

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

Civil Action
No. 99-CV-02496 (GK)

v.

PHILIP MORRIS USA, INC. f/k/a
PHILIP MORRIS INCORPORATED, et al.,

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF MOTION 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 IN SUPPORT
OF THE POSITION OF THE PLAINTIFF UNITED STATES OF AMERICA
REGARDING REMEDIES FOR LEAVE TO FILE AN AMICI CURIAE BRIEF**

Defendants oppose the motion 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 (SFAATFP), and the Black Network In Children's Emotional Health (BNICEH) to file an amici curiae brief on three grounds: (1) that giving extraterritorial application to remedies in the case "is directly contrary to law and thus irrelevant" (Defendants Opposition Memorandum, at 2); (2) that application of remedies to international subsidiaries would violate the Federal Rules of Civil Procedure (Defendants Opposition Memorandum, at 2-3); (3) that the Department of Justice and intervenors can address the issues we raise (Defendants Opposition Memorandum, at 3). These complaints are misplaced and should be rejected.

Regarding extraterritoriality, defendants acknowledge that RICO remedies can be given extraterritorial application where the defendants' acts have substantial effects in the United States. That the defendants disagree with the claim that Enterprise's improper actions outside of the United States have had substantial effects in the United States is not a reason to reject the brief from amici curiae.

In any case, as we highlight in our amici curiae brief, extensive evidence introduced by the United States shows both that a wide range of the Enterprise's overseas activities were vital to maintenance of the Enterprise, had substantial effects in the United States, and that the defendants intended to have such

impact. Defendants' misleadingly cherry-picked examples of overseas activities referenced in our motion for leave to appear as amici curiae fails to reflect the vast array of overseas activities and associated U.S. impacts documented in our motion and accompanying brief. As we emphasize, among the defendant's improper overseas activities to have a substantial effect in the United States are:

- 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;
- suppression of truthful documents and evidence; and
- overseas marketing designed to appeal to consumers, including especially youth, in the United States.

Regarding the international subsidiaries, defendants' complaints ignore at least three key factors. First, as defendants acknowledge, remedies in this case may appropriately extend to agents of the defendants.

"'Agency' is the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1348 (8th Cir. 1980) (quoting Restatement (Second) of Agency § 1 (1958))" Southern Pacific Transportation Company v. Continental Shippers Association, Inc., et. al., 642 F.2d 236, 238 (8th Cir. 1981).

"[I]t is clear that a corporation may become an agent of an individual or of another corporation" Restatement (Second) of Agency § 14M (1958). For an agency relationship to exist, it is not necessary that the principle dominate the agent in all manners; the agency inquiry extends only to the specific cause of action to be assessed. See Phoenix Canada Oil Company Limited v. Texaco, Inc. et. al., 842 F.2d 1466, 1478 (3d. Cir. 1988).

Evidence introduced by the United States makes clear that the international subsidiaries have in many instances acted as agents of the parent company defendants. As the United States explained in its Post-Trial Brief, with citations to the evidentiary record, "Defendant Altria, which was incorporated in 1985 (as Philip Morris Companies Inc.), effectively and actively controls the activities of all of its subsidiaries, including Defendant Philip Morris USA Inc. and Philip Morris International, Inc." (Post-Trial Brief of the United States of America, at fn. 5). With reference to the evidentiary record in this case, we detail in our brief many instances of the subsidiaries carrying out global, company-wide strategies that are directed and controlled by the parents.

Second, as we noted, many of the remedies we propose in our amici curiae brief can be achieved without injunctive remedies applied to the subsidiaries, but through restrictions imposed on the parents' licensing of brand names and associated intellectual property to subsidiaries and others.

Third, we propose remedies both to parents and international

subsidiaries. Even if this Court were to decide not to apply the remedies we suggest to the international subsidiaries, they may still be applied to the parents.

Regarding the ability of the United States and intervenors to address the issues we raise, as we detailed in our motion for leave to appear as amici curiae, we bring a special attentiveness to and expertise in the particular area of how the tobacco industry's improper overseas activities have adverse effects in the United States. It is this unique perspective that amici curiae hope to contribute to fashioning of remedies in this case, and it is exactly such unique perspective that makes appropriate the grant of leave to appear as amici curiae. "An amicus brief should normally be allowed ... when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Cobell v. Norton 246 F. Supp. 2d 59, 62 (D.D.C. 2003), quoting Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997).

Drawing on their expertise, and basing their proposals on evidence in the record, the amici have made arguments for application of remedies that the United States and intervenors have not offered, and shown why grant of such remedies will be important to effectuate effective restraints on the defendants. The Court should grant the amici curiae motion and accept our brief for filing.

Respectfully submitted,

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DATED: September 1, 2005