IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA, INC. f/k/a PHILIP MORRIS INCORPORATED, et al., Defendants.	)	C.A. No. 99-CV-02496 (GK)

BRIEF OF *AMICI CURIAE* 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 IN SUPPORT OF THE POSITION OF THE PLAINTIFF UNITED STATES OF AMERICA REGARDING REMEDIES

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I. INTRODUCTION

The *amici curiae* are nonprofit organizations with a focus on tobacco control and public health; the City and County of San Francisco, which has long been a leader in tobacco control initiatives, and has had a comprehensive tobacco control program since 1990, with an important emphasis on tobacco control activities among non-English speaking populations; and a tobacco control community capacity building program.

The *Amici curiae* have a special interest in international tobacco control issues. We are each concerned not only about how the tobacco industry harms people overseas, but how the industry's overseas activities cause substantial harm in the United States.

We support the remedies proposed by the United States, as well as the enhancements and additions proposed by the public health intervenors and *amici curiae* Tobacco Control Legal Consortium and the University of California.

In this brief, we propose enhancements that concentrate on application of remedies to the overseas activities of the defendants and their international subsidiaries. Our arguments are based entirely on how such remedies would avert future harm and promote public health in the United States.

In Part II of the brief, we review applicable law regarding RICO subject matter jurisdiction and extraterritoriality. In Part III, we propose a framework for application of internationally related remedies. In Part IV, we propose internationally related enhancements and expansions to the remedies proposed by the United States. These relate to corrective communications, document disclosure, prohibited practices, and compliance and enforcement procedures. We conclude in Part V.

II. RICO SUBJECT MATTER JURISDICTION AND EXTRATERRITORIAL APPLICATION OF REMEDIES

The RICO Act specifies that courts issuing remedies to civil violations of the statute have jurisdiction and authority to fashion those remedies to include foreign commerce (18 U.S.C. § 1964(a)).[1] However, the statute does not specify the extent of its extraterritorial reach.

Courts that have considered the extent of RICO's extraterritorial reach have imported the subject matter tests from analogous statutes in the fields of securities and antitrust law that also fail to specify the extent of their extraterritorial reach. See *North-South Finance Corp. v. Al-Turki,* 100 F.3d 1046, 1052 (2d Cir. 1996); see also *Poulis v. Ceasars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004). *Ken Wiwa v. Royal Dutch Shell* 2002 U.S. Dist. LEXIS 3293, 66-71 (S.D.N.Y. 2002); *Sinaltrainal v. The Coca-Cola Company*, 236 F.Supp. 2d 1345, 1359-1360 (S.D. Fla. 2003) (citing *North-South Finance* for appropriate tests to be followed, while finding no subject matter jurisdiction).

This jurisprudence is contrary to the thrust of defendants' contention, who have argued in a footnote to a motion urging disqualification of statements by DOJ witness Matthew Myers regarding the impact of Philip Morris International sponsorship of Formula One racing that "nothing about the RICO statute suggests that Congress intended it to have such

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1 "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."

extraterritorial impact" (Joint Defendants' Memorandum of Points and Authorities in Support of Their Motion to Strike Formula One Testimony of Matthew L. Myers and Related Exhibits, at footnote 2).

In looking to the antitrust and securities laws, courts have borrowed two tests for establishing subject matter jurisdiction: a conduct test and an effects test. Under the conduct test, courts look to whether conduct material to the illegal activity occurred in the United States. The effects test, more relevant here,[2] looks to whether activities overseas have created some substantial effect in the United States.

The securities and antitrust effects test inquiries vary only slightly. In securities fraud cases, subject matter jurisdiction exists "whenever a predominantly foreign transaction has substantial effects within the United States." *North-South Finance,* at 1052, citing *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989).

The comparable test in the antitrust context is similar. In *Hartford Fire Insurance,* the Supreme Court explained, "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." (internal citations omitted) 509 US at 795-796 (1993).

Although it has made no apparent conscious effort to do so, the United States has presented extensive evidence not only that the scope of the defendants' conspiracy was international, but that overseas activities of the defendants' Enterprise had substantial impacts in the United States.

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[2] There is substantial evidence, introduced by the government as well as in addition to the government's evidence, of U.S.-based conduct having impacts overseas. Because the government's case does not address overseas effects, and because we do not address such issues in our proposed remedies, our brief disregards such evidence.

It would be difficult to avoid making such a showing in a detailed case against defendants, because in fact the overseas activities were crucial to perpetuating the Enterprise in the United States.[3]

The government's final Proposed Findings of Fact, drawing heavily on industry documents introduced as evidence in the case, list seven separate international organizational manifestations of the Enterprise: the Tobacco Manufacturers' Standing Committee, the Tobacco Research Council, the Tobacco Advisory Council, the International Committee on Smoking Issues, the International Tobacco Information Center, the Tobacco Documentation Centre and the Centre for Cooperation in Scientific Research Relative to Tobacco (United States' Final Proposed Findings of Fact [hereinafter "US FPFOF"], at 200-231 (¶407-490)). The government also shows that the Enterprise was manifested in Tobacco Institute interaction with overseas and international groups, and in other forms of global cooperation and coordination (US FPFOF, at 231-240 (¶491-524)).

The United States has shown that the defendants' fraudulent Enterprise rested on seven pillars, among them denials of the harmful effects of smoking, misleadingly promoting industry-controlled research in the guise of "independent" science, denials of the addictive nature of smoking, and suppression of truthful documents and evidence. The defendants were conscious that any of these pillars could be knocked over if contrary evidence emerged in other countries and seeped into the United States, and so they conspired to maintain these pillars globally.

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[3] Nonetheless, the United States has introduced only a small fraction of the available evidence related to how the international activities have had substantial harmful effects in the United States. In keeping with the Court's direction to intervenors to rely on evidence introduced at the trial, we have generally not referenced this expansive body of evidence.

In its Proposed Findings of Fact, the United States summarized the extensive evidentiary record it submitted:

> "On behalf of the Enterprise, the Tobacco Institute worked closely with overseas and international tobacco organizations to present a united front; to influence public opinion; to pressure 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 preserve and enhance the Cigarette Company Defendants' profits; and to avoid adverse liability verdicts in lawsuits brought around the world" (emphasis added) (US FPFOF, at 231 (¶491)).

The Tobacco Institute's key role in this regard was to maintain a global united front on smoking and health issues:

> "The purpose of expanding the Tobacco Institute's role was to preserve the industry's position on smoking and health abroad and prevent erosion of public industry positions that had been adopted and publicized in the United States by the actions of the non-domestic companies" (US FPFOF, at 205 (¶418)).

In his written testimony, Jeffrey Harris described the global agreement within the industry to suppress truthful information on smoking and health questions, and the premium placed on efforts in non-U.S. markets to block admission by any tobacco company of truthful information.

> "With anti-smoking legislation threatened in many countries, many manufacturers were under pressure in those countries to make voluntary admissions that smoking caused disease. However, if the firms in any one country made voluntary admissions that smoking caused disease, those admissions might establish sufficient precedent to pressure still other companies to capitulate. It might also embolden governments to take regulatory action in other countries. Garrett's idea was that the major sellers of cigarettes in the major markets would meet and agree to establish a boundary to their voluntary admissions, over which they would never willfully cross" (Dr. Jeffrey Harris, Written Direct Testimony, at 170-171, ll. 23-6).

In addition to obtaining and enforcing agreements among tobacco companies worldwide to perpetuate deceptions about smoking and health questions, the industry conducted global

research programs to deceive the public on such matters, and funded purportedly independent organizations for the same purpose.

The industry's ETS [Environmental Tobacco Smoke] Consultancy Program was an important manifestation of this globalized deception project. The government's Proposed Findings of Fact quotes from the project's description to show its far-reaching, international character, and its essential purpose of attacking the scientific consensus on second-hand smoke:

> In every major international area (USA, Europe, Australia, far East, South America, Central America & Spain) they are proposing, in key countries to set up a team of scientists organized by one national coordinating scientist and American lawyers, to review scientific literature or carry out work on ETS to keep the controversy alive. They are spending vast sums of money to do so, and on the European front Covington and Burling, lawyers for the Tobacco Institute in the USA, are proposing to set up a London office from March 1988 to coordinate these activities (US FPFOF, at 523 (¶828)).

The defendants' joint activities, through the ETS Consultancy and other means, to deceive consumers about the effects of second-hand smoke were thoroughly international in character.

In perpetuation of its fraudulent denials of the health impacts of second-hand smoke, for example, the defendants funded Healthy Buildings International (HBI) to test for nicotine levels in buildings, take readings in lobbies where circulation is best and recommend better ventilation but never smokefree areas. In his written testimony, Reginald Simmons explained how, although they were portrayed as independent, HBI's operations were effectively directed by the defendants and a public relations firm, Fleishman Hillard, working for the industry. He also described how, befitting its name, HBI worked internationally to perpetrate the industry's second-hand smoke fraud. (Reginald Simmons, Written Direct Testimony at 7-10, ll. 22-6.)

Relying on industry documents, the United States also demonstrated how the defendants perpetrated their ETS fraud through a series of international symposia and workshops, among other mechanisms (US FPFOF, at 561-583 (¶942-1008)).

The final element of the United States' claim that the industry has defrauded consumers focuses on the defendant companies' suppression and concealment of information, and particularly the destruction of documents. In this regard, international operations of the companies, particularly of BAT, are central to the government's claims. The United States cites company documents showing that BAT Group has implemented a worldwide document management program, which, the government summarizes, was designed to "prevent adverse scientific documents from coming to the United States or to otherwise control the documents so as to prevent discovery of the documents in ongoing litigation" (US FPFOF, at 2045-2050 (¶5035-5050)). Particularly important to the government's allegations is the Foyle memorandum, written by a British solicitor for BAT and transmitted to the company's Australian subsidiary. This memorandum and associated documents discuss BAT's Australian subsidiary's policy of intentional document destruction -- carried out in significant part to keep documents out of litigation in the United States (US FPFOF, at 2050-2075 (¶5051-5111)).

There is, in sum, an abundance of evidence that the overseas activities of the defendants have "substantial impacts" in the United States. It is also quite clear from the evidence in the case that the defendants intended to have such an impact -- that their global activities, coordinated and independent, were intended to further the Enterprise's fraud in the United States.

We do not recommend that the establishment of subject matter jurisdiction be used as a launching pad for a far-reaching global remedy scheme to control the industry's fraudulent

conduct, though we believe such a remedy approach might well be justified if the government had brought a different case. Rather, as we detail below, we suggest remedies that overlap with the court's subject matter jurisdiction under the effects test. That is, we propose that remedies should apply to the extent the actions of the defendants and their agents have substantial effects in the United States.

III. PROPOSED FRAMEWORK FOR APPLICATION OF INTERNATIONALLY RELATED REMEDIES

Given the international nature of the defendants' operations, remedies that apply only to conduct on U.S. soil will fail to accomplish their purpose of preventing future violations, and will, moreover, invite the multinational defendants to circumvent injunctive remedies simply by shifting operations overseas or among subsidiaries.

Remedies should accordingly be designed to reach overseas as needed to avoid such an outcome, crafted in light of the appellate court's ruling on disgorgement remedies that the basic standard for remedies is that civil RICO "jurisdiction is limited to forward-looking remedies that are aimed at future violations" (*United States v. Philip Morris USA, Inc. et.al.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005)).

We propose that the standard for international remedies should be: remedies to prevent and restrain a likelihood, based on past and ongoing activities, of future improper conduct overseas, or by overseas-based subsidiaries, with substantial effects in the United States.

To effectuate this general rule, we propose a three-pronged approach crafted to the disparate elements of the defendants' corporate structure. Our emphasis is on establishing the scope and reach of remedies that the court will impose, less on urging specific additional substantive remedies, although we offer several of these. We generally endorse the remedies proposed by the United States, as well as the enhancements and additions proposed by the public health intervenors and *amici curiae* Tobacco Control Legal Consortium.

Our three-pronged approach is as follows:

First, for the U.S. subsidiaries, conduct remedies should apply to their operations globally, in any national jurisdiction. As U.S.-focused entities, the purpose of their actions -- whether undertaken in the United States or outside of the country -- is to affect the U.S. market.

Second, for the parent companies, conduct remedies should apply a) to all conduct in the United States; and b) to conduct outside of the United States when there is a foreseeable likelihood of a category of conduct outside the United States having substantial effects in the United States.

Third, for the international subsidiaries of the two defendants currently with substantial global operations, Altria and British American Tobacco, we propose that conduct remedies should apply a) to all conduct in the United States; and b) to conduct outside of the United States when there is a foreseeable likelihood of a category of conduct outside the United States having substantial impacts in the United States.

Although these subsidiaries are not named defendants in the case, the United States has properly proposed that many remedies be applied to them as "covered persons and entities" ([Proposed] Final Judgment and Order, at II.A. ("This Final Judgment and Order applies to each

of the Defendants and to each of their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors."). Failure to extend the remedies to the international subsidiaries, which operate under the control of the parent companies, would simply invite the defendants to circumvent the remedies through manipulation of the corporate form.[4] Many of the remedies to be applied to the international subsidiaries can also be achieved by placing conditions on the terms by which the parent companies license their intellectual property and brand names. For example, restrictions on international subsidiaries' overseas event sponsorship may be achieved by requiring the parent companies to forbid licensees, including the international subsidiaries, from using the parent companies' brand names in connection with proscribed sponsorships.

Failure to adopt standards at least as robust as these will invite circumvention of the final remedies. Efforts at circumvention through manipulation of the international structure of the companies are not likely to be cured merely through implementation of an effective monitoring mechanism; if the application of rules outside of U.S. borders and to the parent companies and international subsidiaries is not clear, then even the strongest monitor will not be able to enforce the remedies against evasions through manipulation of the defendants' multinational structure.

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[4] To highlight one important example, Philip Morris Indonesia has recently purchased Sampoerna, the third largest makers of kretek-style cigarettes in Indonesia. There is a concern that a motivation for the Philip Morris purchase is to export kreteks to the United States, where they might well be marketed to youths as an "exotic" product. While the normal corporate operation would presumably have Philip Morris Indonesia ship them to Philip Morris USA for distribution and marketing in the United States, if the remedies in this case apply only to Philip Morris USA and Altria, Altria may make a decision to leave marketing responsibilities with Philip Morris Indonesia or its agents in the United States.

IV. INTERNATIONALLY RELATED ENHANCEMENTS AND EXPANSIONS TO REMEDIES PROPOSED BY THE UNITED STATES

In addition to establishment of a general standard, the application of remedies outside of U.S. borders and to the parent companies and international subsidiaries should be delineated as applicable in the case of each particular conduct remedy sought.

A. Corrective communications

The United States has proposed that the defendants be required to make corrective communications regarding the health effects of smoking and other matters ([Proposed] Final Judgment and Order, at IV.E.). Certain of the proposed modes of communications should have international elements.

1. Dissemination on defendants' websites

The United States has proposed that one mode of disseminating such communications should be through the defendants' publicly accessible websites ([Proposed] Final Judgment and Order, at IV.E.2.).

This requirement -- as applies to the Internet in particular -- should apply also to the defendants' international subsidiaries. The Internet is inherently a global medium, and Internet sites featuring the defendants' brand and corporate names will reach the public in the United States without regard to whether the sites are based in the United States or overseas, or whether they are maintained by a U.S. subsidiary or one based overseas.

2. Dissemination through mailings

The United States has proposed that the proposed onserts be fashioned into a brochure, and that the defendants be required to mail them to every adult smoker in any Direct Mail Marketing Database they maintain ([Proposed] Final Judgment and Order, at IV.E.3.b.).

This requirement should apply as well to the defendants' international subsidiaries, to the extent any Direct Mail Marketing Database they maintain includes adult smokers in the United States.

B. Document Disclosure

1. Health, marketing and related documents

The United States has proposed that the defendants be required to disclose and maintain on publicly searchable Internet websites documents and bibliographic data related to smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous research. Specifically, the United States proposes that the defendants be required to disclose: documents produced to the United States in this action; documents produced in other court or administrative actions in the United States related to designated issues of smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous research; and transcripts of depositions related to the designated issues from court or administrative actions in the United States ([Proposed] Final Judgment and Order, at IV.F.3.a.).

This proposal should be expanded to include documents and depositions produced in court or administrative actions that occur outside the United States, involving both the parent companies and foreign subsidiaries. For reasons detailed below, failure to expand the United States' proposal

will allow the defendants to circumvent the proposed remedies, resulting in substantial harmful effects in the United States.

We also believe these disclosures should be comprehensive, automatic and scheduled regularly, and not contingent on litigation. That is, the defendants should be affirmatively obligated to make disclosures in the designated areas, without regard to future litigation. Such a requirement may be particularly important for marketing-related disclosures, as *amici curiae* Tobacco Control Legal Consortium suggest, because of the need for public health entities and counter-marketers to respond quickly to evolving industry marketing strategies.

a. Health and science-related documents

Documents produced in overseas actions are likely to provide important information regarding the defendants' activities, including information not disclosed in actions in the United States, and thus should be covered by the disclosure requirement. This is particularly the case because of industry efforts to prevent adverse scientific documents from coming to the United States. The Foyle Memorandum and related materials, themselves documents obtained through litigation outside of the United States, make this policy clear. (US FPFOF, at 2050-2075 (¶5051-5111)). Brown & Williamson continues to instruct international affiliate companies to keep adverse scientific information out of the United States, the United States has shown, citing internal company documents (US FPFOF, at 2075-2077 (¶5112-5115)).

For exactly the same reasons, it is important that the document disclosure requirement apply to the international subsidiaries. Defendants should not be able to escape disclosure requirements through document management schemes that manipulate the corporate form for the express purpose of avoiding discovery and document production obligations in the United States. As the

industry has long recognized, disclosure of documents from international subsidiaries related to the designated issues (or suppression of such information) will have substantial effects in the United States.

There is considerable evidence in the record that the companies' misleading scientific research has been conducted on a global basis, and managed so as to keep damaging information out of the United States.

Dr. Farone, for example, testified that he was informed about Philip Morris's "general policy of restricting all such work [on less hazardous cigarettes] to 'offshore' consistent with the legal policy on limitations of liability …" (William Farone, Written Direct Testimony, at 151, ll. 4-5). Dr. Farone explained that much of this offshore work was done at INBIFO, a facility in Germany that Philip Morris acquired in 1971.

Philip Morris' Vice President of Research and Development Helmut Wakeham explained in a 1970 memorandum that a key reason for the company to purchase INBIFO was to keep research findings outside of the United States. "Location near major airport in Germany makes access easy and obviates the necessity of doing controversial biological work in United States," the memorandum states (US FPFOF, at 422 (¶513)).

Similarly, Dr. DeNoble testified that one way in which Philip Morris considered removing his work from the ambit of potential future discovery in U.S. litigation was to move his work to Switzerland (Victor DeNoble, Written Direct Testimony, at 36, ll. 7-8).

Dr. Henningfield, in citing key internal industry documents relating to the defendants' knowledge of the addictiveness, referenced numerous documents produced overseas or referring to overseas research (Jack Henningfield, Written Direct Testimony, at 89-93, ll. 2-8). At a 1962

conference, "Smoking and Health - Policy on Research," in England, for example, a BAT executive stated that "smoking is an addiction" (Jack Henningfield, Written Direct Testimony, at 91, l. 15).

The defendants' deceptive research effort to deny the health effects of second-hand smoke has been particularly globalized, and is extensively documented in the United States' documentary record (See US FPFOF, at 520-615 (¶819-1108)).

Failure to require disclosure from the worldwide operations of the entire corporate structure would simply reward the parent companies for outsourcing scientific research to overseas operations, and encourage them to continue such maneuvers in the future -- thereby opening the door for a continuation of misleading and deceptive research and misleading and deceptive claims in the United States based on that research.

b. Marketing Documents

This disclosure requirement should apply to parent companies' global marketing and advertising campaigns, and any marketing or advertising campaign conducted by an international subsidiary in connection with a coordinated global campaign. As noted below in the discussion of disaggregated marketing data, if they are part of a broader global design, a company's activities in the United States may only be fully understood in the context of documentation of the global campaign. Moreover, through a variety of mechanisms -- ranging from Internet advertising to television advertising to informal networks -- a worldwide marketing campaign will inevitably seep into the United States, making the logic of disclosure clear.

2. Disaggregated Marketing Data

The United States has proposed that the defendants be required to disclose disaggregated marketing data ([Proposed] Final Judgment and Order, at IV.F.7.).

Such data should also be disclosed for the defendants' international subsidiaries.

If they are part of a broader global design, a company's activities in the United States may only be fully understood in the context of documentation of the global campaign.

Dr. Robert Dolan, for example, testified how understanding BAT's global marketing strategy clarified how the company was targeting youth -- a practice that might be deniable if marketing practices were considered in a single country alone.

> [Dolan:] For example, a British American Tobacco Company document from 1985 entitled "The Current Group R&D Projects" stated under the heading "BAT: General Marketing Policies" that "[o]verall BAT strategy will be market specific and multi-brand but within each major market major effort behind one brand aimed at starters/young adults." 109870521-0561 at 0536 (U.S. Ex. 21,925).
>
> **Q. Why do you point to this document?**
> A. BAT is saying that in "every major market" – this means geographic region around the world – they would have a brand "aimed at" starters. It is another concrete example of how the tobacco companies' public statements about having no interest in starters are simply not true. (Robert Dolan, Written Direct Testimony, at 73, ll. 10-18.)

3. "Front" and related organizations sponsored by defendants

In addition to the disclosures proposed by the United States, we believe at least one other category of disclosures should be required.

The defendants and their international subsidiaries should be required to disclose any and all financial or other support for organizations that have or are likely to have significant contacts with the United States, or whose operations are otherwise likely to have substantial effects in the United States, and which conduct research or address policy issues related to

smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous research. As *amici curiae* Tobacco Control Legal Consortium suggest, this should include academic institutions, grass-roots or citizens' action groups, political or industrial advocacy groups, and political action committees.

The defendants have heavily used front organizations to perpetuate the fraud described by the United States, relying both on organizations based in the United States and overseas. The "Association for Indoor Research," to take just one example, purported to be an independent organization of UK scientists, but in fact was a Philip Morris initiative (US FPFOF, at 541-542 (¶881)). Many of these overseas entities have been intended to have, and have had, effects on global science and policy debates, including in the United States.

The disclosure of support for organizations should be made on an annual basis.

C. Prohibited Practices

1. Using any Misleading Health Descriptor

The United States has proposed that the defendants and covered persons and entities be prohibited from using any misleading health descriptor ([Proposed] Final Judgment and Order, at IV.F.3.). We agree with *amici curiae* Tobacco Control Legal Consortium that this prohibition should be expanded to include more terms and other indicators, such as colors.

The United States proposes also that defendants be prohibited from representing that low-tar and/or lower-nicotine cigarettes are less hazardous ([Proposed] Final Judgment and Order, at IV.F.4.). As drafted, however, it is not clear whether this provision applies to the defendants only, or also to covered persons and entities, inclusive of international subsidiaries. The

provision should be clarified so that it is clearly inclusive of covered parties and entities. Product safety misrepresentations of such a heavily marketed product as cigarettes are certain to cross borders and cause substantial effects in the United States.

2. Marketing Cigarettes in a Manner Appealing to Youth in the United States

The United States has proposed that the defendants and covered persons and entities be prohibited from marketing cigarettes in a manner appealing to youth in the United States ([Proposed] Final Judgment and Order, at IV.F.5.). We support this general rule, but propose enhancements and expansions of the specifically elucidated prohibitions for the reasons set forth below.

a. Motor sports and other brand name sponsorship prohibition

The United States proposes a ban on motor sports brand name sponsorship prohibition by any defendant that results in exposure in the United States, whether intended or not ([Proposed] Final Judgment and Order, at IV.F.5.c.). As drafted, however, it is not clear whether this provision applies to the defendants only, or also to covered persons and entities, inclusive of international subsidiaries. It should be clarified so that it is clearly inclusive of covered parties and entities, which presumably was the United States' intent.

Matthew Myers explained in his testimony how sponsorship of Formula One racing by Philip Morris International results in harmful consequences in the United States:

> Q: Yes, but Philip Morris claims that sponsorship of its Formula One team is technically paid by Philip Morris International, an affiliate who is not signatory to the MSA.
> A: As a technical matter, that is true, and illustrates out one of the loop holes in the MSA that Philip Morris has been able to exploit. The Philip Morris Formula One sponsorship enables the companies to get the Marlboro brand in front of a worldwide audience, including an audience here in the United States. Viewers see only the Marlboro logos all over the race cars and uniforms. The fact is that the

> source of the Marlboro Formula One racing team sponsorship is indistinguishable to the American viewer from the source of Philip Morris's other brand name racing sponsorship, the Marlboro Indy Car racing sponsorship. Altria, the parent of both Philip Morris USA and Philip Morris International can control how the Marlboro logo is used by either company" (Matthew Myers, Written Direct Testimony, at 37, ll. 3-14).

We also agree with *amici curiae* Tobacco Control Legal Consortium that this prohibition should be expanded to include all brand-name sponsorships. An expanded prohibition should also apply globally to the parent companies and international subsidiaries, at least for any event that will or is likely to be televised (including through cable or satellite television), generate substantial media attention in the United States, be webcasted, or otherwise gain substantial public attention in the United States.

b. Product placement prohibition

The United States does not seek any remedies related to product placement, presumably because the Master Settlement Agreement contains a prohibition on tobacco payments for brand-name placement in any media (Master Settlement Agreement III(e)).

The MSA provision, however, does not apply to the international subsidiaries. This creates exactly the kind of loophole evidenced by the Formula One sponsorship.

Many of the companies' movie placements, even in Hollywood films with widespread U.S. distribution, for example, have been arranged by the international subsidiaries. Marlboro placement in "Superman II - The Movie" was arranged by Philip Morris Europe, to cite one important case (Letter from Dovemead Limited to Philip Morris Europe S.A., October 18, 1979, Bates No. 2026120960/0962).

Thus, just as the brand name sponsorship prohibition should be internationalized and applied to both parent companies and international subsidiaries, so should the MSA provision on product

placement be extended, at least as regards any media likely to gain substantial public attention in the United States.

c. Prohibit research and data collection on youth.

We agree with *amici curiae* Tobacco Control Legal Consortium that the defendants should be prohibited from conducting research on, undertaking data collection on, or communicating with youth.

We propose that this prohibition should apply globally, including to the parents and international subsidiaries. Research on youth conducted in Canada, or even in more distant markets, such as Vietnam, for example, will have obvious application to sales and marketing strategies in the United States, including especially in places such as The City and County of San Francisco, which has a large Vietnamese immigrant population. It is not realistic to imagine that barriers to the sharing of such information could be established between the parents and international subsidiaries on one side, and the U.S. subsidiaries on the other. The benefits of information sharing in this regard are simply too great; and even if the information was not transferred within the company, it might easily be done by outside entities, such as a contract market research firm.

d. Prevent Defendants from reaching youth through Internet advertising.

We propose a global ban on Internet advertising, applied to parent and international subsidiary activities anywhere in the world. The Internet is inherently a global medium, and heavily accessed by youth. There will be no difference to a teenager in Ohio whether a Marlboro or Kool ad is placed on the Internet through a server in Columbus, New York, Lausanne or Jakarta. A bar on Internet advertising that does not apply to the entire company structure is likely

to be an empty gesture. Nor is it any answer to limit Internet advertising to non-English languages, because virtually every language is spoken in the United States, and indeed the industry is interested in targeting particular ethnic groups in the United States. An Internet advertising ban should also extend to all tobacco products or tobacco-related products (e.g., tobacco-branded t-shirts and other merchandise), whether or not they are offered in the United States; if the ban does not so extend, then the parent and international subsidiaries would be able to promote the idea of smoking to youth in the United States, even if they cannot deliver the exact product. If the ban did not extend to all tobacco products, the parent and international subsidiaries would also be able to advertise overseas shadow versions of products sold in the United States -- products that use similar colors and brand names but with slight variations.

D. Compliance and Enforcement Procedures

The United States has proposed appointment of an independent investigations officer and an independent hearing officer to provide ongoing enforcement of the terms of the final order.

To ensure effective compliance and enforcement, the authority of the IO and IHO should be delineated to be inclusive of international remedies contained in the final order. The domain of the IO and IHO should explicitly cover application of remedies outside of U.S. borders and to the parent companies and international subsidiaries, according to the proposed general standard.

For reasons elaborated above with regard to specific remedies, the United States' proposal should be modified in certain instances to be clearly inclusive of international affiliates.

This can be achieved by modifying coverage of "any Defendant" to "any Defendant, Covered Person or Entity." Such enhancements should be made:

- Relating to the IO's authority to interview current directors, agents, employees or others of any defendant ([Proposed] Final Judgment and Order, at VI.C.1.d.).

- Relating to monitoring of advertising and marketing practices of the defendants ([Proposed] Final Judgment and Order, at VI.C.1.f.).

- Relating to attending any meeting of senior management or directors of any defendant ([Proposed] Final Judgment and Order, at VI.C.1.g.).

- Relating to the IO's authority to retain an independent auditor to audit the books of any defendant ([Proposed] Final Judgment and Order, at VI.C.1.j.).

E. Public Education and Countermarketing

The United States has proposed that the defendants be required to fund the American Legacy Foundation to carry out activities as specified in Section VI of the Master Settlement Agreement ([Proposed] Final Judgment and Order, at IV.C.1.). Section VI(h) of the MSA specifies that "The Foundation's activities (including the National Public Education Fund) shall be carried out solely within the States." This provision has been interpreted to limit or preclude the American Legacy Foundation from conducting or supporting research overseas and carrying out other activities overseas, such as supporting conferences that focus on global issues with impacts in the United States. As argued throughout this brief, however, the improper overseas activities of the tobacco industry have important consequences in the United States, and need to be understood for effective counter-marketing and other tobacco control strategies. While it may be appropriate for expenditures on advertising and counter-marketing to be limited to within the United States, it is not appropriate for many other activities to be so limited. Specifically, we

propose that the U.S.-only limitation be lifted with regard to the following activities listed as Foundation Functions in the MSA:

- Commissioning studies, funding research, and publishing reports and other publications on factors that influence Youth smoking and substance abuse and developing strategies to address the conclusions of such studies and research (MSA, Section VI(f)(5)); and

- Tracking and monitoring Youth smoking and substance abuse, with a focus on the reasons for any increases or failure to decrease Youth smoking and substance abuse and what actions can be taken to reduce Youth smoking and substance abuse (MSA, Section VI(f)(9).

V. CONCLUSION

The amici believe the enhanced remedies proposed here are important means to achieve the remedial purposes of the United States: to prevent and restrain future public health harm in the United States. In a globalized world, and with a globalized industry that has engaged in a worldwide coordinated and integrated pattern and practice of fraudulent activities for decades, remedies restricted to U.S. borders, we believe, will invite circumvention and, to an important degree, frustration.

Our framework and proposals are crafted in light of the U.S. Court of Appeals ruling on remedies in this case. If review of this decision by the U.S. Supreme Court results in a revised scope of available remedies, we would hope the Court would consider an additional brief from us.

Respectfully submitted,

/s/ Lynne Bernabei

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