No. 06-5267 (Consolidated With Nos. 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, and 06-5367)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

TOBACCO-FREE KIDS ACTION FUND, *et al.*,

Intervenors-Appellees-Cross-Appellants,

v.

PHILIP MORRIS USA INC., *et al.*,

Defendants-Appellants-Cross-Appellees.

On Appeal from the Judgment of the United States
District Court for the District of Columbia

BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED

Alan E. Untereiner
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Bruce G. Sheffler
Benjamin C. Rubinstein
Ellen A. Black
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Attorneys for Defendant-Appellant-Cross-Appellee
British American Tobacco (Investments) Limited

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants ("Joint Defense Brief").

B. Rulings Under Review

References to the rulings under review appear in the Joint Defense Brief.

C. Related Cases

All related cases are identified in the Joint Defense Brief.

CORPORATE DISCLOSURE STATEMENT

British American Tobacco (Investments) Limited ("BATCo") discloses the following parent companies and publicly held companies that have a ten percent or greater ownership interest in BATCo:

- British American Tobacco p.l.c.
- British American Tobacco (1998) Limited
- B.A.T Industries p.l.c.
- British-American Tobacco (Holdings) Limited

STATEMENT REGARDING ORAL ARGUMENT

BATCo respectfully requests oral argument on the issue presented in this brief.

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JURISDICTIONAL STATEMENT

BATCo adopts the Jurisdictional Statement in the Joint Defense Brief.

PERTINENT STATUTES

All applicable statutes are contained in the Joint Defense Brief.

STATEMENT OF THE ISSUES

Pursuant to FRAP 28(i), BATCo adopts by reference the Joint Defense Brief. In addition to the issues presented in the Joint Defense Brief, which BATCo joins, this brief presents one issue that is unique to BATCo:

> Whether the district court erred in concluding that Congress intended for RICO § 1964(a) to "prevent and restrain" BATCo's exclusively extraterritorial conduct.

STATEMENT OF FACTS

Employing the so-called "effects" test derived from securities and antitrust cases, the district court concluded that it had subject matter jurisdiction over the Government's RICO claims against BATCo.[1] Specifically, the district court found that while "BATCo's activities and statements took place outside of

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[1] BATCo, the only remaining foreign defendant in this case, is an English corporation organized under the laws of England and Wales, with its principal place of business in England. *See United States v. Philip Morris USA, Inc., et al.*, 321 F. Supp. 2d 82, 84 (D.D.C. 2004).

the United States, they nevertheless had substantial direct effects on the United States." [Op._1538].

BATCo's foreign conduct that the district court found to have caused direct and substantial U.S. effects consisted of (1) unpublished communications between BATCo (in England) and its U.S. affiliate, Brown & Williamson Tobacco Corporation ("BWTC"),[2] (2) BATCo's participation in international organizations, and (3) BATCo's purported role in the document management practices of its affiliates in Australia and Canada. There was no evidence that any of this foreign conduct by BATCo directly caused the defrauding of a single U.S. consumer out of the purchase price of cigarettes. [Op._1500] ("The purpose of the scheme [to defraud] was to obtain, from [U.S.] smokers and potential smokers, money, i.e., the

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[2] From 1927 until 1979, BATCo was the parent corporation of BWTC. In 1979, BATCo became BWTC's corporate affiliate. *Philip Morris USA, Inc.*, 321 F. Supp. 2d at 84. Effective July 30, 2004, BWTC's cigarette and tobacco business was merged with R.J. Reynolds Tobacco Company. Contemporaneously, BWTC changed its name to Brown & Williamson Holdings, Inc. ("BWH"), and ceased manufacturing, researching, selling, or marketing cigarettes. *See* Joint Defense Brief at Corporate Disclosure Statement and Certificate as to Parties, Rulings, and Related Cases. BATCo remains a corporate affiliate of BWH. *Id.* There was never any finding that BATCo controlled BWTC or BWH.

cost of cigarettes . . .").

A. BATCo's Communications With BWTC

All eleven of the Government's alleged "mail and wire fraud" communications made by BATCo were unpublished communications between BATCo (in England) and BWTC, which were not themselves directed toward U.S. consumers. [Op._App.III_3, 7-8, 12-15, 24]. Moreover, all eleven communications addressed *foreign activity by BATCo* -- namely, BATCo's research efforts in England, and the positions BATCo either took, or intended to take, before foreign regulators such as the U.K. Parliament. *Id.* None of the eleven communications described any statements or conduct of BATCo in the United States.

B. BATCo's Participation In Foreign Organizations

According to the district court, "[t]here is overwhelming evidence demonstrating Defendants' recognition that their economic interests would be best served . . . by a global coordination of their activities to protect and enhance their market positions *in their respective countries*." [Op._170,¶ 364] (emphasis added). To achieve this global coordination, "Defendants participated in an extraordinary number of international organizations and committees throughout the world, [and] used scientists in countries as far apart as Switzerland, Japan, Finland, Germany,

Sweden, Thailand, Argentina, and Brazil . . ." [DN_5799]; [DN_5800_7]. The purpose of this participation, the district court concluded, was to influence scientific opinions on smoking and health and environmental tobacco smoke "to avoid our countries and/or companies being picked off one by one, with a resultant domino effect." [Op._187,¶ 404] (citing US 75149); *see also* [Op._1274,¶ 3457].

BATCo's motives for participating in international organizations, although wrongly characterized by the district court, are not challenged in this appeal. What is challenged is the district court's conclusion that BATCo's foreign participation in these organizations that allegedly sought to influence foreign governments, courts and regulators could give rise to liability under U.S. RICO law.

C. Allegations of Foreign Document Destruction By BATCo's Foreign Affiliates

All of the allegations of document destruction directed at BATCo concerned non-U.S. conduct by non-U.S. companies in non-U.S. litigation. *See* [Op._1433-63,¶¶ 3934-97]. No evidence was submitted that a single document was ever wrongfully destroyed in the United States as a result of anything done by BATCo. In addition, no evidence was submitted that a single U.S. litigant was ever improperly denied discovery based on the destruction of documents by BATCo, or its foreign affiliates, outside the United States. And there was no

evidence that *U.S. consumers* were defrauded out of the purchase price of cigarettes as a direct result of the purported wrongful destruction of documents outside the United States. *See* [Op._1500].

Despite the absence of any nexus between foreign document destruction and the defrauding of U.S. consumers, the document management practices of BATCo's Canadian and Australian affiliates -- both non-defendants in this lawsuit -- featured prominently in the Government's case-in-chief, and in the district court's liability judgment and grant of equitable relief against BATCo. *See* [Op._1432-62,¶¶ 3929-97]. Thus, the district court concluded that BATCo had directed its Canadian affiliate, Imperial Tobacco Limited ("Imperial"), to destroy certain copies of BATCo's R&D documents contained in Imperial's files. [Op._1458,¶ 3985]. The uncontradicted evidence, however, shows that the originals of the documents allegedly destroyed in Canada have been (1) preserved, and in BATCo's possession available for discovery; (2) since 1998 (*see* [JD_093326]) publicly available through the Guildford Depository in England; (3) made available to the Government in this lawsuit. *Compare* [US_20377_202313423-3425] *with* [JD_013222_001-005].

The district court also concluded that BATCo's Australian affiliate, British American Tobacco Australia Services Limited ("BATAS"), formerly

known as W.D. & H.O. Wills (Australia) Limited ("Wills"),[3] had engaged in a policy of improper document destruction to avoid its discovery obligations in Australia. In reaching this conclusion, the district court relied heavily on findings of fact made by an Australian trial court in *McCabe v. British American Tobacco Australia Servs. Ltd.*, (2002) VSC 73 (Sup. Ct. of Vict. Mar. 22, 2002). *See* [Op._1441-55,¶¶ 3947-75; 1460-63,¶¶ 3992-97].

During pre-trial hearings, the *McCabe* court ruled that certain legal advice about BATAS's document retention and destruction policies, including a memorandum authored by Andrew Foyle (the "Foyle Memo"),[4] was not privileged. The *McCabe* court subsequently compelled the production of the Foyle Memo, and

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[3] BATAS intervened in this case to assert and litigate certain privileges it held in its documents after the district court required BATCo to produce (or log) BATAS's documents on pain of civil contempt. *See* [DN2178]; [DN2561] [DN2560]; [DN2614]. Ultimately, BATCo remitted to the district court's registry $1,425,000 in civil contempt fines for failing to produce (or log) BATAS's privileged documents before BATAS's intervention.

[4] When he authored the memo, Foyle was "a partner at the English law firm of Lovell White Durrant [], who represented both BATCo and its then wholly-owned Australian subsidiary," Wills. [DN3273]; [DN3274_1-2].

quoted heavily from it in its published opinion.[5]

On December 6, 2002, the Supreme Court of Victoria -- Court of Appeal reversed and remanded the *McCabe* decision. *British American Tobacco Australia Servs. Ltd. v. Cowell*, 2002 WL 31737235, (2002) VSCA 197 (Sup. Ct. of Vict. -- App. Div. Dec. 6, 2002). In so doing, the appellate court ruled that: (1) the trial court's interpretation of the evidence was tainted by bias (*id.* at ¶¶ 28, 65, 76); (2) Wills's document retention program existed for an innocent purpose and was perfectly lawful (*see id.* at ¶¶ 73, 89, 175); and (3) the Foyle Memo was appropriate and privileged legal advice that was "no more and no less than a document fully and frankly setting out the difficulties facing the tobacco industry

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[5] This Court is no stranger to the Government's (and the district court's) repeated efforts to pierce BATCo's privilege protections in the Foyle Memo. *See United States v. Philip Morris Inc., et al.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (issuing stay pending resolution of merits of BATCo's appeal), later op., 347 F.3d 951, 955 (D.C. Cir. 2003) (vacating district court's order requiring BATCo to produce the Foyle Memo and remanding for further proceedings); *United States v. British American Tobacco (Investments) Ltd.*, 387 F.3d 884, 892 (D.C. Cir. 2004) (reversing and remanding "so that BATCo can log the Foyle Memorandum"). After this Court's last remand, the district court permitted the Government to introduce testimony from a former in-house counsel of BATAS, Frederick Gulson, which revealed the privileged contents of the Foyle Memo, on the ground that BATCo had waived its privileges in the Memo by failing to make efforts to seal the *McCabe* opinion. *See* [DN5000]; [DN4991_10].

[in Australia] given that a wave of litigation was by then anticipated" (*id.* at ¶ 89).

Although directed to *Cowell* by Defendants' Post-Trial Brief (*see* [DN5659_132 n.70]), the district court made no mention in the Final Judgment of *Cowell*'s reversal of the *McCabe* court's factual findings on which the district court had so heavily relied.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government's RICO claims rested on the theory that BATCo, along with the other Defendants, engaged in a decades-long campaign of deception of American consumers through misleading and fraudulent public relations and media campaigns and through deceptive marketing in the U.S. Strikingly, however, not once in this marathon trial did the Government show that BATCo made even a single public statement to American consumers, and no evidence was submitted that BATCo ever engaged in any marketing of cigarettes in this country. Instead of pointing to anything resembling a fraudulent statement or omission directed at American consumers by BATCo, the Government persuaded the district court that BATCo's foreign conduct, purportedly undertaken to prevent foreign governments, courts and regulators from reaching positions that could negatively undermine the U.S. campaign of deceit, was itself reachable by RICO.

Adopting the "effects" test to determine the extraterritorial application of

RICO § 1964(a), the district court determined that BATCo's actions, although foreign, nevertheless violated U.S. racketeering laws. *See* [Op._1537-38]. Put differently, the Government's case against BATCo, and the district court's finding of liability and imposition of equitable relief, rested entirely on supposedly fraudulent activity by BATCo *outside the U.S.* directed at foreign governments, courts and regulators that -- through a chain of causation that would make even Mrs. Palsgraf blush -- defrauded U.S. consumers out of the purchase price of their cigarettes.

However, there is nothing in the text, history or context of RICO generally, or § 1964(a) specifically, that would justify the conclusion that Congress has clearly expressed its intent to prevent and restrain extraterritorial conduct. Thus, the general presumption against extraterritorial application of a U.S. statute should apply, and the liability verdict and grant of equitable relief against BATCo should be reversed. Moreover, there is no proper rationale for using the "effects" test to extend subject matter jurisdiction of § 1964(a) claims to foreign conduct since Congress never intended § 1964(a) claims to require proof of any effect.[6]

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[6] "As [the District] Court . . . stated on numerous occasions, to establish RICO

(Cont'd on following page)

Finally, even if the effects test were an appropriate test for extraterritorial jurisdiction in a § 1964(a) case, it could be satisfied only with a finding that BATCo's conduct itself caused direct and substantial injuries to U.S. consumers. The district court made no such finding.

In sum, no matter how this Court divines congressional intent, one thing is clear: Congress did not intend for the district court to have jurisdiction to "prevent and restrain" BATCo's exclusively foreign conduct pursuant to RICO § 1964(a). Accordingly, this Court should reverse the district court's grant of liability and equitable relief against BATCo, and should vacate the district court's interlocutory orders and rulings against BATCo -- including its privilege rulings with respect to the Foyle Memo, and its orders requiring BATCo to remit $1,425,000 in civil contempt fines to the district court registry -- because the district court lacked jurisdiction to render them.

(Cont'd from preceding page)

liability, the United States is not required to prove that Defendants succeeded in their scheme to defraud." [Op._1520] (citing *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 6 (D.D.C. 2002); *United States v. Philip Morris*, 116 F. Supp. 2d 131, 153 (D.D.C. 2000)).

ARGUMENT

I. CONGRESS DID NOT INTEND TO CONFER ON THE DISTRICT COURT SUBJECT MATTER JURISDICTION TO "PREVENT AND RESTRAIN" BATCO'S ENTIRELY FOREIGN CONDUCT

A. Standard Of Review

Questions of statutory interpretation are reviewed *de novo*. *Zhu v. Gonzales*, 411 F.3d 292, 294 (D.C. Cir. 2005). Whether Congress intended for RICO § 1964(a) to "prevent and restrain" BATCo's extraterritorial conduct presents such a question.

B. The General Presumption Against Extraterritorial Application Of U.S. Statutes Should Apply To RICO

RICO's extraterritorial reach should be read in light of the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotations and citations omitted); *see also Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (recognizing that this canon of statutory construction "is based on the assumption that Congress is primarily concerned with domestic conditions") (internal quotations and citations omitted). This presumption against extraterritorial application of U.S. laws can be overcome only by a "clearly expressed intent on behalf of Congress to legislate extraterritorially." *EEOC*, 499

U.S. at 248. Absent such "affirmative congressional intent" to proscribe foreign conduct, a statute should be read to have domestic application only. *Id.* at 249.

The "RICO statute is silent as to any extraterritorial application." *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996). Moreover, nothing in RICO's legislative history demonstrates a congressional intent for extraterritorial application. To the contrary, RICO's legislative history reveals that the statute's purpose was to "seek the eradication of organized crime *in the United States*." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Oct. 15, 1970) (Statement of Findings And Purpose) (emphasis added). Consistent with that purely domestic objective, Congress made legislative findings that included: (1) "organized crime *in the United States*" has become "widespread," and (2) "organized crime *activities in the United States* weaken the stability of the Nation's economic system." *Id.* at 922-23 (emphasis added). Senator McLellan, a leading sponsor of RICO, repeatedly confirmed that the legislation was aimed exclusively at "organized crime *in the United States*." *See* 115 Cong. Rec. S5872 (Mar. 11, 1969) (emphasis added); 115 Cong. Rec. S9566-67 (Apr. 18, 1969) (goal of "strengthen[ing] the procedural aspects of Federal law enforcement efforts to stamp out organized crime *in the United States*") (emphasis added); 115 Cong. Rec. S9567 (Apr. 18, 1969) ("organized crime is increasingly taking over organizations *in our country* . . . . To aid in the pressing need to remove organized

crime from legitimate organizations *in our country*, I have thus formulated this bill . . . .") (emphasis added).

Against this legislative backdrop and in light of the absence of any express language in the statute indicating foreign application, the general presumption against extraterritorial application of U.S. statutes should be dispositive. *See Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) ("the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries").

C. Nothing About RICO's Overall Context Reveals A "Clearly Expressed Intent" By Congress For RICO To Proscribe BATCo's Extraterritorial Conduct

Even if this Court went beyond RICO's text and legislative history, and examined RICO's overall context, nothing about this context demonstrates a clear intent by Congress for RICO § 1964(a) to "prevent and restrain" extraterritorial conduct. On this point, a recent decision of this Court -- *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004) -- is instructive.

In *Delgado*, defendants "pleaded guilty of either conspiring to induce aliens illegally to enter the United States, or to attempting to bring illegal aliens into the United States in violation of 8 U.S.C. § 1324(a)." *Id.* at 1339. On appeal, defendants argued that the statute did not apply extraterritorially, an argument this

Court rejected in light of the statute's overall context. *Id.* at 1345.

After noting the presumption against extraterritorial application of U.S. statutes, this Court identified "contextual factors show[ing] that Congress had a contrary intent in this case." *Id.* at 1344. The statute at issue in *Delgado* defined the crime as "bring[ing] to or attempt[ing] to bring to the United States" any alien who "has not received prior official authorization to come to" this country. *Id.* at 1344 (quoting 8 U.S.C. § 1324(a)(2)).

Although the statute did not state expressly that it applied to foreign conduct, this Court found that "[i]t is natural to expect that a statute that *protects the borders of the United States, unlike ordinary domestic statutes, would reach those outside the borders*. It makes no sense to presume that such a statute applies only domestically." *Id.* at 1345 (emphasis added); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporter's note 2 (1987) ("It is more plausible to interpret a statute of the United States as having extraterritorial reach when the act is international in focus, for example the Trading with the Enemy Act.") (internal citation omitted).

Unlike the border protection statute at issue in *Delgado*, RICO is not a statute that was designed to protect U.S. borders, or is otherwise "international in focus." Instead, as explained above, RICO was designed with an exclusively

domestic purpose in mind -- the combating of "organized crime activities in the United States." (*See supra* at 11-13). Accordingly, even under a broad contextual reading of RICO, there is no "clearly expressed intent" by Congress for it to proscribe foreign conduct.

In fact, using RICO § 1964(a) -- a provision that to our knowledge has never before been used to prosecute foreign conduct by a foreign defendant, or been deployed by the Government against defendants with no connection to organized crime -- to "prevent and restrain" foreign business activities, such as BATCo's here, would undermine the policy judgments of other nations. *See Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007) ("Foreign conduct is [generally] the domain of foreign law [which] may embody different policy judgments . . .") (internal citations and quotations omitted). For example, the district court came to the conclusion that BATCo's purported role in pre-trial discovery practices in Australia violated RICO, even though an Australian appellate court found that these same practices were not unlawful. *See Cowell*, 2002 WL 31737235 at ¶¶ 73, 89.

D. The So-Called "Effects" Test Sheds No Light On Whether Congress Intended District Courts To Have Jurisdiction To "Prevent And Restrain" Foreign Conduct By a Foreign Defendant Under RICO § 1964(a)

While this Court has not "had occasion to reach" the question whether

RICO "applies extraterritorially,"[7] courts in other jurisdictions have suggested that the general "presumption against extraterritoriality" could be overcome in private civil RICO actions brought under § 1964(c) where the plaintiff proves that foreign "conduct is intended to *and actually does*" have direct and substantial effects in the United States. *See N. S. Fin. Corp.*, 100 F.3d at 1052 (emphasis added) (declining to determine whether effects test would definitely apply in the RICO context).[8]

Here, the effects test is unhelpful in determining whether Congress intended the *U.S. Government, pursuant to § 1964(a),* to be able to "prevent and restrain" BATCo's foreign conduct since "the United States is not required to prove that Defendants succeeded in their scheme to defraud." [Op._1520] (citations omitted). Because Congress did not intend § 1964(a) claims to require proof of any effect (*e.g.*, proof of actual economic injuries to U.S. consumers

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[7] *See Doe I v. State of Israel*, 400 F. Supp. 2d 86, 114 (D.D.C. 2005).

[8] Courts in other jurisdictions have also employed a so-called "conduct" test, also derived from securities and antitrust cases, where conduct "within the United States directly caused" a foreign injury. *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (quotation and citation omitted). As the district court recognized, the conduct test is wholly inapposite here because the injuries alleged by the Government are domestic in nature -- *i.e.*, the defrauding of U.S. consumers out of the purchase price of their cigarettes. *See* [DN5800_6].

caused by BATCo's purported foreign attempts to defraud them), the effects test sheds no light on whether Congress would have intended § 1964(a) to "prevent and restrain" foreign conduct by a foreign defendant.

Tellingly, every civil RICO decision discussing the effects test does so where a private litigant "injured in his business or property *by reason of* a violation of section 1962" brought suit pursuant to § 1964(c). 18 U.S.C. § 1964(c) (emphasis added). Because claims brought by private litigants under § 1964(c) *do* require a showing of an economic injury "by reason of" RICO violations,[9] an effects test -- derived from securities and antitrust cases also involving private litigants claiming that foreign misconduct proximately caused U.S. economic injuries -- at least arguably[10] sheds light on whether Congress intended RICO § 1964(c) private causes of action to reach foreign conduct by foreign defendants. With respect to § 1964(a) attempt-only claims brought by the Government,

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[9] *See Brandenburg v. Seidel*, 859 F.2d 1179, 1184 (4th Cir. 1988).

[10] Because a general presumption against extraterritorial application of U.S. laws applies absent an "affirmative Congressional intent" to the contrary, and nothing in RICO's text, history or context provides such affirmative congressional intent, the effects tests should never be used to determine RICO's extraterritorial reach, even for claims brought under § 1964(c).

however, the effects test provides no such guidance.

E. Even If the "Effects" Test Were A Helpful Gauge Of Congressional Intent For § 1964(a) Claims, The Government Failed To Prove That BATCo's Foreign Conduct Generated Direct And Substantial U.S. Effects

The district court recognized that "BATCo's activities and statements took place outside of the United States," yet it sought to justify its jurisdiction by concluding that BATCo's foreign conduct caused "substantial direct effects on the United States." [Op._1538].

In particular, the district court wrote that "many of BATCo's statements and policies at issue in this case concerned US subsidiary/affiliate Brown & Williamson and potential litigation in the United States." *Id.* The district court never made any findings, however, as to what effect, if any, BATCo's conduct had on BWTC, BWH or on potential litigation in the U.S. Nor did it make any finding, as it had to do to satisfy the effects test, of how this purported effect on BWTC, BWH and/or on potential litigation itself substantially and directly affected U.S. consumers by defrauding them out of the purchase price of their cigarettes. *See Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002) ("the 'effects' test establishes jurisdiction for *foreign conduct that directly causes domestic loss or injury*") (emphasis in original); *see, e.g., Nuevo Mundo Holdings v. PriceWaterhouse Coopers LLP*, No. 03 Civ. 0613(GBD), 2004 WL 2848524, at

*2, *4 (S.D.N.Y. Dec. 9, 2004) (dismissing plaintiffs' RICO claim against foreign defendants accused of conspiring to seize control of a foreign bank to the detriment of U.S. investors where plaintiffs "provide[d] *no specific factual allegations* regarding the number of U.S. investors or the amount of monetary loss incurred") (emphasis added).

Similarly, while the district court referred to its Findings of Fact *en masse* to support its conclusion that "BATCo's activities and statements furthered the Enterprise's overall scheme to defraud, which had a tremendous impact on the United States," [Op. 1538], nowhere did the district court find how, if at all, this impact would have differed but for BATCo. *See United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (finding that for an effect to be "direct," it must be the "*immediate consequence* of the *defendant's* activity") (emphasis added) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). More significantly, nowhere in the Final Judgment did the district court identify a specific loss or injury suffered by even a single member of the American public that proximately and directly flowed from *BATCo's* foreign conduct. *See Doe I*, 395 F.3d at 961.

The district court's third rationale for "substantial direct effects" -- the fact that "all Defendants taken together have bought and sold

literally over one trillion dollars of goods and services in interstate and foreign commerce" [Op._1538] -- is no evidence of the loss or injury required by the effects test at issue.

Accordingly, even under the most liberal of tests for divining congressional intent to regulate foreign conduct (the effects test), the Government had to show that *BATCo's* foreign conduct had, and will continue to have, direct and substantial effects on U.S. consumers in order for civil RICO to "prevent and restrain" this foreign conduct pursuant to § 1964(a). This showing was never made. For that reason, the district court's liability judgment and grant of equitable relief against BATCo should be reversed.

F. The District Court's Rulings And Orders Against BATCo Should Be Struck Because The Court Was Without Subject Matter Jurisdiction To Make Them

Without subject matter jurisdiction, a court's interlocutory orders and rulings cannot stand and should be vacated.

Accordingly, BATCo is entitled to recover $1,425,000 it remitted to the district court's registry in coercive sanctions (*see supra* at n. 3) because the district "court's lack of subject matter jurisdiction is a defense to a finding of contempt." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2465 (2d ed. 1994); *see U.S. Catholic Conference v. Abortion Rights Mobilization,*

Inc., 487 U.S. 72, 76 (1988).

Similarly, the district court's privilege rulings and orders -- including its repeated efforts to de-privilege the Foyle Memo (*see supra* at n. 5) -- should be vacated because the district court lacked subject matter jurisdiction. *See Brown v. Francis*, 75 F.3d 860, 866 (3d Cir. 1996) ("vacat[ing] any orders entered by the district court" because it was without subject matter jurisdiction); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 192 (5th Cir. 1989) (same).

CONCLUSION

For the reasons set forth above, the district court's grant of liability, imposition of equitable relief, and privilege rulings against BATCo should be vacated in all respects, BATCo should be entitled to recover $1,425,000 in civil contempt fines it remitted to the district court's registry, and the action against BATCo should be dismissed.

Dated: August 10, 2007

Respectfully submitted,

Alan E. Untereiner (EHB)

Alan E. Untereiner
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

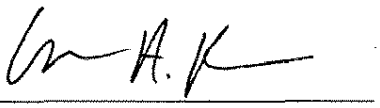
Bruce G. Sheffler (EHB)

Bruce G. Sheffler
Benjamin C. Rubinstein
Ellen A. Black
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Attorneys for Defendant-Appellant-Cross-Appellee
British American Tobacco (Investments) Limited

CERTIFICATE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)(i)

I hereby certify that this brief contains 4,485 words (exclusive of the certificate as to parties, rulings, and related cases, the table of contents, the table of authorities, the corporate disclosure statement, the statement regarding oral argument, this certificate, and the certificate of service), and that the brief (taken together with the other briefs for Defendants-Appellants) therefore complies with the word limit set forth in this Court's scheduling order.



Ellen A. Black

CERTIFICATE OF SERVICE

The foregoing Brief for Defendants-Appellants-Cross-Appellee British American Tobacco (Investments) Limited was served on the following:

By Hand-Delivery on August 10, 2007, to:

Mark Freeman
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7228
Washington, D.C. 20530
(202) 514-5714

Counsel for the United States of America

Katherine A. Meyer
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1075
(202) 558-5206

Counsel for Intervenors-Appellees

By First Class Mail on August 10, 2007, to:

Deborah J. Israel
Womble Carlyle Sandridge & Rice
1401 Eye Street, NW
Seventh Floor
Washington, D.C. 20005

Counsel for Appellant The Council for Tobacco Research-USA, Inc.

Clausen Ely, Jr.
Keith Allan Teel
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004-2401

Counsel for Appellant The Tobacco Institute, Inc.

Timothy M. Broas
Winston & Strawn LLP
1700 K Street, NW
Washington, D.C. 20006-3817

Peter A. Woolson
Robinson Woolson O'Connell
217 East Redwood Street
Suite 1500
Baltimore, MD 21202

Leonard A. Feiwus
Kasowitz, Benson, Torres & Friedman
1633 Broadway
New York, NY 10019

Counsel for Appellant Liggett Group, Inc.

Murray R. Garnick
David S. Eggert
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004

Counsel for Defendant-Appellants Philip Morris USA Inc. and Altria, Group Inc.

Guy Miller Struve
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017

Counsel for Defendant-Appellant
Altria Group, Inc.

Robert F. McDermott, Jr.
Michael A. Carvin
Peter J. Biersteker
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Counsel for Defendant-Appellant
R. J. Reynolds Tobacco Company

David E. Mendelson
John K. Crisham
Kirkland & Ellis LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

David M. Bernick
Stephen R. Patton
Renee D. Honigberg
Kirkland & Ellis LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601

Counsel for Defendant-Appellant
Brown & Williamson Holdings, Inc

Michael B. Minton
Bruce D. Ryder
Thompson Coburn LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693

Counsel for Defendant-Appellant
Lorillard Tobacco Company

Steven D. Gordon
Holland & Knight
2099 Pennsylvania Avenue, NW
Suite 100
Washington, D.C. 20006-6801

Counsel for Smithkline Beecham Corp. and
Glaxosmithkline Consumer Healthcare, L.P.

Arnon D. Siegel
Dechert LLP
1775 Eye Street, NW
Suite 900
Washington, D.C. 20006

Counsel for Pharmacia Corporation

Kate C. Beardsley
Buc & Beardsley
919 18th Street, NW
Suite 600
Washington, D.C. 20006-5503

Counsel for Elan Corporation

Stephen P. Murphy
Reed Smith LLP
1301 K Street, NW
Suite 1100, East Tower
Washington, D.C. 20005-3317

Counsel for Novartis Consumer Health, Inc.

Stephen Paul Mahinka
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004-2541

Counsel for Pfizer, Inc.

Richard A. Levie
ADR Associates
1666 Connecticut Avenue, NW
Suite 500
Washington, D.C. 20009

Special Master

Ellen A. Black