IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Civil Action No. 99-2496 (GK)**
v.	)	
PHILIP MORRIS USA INC., *et al.*,	)	**Next Scheduled Court Date: None**
Defendants.	)	

CERTAIN DEFENDANTS' RESPONSE
TO THE UNITED STATES' AND INTERVENORS' BRIEFS REGARDING
THE MINNESOTA DEPOSITORY REQUIREMENTS

Defendants Altria Group Inc., Philip Morris USA Inc., R.J. Reynolds Tobacco Company (individually and as successor to Brown & Williamson Tobacco Corporation), and Lorillard Tobacco Company write in support of their Motion seeking relief from requirements related to the Minnesota Depository (the "Depository").

The issue here is not whether Defendants' documents should be publicly available. Regardless of whether the Depository remains open, those documents will be available to the public, both through Defendants' websites and similar non-industry websites, such as the Legacy Tobacco Documents Library ("LTDL") maintained by the University of California, San Francisco ("UCSF"). (*See* Klausner Decl. ¶¶ 2, 4-6). The issue, rather, is whether, in addition to these multiple websites, Defendants must also maintain the Depository, which clearly is rarely used. As the Depository's own usage statistics show, members of the public visited the Depository on just eight days in 2008, nine days in 2009, and six days in 2010; that means that, on average, the Depository received public visitors on just one day out of every seven weeks. In

contrast, Defendant Philip Morris USA's website alone receives an average of 27,819 hits per month. (Klein Decl. ¶ 7; *see also* Leonard Decl. ¶ 5 (rjrtdocs.com receives an average of 7,180 image requests per week); Talbert Decl. ¶ 7 (lorillarddocs.com received almost 79,000 image requests in 2010)).

In light of the public's overwhelming and undisputed preference for accessing tobacco-company documents via the Internet, there is simply no need to continue operating the Depository. Indeed, this Court expressly acknowledged that "[d]ocument websites have several significant desirable features that document depositories do not," chief among them the fact that "a document website 'increases the availability of the documents to the general public.'" *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 931 (D.D.C. 2006). The only apparent purpose in extending the Depository requirement in the first place arose from Defendants' inability to place their non-standard media onto their websites. But Defendants now have that capability and either have posted or will post their non-confidential and non-privileged non-standard media to their websites by the end of June. (*See* Klein Decl. ¶ 4; Leonard Decl. ¶ 8; Talbert Decl. ¶ 4). Thus, the original purpose of the Depository requirement has been met. And, as explained in greater detail below, the other arguments advanced by the Government and Intervenors do not justify requiring the continued operation of the rarely used and anachronistic Depository. Any marginal benefit that the Depository provides to the few individuals who visit it simply cannot justify the financial and administrative burdens—on both Defendants, who must maintain it, and the judiciary, which must oversee it—of keeping it open.

Accordingly, Defendants respectfully request that this Court remove the Depository requirement from Order #1015.

ARGUMENT

I. THE GOVERNING STANDARD PERMITS THE RELIEF DEFENDANTS SEEK.

Defendants are entitled to relief from the Depository requirement under Rule 60(b).[1] In particular, Rule 60(b)(5) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "'The power of a court of equity to modify a decree of injunctive relief,' Judge Friendly wrote in his influential opinion in *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983), 'is long-established, broad, and flexible.'" *United States v. W. Elec. Co., Inc.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995). Consequently, a "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). In practical terms, Rule 60(b)(5)'s flexibility confers upon a court "considerable discretion" to modify an order's prospective application as it sees fit. *W. Elec. Co.*, 46 F.3d at 1207; *see also Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 260 (D.D.C. 2010) ("The district court has discretion to grant or deny a motion brought under Rule 60(b)."). The Supreme Court has thus long held that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

[1] Defendants maintain that Federal Rule of Civil Procedure 54(b) provides the governing standard for their Motion because the D.C. Circuit's partial vacatur of certain remedies in Order #1015 deprived this Order of finality by leaving these remedial issues to be resolved on remand. (*See* Certain Defs.' Mem. of Points & Auth. in Support of Their Mot. to Modify Order #1015 to Remove the Minn. Depository Requirement ("Defs.' Mem."), at 8-9 (D.N. 5897-1)). Defendants, however, recognize that, subsequent to the filing of their Motion, this Court reached a contrary conclusion when resolving both Plaintiff's Motion to Compel Defendant British American Tobacco (Investments) Limited's Compliance and Defendant British American Tobacco (Investments) Limited's Motion for Reconsideration. (*See* Mem. Op., at 5-6 (D.N. 5901)). Defendants nevertheless reiterate and preserve their argument that Rule 54(b) applies here and provides the proper governing standard.

Here, there are at least four significantly changed circumstances that render continued operation of the Depository inequitable.

First, when Order #1015 was entered, Defendants' websites did not include their non-standard media—*i.e.*, video tapes, audio tapes, and certain oversized documents. It is undisputed, however, that since then, Defendants have developed the ability to provide public access to such non-standard media on their websites. (*See* Defs.' Mem. at 6). Defendant R.J. Reynolds has already posted its non-privileged and non-confidential non-standard media to its website, and Defendants Philip Morris USA, Altria, and Lorillard will complete doing so in the very near future. (*Id.*). Consequently, the Government and Intervenors are simply wrong when they assert that "the availability of electronic access to Defendants' documents has not changed since 2006." (Gov't Br. at 13 (internal quotation marks omitted); *see also* Intervenors Br. at 3 (asserting that Defendants' websites cannot constitute grounds for relief "since *both* the Depository *and* websites were among the Court's original remedies in this case.")). These technological changes to Defendants' websites illustrate perfectly why Rule 60(b)(5) makes prospective injunctions "subject always to adaptation as events may shape the need." *Swift & Co.*, 286 U.S. at 114.

Second, it is now clear that, as compared to Defendants' websites, almost no one actually visits the Depository. In 2010, it was visited by a member of the public on just six days, in contrast to the hundreds of thousands of visits to Defendants' websites. *See supra* at 1-2. The Government and Intervenors claim that this does not constitute a change in circumstances because, in their view, the Depository has never been extensively used. (*See* Gov't Br. at 13 ("Use of the Depository has not plummeted since 2006."); Intervenors' Br. at 2 ("[T]he Minnesota Depository is not utilized significantly less than it was before the Court's ruling.")).

But their own declarants refute that assertion. For example, Dr. Monique Elizabeth Muggli explains that "[a]t times, [she has] spent months conducting research at the Minnesota Depository on a daily basis." (Muggli Decl. ¶ 10; *see also, e.g.*, LeGresley Decl. ¶ 6 ("I have traveled many times to … the Minnesota Depository"); Hirschhorn Decl. ¶ 8 ("I began my research into internal tobacco company documents at the Minnesota Depository in August 1998, and continued my in-person research there through much of 1999.")). But as noted, in each of the last three years, members of the public visited the Depository on, at most, just *nine days* (in 2009), and there were no visits lasting longer than *three* consecutive days.[2] Thus, unlike in the past, neither Dr. Muggli nor any other public visitor in the last three years has spent anything even close to "months conducting research at the Minnesota Depository on a daily basis." (Muggli Decl. ¶ 10.)

Third, since August 2010, Defendants have been working with the California Attorney General's Office ("CAAG") to reconcile discrepancies between documents posted on their websites and those listed in the 4B Indices housed at the Depository.[3] (*See* Defs.' Mem. at 6-7; *see also* Klausner Decl. ¶ 21 (agreeing that Defendants have been "responsive to the letters sent by [CAAG] last year")). It is noteworthy that all of the documents identified by CAAG relate to documents produced in applicable litigation years ago. (Klein Decl. ¶ 6; Leonard Decl. ¶ 12; Talbert Decl. ¶ 5). In contrast, all of the documents produced in recent years have consistently

[2] The statistics provided by Judge Guthmann and Ms. Sharp show only four instances during the past three years in which members of the public visited the Depository on either consecutive days or consecutive business days: Saturday, December 1 and Sunday, December 2, 2007; Friday, January 9 and Monday, January 12, 2008; Tuesday, May 12 through Thursday, May 14, 2009; and Thursday, August 19, Friday, August 20, and Monday, August 23, 2010. This list may overstate the instances of extended Depository visits, however, because the redacted statistics provide no way of knowing if, in these instances, the same person visited on consecutive days or if there just happened to be different public visitors on consecutive days.

[3] As Defendants explained in their opening brief, a significant majority of the documents that CAAG identified as missing from Defendants' websites were, in fact, already posted on Defendants' websites or were not required to be posted in the first instance. (*See* Defs.' Mem. at 7; Klein Decl. ¶ 6 (noting that nearly 80% of documents that CAAG claimed were missing from PM USA's website were either on its website or not required to be).

been loaded onto Defendants' websites and sent to the Depository. (Klein Decl. ¶ 6; Leonard Decl. ¶ 8; Talbert Decl. ¶ 6). Moreover, Defendants have resolved or will soon resolve all outstanding discrepancies. (Klein Decl. ¶ 6; Leonard Decl. ¶¶ 14-15; Talbert Decl. ¶ 6). Since Order # 1015 issued, therefore, each Defendant has improved its website such that each website now, or in the very near future, will contain all non-privileged, non-confidential documents listed on the Depository's 4B indices.

Fourth, going forward, at the Government's request, Defendants will post to their websites electronic spreadsheets listing all documents being produced in applicable litigation within a week after making such production, thus enabling the Government to "check" that Defendants promptly post these documents to their websites. (Klein Decl. ¶ 5; Leonard Decl. ¶ 17; Talbert Decl. ¶ 6). This agreement will eliminate any need to visit the Depository to review 4B indices to check the completeness of Defendants' website posting and significantly changes the ease with which the Government and public can monitor Defendant compliance with the Court's disclosure requirements.

In short, since Order #1015 was entered, there have been several significant developments that make clear that the Depository is no longer necessary to further the purposes of this Court's Order and that a requirement that Defendants continue to operate it through 2021 would be inequitable. Accordingly, in accordance with Rule 60(b)(5), this Court should remove the Minnesota Depository Requirement from Order #1015.[4]

[4] In addition to our position regarding Rule 54(b), *see* note 1, *supra*, alternatively, this Court should eliminate the Minnesota Depository Requirement pursuant to Rule 60(b)(6), which allows a court to "relieve a party" from "a final judgment [or] order" for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Government cites the D.C. Circuit's recent admonition that Rule 60(b)(6) "may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.'" *Salazar v. District of Columbia*, --- F.3d ---, No. 07-7031, 2011 WL 403448, at *8 (D.C. Cir. Feb. 8, 2011) (quoting *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007)). But as explained above, Defendants' Motion is not based on a strategic decision about challenging the Minnesota Depository requirement, but rather, on significantly changed circumstances since Order #1015's entry that make clear that the burdens of continued operation of the Minnesota Depository can no longer be justified by the benefits, if any, of such continued operation.

II. THE GOVERNMENT'S AND THE INTERVENORS' ASSERTIONS THAT THE DEPOSITORY IS NECESSARY ARE INCORRECT.

As this Court's opinion well explained:

> Document websites have several significant desirable features that document depositories do not. Collections of tobacco documents placed on the web following the litigation of the 1990s, unlike the majority of non-digitized archival materials, are generally searchable through the web. In addition, relatively few members of the public are able to travel to Minnesota … to access the Minnesota [Depository] … so a document website "increases the availability of the documents to the general public."

Philip Morris USA, Inc., 449 F. Supp. 2d at 931. As explained above, developments since Order #1015 confirm this observation: In contrast to the rarely visited Depository, the websites receive hundreds of thousands of visits every year. The Government and Intervenors nevertheless advance several arguments why, in their view, the Depository is so vital to the prevention of future RICO violations that it must be maintained until 2021. None of these arguments, however, is well founded.

A. The Depository Is No Longer Necessary as a "Check" on Defendants' Document Posting Obligation

The Government's primary argument for the Depository requirement is that it provides "a vital cross-check on the integrity of … the Defendants' document websites." (Gov't Br. at 13). But as Defendants have explained, this simply is no longer true, for several reasons.

First, as Ms. Klausner agrees, Defendants have worked diligently with CAAG to identify, assess, and remedy apparent historical discrepancies between documents listed on the 4B Indices and documents posted on Defendants' document websites. (Klausner Decl. ¶ 21). As a result of the cooperation, Defendants either have resolved or will soon resolve all issues identified by CAAG. (Defs.' Mem. at 7). Consequently, the Depository will no longer serve as a "cross-check" on website document postings to date. And in any event, even if the Depository is

closed, the 4B Indices will continue to exist, thus allowing additional checks of the websites against the contents of the Depository as it now stands.

Second, the Depository is not necessary as a "cross-check" against new postings. The Government is correct that "[t]he Minnesota Depository is not a static or 'closed' collection; to the contrary, … Defendants [] continue to send copies to the Depository of all documents they produced in other United States smoking-and-health litigation … within 30 days of their production in the other litigation." (Gov't Br. at 2). But what the Government omits is the fact that *none* of the CAAG-identified documents available at the Depository but actually missing from Defendants' websites were documents that Defendants produced in recent years; rather, they were produced in litigation years ago. (Klein Decl. ¶ 6; Leonard Decl. ¶¶ 8, 12; Talbert Decl. ¶¶ 5-6). This reflects the fact that each Defendant now has in place a rigorous and effective mechanism for promptly posting to their websites all documents that Order #1015 requires them to disclose. (Klein Decl. ¶ 6; Leonard Decl. ¶ 8; Talbert Decl. ¶ 6). Thus, neither the Government nor the Intervenors can identify a need for a "cross-check" as to documents that Defendants must post on a going-forward basis.

Third, even if there were a need for a "cross-check" on a going-forward basis, Defendants recently agreed, at the Government's request, to an alternative "cross-check" mechanism that is far superior to continued maintenance of the Depository—and far less financially and administratively burdensome for the public and Defendants alike. Defendants have agreed to post on their websites electronic spreadsheets of all documents produced in applicable litigation within seven days of making such production. (Klein Decl. ¶ 5; Leonard Decl. ¶ 17; Talbert Decl. ¶ 6). Thus, the Government and the public need only to compare these electronic lists with

documents posted to Defendants' websites to "cross-check" Defendants' compliance with their document disclosure obligations going forward.

Finally, the Government suggests that the Depository staff is necessary to conduct this "cross-check." (*See* Gov't Br. at 15-16). This simply is not true; it is neither the Depository staff's duty nor their role to enforce this Court's orders. Rather, as the Government notes, there are numerous "government personnel assigned to enforce the Court's decree." (*Id.* at 16). In addition, Ms. Klausner declares that she, as manager of the LTDL, checks to ensure that all documents ordered to be posted on Defendants' websites are indeed there. (*See* Klausner ¶ 8 ("As the manager of the LTDL since 2006, I have been responsible for … reconciling records of documents between the Minnesota Depository, the industry websites and the LTDL.")). And on top of that, at least some tobacco researchers routinely monitor postings to Defendants' document websites for completeness. (*See, e.g.*, Muggli Decl. ¶ 32 ("I have routinely used such lists as a check on what Defendants place on their tobacco document websites.")). Consequently, at best, the Depository staff is merely redundant to numerous other means for "checking" Defendants' compliance with their disclosure obligations.

Accordingly, contrary to the Government and Intervenors' assertions, continued maintenance of the Depository is *not* necessary as "a vital cross-check on the integrity of … the Defendants' document websites." (Gov't Br. at 13).

B. The Depository Is Rarely Used

The Government and Intervenors next attempt to inflate Depository use, asserting that it is "regularly used" (Gov't Br. at 20), and purporting to cite "numerous inquiries … in recent years" (Intervenors' Br. at 3). The data provided by Judge Guthmann and Ms. Smart, however, tell a different story:

	2008	2009	2010
Public visits	18	25	7
Telephone inquiries	5	4	3
Email inquiries	52	87	78

Yet even these numbers overstate the Depository's use. When *repeat* visits, telephone inquiries, and email inquiries from the same individual are excluded, the numbers shrink almost to the vanishing point:

	2008	2009	2010
Public visits	12	18	2
Telephone inquiries	1	2	3
Email inquiries	4	0	1

The 12 non-repeat visitors in 2008, moreover, all visited on only three days; and of the 18 non-repeat visitors in 2009, 12 visited on November 18 and another five visited on October 14. All told, during 2008, even counting repeat visitors, a member of the public visited the Depository on just eight days; in 2009, on just nine days; and in 2010, on just six days. That means that, on average, the Depository hosted a member of the public only once every forty-seven days.

The Government and Intervenors nevertheless advance several arguments in an effort to undermine these statistics, none of which withstands scrutiny.

First, the Government asserts that "the bare fact of mandatory disclosures prevents and restrains wrongdoing." (Gov't Br. at 21). This, of course, is not at issue. Defendants are *not* seeking to end their disclosure obligations. Regardless of how this Court resolves the Depository issue, Defendants will continue to disclose their documents and post them on their websites for all the world to see. The only issue here, rather, is whether, in addition, Defendants should also

be required to maintain their documents in the remote and rarely used Depository. And as Defendants have explained, there is simply no basis for that *additional* obligation.

Second, the Government argues that attempts to quantify Depository usage undervalue the Depository's importance. (Gov't Br. at 22). The Government's primary criticism seems to be that the use statistics do not accurately reflect the Depository's role in the CAAG's and Defendants' efforts to reconcile discrepancies between documents available at the Depository and those available on Defendants' websites. (*Id.* at 21-22.) But those discrepancies, all of which involved documents produced in litigation years ago, have been or soon will be resolved. (*See* Defs.' Mem. at 6-7). And Defendants and the Government have since agreed to a superior mechanism for conducting this sort of "cross-check" on a going-forward basis—posting to Defendants' websites spreadsheets of documents produced in litigation within seven days of production. (*Id.*)

Third, the Government complains that the Defendants' approach of counting only unique visits to the Depository undervalues "months' worth of daily research visits by an academic researcher preparing articles for submission to a peer-reviewed journal." (Gov't Br. at 22 (citing Muggli Decl. ¶ 10)). But regardless of whether, during the early days of the Depository, researchers used it on such a regular basis, it is undisputed that that is no longer the case. As explained above, members of the public visited the Depository on no more than *nine days* in each of the last three years and, at best, no single visitor spent longer than *three* consecutive days there. Nor have the Government, the Intervenors, or any of their declarants even asserted that they have visited the Depository for extended periods of time in the last several years or that they intend to do so in the future. In a similar vein, the Government's observation that "the same researchers [] do research at the Minnesota Depository on behalf of multiple clients and

organizations" (*id.*), does nothing to undermine the fact that these researchers rarely visit the Depository anymore and that, when they do, practically all such visits last just a single day. And in any event, whatever information they obtain by their short, sporadic visits can be obtained from Defendants' far more accessible websites, which, after all, contain the same documents that are in the Depository. (*See, e.g.*, Hirschhorn Decl. ¶ 8 (describing how, when Dr. Hirschhorn worked in Minnesota, he regularly conducted research at the Depository, but, "when [he] left Minnesota, [he] continued research on-line at the Defendants' tobacco document websites and the non-industry websites for much of the past twelve years")).

In short, the statistics provided by Judge Guthmann and Ms. Smart irrefutably demonstrate that the Depository is rarely used by the public, in marked contrast to Defendants' websites, which receive hundreds of thousands of visits every year. These data confirm this Court's original observation regarding the "significant desirable features" that "websites have" but "document depositories do not." *Philip Morris USA, Inc.*, 449 F. Supp. 2d at 931. They also confirm that, in light of significant developments since Order #1015 was entered, there is simply no basis for requiring that the administratively and financially burdensome Depository be maintained for another ten years.

C. The Websites Fully Satisfy the Purpose of the Disclosure Requirements: To Prevent and Restrain Future RICO Violations

Despite this Court's finding that document websites are superior to the Depository, *see Philip Morris USA, Inc.*, 449 F. Supp. 2d at 931, the Government and Intervenors portray the Depository as indispensable for academic research. Of course, even if this was true—and it is not—it would provide no basis for retaining the Depository. The purpose of the Depository is not to provide a convenient research atmosphere. Instead, as the Government acknowledges, it is "the bare fact of mandatory disclosures [that] prevents and restrains wrongdoing." (Gov't Br. at

21). And that disclosure is fully accomplished by Defendants' document websites. Moreover, regardless of its utility in the past, the asserted *continued* importance of the Depository is fatally undermined by the irrefutable fact that, in stark contrast to Defendants' websites, almost no one ever visits the Depository. Consequently, none of the arguments advanced by the Government and Intervenors can demonstrate that, given the widespread availability and use of the websites, the Depository's continued operation is necessary to prevent and restrain future RICO violations.

In any event, the scattershot of utility arguments advanced by the Government and Intervenors are demonstrably wrong.

First, several of the Government's and Intervenors' declarants emphasize the importance of reviewing the entirety of boxes sent to the Depository. (Gov't Br. at 17 (quoting LeGresley Decl. ¶ 12); Intervenors' Br. at 5-7 (quoting Muggli Decl. ¶¶ 18-20, 22, 25)). For example, Dr. Muggli asserts that she has "frequently identified an initial 'seed' document on one of the Defendants' tobacco document websites," then used the 4B Indices to locate that document in a box at the Depository, and then "review[ed] that entire box and multiple boxes with numerical identifiers preceding and following the original identified box." (Muggli Decl. ¶ 22). But eliminating the Depository will not prevent this research. Once Dr. Muggli identifies a "seed" document, she can then easily use Defendants' websites to print out and thus recreate in hardcopy (or alternatively, electronically) the "box" in which that document appeared. After all, under this Court's Order, Defendants are required to code for, among other fields, the "Box number in which hard copy was produced to" the Depository. *Philip Morris USA, Inc.*, 449 F. Supp. 2d at 943 (¶ 10(c)(28)). Moreover, other coding fields provide additional avenues for conducting a more contextual review of documents, including those of the same or similar date, by the same author, and/or sent to the same recipients as the "seed" document. *Id.* at 942

(¶ 10(c)(9)-(10), (12)-(13)).[5] These electronic alternatives are obviously less cumbersome than traveling to Minneapolis to visit the Depository, which explains why Defendants' websites receive hundreds of thousands of hits annually while almost no one actually visits the Depository.

Second, the Government complains that under the MSA, "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." (Gov't Br. at 18.) But it is now undisputed that Defendants have posted or will soon post their non-privileged and non-confidential non-standard media to their websites. (*See* Klein Decl. ¶ 4; Leonard Decl. ¶ 8; Talbert Decl. ¶ 4).

Third, the Government asserts that the Depository should remain open because it provides the public quicker access to Defendants' documents. This assertion appears to be predicated on Defendants' obligation to send new documents to the Depository within 30 days, whereas they have 45 days to post them to their websites. (Gov't Br. at 17). As an initial matter, Defendant Philip Morris USA posts documents to its public website on the day they are produced in litigation because its standard method for producing non-privileged, non-confidential documents in litigation is posting them to its public document website. (Klein Decl. ¶ 5). Thus, in practice, Philip Morris's documents appear on its website immediately, and long before they are shipped to the Depository. But even for the Defendants who do not operate this way, the assertion that the Depository must be kept open so that researchers can, in theory, travel

[5] Dr. Muggli notes that only RJRT currently includes the Depository "Box number" coding field. (Muggli Decl. ¶ 20.) But while the details and implementation of how each Defendant will code documents has been referred by this Court to Judge Richard J. Levie (ret.) for mediation and, if necessary, recommendations, *see* Order #15, *United States v. Philip Morris USA, Inc.*, Civil Action No. 99-cv-02496-GK (Mar. 24, 2011), none of the Defendants opposes coding the Depository "Box number" field for historical productions or continuing to code any of the other fields referenced in text above going forward. Of course, if the Depository requirement is removed, there will be no "Box number" coding for productions going forward.

to Minnesota and review documents 15 days sooner than would be the case if they had to wait for website postings strains credulity and provides an insufficient rationale to require that the Depository be kept open for another ten years. Moreover, the Government's assertion that Defendants "want a substantial *increase* in the 45-day period for certain groups of documents" is misleading by omission. (Gov't Br. at 17). This so-called extension, which the parties agreed should be referred to Judge Levie, applies only to "subsets of documents that require individualized confidentiality review." (Joint Mot. for Referral of Additional Doc. Website Issues for Mediation and/or Recommendation, at 1, *United States v. Philip Morris USA, Inc.*, Civil Action No. 99-cv-02496-GK (Mar. 23, 2011) (D.N. 5894)). Moreover, as noted, at the Government's request, Defendants have unilaterally committed to posting spreadsheets cataloguing documents produced in ongoing smoking and health litigation within just *seven days* of making such a production. (*See* Klein Decl. ¶ 5; Leonard ¶ 17; Talbert ¶ 6).

Fourth, the Government argues that the Depository is necessary to prevent Defendants from monitoring the research conducted by anti-tobacco researchers on Defendants' websites. (Gov't Br. at 19-20.) The Government's claim is baseless. All but one of the examples of such conduct that the Government cites took place overseas at the Guildford Depository, and all such conduct the Government cites involves BATCo, (*see* Hurt Decl. ¶¶ 14-21; Muggli Decl. ¶¶ 36-37; Graves Decl. ¶ 6), which, as the Court is aware, is no longer a party to this case (Mem. Op. (D.N. 5901)). In any event, Defendants do not monitor such research, either at the Depository or on their websites. (Supplemental Declaration of Michael E. Klein ¶ 3, attached as Exhibit 1; Supplemental Declaration of R. Michael Leonard ¶ 2, attached as Exhibit 2; Supplemental

Declaration of Denise J. Talbert ¶ 3, attached as Exhibit 3). The Government's rank, wholly unsubstantiated innuendo to the contrary does not make it so.[6]

Finally, both the Government and the Intervenors suggest that continuation of the Depository is necessary because the Depository's administrative staff help the public access and understand the documents stored at the Depository. (*See* Gov't Br. at 24; Intervenors Br. at 8-10). However, with all due respect to the Depository's administrative staff, it is important to note that they serve an *administrative* function: they do not function as research librarians, nor do they have substantive expertise in the subject matter of the Depository collections. Thus, while they are no doubt helpful to the few people who actually use the Depository, this provides no basis for requiring Defendants and the judiciary to continue operation and supervision of the Depository for ten more years. To the extent that the Depository staff provide useful assistance by providing access to the 4B Indices (*see, e.g.*, Klausner Decl. ¶ 13; Muggli Decl. ¶ 32), Defendants are amenable to posting the 4B Indices on their public document websites.[7]

CONCLUSION

The Minnesota Depository has run its course. Accordingly, Defendants respectfully request that the Court grant Defendants' motion and remove the Minnesota Depository requirement from Order #1015.

[6] Nor are the Government's declarants deterred from using Defendants' websites, since they candidly admit that they regularly use Defendants' websites for their research. (*See* Bialous Decl. ¶ 18; Hirschhorn Decl. ¶¶ 8, 14; Klausner Decl. ¶¶ 7-8; LeGresley Decl. ¶ 8; Muggli Decl. ¶¶ 4-5, 20, 22, 32). In any event, the Depository is not the only non-industry venue that stores Defendants' documents. To the contrary, as described in Ms. Klausner's declaration, the LTDL maintained by UCSF "provides researchers and the public with uniform, free, instant Web access to available documents in a permanent, stable, user-friendly system." (Klausner Decl. ¶ 5; *see also id.* ¶ 12 ("The LDTL has sought to make as many [tobacco company documents produced in litigation and provided to the Depository] as possible available through the Internet"); *id.* ¶ 7 ("One major source, but definitely not the only major source, of LTDL's documents are the tobacco company document websites.").

[7] Were Defendants to post the final 4B Indices on their public document websites prior to closure of the Depository, the spreadsheets that Defendants have agreed to post cataloguing future document production would function as supplements to the 4B Indices.

Dated: April 5, 2011 Respectfully submitted,

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