I. INTRODUCTION

A. Overview

On September 22, 1999, the United States brought this massive lawsuit against nine cigarette manufacturers of cigarettes and two tobacco-related trade organizations. The Government alleged that Defendants have violated, and continue to violate, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, by engaging in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, "light" cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction. As Justice O'Connor noted in Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corporation, et al., 529 U.S. 120, 125 (2000), "[t]his case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use."

In particular, the Government has argued that, for approximately fifty years, the Defendants have falsely and fraudulently denied: (1) that smoking causes lung cancer and emphysema (also known as chronic obstructive pulmonary disease ("COPD")), as well as many other types of cancer; (2) that environmental tobacco smoke causes lung cancer and endangers the respiratory and auditory systems of children; (3) that nicotine is a highly addictive drug which they manipulated in order to sustain addiction; (4) that they marketed and promoted low tar/light cigarettes as less harmful when in fact they were not; (5) that they intentionally marketed to young people under the age of twenty-one and denied doing so; and (6) that they concealed evidence, destroyed documents, and abused the

attorney-client privilege to prevent the public from knowing about the dangers of smoking and to protect the industry from adverse litigation results.

The following voluminous Findings of Fact demonstrate that there is overwhelming evidence to support most of the Government's allegations. As the Conclusions of Law explain in great detail, the Government has established that Defendants (1) have conspired together to violate the substantive provisions of RICO, pursuant to 18 U.S.C. § 1962 (d), and (2) have in fact violated those provisions of the statute, pursuant to 18 U.S.C. § 1962 (c). Accordingly, the Court is entering a Final Judgment and Remedial Order which seeks to prevent and restrain any such violations of RICO in the future.

In particular, the Court is enjoining Defendants from further use of deceptive brand descriptors which implicitly or explicitly convey to the smoker and potential smoker that they are less hazardous to health than full flavor cigarettes, including the popular descriptors "low tar," "light," "ultra light," "mild," and "natural." The Court is also ordering Defendants to issue corrective statements in major newspapers, on the three leading television networks, on cigarette "onserts," and in retail displays, regarding (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking "low tar," "light," "ultra light," "mild," and "natural" cigarettes; (4) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke.

Finally, the Court is ordering Defendants to disclose their disaggregated marketing data to the Government in the same form and on the same schedule which they now follow in disclosing this material to the Federal Trade Commission. All such data shall be deemed "confidential" and "highly

sensitive trade secret information" subject to the protective Orders which have long been in place in this litigation.

Unfortunately, a number of significant remedies proposed by the Government could not be considered by the Court because of a ruling by the Court of Appeals in United States v. Philip Morris, USA, Inc., et al., 396 F.3d 1196 (D.C. Cir. 2005). In that opinion, the Court held that, because the RICO statute allows only forward-looking remedies to prevent and restrain violations of the Act, and does not allow backward-looking remedies, disgorgement (i.e., forfeiture of ill-gotten gains from past conduct) is not a permissible remedy.

Applying this same legal standard, as it is bound to do, this Court was also precluded from considering other remedies proposed by the Government, such as a comprehensive smoker cessation program to help those addicted to nicotine fight their habit, a counter marketing program run by an independent entity to combat Defendants' seductive appeals to the youth market; and a schedule of monetary penalties for failing to meet pre-set goals for reducing the incidence of youth smoking.

The seven-year history of this extraordinarily complex case involved the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court. Those statistics, and the mountains of paper and millions of dollars of billable lawyer hours they reflect, should not, however, obscure what this case is really about. It is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with

enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

Finally, a word must be said about the role of lawyers in this fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes. They devised and coordinated both national and international strategy; they directed scientists as to what research they should and should not undertake; they vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected; they identified "friendly" scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry; and they devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.[1]

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[1] It would appear this situation continues even to the present. For example, in this very litigation, a former long-time career government lawyer was so intent on representing a company (continued...)

What a sad and disquieting chapter in the history of an honorable and often courageous profession.

B. Preliminary Guidance for the Reader

Courts must decide every case that walks in the courthouse door, even when it presents the kind of jurisprudential, public policy, evidentiary, and case management problems inherent in this litigation. From the day this lawsuit was filed, it has garnered much media attention. Recognizing this, the Court hopes to assist the intrepid reader with her task by explaining certain principles and procedures that it has followed.

First and foremost, the Court has decided that, as fact finder, its obligation is to present to the appellate courts, the parties, and the public all the relevant facts which have been proven by a preponderance of this massive body of evidence consisting of testimony (including written direct examination, in-court cross examination, and re-direct examination of witnesses in this trial, as well as deposition and trial testimony of witnesses in related cases), and thousands of exhibits. By virtue of this procedure, the appellate courts will have before them all the factual determinations they need to decide the numerous legal issues which will unquestionably be raised.

Certain consequences flow from the decision to present the most complete factual picture possible. Even though this Opinion is unusually long and detailed, on occasion, there are very few facts presented on important issues and questions leap off the page to the reader. In those instances, it should be understood that the parties presented no further evidence and the Court has stated

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[1](...continued)
aligned with the Defendants that he grossly misrepresented in his pleadings and declaration to the Court the degree and substance of his earlier participation as government counsel in related litigation involving the Food and Drug Administration. As a result, he was disqualified from representing Defendant-Intervenor BATAS. See Order #915.

whatever Findings can be appropriately made on whatever evidence does exist; the record must remain bare as to the unanswered questions and the gaps in the evidence. On other occasions, some individual factual findings may appear unclear or inconsistent with other factual findings. In those instances, the Conclusion to that Section will contain the Court's final Findings, and its reasons for reaching them.

Second, in an effort to make the substance of the Opinion as accessible as possible, almost every Section of the Opinion in both the Findings of Fact and the Conclusions of Law contains an Introduction that provides an overview of the subject matter to be covered and a Conclusion that summarizes what has been found in that Section; the extensive detailed Findings between the Introduction and the Conclusion provide the factual "meat" between the two. In a few instances, Sections are so brief or so self-evident that no Introduction or Conclusion was necessary. Finally, Appendix I contains a Glossary of frequently used terms and concepts; Appendix II contains the relevant Surgeon Generals' Reports and their major findings; and Appendix III contains all the Racketeering Acts charged by the Government.

Third, every effort has been made to make each Section self-contained so that it is complete and understandable in and of itself. Thus, a reader who is interested in only a particular topic, such as youth marketing, can pick up that Section, and obtain the information he needs without having to read the entire Findings of Fact. However, it has been virtually impossible to totally segregate the Findings presented in each Section. At times, the historical data, the scientific data, and the relevant documentary materials overlap subject matter areas and therefore must be repeated in order to ensure that a Section can be read and understood by itself. By the same token, many individuals are identified numerous times in the text in an effort to make it easier for the reader to follow the

narrative rather than having to search through many pages to re-familiarize himself with a person's position within either a Government agency or one of the Defendant corporations.

Fourth, specific record citations have been given whenever possible. Many times an individual Finding of Fact is either a direct quote from a witness's written or oral testimony or is taken directly from a proposed finding submitted by one of the parties and supported by the record and proved by at least a preponderance of the evidence. Vast amounts of testimony were given -- by eminent and respected scientists, government officials and corporate executives. Only the portions of their testimony specifically cited in the Opinion were affirmatively credited and relied on by the Court. The Court has made it very clear when specific evidence referred to is being rejected or discredited.

Fifth, parties should understand that every Exhibit and Prior Testimony cited in the Findings of Fact is deemed admitted into evidence. A formal Order, accompanying this Opinion, will be entered listing those hundreds (perhaps thousands) of Exhibit numbers and Prior Testimonies, overruling any objections made thereto.

Sixth, several observations need be made about witness bias and credibility. For the most part, each individual Chapter in the Findings of Fact explains why certain facts were found, why certain witnesses were credited, and why the testimony of certain witnesses was either discredited as just plain not believable or, in most instances, outweighed by other more convincing and credible evidence.

Most of the witnesses whose testimony was most vehemently attacked by the Defendants (such as Dr. David R. Kessler,[2] Dr. Michael C. Fiore, Dr. Jeffrey Wigand, and Dr. Cheryl Healton) were only relied upon for undisputed or relatively insignificant background facts (as with Dr. Kessler and Dr. Wigand), or testified about remedies which this Court could not consider on the merits under the Court of Appeals decision discussed above (as in the case of Dr. Fiore and Dr. Healton).

Much of the Defendants' criticisms of Government witnesses focused on the fact that these witnesses had been long-time, devoted members of "the public health community." To suggest that they were presenting inaccurate, untruthful, or unreliable testimony because they had spent their professional lives trying to improve the public health of this country is patently absurd. It is equivalent to arguing that all the Defendants' witnesses were biased, inaccurate, untruthful, and unreliable because the great majority of them had earned enormous amounts of money working and/or consulting for Defendants and other large corporations, and therefore were so devoted to the cause of corporate America that nothing they testified to, even though presented under oath in a court of law, should be believed. Such simplistic attacks on the credibility of the sophisticated and knowledgeable witnesses who testified in this case are foolish.

All of this is not to deny that there were significant differences in the overall qualifications of the Government's witnesses and the Defendants' witnesses. There were. The Government's witnesses, viewed as a whole, were far more experienced, credentialed, and active in the area of smoking and health, whatever their particular area of specialty, than were the Defendants'. Many of the Government experts had participated extensively, over many years, in the long and drawn-out

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[2] As the Court has noted for the record on numerous occasions, Dr. Kessler is not related in any way.

process of ascertaining the consensus of scientific opinions embodied in each Surgeon General's Report. Virtually every one had taught at a well-regarded academic institution and written numerous peer-reviewed articles in their particular area of specialty. Many of the Government witnesses continued "hands on," clinical work in their fields despite heavy commitments for research, writing, teaching, and lecturing to their peers.

The Defendants' witnesses were obviously well educated in their areas of specialty. Indeed, as was mentioned on many occasions, Defendants even presented the testimony of an impressive Nobel Prize winner. However, rarely did these witnesses have the depth and breadth of experience of the Government witnesses. Many had worked only in large corporations, and many for only one or two such employers. Many -- although not all -- had written relatively few peer-reviewed articles. Many of the highest paid experts of Defendants, while well credentialed in their particular fields, such as economics, presented relatively narrow testimony tailored to the particular problem or issue they were retained to opine on for purposes of this litigation. A few of Defendants' experts had done virtually no individual research and written virtually no peer-reviewed articles, and a few were unfamiliar with the relevant facts and/or the major scientific literature on the issue about which they testified.

While the testimony of each person -- expert or fact witness -- was evaluated on its own merits, there can be no denying that, <u>as a group</u>, the Government's witnesses were far more knowledgeable, experienced, and active in their respective fields.

Finally, despite the length and detail of the Findings of Fact, the evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against the Defendants, how

irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by the cigarettes they sell.[3]

II. PROCEDURAL HISTORY

Plaintiff, the United States of America ("the Government") brought this suit in 1999 against eleven tobacco-related entities ("Defendants")[4] to recover health care expenditures the Government has paid or will pay to treat tobacco-related illnesses allegedly caused by Defendants' unlawful conduct. The Government also asked this Court to enjoin Defendants from engaging in fraudulent and other unlawful conduct and to order Defendants to disgorge the proceeds of their past unlawful activity.

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[3] One cannot help wondering whether this litigation was the best vehicle for attempting to hold Defendants accountable for their indifference to the health of American citizens. In a democracy, it is the body elected by the people, namely Congress, that should step up to the plate and address national issues with such enormous economic, public health, commercial, and social ramifications, rather than the courts which are limited to deciding only the particular case presented to them in litigation. However, this will certainly not be the first, nor the last, time that litigants seek to use the courts and existing legislation to address broad-scale economic and social problems which might be far better and more appropriately grappled with by our elected representatives.

[4] The eleven Defendants were: Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co., now Reynolds American ("R.J. Reynolds"), Brown & Williamson Tobacco Co., now part of Reynolds American ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), The Liggett Group, Inc. ("Liggett"), American Tobacco Co., merged with Brown & Williamson which is now part of Reynolds American ("American Tobacco"), Philip Morris Cos., now Altria ("Altria"), B.A.T. Industries p.l.c. ("BAT Ind."), now part of BATCo, British American Tobacco (Investments) Ltd. ("BATCo"), The Council for Tobacco Research--U.S.A., Inc. ("CTR"), and The Tobacco Institute, Inc. ("TI"). The latter two entities do not manufacture or sell tobacco products, but are alleged to be co-conspirators in Defendants' tortious activities. BAT Ind. has been dismissed for lack of personal jurisdiction. All Defendants but Liggett joined together in common defense (the "Joint Defendants"). In 2003, the Court granted the Motion of British American Tobacco Australian Services, Ltd. ("BATAS") to intervene for the limited purpose of asserting and protecting its interests in litigation documents. Order #449.

In its original Complaint, the Government made four claims against Defendants under three federal statutes. The first statute, the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-2653, provides the Government with a cause of action to recover certain specified health care costs it pays to treat individuals injured by a third-party's tortious conduct (Count 1). The second statute is a series of amendments referred to as the Medicare Secondary Payer provisions ("MSP"), 42 U.S.C. § 1395y, which provides the Government with a cause of action to recover Medicare expenditures when a third-party caused an injury requiring treatment and a "primary payer" was obligated to pay for the treatment (Count 2). The third statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (Counts 3 and 4), which provides private parties with a cause of action to recover treble damages due to injuries they received from a defendant's unlawful racketeering activity and the government with a cause of action to seek other equitable remedies to prevent future unlawful acts. Joint Defendants moved to dismiss the case on all counts. On September 28, 2000, the Motion was granted in part and denied in part, and Counts 1 and 2 were dismissed. United States v. Philip Morris, Inc., 116 F.Supp.2d 131 (D.D.C. 2000).

Continuing its case on Counts 3 and 4, the Government sought injunctive relief and $289 billion[5] in disgorgement of Defendants' ill-gotten gains for what it alleges to be an unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating back to at least 1953, to intentionally and willfully deceive and mislead the American public about, inter alia, the harmful nature of tobacco products, the addictive nature of nicotine, and harmfulness of low tar cigarettes. Amended Complaint ("Am. Compl.") at ¶ 3. According to the Government, the underlying strategy Defendants adopted was to deny that

[5] See United States' Preliminary Proposed Findings of Fact at 14.

smoking caused disease and to consistently maintain that whether smoking caused any kind of disease was still an "open question" for which no scientific consensus existed. Am. Compl. at ¶ 34. In furtherance of that strategy, Defendants allegedly issued deceptive press releases, published false and misleading articles, destroyed and concealed documents which indicated that there was in fact a correlation between smoking and disease, and aggressively targeted children as potential new smokers. Am. Compl. at ¶ 36.[6]

The parties engaged in intensive discovery for more than two years, with the assistance of Special Master Richard Levie overseeing disputes and issuing 172 Reports and Recommendations, the majority of which were appealed to this Court. During discovery, the parties exchanged over 4,000 requests for production of documents. Defendant alone made available to the Government over 26 million pages of documents. In addition, the parties each took over 1,000 hours of depositions. As discovery progressed and trial loomed, the Court held regularly scheduled and, when events necessitated it, irregularly scheduled status conferences and conference calls and oversaw the filing of many status reports and praecipes.

In addition, the parties filed, pursuant to limitations imposed by the Court, 18 summary judgment motions and countless motions in limine. The Court granted all of the Government's Motions for partial summary judgment to dismiss Defendants' Affirmative Defenses based on: (1) the assertion that the Federal Trade Commission had exclusive authority over Defendants' marketing activities (Order #356); (2) waiver, equitable estoppel, laches, unclean hands and in pari delicto (Order #476); (3) the assertion that the Government's claims and remedies sought violated the 8th

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[6] These allegations have been further described in U.S. v. Philip Morris Inc., 116 F.Supp.2d at 136-38.

Amendment of the Constitution and the Ex Post Facto Clause (Order #509); (4) the assertion that constitutional separation of powers precludes the Government's claims (Order #510); (5) the assertion that the RICO claims and relief sought are prohibited by the 10th Amendment of the Constitution and by separation of powers and that Defendants are not jointly and severally liable for any disgorgement ordered by the Court (Order #538); and (6) res judicata, collateral estoppel, release, accord and satisfaction, and mootness (Order #586). In addition, the Court granted the Government's Motions for partial summary judgment that each Defendant is distinct from the RICO enterprise (if the Court were to determine that there is an enterprise) and that a Defendants' liability for a RICO conspiracy does not require that Defendant to participate in the operation or management of the Enterprise (Order #591). All other summary judgment motions of the Government and the Defendants were denied because the existence of material facts in dispute rendered summary judgment inappropriate.

Upon resolution of all preliminary matters, trial began on September 21, 2004. Together, the parties presented eighty four witnesses and tens of thousands of exhibits. The trial lasted nine months.

On February 4, 2004, our Circuit rendered a decision on an interlocutory appeal from this case. Defendants had appealed this Court's decision denying summary judgment as to the Government's claim for disgorgement under 18 U.S.C. 1964(a). (Order #550). In that opinion, written by Judge David Sentelle, the Court of Appeals determined that disgorgement is not a permissible remedy in civil RICO cases. United States of America v. Philip Morris USA Inc., et al., 396 F.3d 1190 (D.C. Cir. 2004). As a result, because $280 billion in disgorgement was the centerpiece of its requested relief, the Government moved for leave to reformulate their proposed

remedies. The Court granted that motion. After the liability phase of the trial concluded, the parties were allowed to put on evidence pertaining to the remedies sought by the Government.

At the conclusion of the remedies trial, several entities and organizations moved to intervene in order to assert their interests in the proposed relief. The Court granted the Motions to Intervene for the following parties: American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; National African American Tobacco Prevention Network; and Tobacco-Free Kids Action Fund. These parties had a clear interest in advancing the public health and in the remedies proposed in this case.

In addition, the Court received numerous motions for leave to appear as amicus curiae, in support of the United States, from organizations who also wanted to assert their views on the appropriate and necessary remedies in this case. The Court granted the Motions of the following states and organizations because of their enormous collective knowledge and experience in the fields of public health, smoking, and disease: Arkansas; Connecticut; Hawaii; Idaho; Iowa; Kentucky; Louisiana; Maryland; Massachusetts; Nevada; New Jersey; New Mexico; New York; Ohio; Oklahoma; Oregon; Tennessee; Vermont; Washington; Wisconsin; Wyoming; and the District of Columbia.; Citizens' Commission to Protect the Truth; Regents of the University of California; Tobacco Control Legal Consortium, including 18 additional nonprofit organizations; Essential Action; the City and County of San Francisco; the Asian Pacific Island American Health Forum; San Francisco African-American Tobacco Free Project; Black Network in Children's Emotional Health.[7]

On August 8, 2005, each side simultaneously submitted its 2,500 page Proposed Findings

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[7] To the extent that they are relevant, all arguments of the intervenors and amici have been considered and addressed.

of Fact. As August turned into September, the Government filed its 250 page opening Post-trial brief; Defendants filed their 250 page opposition to the Government's brief and their 50 page opening brief on affirmative defenses; the Government filed its 100 page reply brief and 50 page opposition to Defendants' brief on affirmative defenses; and Defendants filed their 20 page reply brief on affirmative defenses.

The Court has issued 1010 Orders during the course of this arduous litigation. Some pundits have opined that this is the largest piece of civil litigation ever brought. The Court will leave that judgment to others.

FINDINGS OF FACT

III. CREATION, NATURE, AND OPERATION OF THE ENTERPRISE[8]

The following Section sets forth in enormous detail the intricate, interlocking, and overlapping web of national and international organizations, committees, affiliations, conferences, research laboratories, funding mechanisms, and repositories for smoking and health information which Defendants established, staffed, and funded in order to accomplish the following goals: counter the growing scientific evidence that smoking causes cancer and other illnesses, avoid liability verdicts in the growing number of plaintiffs' personal injury lawsuits against Defendants, and ensure the future economic viability of the industry.

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[8] "Enterprise" is a statutory term contained in 18 U.S.C. § 1962(c). The Court's use of it in these Findings does not imply that Defendants' activities meet the statutory definition contained in 18 U.S.C. § 1961(4). That issue will be fully discussed in the Conclusions of Law.