterritorial application, so as to avoid circumvention." Putative Amici Br. at 8. The Putative Amici's motion should be denied on at least three grounds:[1]

[1] The Putative Amici -- unlike the other would-be amici who filed motions this past week -- did not meet and confer with Joint Defendants in advance of filing their original motion on August 24, 2005, as required by LCvR 7(m). They have sought to remedy this defect by filing this amended motion today. Regardless, the Court can and should deny the motion on this basis alone. *See, e.g., Center for Auto Safety v. National Highway Traffic Safety*

- First, the Putative Amici's goal -- to make sure that certain remedies are "given explicit extraterritorial application" (Putative Amici Br. at 8) -- is directly contrary to law, and thus irrelevant to this case. It is well-established that RICO does not apply to conduct occurring outside the United States that does not have substantial effects in this country. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996); *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (Sherman Act reaches extraterritorial conduct only if it "was meant to and did in fact produce some substantial effect in the United States."). This rule derives from both the "presumption against extraterritoriality" of federal statutes, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (Title VII of Civil Rights Act), and the courts' concern "to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law," *see Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Securities Exchange Act). Because extraterritorial conduct not having substantial effects in the United States cannot constitute a RICO violation, the Court does not have the power to prohibit or otherwise remedy it. *See, e.g., United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) ("Section 1964(a) provides jurisdiction to issue a variety of orders 'to prevent and restrain' RICO violations."). The purported effects cited by the Putative Amici (e.g., exposure of immigrants to deceptive marketing via satellite TV, or when they travel overseas) are not substantial. Accordingly, the Court does not have the power to prohibit or otherwise remedy the extraterritorial conduct of which the Putative Amici complain.

- Second, the Putative Amici's proposal that any remedies imposed by the Court should apply to international subsidiaries of the defendants (Putative Amici Br. at 12) is directly

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Admin., 93 F. Supp. 2d 1, 32-33 (D.D.C. 2000), *remanded on other grounds*, 244 F.3d 1 (D.C. Cir. 2001); *Alexander v. FBI*, 186 F.R.D. 197, 199 (D.D.C. 1999); Report and Recommendation #22 at 11-16, *adopted by* Order #97.

contrary to Federal Rule of Civil Procedure 65(d), and thus irrelevant to this case. *See* Fed. R. Civ. P. 65(d) (injunction may bind "only" parties to action, their agents, and "those persons in active concert or participation with them who receive actual notice of the order"); *see also, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (error under Rule 65(d) for trial court to have entered injunction against parent company of party, without having determined that parent was "in active concert or participation" with its subsidiary in proceeding to which parent was party). The Putative Amici's proposal that non-party subsidiaries be bound by any injunction would also violate due process and fundamental fairness. *See, e.g.*, *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934) (injunction that subjected non-parties acting independently to "peril" of contempt proceeding "violate[d] established principles of equity jurisdiction and procedure").

- Third, the Putative Amici fail to demonstrate why the United States of America and the intervenors already in this case cannot adequately address the issues they raise. The U.S. Department of Justice brought this action on behalf of the United States and has now prosecuted it for almost six years. Over Joint Defendants' strenuous and continuing objection, the Court saw fit in Order #987 to permit six public health organizations to intervene in this action to brief remedies issues in this case. There are thus already a range of voices that will be addressing remedies issues before this Court. Any more will simply sow confusion and increase the burdens on the Court and the parties rather than shed any useful and relevant new light.

For the foregoing reasons, the Putative Amici's motion should be denied.

DATED: August 26, 2005

Respectfully submitted,

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