UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **Plaintiff,**	
v.	**Civil No. 99-CV-02496 (GK)**
PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., et al., Defendants.	**Next scheduled court appearance: None**

UNITED STATES' OPENING BRIEF ON DEFENDANTS' RULE 60(b) MOTION TO CLOSE THE MINNESOTA DEPOSITORY

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INTRODUCTION

As one of its transparency remedies, the Court ordered Defendants to maintain the Minnesota Depository until 2021. Defendants did not challenge the Court's Minnesota Depository remedy in their post-judgment motion for clarification or for relief from the judgment; did not object to keeping the Minnesota Depository and their document websites open the same number of years; and did not challenge the Minnesota Depository remedy in their appeals. Nonetheless, Defendants now claim that—due to significantly changed and unexpected circumstances—the Court should lift this requirement and let them close the Minnesota Depository.

The Minnesota Depository has received over 350 unique requests for documents, data files, or other information since May 2008, when it would have closed but for this Court's Final Order, with 270 of those from members of the public and 86 from Defendants' representatives. Closing the Minnesota Depository would remove a valuable resource that has directly led to important discoveries about Defendants' past frauds and deceptions, and, perhaps even more important, would remove the only check on the accuracy and completeness of the documents that Defendants post to their document websites. Indeed, as described in detail in the affidavit of Kim Klausner, one particular Minnesota Depository resource, the so-called "4(b) Index," directly led to the discovery last summer of tens of thousands of Philip Morris and R.J. Reynolds documents that should have been posted to their document websites, but were not.

Removing the Minnesota Depository would make it impossible for anyone outside of the Defendants to identify such discrepancies, and Defendants have conspicuously not indicated that they would be open to the Court's appointing an independent third party to monitor the accuracy, completeness, and timeliness of the documents that they post to their document websites. Closing

the Minnesota Depository as Defendants ask would leave Defendants wholly on their own to police the accuracy, completeness, and timeliness of whatever documents they chose to post to their document websites.

FACTUAL AND PROCEDURAL BACKGROUND

1. CREATION OF THE MINNESOTA DEPOSITORY

The Minnesota Depository was created during the Minnesota litigation to hold tobacco-industry documents produced during discovery in that case. As part of the Minnesota consent decree, the Minnesota court ordered the non-confidential and non-trade-secret documents at the Minnesota Depository to be made available to the public, and ordered that the Depository be operated in a manner that would "ensure broad and orderly access" to its materials. Minnesota Consent J. § VII(A)(2) (JD-093326 at 5). The Minnesota Depository is not a static or "closed" collection; to the contrary, the Minnesota decree required Defendants to continue to send copies to the Depository of all documents they produced in other United States smoking-and-health litigation but not previously produced in the Minnesota case, within 30 days of their production in the other litigation. *Id.* § VII(G). The decree ordered Defendants to maintain the Minnesota Depository in this fashion for ten years. *Id.* § VII(E). The Minnesota Depository today has over 23,000 boxes of documents, which likely total approximately 55 million pages. 3/24/2011 email, the Hon. John Guthmann to Crystal (Ex. 1).

2. PROCEDURAL HISTORY WITHIN THIS LITIGATION

To prevent and restrain continued violations, the Court's Final Order imposes a range of injunctive remedies, including a transparency remedy that requires Defendants to continue maintaining (and sending newly produced documents to) the Minnesota Depository, and to continue

posting documents to their document websites (and in BATCo's case, to maintain and enhance access to its Guildford Depository, and to create and provide public access to a document website). *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 941-43 (D.D.C. 2006), *aff'd in part & vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), *cert. denied*, 561 U.S. ___, 130 S. Ct. 3501 (2010). The Court noted that "this remedy is exactly what Judge Williams, in his concurrence in the disgorgement opinion, recommends that the District Court do under [18 U.S.C.] § 1964(a): 'impose transparency requirements so that future violations will be quickly and easily identified.' " *Id.* at 928-29 (quoting *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1203 (D.C. Cir. 2005) (Williams, J., concurring)).

In its Final Decision, the Court stated that it would order its document-disclosure obligations to run for 15 years, but the Final Order directed them to run for 10 years, through September 1, 2016. Final Order, § II(C), ¶¶ 8-9, 11(d), 12, 449 F. Supp. 2d at 941, 943. As discussed in more detail below, the Court amended this portion of the Final Order to conform to the Final Decision, specifying that Defendants' document-disclosure obligations were to run for 15 years, through September 1, 2021. Order #1021 (R. 5765; issued 9/20/2006).

It is important for the Court to recognize that it is *only* due to the Final Order's document-disclosure remedy that the Minnesota Depository remains open as a check on "what Defendants are doing internally" and (as explained in detail below) on "the accuracy [and completeness] of future information [Defendants] may make available" on their document websites (which also are required to remain open only due to the Court's Final Order). 449 F. Supp. 2d at 928. The 10-year period that the Minnesota consent decree required Defendants to continue maintaining and adding to the Minnesota Depository ended in May 2008—while this case was on appeal, and after the D.C. Circuit

had issued a stay of this Court's Final Order. In response to pointed inquiries about Defendants' intentions from the United States and the Intervenors while the appeals were proceeding, Defendants agreed to continue maintaining the Minnesota Depository through the end of 2008, and to provide 60 days' notice if they intended to close it thereafter. 1/11/2008 ltr., McCarter to Klein & Crystal (Ex. 2). Likewise, the document-website obligations imposed on the Defendants (other than BATCo and Altria) by the Master Settlement Obligation ran for 10 years, and ended on June 30, 2010. MSA § IV(c) at 37-38 (JD-045158); *see also* 449 F. Supp. 2d at 930. It is thus only this Court's order that is keeping the Minnesota Depository and Defendants' document websites open now; and as explained below.

It is helpful to review the filings that led to the Minnesota Depository remedy, and the post-judgment litigation that has already occurred on this and related issues. In our post-trial brief, the United States explained that document-disclosure requirements are a well-accepted remedy to address future legal violations. U.S. Post-Trial Br. at 238-40 (R. 5606; filed 8/24/2005) (citing, *e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963) (discussing ongoing public disclosures as a "mild prophylactic" to prevent ongoing fraudulent practices in the securities context)). Defendants objected to the requested document-disclosure remedy *in toto*, arguing, *inter alia*, that such disclosures would not prevent and restrain them from engaging in further violations, and made no specific objections to maintaining the Minnesota Depository. Defs.' Corrected Post-Trial Br. at 210-13 (R. 5666, Ex. 1; filed 9/13/2005).

The Court rejected Defendants' arguments against a document-disclosure remedy, and ruled that "[r]equiring Defendants to make public the documents that they produce or use in future litigation or administrative actions, with certain safeguards to protect privileged and confidential

trade secret information, is a first step towards preventing and restraining Defendants from engaging in future fraudulent activities." 449 F. Supp. 2d at 929. As the Court observed:

> [I]n order to prevent and restrain such RICO violations in the future, Defendants must create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward. Disclosing such information will allow the public to monitor what Defendants are doing internally and to assess the accuracy of future information they may make available about their activities and their products. Imposing such disclosure requirements will act as a powerful restraint on Defendants' future fraudulent conduct.

Id. at 928. The Court thus stated that it would order Defendants to continue sending copies of newly-produced documents to the Minnesota Depository (and to post them to their document websites) "for an additional fifteen years." *Id.* at 930. However, the Court's accompanying Final Order directed the document-disclosure remedy to run only "until September 1, 2016." Final Order, § II(C), ¶¶ 8-9, 11(d), 12, 449 F. Supp. 2d at 941, 943.

Shortly after the Court's ruling, the United States timely moved under Rule 59(e) to reconcile the inconsistency in the dates, and asked the Court to modify the Final Order to require the document-disclosure remedy to remain in place for fifteen years, until 2021. *See* U.S. Mot. to Amend Court's Final Order Pursuant to Rule 59(e) (R. 5739; filed 8/30/2006); *see also* U.S. Reply (R. 5763; filed 9/18/06).

Defendants opposed this motion, but made no argument that the Court should vacate the Minnesota Depository portion of its document-disclosure remedy, or even that their Minnesota Depository obligations should run for fewer years than their document website obligations. Rather, they simply argued that the Court should keep both portions of the document-disclosure remedy in place until 2016, rather than 2021: "To the extent that requiring the production of documents

prevents and restrains future RICO violations at all, the Order's 10-year extension of defendants' production obligations is more than sufficient, particularly in light of the Master Settlement Agreement and the other injunctive remedies ordered by the Court." Defs.' Opp'n at 2 (R. 5758; filed 9/11/2006) (placement of apostrophe corrected).

Granting the United States' motion, the Court explained that "Defendants essentially ask the Court to reconsider its initial ruling extending the disclosure requirement for 15 years. The Court has no reason to reconsider that determination." Accordingly, the Court amended the Final Order to extend the document-disclosure remedy to September 1, 2021. Order #1021 at 2 (R. 5765; issued 9/20/2006).

Defendants filed their own post-judgment motion to clarify the Court's Final Order, or in the alternative, to modify it under Rules 52, 59 and 60. (R. 5743; filed 8/31/2006). That motion raised issues concerning the Court's general injunction, and the applicability of part of the Final Order outside the United States. *Id.* But neither in that motion—nor in any other post-judgment motion Defendants have filed before 2011—sought any relief related to the Minnesota Depository.[1]

Defendants subsequently appealed this Court's ruling on multiple grounds, including, *inter alia*, challenges to several other components of the Court's remedial decree. *See United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1135-45 (D.C. Cir. 2009) (discussing Defendants' challenges to general injunctive relief and corrective statements remedies). However, Defendants

[1] Defendants also filed a motion to stay the Court's Final Order pending appeal. (R. 5746; filed 9/1/2006). That motion raised a discrete issue about bibliographic coding fields for Defendants' documents websites, and objected to the specter of being obliged to post documents this Court had determined were not privileged to their websites and to send them to the Minnesota Depository, before the D.C. Circuit ruled on possible challenges to this Court's privilege rulings. *Id*. at 10-12. But once again, Defendants gave no argument that the Court should vacate or modify its document-disclosure remedy, either in general, or as to the Minnesota Depository in particular.

elected not to appeal *any aspect* of the Court's document disclosure remedies, including those related to the Minnesota Depository.

After the case was remanded to this Court, Defendants have stated that they believe that the Minnesota Depository is "an expensive, unnecessary anachronism," Defs.' 11/24/10 Status Rep. at 31 (R. 5841; filed 11/24/2010), and that they planned to move the Court to relieve them from that portion of the Court's Final Order. In Order #14, the Court directed the parties to file simultaneous briefs on March 24, 2011 on Defendants' Rule 60(b) motion, and to file simultaneous response briefs on April 5, 2011.

3. OPERATION AND FEATURES OF THE MINNESOTA DEPOSITORY

As detailed in a description of the Minnesota Depository's General Procedures, recently prepared by the administrator of the Depository and forwarded to the parties by Minnesota District Judge John H. Guthmann, Defendants send boxes of documents to the Depository with a letter identifying the jurisdiction where the underlying case is pending. Cindie Smart, "Minnesota Tobacco Document Depository–General Procedures," ¶ 1 at 1 (hereafter "Smart, 'Minnesota Depository General procedures' ") (Ex. 3). Depository staff log boxes in with specific identifying information, including the Bates range of the pages in the box. *Id.* ¶¶ 1-2. That information is entered into a database, after which the contents of the boxes are verified, and any discrepancies resolved. *Id.* ¶ 5 at 1-2. Where the Depository managers encounter "problem boxes" with "Index discrepancies" or "missing documents," that information is communicated to "the appropriate tobacco companies twice a month" to allow appropriate corrections to be made. *Id.* ¶ 5(f)-(h) at 2. Index discrepancies and missing documents are noted on electronic spreadsheets kept for the purpose. *Id.* ¶ 5(h).

a. The Minnesota 4(b) Index

The Depository's "main, in house, research tool" is called the "4(b) Database Index." *Id.* ¶ 6. Established as part of the Minnesota Court's orders in 1998, the Index is a "user-friendly electronic inventory of documents archived at the Depository" which is "used by both the public and the tobacco companies." *Id.*; *see also id.* (explaining that the public "uses the 4(b) database *for a wide range of research projects*") (emphasis added). The 4(b) Index—which contains "[a]ll of the tobacco companies' document populations—with the exception of Liggett, Bat Co., and BAT Industries"—"provides document location information along with brief descriptions of all documents that are relevant, not privileged, and produced to the depository." *Id.*

The 4(b) database allows researchers or other members of the public to print "individual document indices for each document box contained on the 4(b) database," which can then be used to cross check the range of documents within a specific box to ensure that the box's contents match the 4(b) database." *Id.* at 2-3. Because "[t]he 4(b) database should mirror the bates index and box contents," where that is not the case, the Depository staff fill out a "4(b) Discrepancy Form," which, afer being "verified by a depository manager," is "forwarded to the appropriate tobacco companies." *Id.* at 3. The companies then "review the requested changes and forward them to their database management contractor, Technology Concepts & Design, Inc. (TCDI), for corrections." *Id.* All of these efforts help to insure the integrity and accuracy of the Defendants' document productions. *See id.* at, *e.g.*, Attachment pages B-1 and B-2 (sample "4(b) Discrepancy Forms," listing 29 Bates- range discrepancies requiring correction by the tobacco companies, with specific Bate-range numbers redacted).

b. Use of the Minnesota Depository

As discussed further below, the Minnesota Depository has been used extensively by researchers, journalists, public health officials, legislators, students, litigants and other advocates since its creation. The declarations of six researchers with extensive research experience at the Minnesota Depository are provided; these researchers have cumulatively authored hundreds of papers over their careers, and their declarations detail particular findings of fraud, deception, and subterfuge that they have discovered at the Minnesota Depository. The declarations of Klausner, Bialous, Hurt, LeGressley, Hirschhorn, and Muggli are attached as Exs. 4 - 9. Contrary to Defendants' claims, the Depository has been and continues to be a vital resource not only to expose Defendants' misconduct, but also to ensure the integrity of Defendants' documents productions, both at the Depository and on Defendants' websites.

Indeed, it bears noting at the outset that Defendants *themselves* rely on the Minnesota Depository and its functions in complying with their own litigation obligations. Thus, for example, in response to a request for production of documents in a smoking and health lawsuit, R.J. Reynolds Tobacco Company explained the availability of responsive records at the Depository, explaining that "the Minnesota Depository has been renovated into a library that provides an *organized, efficient and comfortable environment designed to expedite the search for and production of defendants' documents*." R.J. Reynolds Objs. & Resps. to Pl.'s 1st Demand for Produc. at 4, *People ex rel. Lockyer v. R.J. Reynolds*, No. GIC 764116 (Cal. Superior Ct. June 8, 2001) (Bates Nos. 526310209/ 0225 at 0211-0213) (hereafter, "RJR Resps. to RFPs") (emphasis added) (Ex. 10). R.J. Reynolds further explained the utility of the Depository as a place where "[i]ndividuals seeking documents from the depository have access to a comprehensive computer index for locating documents, a 'help

desk,' on-site staff, study carrels, audiovisual equipment, telephones, and work and break rooms." *Id.*; *see also id.* ("The depository also provides access to additional items, such as over-sized documents, audio tapes and video tapes, that could not be reproduced on Reynolds' Internet document website [and also] contains Reynolds' indices to documents withheld in their entirety or redacted in the case on the grounds of privilege and/or work product protection."). *Accord* Lorillard Resps. to Pls.' 1st Set of Interrogs. at 2-4, City of St. Louis v. Am. Tobacco Co., No. 982-9652 (Mo. Cir. Ct. Aug. 2, 2002) (Bates Nos. 94700338/0367 at 0339-0341) (hereafter "Lorillard Rog Resps.") (Ex.11) (discussing how "the Minnesota Depository was renovated, at defendants' expense, into an organized, efficient and comfortable library . . . in a manner that will expedite the search for and retrieval of defendants' documents," providing "the following 'tools': a help desk; on-site staff; a comprehensive computer index for locating documents; audiovisual equipment; telephones; study carrels; work rooms; and break rooms."); *see also id.* ("the Minnesota Depository has become a national depository for Lorillard's documents and those of other defendants in the Minnesota litigation").

ARGUMENT

As discussed below, Defendants' factual claims about the Minnesota Depository,e ven if they were true, would not demonstrate the "significant changes" that Supreme Court caselaw requires for relief under Rule 60(b)(5), or the "exceptional circumstances" that Supreme Court caselaw requires under Rule 60(b)(6). As such, there is no need for the Court to spend time parsing the details of Defendants' factual allegations. That said, Defendants' criticisms of the Minnesota Depository are demonstrably mistaken. The Depository provides immense value as a research tool and, in particular, serves as a crucial check on the accuracy and completeness of Defendants' document-

disclosure obligations under this Court's Order. Defendants appear likely to claim that the Depository offers little or no research value beyond the tobacco-document websites maintained by Defendants other than BATCo; is rarely used; and is expensive. As shown below, Defendants' claims are mistaken and do not show "significant changes" or "exceptional circumstances."

1. DEFENDANTS CANNOT DEMONSTRATE EXTRAORDINARY OR CHANGED CIRCUMSTANCES WARRANTING LIFTING ONE OF THE COURT'S CRITICAL TRANSPARENCY-ENHANCING REMEDIES

It appears likely that Defendants will rest their motion to close the Minnesota Depository upon either or both Federal Rule of Civil Procedure 60(b)(5) and 60(b)(6). Even if Defendants' factual assertions (about such matters as the Minnesota Depository's value for researchers and usage levels) were true (and they are not, as shown below), they would not meet the threshold legal requirements for the Court to consider modifying its judgment under either subsection of the rule.

As the Supreme Court has explained, Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if a '*significant change* either in factual conditions or in the law' renders continued enforcement '*detrimental to the public interest*.' " *Horne v. Flores*, 557 U.S. ___, 129 S. Ct. 2579, 2593 (2009) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1991)) (emphases added). As the parties seeking relief from the Court's judgment, Defendants "bear[] the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo,* 502 U.S. at 383.

The application of Rule 60(b)(6) is similarly stringent. As the D.C. Circuit recently emphasized, a movant must demonstrate "extraordinary circumstances" to receive relief under Rule 60(b)(6). *Salazar ex rel. Salazar v. District of Columbia*, ___ F.3d ___, No. 07-7031, 2011 WL 403448, at *4 (D.C. Cir. Feb. 8, 2011); *see also id.* at *7 (noting that "[t]he phrase 'extraordinary

circumstances' does not appear in the text of Rule 60(b)(6), but the Supreme Court has added this gloss to the rule"). As the *Salazar* court emphasized, Rule 60(b)(6) " 'should be only *sparingly used*' and may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.' " *Id.* at *8 (quoting *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007)) (emphasis added).

Defendants cannot meet their heavy burden either Rule 60(b)(5) or 60(b)(6). To do so, Defendants would have to demonstrate significant, *unexpected* changes in circumstances that warranted reconsideration of the Minnesota Depository remedy. As the *Salazar* court observed, "Rule 60(b)(6) relief is not a substitute for appeal." 2011 WL 403448, at *9 (internal quotation marks and citation omitted); *Rufo*, 502 U.S. at 385 ("Ordinarily, however, [Rule 60(b)(5)] modification should not be granted where a party relies upon events that *actually were anticipated* at the time it entered into a decree") (emphasis added). Defendants cannot come close to meeting this burden here.

Defendants have claimed that "[t]he Minnesota Depository is antiquated, rarely used, and inconveniently located," and that "the availability of electronic access to Defendants' documents makes the continued retention and storage of hard copies superfluous and unwarranted." Defs.' Praecipe re Court's Aug. 12, 2010 Order, at 7 (R. 5826; filed 9/7/2010). Defendants have further claimed to have "certain knowledge that few documents, if any, will ever be read by anyone" at the Minnesota Depository, and that it "has become an expensive, unnecessary anachronism." Defs.' 11/24/10 Status Rep. at 30, 31 (R. 5841; filed 11/24/2010).

As explained below, such factual claims are mistaken. However, none of these claims, even if true, would meet Defendants' threshold requirement of demonstrating unanticipated, changed

circumstances. In short, while the Depository in fact has been and continues to be utilized, and serves vital functions, Defendants have not articulated *unanticipated* changes, much less unanticipated changes that made this critical remedy appropriate previously, but not appropriate now. The Minnesota Depository is no more "antiquated, rarely used, [or] inconveniently located" than it was in 2006. Defs.' Praecipe at 7 (R. 5826). The "the availability of electronic access to Defendants' documents" has not changed since 2006. Use of the Depository has not plummeted since 2006—to the contrary, there was a significant increase in Depository use in 2007. *See* Minnesota Depository Usage Graph (Ex. 12); Minnesota Depository Usage Figures (Exs. 13, 14). Finally, while Defendants may consider the Depository to be "an expensive, unnecessary anachronism," they suggest no reason to believe that it is more so now than it was in 2006 when this Court ordered this remedy. Defendants elected neither to seek reconsideration, nor to appeal, the Court's Minnesota Depository remedy. Under these circumstances, the Court need not even consider Defendants' factual assertions to deny Defendants' request for relief under Rule 60(b).

2. VALUE OF THE MINNESOTA DEPOSITORY

As Judge Williams observed in his concurrence to the D.C. Circuit's disgorgement decision, "[t]he equity court, empowered under § 1964(a) to 'prevent and restrain' future violations, . . . [can] impose transparency requirements so that future violations will be quickly and easily identified." *Philip Morris USA*, 396 F.3d at 1203 (Williams, J., concurring). The Minnesota Depository provides precisely such a transparency requirement, and as explained below, its existence provides a vital cross-check on the integrity of the other component of the Court's document-disclosure remedy, namely, the Defendants' document websites.

a. Independent quality control ensures integrity of the contents of the Minnesota Depository—and, crucially, of the 4(b) Index that lists the quality-controlled contents of the Depository

As discussed in the "Factual and Procedural Background" section above, the Minnesota Depository takes very careful steps to ensure the integrity and completeness of its contents. Every box is examined as it arrives to confirm that its contents match its index and its label; and the Minnesota staff perform extensive cross-checks between the contents of individual boxes and the Minnesota 4(b) Index. Cindie Smart, "Minnesota Depository General Procedures" (Ex. 15).

These measures have helped others ensure the quality, accuracy, and completeness of Defendants' document-disclosure obligations, both at the Minnesota Depository, and, as explained in Kim Klausner's declaration, on their tobacco-document websites. Klausner is the manager of the University of California–San Francisco Legacy Tobacco Foundation Library (LTDL), which works to provide researchers with uniform, free, instant Web access to tobacco-industry documents. Klausner Decl. ¶¶ 2, 5. A major source, although far from the only major source, of LTDL's documents are the tobacco-company document websites. *Id.* ¶ 7. To ensure that LTDL's collections are as complete as possible, Klausner's job duties require her to reconcile records of documents among the Minnesota Depository, the tobacco-company document websites, and her own Library's collection. *Id.* ¶ 8.

In its role of facilitating public access to the documents it houses, the Minnesota Depository provided Klausner with a copy of the 4(b) Index current as of March 2010. *Id.* ¶ 13. Klausner and her University of California–San Francisco staff then sought to compare that index against the documents available on Defendants' websites. *Id.* The results appeared to show well over 100,000 documents that were *not* available on Defendants' document websites—but that Minnesota

Depository staff had confirmed, through their document by document cross-checks over the years, as each physical box arrived at the Depository, were physically at the Minnesota Depository (and thus should be on the 4(b) Index). *Id.*

At the request of the LTDL, the California Attorney General's Office then sent the Defendants copies of the apparent discrepancies that had been found, and asked if they could please investigate and follow up. *Id.* ¶ 14. It took months for the companies to carry through their investigations, but it appears that as a result of the California Attorney General's Office inquiry, Philip Morris and Altria added as many as 60,000 or so documents to the Philip Morris website. *Id.* ¶ 15. In similar fashion, R.J. Reynolds acknowledged that, as a result of the inquiry, it was planning to add over 32,000 American Tobacco documents to the relevant website. *Id.* ¶ 17.[2]

As Klausner explains in her declaration, it thus appears that tens of thousands of documents have now become available to researchers as a direct result of the Minnesota Depository. If the Depository did not exist, researchers obviously could not have accessed the documents there. As Klausner states, in her view this newly accessible source of online tobacco documents for public researchers (and government personnel charged with enforcing the Court's decree) "would not have been possible without using the 4(b) Index as a check on Philip Morris', R.J. Reynolds', American Tobacco's, and Brown & Williamson's obligations to post documents on their websites." *Id.* ¶ 16; *see also id.* ¶ 17.

The Minnesota Depository thus serves an independent entity, operating at arms' length from Defendants, to verify, confirm, cross-check, and seek to correct problems in Defendants' document

[2] There were also discrepancies between the 4(b) Index and the documents available on the Lorillard website, although a smaller number; and no inquiry was sent to BATCo because it does not contribute to the 4(b) Index or—yet—have a document website. *Id.* ¶ 14.

productions to the Depository. Even more importantly, the Depository's careful quality control over the 4(b) Index—prepared in the first instance by the Defendants, but carefully compared against the actual documents that Defendants send to the Depository, by the Depository clerks—ensures that there is a detailed and accurate record of the Depository's holdings which (as noted) are themselves carefully quality-controlled. The value of the 4(b) Index as a check upon the quality, accuracy, and completeness of Defendants' document websites cannot be overstated. If the Court were to close the Depository, there would be no independent, arms' length mechanism to let members of the public or (government personnel assigned to enforce the Court's decree) to check the quality, accuracy, or completeness of the documents Defendants post to their document websites.

Beyond the 4(b) Index, the Minnesota Depository provides additional valuable checks on the contents of Defendants' websites. If a document goes missing from a Defendant's website (no matter whether intentionally or not), researchers are currently able to seek redress from the hard copies stored at the independently operated Minnesota Depository. LeGressley Decl. ¶ 13. By contrast, in analogous circumstances, when a researcher found an audiotape that put a Defendant in bad light, available only at that Defendant's Defendant-owned and operated source, he found that the relevant side of the audiotape had been erased the next time he requested it. Hurt Decl. ¶¶ 20-21. There is no need to speculate whether anyone intentionally deleted the incriminating side of the audiotape, or perhaps simply wrote over it in the process of preparing a copy for the researcher; all that needs to be noted is that the Minnesota Depository's very existence gives the Defendants a heightened incentive to make sure that no material goes missing from their document websites. LeGressley Decl. ¶ 13. In short, simply by existing, the Minnesota Depository provides a valuable accountability mechanism. Hurt Decl. ¶ 21. The alternative is for the Court to place its full

confidence in relying upon the Defendants to police the quality and contents of their own document websites; as LeGressly wryly observes, "I see no indication from the industry's track record to accord such latitude." LeGressley Decl. ¶ 14.

b. Importance of context and serendipitous findings

Certain fundamental facets of doing research in the Minnesota Depository's hard-copy boxes has proven of great value to the researchers who have spent considerable time working there. The "seed" method of research allows researchers to find documents in context—a function frequently not possible at all, or only with a great deal of work, using any online document website. Muggli Decl. ¶¶ 18-19, 22-25; LeGressley Decl. ¶¶ 9-12.

> The physical ability to juggle multiple documents at once enables one to answer the myriad of intermediate questions one inevitably faces in trying to decipher often cryptic documents. In peer-reviewed publications or reports succinct, clear quotes from the industry documents are presented. What does not appear are the large number of lesser points and linkages the researcher deciphered in order to ultimately find that extremely rare succinct quote. And in my experience researchers are greatly hindered in making those connections if they cannot quickly and easily see multiple documents. This is an important research opportunity one cannot replicate with a progressive scan through a sequence of online documents.

LeGressley Decl. ¶ 12.

c. The Minnesota Depository Timing

As noted above, Defendants are obliged to send new documents to the Minnesota Depository more quickly than to post them to their document websites—30 days versus 45 days (and Defendants want a substantial *increase* in the 45-day period for certain groups of documents; by consent, the Court referred that matter for mediation earlier today (Order #15; issued 3/24/2011)). In practice, tobacco document researchers have found it worthwhile to monitor the Defendants' document websites to see whether documents sent to the Minnesota Depository are posted on Defendants'

websites when they are supposed to be, Muggli Decl. ¶ 32, and have found that, in fact, "there sometimes has been an inordinate lag between when physical documents have been produced to the Minnesota Depository and when the producing tobacco company has placed those same documents on their online collections," LeGressley Decl. ¶ 8. Because of precisely this problem, Mr. LeGressley states, "I have traveled from Canada to Minneapolis to review documents because at the time in question the documents were *only available at the Minnesota Depository*. Given the utility of these documents for academic, policy, and legal purposes, timely access to the documents can be as important as access itself." LeGressley Decl. ¶ 8.

d. Oversize and non-standard media

The MSA provides that Defendants are not required to post oversize and nonstandard media (such as audiotape and videotape) on their websites, but instead, are to make such documents available to the public through the Minnesota Depository. MSA § IV(g), at 40 (JD-045158). *See* Klausner Decl. ¶ 23.

Defendants have acknowledged this themselves; in describing the Minnesota Depository's advantages in 2002, Lorillard stated that its document website indexes oversized documents, audio and videotapes, and other non-standard media, but that those materials themselves are not available on its website—but can be requested from the Minnesota Depository. Lorillard Rog Resps. at 3 n.1 (94700338/0367 at 0341) (Ex. 11); *see also* RJR Resps. to RFPs at 4 (526310209/0225 at 0212) (Ex. 10) ("The [Minnesota] [D]epository also provides access to additional items, such as over-sized documents, audio tapes and video tapes, that could not be reproduced on Reynolds' Internet document website.").

e. An independent document-disclosure site ensures that Defendants cannot intrude on the thought processes of members of the public, public-health officials, or anyone else making use of the Court's document-disclosure remedy

A final reason to require Defendants' documents to be disclosed and publicly available at a site that they do not own, control, or operate, is to ensure that there is at least one place that Defendants have no ability to monitor or track usage. The importance of this facet of the Minnesota Depository is demonstrated by BATCo's surveillance of visitors at the Guildford Depository. Privilege-challenge litigation in this case revealed that BATCo hires attorneys at the Lovells law firm to prepare daily reports that summarize and evaluate the documents that are requested by visitors to the Guildford Depository. To support its privilege assertions over these so-called "Guildford Daily Reports," BATCo submitted an affidavit from David Graves, a Lovells attorney who personally reviewed documents selected by Guildford visitors. Here is how BATCo's attorney described how a Defendant can—and how at least one Defendant does—make use of the fact that it owns, operates, and controls a facility designed to facilitate public access of a document-disclosure remedy:

> "Simultaneously, with the establishment of the Guildford Depository, BATCo in-house counsel requested that Lovells (then Lovell White Durant) track and crucially analyze for litigation purposes all documents selected by plaintiffs and potential litigants from the Guildford Depository. . . At BATCo's request, therefore, these Reports contain a detailed review and legal analysis of the identity of documents selected from Guildford, as well as their content and potential evidentiary uses under different theories of liability—all in the context of the company's confidential strategy for the defense of smoking and health litigation—in Minnesota, the various jurisdictions in the United States and elsewhere where litigation has been threatened or is pending against BATCo since 1994."

Graves 8/1/2002 Aff. ¶ 6 (Ex. 16), *quoted in* R&R #93 at 2-3. Graves makes clear that in BATCo's view, public-health organizations such as Action for Smoking and Health (ASH) and the World Health Organization "have allied themselves in one form or another with tobacco plaintiffs since the

1990s." *Id.* ¶ 4. Thus—when confronted—BATCo concedes that it uses its ownership, operation, and management of a document-disclosure facility for advance insight into what researchers, public-health officials, and other members of the public are researching.

Nor do the perils of a Court's relying solely upon company owned-and-operated sites end there. The same facilities use surveillance cameras to observe visitors as they review documents; and—perhaps even more ominously from the perspective of intruding on the thought processes of people relying upon the Court's document-disclosure obligations—monitor visitors' computer database searches. Muggli Decl. ¶¶ 36-37. The Court did not take the United States up on our request to order Defendants not to engage in similar surveillance on their tobacco websites, U.S. Post-Trial Br. at 241 n.147 (R. 5606; filed 8/24/2005); the Minnesota Depository ensures that there is at least one document-disclosure facility where Defendants cannot engage in such surveillance at will.

3. USE OF THE MINNESOTA DEPOSITORY

As several researchers explain, the Minnesota Depository is expected to remain in active use for research purposes going forward into the future. Klausner Decl. ¶ 10; Hurt Decl. ¶ 11.

The usage figures supplied by the Minnesota Depository confirm that it is regularly used. The figures indicate that from May 2008, when the Depository would have closed but for Defendants' agreement to continue operating it during the pendency of appeals in this case, up through March 15, 2011, the Depository has received over 356 unique requests for documents, data files, or other information, with 270 of these from members of the public and 86 from Defendants' representatives. *See* Minnesota Depository Usage figures, Dec. 2007 to Mar. 15, 2011 (Ex. 14). Defendants send personnel to the Minnesota Depository to research and improve the accuracy and

completeness of their responses to this Court's document-disclosure obligations, both at the Minnesota Depository and on their tobacco-document websites. Klausner Decl. ¶ 18 (discussing 2010 and 2011 correspondence from R.J. Reynolds and Philip Morris). Thirty-one of the Defendants' requests for information have come just in the past seven months, following the California Attorney General's Office's written inquiries about documents listed on the 4(b) Index but not posted on their document websites. It is thus apparent that the Defendants' conduct demonstrates that they themselves acknowledge the Minnesota Depository's unique contribution to ensuring the accuracy and completeness of their own document-disclosure obligations.

Defendants have suggested that they will ask this Court to assess the utility of the Depository by looking primarily to how many requests for information the Depository receives from "unique" visitors. There are three fundamental problems to such an approach. First, the bare fact of mandatory disclosures prevents and restrains wrongdoing. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (upholding disclosure requirements in part on grounds that they deter corruption); *Capital Gains*, 375 U.S. at 191-93 (affirming SEC order imposing "mild prophylactic" of mandatory disclosures in order to reduce future fraud). This Court imposed document-disclosure requirements because being obliged to make the disclosures would itself "act as a powerful restraint on Defendants' future fraudulent conduct." 449 F. Supp. 2d at 928-29. Defendants make no claim that the Court's document-disclosure requirements will be less effective at preventing and restraining them from continued fraud and deception if fewer rather than more academic researchers and Government staff submit information requests to the Minnesota Depository. But given the number of peer-reviewed findings of past fraud and subterfuge that the Minnesota Depository has made

possible, it is understandable that the Defendants would prefer the Depository to disappear as quickly as possible.

Second, any count of discrete requests for information would substantially underestimate the Depository's importance of the contributions. As discussed as discussed in detail above, during late 2011 and early 2011, the Minnesota 4(b) Index has been instrumental in identifying tens of thousands of documents that should have been—but were not—on Defendants' document websites, and inducing the Defendants to resolve the discrepancies. If the Depository did not exist, researchers, public-health officials, and government personnel assigned to police Defendants' practices under this Court's Order would not have had access to those documents. Nonetheless, a request for the current copy of the 4(b) Index would count as only one request. The Court would severely underestimate the Minnesota Depository's importance if it focused solely, or even primarily, upon the number of discrete requests for information.

Third, Defendants' notion would count information requests from "unique" members as of similar weight to months' worth of daily research visits by an academic researcher preparing articles for submission to a peer-reviewed journal. *See* Muggli Decl. ¶ 10 ("At times, I have spent months conducting research at the Minnesota Depository on a daily basis."). Any such method of counting makes no sense. Moreover, it is common for the same researchers to do research at the Minnesota Depository on behalf of multiple clients and organizations. *See, e.g.*, LeGressley Decl. ¶¶ 3-5 (describing depository research on behalf of clients in the USA, Canada, the United Kingdom, Egypt, India, the Philippines, and Australia, on topics such as "the industry's use of exceptionally broad legal privilege claims in documentary disclosure; industry strategies to block or circumvent ingredient disclosure laws; tobacco smuggling in Latin America, Asia, Africa and Eastern Europe;

promotion of smoking through film; and the industry's operation of the depositories"); Muggli Decl. ¶ 9 (describing research at the Minnesota Depository on behalf of "at least 13 different organizations based in at least 6 different countries over the past 13 years," including a number of governmental entities). Considering the work of such experienced and professional researchers as being "worth" a single research query from a one-time user would severely undervalue the importance of the Minnesota Depository.

4. ADMINISTRATION AND PAYMENTS FOR THE MINNESOTA DEPOSITORY

In Order #14, the Court directed the parties to address the administration of the Minnesota Depository. The Depository has been managed by the same firm, Smart Legal Assistance, for the past 13 years, since it opened to the public in 1998. The administration of the Depository includes numerous steps to ensure that each box contains the documents that it is supposed to contain, and that the 4(b) Index provides an accurate record of the (highly quality-controlled) contents of the Depository. Cindie Smart, the president of Smart Legal Assistance, prepared a detailed summary of the specific steps that she and her staff take to verify and cross-check the accuracy and completeness of the Depository's holdings. Smart, "Minnesota Depository General Procedures," at 1-3 (Ex. 15). In addition, her provision of detailed statistics describing usage of the Depository—broken down into separate categories for in-person visits, telephone requests, and emails—further demonstrates that the current administration of the Depository appears to function very well. Minnesota Depository Usage Figures (Exs. 13, 14).

Researchers at the Minnesota Depository often use its facilities on behalf of governmental entities. *See, e.g.*, Klausner Decl. ¶¶ 8-9 (stating that position as manager of University of California

Library component requires frequent consultation with Minnesota Depository staff and use of Minnesota Depository resources); Bialous Decl. ¶¶ 9, 10 (describing using Minnesota Depository on behalf of clients and governmental entities including U.S. Justice Department, the World Health Organization, and the National Cancer Institute); Hirschhorn Decl. ¶ 11 (discussing role of Minnesota Depository documents in preparing World Health Organization reports for individual member nations); Muggli Decl. ¶ 9 (describing research at the Minnesota Depository on behalf of multiple World Health Organization components, the Minnesota Department of Health, and the U.S. Justice Department). The Minnesota Depository administration works hard to make sure that members of the public, academic researchers, and researchers working on behalf of such governmental entities have access to updated and current resources. *See, e.g.*, Klausner Decl. ¶ 13 (describing Minnesota Depository staff working to provide current 4(b) Index); Hurt Decl. ¶ 16 (describing Depository staff working as intermediaries between researchers and tobacco company in addressing numerous problems Mayo Clinic researchers found with BATCo documents); Muggli Decl. ¶ 35 (discussing detailed list Depository staff provided researcher, listing discrepancies Depository staff had identified between 4(b) Index and Defendants' actual production boxes, and stating declarant's understanding that Depository staff worked over subsequent months and years with Defendants to resolve the discrepancies).

In addition, Defendants themselves rely upon the Minnesota Depository staff to assist in resolving problems in their document-disclosure obligations. Klausner Decl. ¶ 18 (discussing and providing copies of 2010 and 2011 correspondence from R.J. Reynolds (concerning R.J. Reynolds, American Tobacco, and Brown & Williamson documents) and from Altria Client Services (discussing Altria and Philip Morris documents).

Based on all available information, the current administration of the Minnesota Depository functions efficiently and smoothly. Researchers and Defendants alike rely upon the Depository administration to serve its function of providing "broad and orderly access" to its resources. Minnesota Consent J. § VII(A)(2) (JD-093326 at 5).

In Order #14, the Court also directed the parties to address payments for the Minnesota Depository. The Minnesota consent decree directed the defendants to that action to pay the costs of the Depository, *id.* § VII(E), and the United States has no information on how they have been doing so. Defendants have asserted that the Depository is expensive to maintain (suggesting that the annual cost might be around $1 million). The possibility that the Court could save Defendants such a sum should be weighed against the Court's finding that Defendants engaged in massive schemes to prevent the disclosure of internal documents that would reveal their knowledge of the health hazards of smoking, secondhand smoke, addiction, and designing cigarettes to ensure that they delivered optimal amounts of nicotine. 449 F. Supp. 2d at 801-39. Moreover, as Defendant R.J. Reynolds has stated, it spent well over $1.5 million to set up its document website, and spends tens of millions of dollars gathering and indexing the documents it posts on its document website. RJR RFP Resps. at 8 (Ex. 10). Defendants spend in excess of $10 *billion* per year on marketing. *See, e.g.*, 449 F. Supp. 2d at 863 (citing 2005 FTC Cigarette Report for 2003 as showing "a staggering $15.15 billion" in expenditures on marketing and promotions). It would severely undermine the Court's transparency remedies if the Court were to let Defendants save perhaps $1 million per year by removing a valuable research tool and the one independent cross-check on the accuracy and completeness of Defendants' document websites.

CONCLUSION

For the reasons addressed above, the United States respectfully urges the Court to deny Defendants' motion to close the Minnesota Depository years before the Court's Final Order (as modified by Order #1021) prescribes.

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Washington, D.C.

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