No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA INC., ET AL., F/K/A PHILIP MORRIS INCORPORATED, APPELLANTS

Feb. 4, 2005

OPINION

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Senior Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

A group of cigarette manufacturers and related entities ("Appellants") appeal from a decision of the District Court denying summary judgment as to the Government's claim for disgorgement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18 U.S.C. §§ 1961-68. The relevant section

of RICO, 18 U.S.C. § 1964(a), provides the District Courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act. Because disgorgement, a remedy aimed at past violations, does not so prevent or restrain, we reverse the decision below and grant partial summary judgment for the Appellants.

I. Background

In 1999 the United States brought this claim against appellant cigarette manufacturers and research organizations, claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors. The Government sought damages under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-53, and the Medicare Secondary Payer ("MSP") provisions of the Social Security Act, 42 U.S.C. § 1395y to recover health-care related costs Appellants allegedly caused. The United States also claimed that Appellants engaged in a criminal enterprise to effect this cover-up, and sought equitable relief under RICO, including injunctive relief and disgorgement of proceeds from Appellants' allegedly unlawful activities. The Government sought this relief under 18 U.S.C. § 1964(a), which gives the District Court jurisdiction

> to prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign

> commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a).

Appellants moved to dismiss the complaint in 2000. The District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 134 (D.D.C. 2000).

Section 1964(a) conferred jurisdiction on the District Court only to enter orders "to prevent and restrain violations of the statute." In considering whether disorgement came within this jurisdictional grant, the court relied on a decision of the Second Circuit, the only circuit then to have considered "whether . . . disgorgements . . . are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995) (emphasis in original). After noting that "RICO has a broad purpose [and] the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary," *id.* at 1181, the *Carson* court went on to observe that it did not see how it could "serve[ ] any civil RICO purpose to order disgorgement of gains illgotten long ago. . . ." *Id.* at 1882. The portion of *Carson* relied upon by the District Court in the present controversy suggested that disgorgement *might* "serve the goal of 'preventing and restraining' future violations," but flatly held that the remedy would not do so "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute

capital available for that purpose."[1] *Id.* at 1182. The Second Circuit went on to caution that disgorgement would be better justified under this analysis where the "gains [were] ill-gotten relatively recently." *Id.* The District Court accepted the Second Circuit's suggested holding that the appropriateness of disgorgement depends on whether the proceeds are available for the continuing of the criminal enterprise, but ruled that the question was premature, and denied the motion for dismissal on the RICO-disgorgement claim. *Philip Morris*, 116 F. Supp. 2d at 151-52. Neither party sought leave to file an interlocutory appeal of that ruling.

The case proceeded, and the Government sought disgorgement of $280 billion that it traced to proceeds from Appellants' cigarette sales to the "youth addicted population" between 1971 and 2001. This population includes all smokers who became addicted before the age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age.

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[1] While the *Carson* language may appear to be dicta, the Second Circuit remanded for determination of which disgorgement amounts were sufficiently directed to prevention and restraint to qualify under § 1964(a), thus treating the language on availability of disgorgement as essential to the outcome of the case, and therefore a holding. Some other courts have followed *Carson*. *See, e.g.*, *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354 (5th Cir. 2003) (observing that "the Second Circuit noted that disgorgement is generally available under § 1964"); *United States v. Private Sanitation Indus. Ass'n*, 914 F. Supp. 895, 901 (E.D.N.Y. 1996) ("[T]he disgorgement in this case is clearly directed towards the prevention of future illegal conduct, and is therefore a permissible remedy for civil RICO violations under the limitations imposed by Carson.").

After discovery, Appellants moved for summary judgment on the disgorgement claim arguing that (1) disgorgement is not an available remedy under § 1964(a), (2) even if disgorgement were available, the Government's model fails the *Carson* test for permissible disgorgement that will "prevent and restrain" future violations, and (3) even if disgorgement were available, the Government's proposed model is impermissible because it includes both legally and illegally obtained profits in violation of *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989). The District Court denied this motion in a memorandum order designated "#550." *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72 (D.D.C. 2004). On motion of the defendants, the District Court certified Order #550 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That section provides for interlocutory appeal where a district judge has certified that "an order not otherwise appealable . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. . . ." Under § 1292(b), the Court of Appeals may then decide whether to permit the appeal to be taken from such order. In the present case, we allowed the appeal.

II. Analysis

A. Scope of Review

At the outset, the Government urges that our review should be limited to the narrow question of whether the disgorgement it seeks is consistent with the standards of *Carson*, not whether disgorgement *vel non* is an available remedy under civil RICO. The Government bases this argument on the theory that the order on

appeal—that is the memorandum order denying "defendants' motion for partial summary judgment dismissing the Government's disgorgement claim"—was reiterating a prior order on the general question of availability of disgorgement. Further, the Government argues, the order spoke anew only to the measure of disgorgement, assuming such disgorgement to be otherwise available. In support of its proposed limitation of our review, the Government relies upon *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). In *Yamaha*, the Supreme Court dealt with the breadth of review properly conducted by a court of appeals under 28 U.S.C. § 1292(b). *Id.* at 204, 116 S. Ct. 619. The Government selectively quotes from *Yamaha* the sentence that, "The court of appeals may not reach beyond the certified order to address others made in the case." *Id.* at 205, 116 S. Ct. 619. Based on this sentence, the Government then argues that because the first order denying a motion to dismiss had dealt with the question of the availability of disgorgement, this certified interlocutory review of the subsequent summary judgment order is restricted to the new theory considered by the court on that occasion-that the disgorgement the Government pursued exceeded the standard available for such disgorgement as set by the Second Circuit in *Carson.*

Unfortunately for the Government's position, the *Yamaha* opinion did not end with the sentence upon which the Government relies. The Supreme Court went on to say in the same paragraph: "But the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by

the district court.'" *Id.* (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.25[1] at 300 (2d ed. 1995) and citing 16 C. Wright, A. Miller, E. Cooper, & E. Greshman, Federal Practice & Procedure § 3929 at 144-45 (1977)). Appellants' motion below was for "Summary Judgment Dismissing the Government's Disgorgement Claim," and granting this motion would have resulted in *complete dismissal* of the Government's claim for disgorgement with prejudice. *See* Appellee's App. at 19, 79. Thus the District Court's denial was on the question of whether disgorgement would be allowed *at all*, and we may review it as such regardless of the grounds the District Court gave for its decision. In the memorandum accompanying its denial of this motion, evidencing an accurate understanding of the summary judgment standard provided by Rule 56 of the Federal Rules of Civil Procedure, the District Court noted that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Philip Morris*, 321 F. Supp. 2d at 74 (citing FED. R. CIV. P. 56(c)). Significantly, the court further noted that "Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by *both the text of Section 1964(a) itself and the holding* in United States v. Carson . . . interpreting that section." *Philip Morris*, 321 F. Supp. 2d at 74 (emphasis added). Thus the court clearly implied the possibility that none might be ordered, and that statutory issues outside *Carson* were before the court.

Our dissenting colleague argues that the availability of the disgorgement claim *vel non* is not before us because Appellants did not fully restate their earlier arguments in their motion, but only expressed their reservation in a footnote referencing the District Court's prior rejection of their position. While it is true, as our colleague reminds us, that we have held that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion,' with only 'bare-bones arguments,'" *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C.Cir. 2001) (per curiam), our prior holdings on that subject have been in very different contexts. In *Cement Kiln*, for example, and in *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997), relied upon by the dissent, we were determining whether an issue was properly before us that had been raised in no other fashion. In the present case, we are reviewing a summary judgment decision, presumably according to the standards set forth by the Supreme Court in such decisions as *Yamaha*, and the issue in question was clearly decided by the District Court in the first rejection of the motion to dismiss. The issue was called to the attention of the second summary judgment order, now under direct review, and expressly pointed out in the footnote which our colleague disdains. Furthermore, the motion leading to the order presently before us sought summary judgment of dismissal of the disgorgement claim, not simply a limitation to such disgorgement as might have been supported by the *Carson* test or other factors. Given the Supreme Court's plain teaching in *Yamaha*, particularly its adoption from a learned treatise of the language "it is the order that is appealable, and not the controlling question identified by the district court," *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619 (*see* other

authorities, *supra*), *Cement Kiln* and *Barry* have no applicability. *Yamaha* controls. We therefore proceed to review the denial of summary judgment, under the usually applicable standards, not simply the sole question to which the Appellees and the dissent would restrict us.

Our dissenting colleague suggests that we are limited by "our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal." Dissent at 1211. We know of no such "general policy" that the particular issue addressed has to have been raised in the particular motion. Rather, we understand our general policy to be following the instructions of the Supreme Court that we are to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619. Insofar as our colleague's differing understanding rests on *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 892 (D.C. Cir. 2004) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C. Cir. 2002)), cited by Dissent at 1213, we do not read that case as supporting a general policy that limits consideration to those arguments raised in the particular motion leading to the certified order, as opposed to being "fairly included" within that order, or even to address the point. The court in *British American Tobacco* held only that an intervenor that had raised a privilege issue with respect to an entire collection of documents at one stage of the litigation, but that failed to participate at all in later proceedings focused on one of the documents, despite having notice, had not adequately preserved its objection as to that single document. 387 F.3d at 887-88. It had nothing to do with the scope of review on an interlocutory appeal under

§ 1292(b). Neither it nor *Hylton* dealt in any fashion with the breadth of interlocutory review, nor was establishing any standard for the papers in which an argument must have been raised. Each rejected an attempt by an appellant to raise a new ground for the first time on appeal. Appellants before us raised and preserved their argument as set forth in the text above. We read nothing in *British American Tobacco* or *Hylton* to suggest a general policy barring our review under the *Yamaha* standard.

We find no history of such a general policy that would bar us from considering questions logically antecedent and essential to the order under review. Especially is this so given the Supreme Court's instructions in *Yamaha* that we are to "address any issue fairly included within the certified order." That must include at least issues that are logically interwoven with the explicitly identified issue and which were properly presented by the appellant. Even ignoring the apparent allusion to the broader issue of summary judgment preserved in the caption of the motion, the relief sought, and the footnote provided above, it is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order. Our colleague's interpretation of general policy would seem to compel us to return for trial a case before us for review of a denial of summary judgment, no matter how plain the absence of substantial question of material fact, on the grounds that the denial of summary judgment had been based on rejection of some other reasoning in a previous motion, even though the trial court had earlier erred in denying the first motion to dismiss—even when the appellant

had called that denial to the court's attention in the caption of its motion, and a proposed order accompanying the second motion.

Our dissenting colleague finds in *Yamaha* support for the proposition that "the only issues 'fairly included' within a certified order are those decided in the district court's accompanying memorandum. . . ." Dissent at 1213. We understand the law to be, as suggested in *Yamaha*, that issues are not decided in memoranda at all, but rather in orders. Therefore, consistent with *Yamaha*, we review orders, not memoranda. Our colleague asserts that in *Yamaha* the Court "found 'fairly included' an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law." Dissent at 1213. While this may well be the case, the Supreme Court not only did not stress that circumstance, it did not even mention it. Indeed, we note that our colleague had to repair to the unpublished opinion of the District Court to discover the truth of his proposition. We seriously doubt that the Supreme Court intended to establish a precedent that difficult to discover, let alone apply.

Nothing in *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987), is to the contrary. The passage relied upon by our dissenting colleague to the effect that courts considering interlocutory appeals under § 1292(b) should "not consider matters that were ruled upon in other orders," *id.* at 677, 107 S. Ct. 3054, did not address a situation like the one before us. Here the order appealed from reiterated, and totally depended upon, an issue fairly encompassed within the motion before that court and the order now before us. In *Stanley*, the court of appeals undertook interlocutory review of an order dealing with one claim of a multi-

claim complaint. In that order, the district court had refused to dismiss a claim asserted under the authority of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). On appeal, the court of appeals not only affirmed the district court's conclusion as to the *Bivens* claim, but reached back in the record to order the district court to reinstate another claim for relief asserted under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* In the present case, the disputed "prior order" had denied judgment of dismissal on the disgorgement claim. The order concededly before us denied judgment of dismissal on the same disgorgement claim. We see nothing in *Stanley* inconsistent with the later instruction in *Yamaha* recognizing our jurisdiction to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619. We therefore proceed, obedient to our understanding of *Yamaha*, to review the order before us denying summary judgment.

We review an order denying summary judgment *de novo*. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1031 (D.C. Cir. 2004). Obedient to *Yamaha*, we will review Order #550 denying summary judgment applying anew the standards of Rule 56, and will not simply review that part of the District Court's thinking directed to the applicability of the *Carson* standard or the consistency of the Government's proffers with that standard. Therefore, we must address the issue, logically prior to the *Carson* question, of whether disgorgement is available at all. We hold that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case.

B. The Availability of Disgorgement

The Government argues that § 1964 contains a grant of equitable jurisdiction that must be read broadly to permit disgorgement in light of *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), and its progeny. The *Porter* Court considered reimbursement awards under the Emergency Price Control Act of 1942 ("EPCA") and concluded that where a statute grants general equitable jurisdiction to a court, "all the inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398, 66 S. Ct. 1086. This grant is only to be limited when "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction." *Id.* In this case the text and structure of the statute provide just such a restriction.

As the Supreme Court has repeatedly observed: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (citations omitted). Reading *Porter* in light of this limited jurisdiction we must not take it as a license to arrogate to ourselves unlimited equitable power. We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

As our dissenting colleague correctly notes, the Court in *Porter* was considering whether a district court acting under the authority granted in the EPCA

had the authority to order restitution for overcharges. The implication of broad equitable authority in *Porter* came from a statute which empowered the district court to grant "a permanent or temporary injunction, restraining order, or other order." EPCA § 205(a), 56 Stat. 23, 33 (1942). The action before the Court in *Porter* was brought under a section providing that "the Administrator" could bring action against persons engaged in overcharges for "an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Id.*

The Supreme Court did not have to make much of a stretch to determine that the phrase "enforcing compliance with such provision," and expressly referring to "a permanent or temporary injunction, restraining order, or other order," would include restitution for amounts collected exceeding the ceilings determined under the statute. The Government in the present case asks us to work a far greater expansion of the statutory grant enabling the District Court in a civil RICO action brought by the Government under § 1964(a). We further note that the Court in *Porter* was ordering restitution, under a statute designed to combat inflation. Restitution of overcharge works a direct remedy of past inflation, directly effecting the goal of the statute. The Court in *Porter* set forth two theories under which "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' " under the applicable statute. 328 U.S. at 399, 66 S. Ct. 1086. First, the recovery of the illegal payment by the victim tenant

"may be considered as an equitable adjunct to the injunction decree," as it effects "the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* (noting that "such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available."). The equitable jurisdiction of the Court having been properly invoked, the Court then had the power "to decide all relevant matters in dispute and to award complete relief. . . ." *Id.* Also, and more to the point, the Court was authorized "in its discretion, to decree restitution of excessive charges in order to give effect of the policy of Congress." *Id.* at 400, 66 S. Ct. 1086. The policy of Congress under the EPCA was to prevent overcharges with inflationary effect. The goal of the RICO section under which the government seeks disgorgement here is to prevent or restrain future violations. We therefore must consider the forward-looking nature of the remedy in a way not applicable to a different remedy in *Porter* for the accomplishment of a different goal under a different statute.

Section 1964(a) provides jurisdiction to issue a variety of orders "to prevent and restrain" RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations. The examples given in the text bear this out. Divestment, injunctions against persons' future involvement in the activities in which the RICO enterprise had been engaged, and dissolution of the enterprise are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future.* Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to

restore the status quo. *See, e.g., Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.

The Government would have us interpret § 1964(a) instead to be a plenary grant of equitable jurisdiction, effectively ignoring the words "to prevent and restrain" altogether. This not only nullifies the plain meaning of the terms and violates our canon of statutory construction that we should strive to give meaning to every word, *see, e.g., Murphy Explor. & Production Co. v. United States Dept. of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001), but also neglects Supreme Court precedent. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996), the Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions "to restrain" persons who were improperly disposing of hazardous waste. If "restrain" is only aimed at future actions, "prevent" is even more so.

Mitchell v. DeMario Jewelry, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960), relied on by the Government, is not to the contrary. The *Mitchell* case was brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 215, 52 Stat. 1060 (1938) ("FLSA"). In that action, the Government was invoking the court's jurisdiction to restrain violations of a section making it unlawful for a covered employer to discharge or discriminate against employees who had filed complaints or instituted actions under the FLSA. The Court reviewed the whole breadth of that broad Act to conclude

that the available remedies included not only injunction against further discrimination and mandatory injunctions of reinstatement, but also a "make whole" reimbursement for lost wages because of the discriminatory discharge. As in *Porter*, the Court reiterated that in equitable jurisdiction "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Mitchell*, 361 U.S. at 291, 80 S. Ct. 332 (quoting *Porter*, 328 U.S. at 398, 66 S. Ct. 1086). In the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA or the EPCA. The statute under which the Government sued Appellants, 18 U.S.C. § 1964(a), granted only the jurisdiction which we set forth above. The District Court, so far as is relevant to actions under that section, has jurisdiction only

> *to prevent and restrain* violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a) (emphasis added). The order of disgorgement is not within the terms of that statutory grant, nor any necessary implication of the language of the statute.

In considering the broad language from *Porter* upon which our dissenting colleague relies for the proposition

that we should find disgorgement available because Congress has not taken it away, we note that the Supreme Court considered a similar argument in *Meghrig*. The High Court nonetheless limited the available remedies under CERCLA to those provided in the statute, declaring that

> where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . ."

516 U.S. at 487-88, 116 S. Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)).

In RICO, as in RCRA and in CERCLA, Congress has laid out elaborate enforcement proceedings. One of those proceedings is a government action brought under § 1964(a). That one does not provide for disgorgement. That one provides only for orders which "prevent or restrain" future violations. Disgorgement does not do that.

It is true, as the Government points out, that disgorgement may act to "prevent and restrain" future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain." *Carson*, 52 F.3d at 1182.

The remedies available under § 1964(a) are also limited by those explicitly included in the statute. The

words "including, but not limited to" introduce a non-exhaustive list that sets out specific examples of a general principle. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997). Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). The remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations. Disgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from § 1964(a).

The structure of RICO similarly limits courts' ability to fashion equitable remedies. Where a statute has a "comprehensive and reticulated" remedial scheme, we are reluctant to authorize additional remedies; Congress' care in formulating such a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 251, 254, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993)) (internal quotations omitted) (emphasis in original). RICO already provides for a comprehensive set of remedies. When Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much. In a criminal RICO action the defendant must forfeit his interest in the

RICO enterprise and unlawfully acquired proceeds, and may be punished with fines, imprisonment for up to twenty years, or both. 18 U.S.C. § 1963(a). In a civil case the Government may request limited equitable relief under § 1964(a). Individual plaintiffs are made whole and defendants punished through treble damages under 18 U.S.C. § 1964(c). This "comprehensive and reticulated" scheme, along with the plain meaning of the words themselves, serves to raise a "necessary and inescapable inference," sufficient under *Porter*, 328 U.S. at 398, 66 S. Ct. 1086, that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement.

Congress' intent when it drafted RICO's remedies would be circumvented by the Government's broad reading of its § 1964(a) remedies. The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges, including a five-year statute of limitations, 18 U.S.C. § 3282, notice requirements, 18 U.S.C. § 1963(*l*), and general criminal procedural protections including proof beyond a reasonable doubt. Further, on the Government's view it can collect sums paralleling-perhaps exactly-the damages available to individual victims under § 1964(c). Not only would the resulting overlap allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies, *see Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987), but it raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v. Securities Investor Protection*

Corp., 503 U.S. 258, 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), constituted a basis for refusing to infer a cause of action not specified by the statute. Permitting disgorgement under § 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme.

A note appended to the statute stating that RICO "shall be liberally construed to effectuate its remedial purposes" does not effect this structural inference. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). This clause may warn us against taking an overly narrow view of the statute, but "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). The text and structure of RICO indicate that those remedial purposes do not extend to disgorgement in civil cases.

The Second Circuit in *Carson* has interpreted "prevent and restrain" not to eliminate the possibility of disgorgement altogether, but to limit it to cases where there is a finding "that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson*, 52 F.3d at 1182. The Fifth Circuit adopted this interpretation in a case holding that disgorgement after the defendant had ceased production of an allegedly defective product would be inappropriately punitive rather than directed toward future violations. *See Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 355 (5th Cir. 2003). While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as re-

quired by § 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.

Our colleague reminds us that the Supreme Court has instructed "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Dissent at 1220 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). This would be most devastating to one side of the case or the other if we were in fact attempting to overrule a Supreme Court precedent. That is, if there were a Supreme Court case that had direct application to the facts before us, we would be required to follow it, and that would be the end of the matter. We would not need to consider any other line of cases. However, the *Rodriguez de Quijas* language is not particularly helpful when no precedent of the Supreme Court "has direct application," as in the present case. There is not a Supreme Court case dealing with the jurisdiction of a district court to order disgorgement under RICO § 1964(a). There is not a Supreme Court case discussing that question. There is, in short, no Supreme Court case having direct application. With no Supreme Court case having direct application, it is our duty to construe the statute. That is what we have done.

III. Conclusion

Because we hold that the District Court erred when it found that disgorgement was an available remedy under 18 U.S.C. § 1964(a), we reverse the District Court and grant summary judgment in favor of Appellants as to the Government's disgorgement claim.

WILLIAMS, Senior Circuit Judge, concurring.

I join the opinion for the court. I write separately to emphasize problems with the government's fallback interpretation of 18 U.S.C. § 1964(a), under which the government could obtain disgorgement for purposes of reducing the defendant's *ability* to commit future RICO violations, with the amount accordingly limited to assets "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995). This superficially appealing interpretation in fact creates a kind of pushmi-pullyu, a beast that Congress is most unlikely to have ordained.

I.

The statute gives district courts "jurisdiction to prevent and restrain [RICO] violations." 18 U.S.C. § 1964(a). Reasoning that pure deterrence was an impermissible objective of orders under § 1964(a), the Second Circuit went on to find that disgorgement could "prevent and restrain" if limited to the amount of ill-gotten gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. Because money is fungible, as indeed are virtually all resources when viewed as enablers of future criminal conduct, the government here refines its *Carson*-derived fallback position, quite sensibly rejecting any limitation to "ill-gotten gains" in

the form of specific money or resources so gained. Such a limit, we have said (applying a different statute), would lead to absurd results. *SEC v. Banner Fund International*, 211 F.3d 602, 617 (D.C. Cir. 2000). There the defendant proposed to confine disgorgement to the "actual assets" unjustly received. We said that what mattered was not the specific assets but the *amount* by which the defendant was unjustly enriched; the alternative would allow a defendant to escape liability by spending ill-gotten gains while husbanding other assets. *Id.* at 617. Thus the government's proposal is that the amount of the ill-gotten gains should set a ceiling on the disgorgement recovery, subject to the further limit mentioned above—essentially purporting to limit the disgorgement to crime-enabling resources, broadly construed.

In *Carson* itself the court ruled that this prevented the government from forcing disgorgement of funds, ill-gotten in the distant past, from a RICO defendant by then retired from the RICO enterprise itself (a union). In the context of corporate defendants such as those before us, a possible limit would be the entire net worth of the companies (a good deal less than the $280 billion that the government claims to have been ill-gotten gains). But perhaps not. Even that limit is arbitrary, as resources can be used for criminal purposes even if offset by company debt. Subject to the bankruptcy laws, nothing in the logic of the crime-enablement theory clearly calls for stopping at confiscation of the shareholders' interests; why not the bondholders' as well?

On the other side, it might be plausible under the *Carson* theory to exempt firm resources now devoted to non-tobacco enterprises. It is probably about as

difficult for these defendants to re-allocate resources from the businesses of cheese and crackers, for example, to criminality in the sale of cigarettes, as for the union in *Carson* to lure Carson and his funds back from retirement to union criminality.

In short, *Carson* and the government's fallback position send the court off on a virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime.

II.

It is hardly surprising that there are only gossamer lines between drastic disgorgement (destruction of bondholder as well as shareholder wealth) and relatively mild disgorgement (cordoning off resources in non-tobacco subsidiaries). The plain fact is that wealth deprivation is an extremely crude device for "prevent-[ing]" criminal behavior. Granted, a criminal miscreant with a billion dollars is potentially more dangerous than an impoverished criminal miscreant. But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught).

Confusion arises from an ambiguity in our understanding that, in the civil context, such remedies as damage awards and restitution "deter," and thus in a sense "prevent" commission of torts, breaches of contract, and other civil wrongs. It is quite true that a rule or practice of awarding such remedies deters, and thus prevents, such wrongs. Indeed, under one viewpoint that is the primary or even sole purpose of awarding such remedies. See William M. Landes & Richard A.

Posner, *The Economic Structure of Tort Law* (1987). But it is the *rule* or *practice* that creates the incentive. To make the rule credible, of course, the awards must be made; but no individual *award* has a material deterrent effect.

To evaluate that last statement consider a society that empowered some deus ex machina to randomly excuse one damage judgment in a million. Such an exception to the rules would have no detectable effect on the commission of torts or breaching of contracts. Even the lucky defendant who enjoyed the benefit of the pardon wouldn't—unless a complete fool—materially alter his future conduct because of that manna from heaven.

The equity court, empowered under § 1964(a) to "prevent and restrain" future violations, has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior. It can, for example, establish schedules of draconian contempt penalties for future violations, and impose transparency requirements so that future violations will be quickly and easily identified.

In assessing the likelihood that Congress intended an additional disgorgement remedy, it makes sense to inquire into the tendency of such an implied remedy to "prevent and restrain" future violations by the defendant. Of course the rule the government seeks here would be a rule, not merely a random extra penalty. But the question would be its incremental effect, on top of (1) RICO's explicit provisions for criminal penalties (including disgorgement and imprisonment under § 1963(a)) and for victim recoveries (trebled) under § 1964(c), and (2) the whole available panoply of genu-

inely forward-looking remedies—express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations. It seems almost inconceivable that many aspiring criminals would find the incremental risk decisive. I find it hard to imagine a waffling villain—already in court for RICO violations—saying to himself: "Well, my chances of escaping § 1963(a) forfeiture and imprisonment because of the statute of limitations and the burden of proof, and of escaping treble damages under § 1964(c), and contempt penalties for violating the court's orders, still leave RICO violations attractive on a net basis; but that implied disgorgement under § 1964(a)—wow! Too much. It tilts me over the line."

The weakness of that scenario supports the inference that for the defendant who winds up before the equity court, Congress intended the words "prevent and restrain" to authorize only a tailored, forward-looking remedy. Penalties for violations of the court's decree, and transparency-enhancing measures meet that standard. A purported § 1964(a) disgorgement remedy, on top of those explicitly authorized, would provide only a trivial incremental effect (the reverse of the pardon granted once in a million), and would not qualify. Nor would disgorgement aimed at reducing the defendant's crime-enabling resources, a factor linked only crudely to his future tendency toward criminality.

Once we (1) accept the proposition that § 1964(a) limits the equity court to forward-looking remedies, as even the dissent appears to do with respect to the government's narrower argument, see Dissent at 1224-25 ("I also share the Second Circuit's apparent conclusion . . . that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO

violations."), and (2) reject the supposition that "whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future violations," *Carson*, 52 F.3d at 1182, the court must try to draw lines between equitable remedies that merely "hurt" the defendant and ones that have a genuine tendency to "prevent and restrain" his future violations.

Because disgorgement under § 1964(a) so evidently lacks that tendency, the dissent relies on *Porter* and on the government's experts. *Porter* indeed includes the twice cited phrase suggesting that "[f]uture compliance may be more definitely assured if one is compelled to restore one's ill- gotten gains." Dissent at 1223, 1224. But the statute at issue in *Porter* gave district courts power to issue orders "enforcing compliance" and thus didn't seem to narrow the grant to forward-looking remedies. Indeed the *Porter* dissent never suggests such a limit; nor, so far as appears, did the defendant firm. For construing § 1964(a), *Porter* is of remarkably little help.

The expert testimony offered by the government for the proposition that backward-looking disgorgement will "'prevent and restrain' defendants from committing future RICO violations," see Dissent at 1226, serves no better. Obviously such testimony cannot alone resolve the issue, turning legal analysis of the statute into a fact battle among experts. Thus the experts' testimony is valuable for its analytic quality, not its utterance by a PhD.

The dissent's genuflection before the experts leaves the reader to imagine some supporting analysis. Lest the imagination run riot, I attach an appendix containing *all* of the expert testimony that the government saw fit to offer on the point in the summary judgment motion. The crux is Dr. Franklin Fisher's statement:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct. [1]

While it is a nice rhetorical move to point out that the defendants violated RICO (as we must assume) despite existing sanctions, Fisher offers no analysis as to why the presence of a civil disgorgement remedy in favor of

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[1] United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 813-14. Although Appellee's Appendix was filed under seal, the expert testimony presented to the court has also been posted by the government on its website.

the government would have reduced the likelihood of violations. (Indeed, on the government's theory—that the statute actually creates such a remedy—the defendants would have taken that into account in deciding to proceed with violations.) More important, Fisher looks at the wrong setting. Before this (or any) RICO litigation against a particular defendant, that defendant would have operated without the spotlight of the lawsuit itself. (That may explain why the government let the statute of limitations run for decades, and why the victims failed to seek treble damages.) Now the spotlight is on, and the plausible explanations for non-application of the explicit remedies (other than § 1964(a) equitable relief) have disappeared. And the district court can amplify the spotlight with transparency-enhancing and prior-approval measures. The real question is whether the imposition of this extra remedy on the defendants before the court—backward-looking civil disgorgement in favor of the government—would materially alter their readiness to persist in violations, in the face of all RICO's explicit remedies, and a forward-looking schedule of penalties for even minute infractions, made doubly effective by compulsory disclosure and approval measures. The government's experts simply did not address that question. This court's own analysis provides a clear answer that the extra "remedy" would not do so.

The dissent's use of the government's experts is part of its effort (in its qualified endorsement of the government's fallback position) to transform an issue of statutory interpretation into one of fact. See Dissent at 1222-23, 1227-28; see also *id.* at 1223 (noting that in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996), there was no affirmative

evidence that the defendants were likely to commit future RCRA violations, and thus suggesting that the case was something other than pure statutory interpretation). But the "facts" hypothesized by the dissent are unrelated to the real world faced by RICO defendants —already arraigned for their past offenses and subject to a battery of new disincentives on top of all RICO's conventional explicit remedies. Statutory interpretation shouldn't turn on factual hypotheticals such as, "What if pigs had wings."

III.

The above analysis seems to me to confirm what intuition suggests about the jurisdictional issue in this case. Even the most narrowly formulated question about the validity of the district court's order—the choice between the government's primary position (that § 1964(a) creates unlimited discretion to order disgorgement) and its fallback position (that it provides authority to award crime-enabling disgorgement)—requires the court to plumb the meaning of § 1964(a). The issues in this case, all turning on the interpretation of § 1964(a)'s lone sentence, are so thoroughly enmeshed that we needn't explore the court's language limiting § 1292(b) jurisdiction to issues "logically interwoven" with the explicitly identified issue. Maj. Op. at 1196. The dissent's hypotheticals as to what might be covered, see Dissent at 1212, plainly depend on an astonishingly broad notion of either logic or weaving. Having analyzed § 1964(a) and having found the order in conflict with its terms, the court must reverse.

One final note. The dissent chides the court for creating a circuit split. See Dissent at 1208. But if we confined ourselves to what the dissent acknowledges to be properly before us, and adopted the dissent's

preferred position (that disgorgement is available like any other equitable remedy, regardless of its likely effects on a defendant's future behavior, simply because RICO doesn't explicitly preclude it), we would create no less of a split between this circuit and the Second.

Appendix

Excerpt from United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 812-14.

B. *Disgorgement Provides Economic Incentives That Will Prevent Further RICO Violations*

172. Despite the fact that it is not necessary for the United States to prove this, disgorgement will prevent and restrain further bad acts.

173. Drs. Fisher and Kothari have both stated in their expert reports and deposition testimony, that disgorgement of the proceeds calculated by Dr. Fisher would in fact act to prevent and restrain future RICO violations. Dr. Fisher directly addressed this point in his rebuttal report in which he states:

> Defendants' experts have suggested that disgorgement of ill-gotten gains such as the proceeds sought in this matter will not serve the goal of preventing or restraining the defendants from engaging in similar bad acts in the future. For example, Professor Carlton argues, "Having to disgorge past proceeds, by itself, would not affect a defendant's incentives to engage in misconduct in the future because it would not affect the returns (if any) from future misconduct." I address these criticisms with well-known economic principles. What Professor

> Carlton and the other defendants' experts who espouse this view fail to recognize is that requiring defendants to pay proceeds will affect their expectations (and those of others contemplating malfeasance) about the returns from future misconduct. As a matter of economic principle, the higher the proceeds amount, the lower the expected returns from future misconduct and the greater the desired effect of deterrence.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris*, (R. 1450; filed July 24, 2002) at 4-5 ¶ 12.

174. Dr. Kothari's expert report confirms Dr. Fisher's conclusion:

> Requiring the defendants to pay ill-gotten proceeds is relevant. The economic incentive for illegal behavior is higher (for defendants and onlookers) if defendants are not required to pay the proceeds. While payment of proceeds has some of the features of sunk cost, it is not identical to a sunk cost because it will affect future decisions or behavior. The higher the proceeds paid the greater the economic incentive to avoid illegal behavior in the future.

Expert Report of S.P. Kothari, *United States v. Philip Morris*, (R. 1451; filed July 24, 2002) at 3-4, ¶ 8.

175. Dr. Fisher expressly states in his expert report:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could

> establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris*, (R. 1450; filed July 24, 2002) at 5-6, ¶ 14.

176. Dr. Fisher has repeatedly confirmed the preventative benefit of disgorgement. At his deposition he stated:

> Q. . . . the idea is that disgorgement prevents and restrains future violations by altering the defendants' expectations about the returns they might receive from future misconduct. Is that right?
>
> A. . . . I believe that to be correct.
>
> Q. Does disgorgement prevent and restrain future RICO violations in any other way?
>
> A. Well, it removes at least some, and possibly all, of the assets with which to engage in future illegal activities.

Deposition of Franklin Fisher, *United States v. Philip Morris*, September 12, 2002, 828:4-19 (Exhibit 77).

177. "[A]s I have repeatedly and clearly stated in my report and deposition testimony, disgorgement of Defendants' proceeds, as I have calculated them, would in fact act to prevent and restrain future RICO violations." Declaration of Franklin Fisher, *United States v. Philip Morris*, at 7, ¶ 16 (Master Rule 7.1/56.1 St. Exhibit 5)

TATEL, Circuit Judge, dissenting.

Congress passed the Organized Crime Control Act of 1970, which included RICO, "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (quoting Pub. L. No. 91-452, 84 Stat. 922, 923 (1970)). Through this lawsuit, the United States seeks to end what it perceives as rampant racketeering violations within the tobacco industry. Specifically, the government offers voluminous evidence, which we must view in the light most favorable to it, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (stating that at summary judgment the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor"), that Philip Morris, Altria Group, R.J. Reynolds, Brown & Williamson, Lorillard, BATCo, and Liggett have engaged in a half century of deceptive practices to the detriment of the health—and lives—of their customers. Acting both individually and in concert through collective agreements and jointly funded organizations like the Council for Tobacco Research and the Tobacco Institute (also defendants), these companies publicly defended smoking as both harmless and nonaddictive despite knowing

from internal research that it was neither. In their advertising campaigns the companies targeted young people, who "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979), despite publicly claiming otherwise.

The government alleges that during the course of this behavior, the defendants committed over ninety racketeering violations between RICO's 1970 effective date and the government's 1999 complaint. Significantly for this appeal, the government further claims that absent court intervention and despite the master settlement agreement between the tobacco companies and the states, the companies are likely to continue their deceptive practices and commit further racketeering violations in the future. The government's claim regarding likely future conduct rests not only on the companies' alleged history of deceptive activities, but also on record evidence that the companies continue making their misleading statements about both the health consequences of smoking and the addictive nature of nicotine, as well as persisting in their marketing efforts aimed at young people. The government asks the district court to enjoin the tobacco companies from future unlawful conduct and to order them to disgorge the profits they have earned due to their racketeering violations since RICO's effective date—profits the government estimates amount to $280 billion.

In now holding that district courts may never order disgorgement as a remedy for RICO violations, this court ignores controlling Supreme Court precedent, disregards Congress's plain language, and creates a circuit split—all in deciding an issue not properly before

us. Because the tobacco companies ask us to address an issue not fairly included in the certified order and not presented at that time to the district court, I would dismiss this interlocutory appeal. Were it appropriate to reach the merits, I would uphold the district court's denial of summary judgment on either of two grounds. First, unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," district courts may grant any equitable relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). Because under a fair application of Supreme Court precedent, *see id.* at 398-403, 66 S. Ct. 1086, no such inference can be drawn about RICO, I would conclude that the district court has authority to order disgorgement. Alternatively, even if RICO's phrase "prevent and restrain violations," 18 U.S.C. § 1964(a), limits the district court's equitable jurisdiction, I would still uphold the denial of summary judgment because the government has presented evidence that disgorgement will accomplish just that purpose in this case.

I.

Under 28 U.S.C. § 1292(b), if a district court "shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it may certify the order for interlocutory review, and the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order." Section 1292(b) establishes a "two-tiered arrangement." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995). Congress "chose to confer on district courts

first line discretion to allow interlocutory appeals," *id.*, and "even if the district judge certifies the order under § 1292(b*)*, the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (internal quotation marks and citation omitted). In accepting this interlocutory appeal, this court not only (at the least) pushes the bounds of its jurisdiction, but also exercises its discretion on behalf of defendants whose litigating tactics leave much to be desired.

A.

In 2000, the tobacco companies—usually referred to in this opinion as "Philip Morris"—filed a motion to dismiss, arguing (among other things) that "disgorgement . . . is never available under a civil RICO count." *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 150 (D.D.C. 2000). Denying that motion, the district court held that disgorgement could be available under 18 U.S.C. § 1964(a), but did not address whether disgorgement would be available in this particular case. *See id.* at 150-52. Philip Morris never sought certification of that order, though it could have done so at any time after the order's issuance. *See* Fed. R. App. P. 5(a)(3) (providing that the time for filing an appeal runs from when the district court amends the order to include certification, not from the issuance of the actual order); 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3929 (2d. ed. 1996) ("This latitude [in Rule 5(a)] makes it possible to employ § 1292(b) with some precision, deferring the question of appeal until it is clear that prompt appeal is apt to be useful.").

In 2004, Philip Morris sought summary judgment regarding the government's request for disgorgement in this case. Contrary to the court's statement, *see* majority op. at 1193, Philip Morris neither reargued the position it took in 2000 nor asked the district court to revisit its 2000 decision. Philip Morris's only reference to its prior position came in a one-sentence footnote: "As noted previously, Defendants respectfully disagree with the Court and maintain that disgorgement in any fashion is unavailable to the Government in a civil RICO action." Defs.' Br. in Supp. Mot. Partial Summ. J. at 6 n.4. Instead, Philip Morris urged the court to grant its motion for summary judgment for two primary reasons. First, relying on *United States v. Carson*, where the Second Circuit held that district courts may order disgorgement as a RICO remedy only where the gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," *id.* at 20 (quoting *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995)), Philip Morris claimed that 18 U.S.C. § 1964(a) "limits disgorgement to the amount of ill-gotten gains that remain available to defendants to fund future RICO violations," *id.* Philip Morris further argued that "the Government deliberately has refused to develop the proof properly required under *Carson*" and this in turn "requires dismissal of the Government's disgorgement claim." *Id.* at 25. Second, Philip Morris asserted that the government's disgorgement model fails as a matter of law to reasonably approximate the defendants' ill-gotten gains.

The district court rejected both arguments and denied summary judgment to Philip Morris. *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72 (D.D.C. 2004). Interpreting section 1964(a) more

broadly than had the Second Circuit, the court concluded that it could order disgorgement in situations besides those identified in *Carson*. *Id.* at 77-79. Unsurprisingly, the district court did not revisit its 2000 decision, observing only (in a footnote) that this decision had held "that disgorgement is a permissible remedy under Section 1964(a)." *Id.* at 76 n.7. The district court also rejected Philip Morris's contention regarding the government's disgorgement model. *Id.* at 81-82.

Philip Morris then asked the district court to certify its 2004 order under section 1292(b). In its certification request, Philip Morris did not reassert its legal argument from 2000. Instead, it stated that "[w]hether the *Carson* standard applies to the Government's disgorgement claim is clearly a controlling question of law. . . . If the Government is wrong, and *Carson* applies, nothing is left of its claim in this case." Def's Br. Supp. Mot. Certify Order # 550 for Interloc. App. at 4.

The district court agreed that a controlling question of law existed as to whether "the disgorgement allowed under 18 U.S.C. § 1964(a) is limited to those ill-gotten gains which are 'being used to fund or promote the illegal conduct or constitute capital available for that purpose.'" *United States v. Philip Morris USA, Inc.*, No. 99-2496, slip op. at 2-4, 2004 WL 1514215 (D.D.C. June 25, 2004) (quoting *Carson*, 52 F.3d at 1182). Although in its 2004 order the district court had rejected *Carson*'s interpretation of section 1964(a), it found substantial ground for difference of opinion on this issue, explaining that "it is obvious that the arguments to the contrary in *Carson* are neither insubstantial nor frivolous," and certified the 2004 order. *Id.* at 4, 7.

In its initial petition urging this court to accept the interlocutory appeal, Philip Morris never raised the

broader question the district court had addressed in 2000, i.e., whether disgorgement is ever available under section 1964(a). Instead, Philip Morris focused on the narrower issue actually raised in its 2004 motion for summary judgment, arguing that the district court had erred in rejecting *Carson*'s interpretation of section 1964(a) and claiming that "[i]f this Court agrees with the Second Circuit in *Carson*, its decision on appeal would dispose of the Government's disgorgement claim." Emergency Pet. for Permission to Appeal an Order at 9. The government opposed Philip Morris's section 1292(b) petition, arguing that a host of factual issues would require resolution regardless of whether this court adopted *Carson*'s or the district court's interpretation of section 1964(a) and thus that "interlocutory appeal would not materially advance the termination of this litigation." Resp. in Opp'n to Emergency Pet. at 15.

Responding to the government's opposition, Philip Morris suddenly changed tack and brought in play the issue decided in 2000. Philip Morris wrote:

> The district court rejected [the government's] argument [that an interlocutory appeal would not materially advance the litigation's termination] as a reason not to permit an appeal, and this Court should as well.
>
> First, and most obviously, if this Court reverses the district court's ruling that 'disgorgement is a permissible remedy under section 1964(a),' (Summary Judgment Order at 8 n.7), then the Government's $280 billion claim is precluded as a matter of law.

Reply to Emergency Pet. for Permission to Appeal an Order at 5. This entirely disingenuous statement conveyed the impression that the district court had *ruled* on this broader issue in the certified 2004 order rather than simply mentioning its 2000 decision. Moreover, by placing this statement under the heading "The District Court Properly Determined That an Appeal From Its Order Would Materially Advance This Litigation," *id.*, Philip Morris insinuated that the district court had certified *this* issue to this court as opposed to the narrower question actually resolved in the 2004 order. The government, of course, had no opportunity to correct these misrepresentations, and a motions panel accepted Philip Morris's appeal, expressly leaving the merits panel free to reconsider and dismiss the appeal. *In re Philip Morris USA, Inc.*, No. 04-8005 (D.C. Cir. July 15, 2004).

Philip Morris's opening brief on the merits reveals the scope of its bait and switch. The brief devotes forty pages to the issue decided in the 2000 order and only seven to the issues decided in the certified 2004 order. In response, the government urges us to dismiss the appeal entirely, suggesting that we lack jurisdiction over the issue decided in the 2000 order and observing that "Defendants' tactics subvert the mechanism for appeal established by section 1292(b)." Appellee's Br. at 45-46.

B.

As the foregoing discussion indicates, Philip Morris asks us—and the court now agrees—to decide an issue (1) not briefed in the motion leading up to the certified order, (2) not decided in the district court's opinion accompanying the certified order, (3) not raised by Philip Morris in its request for certification, (4) not

discussed in the order granting certification, (5) not raised by Philip Morris in its section 1292(b) petition before this court, and (6) decided in an entirely different order which Philip Morris could at any time have asked the district court to certify. This presents serious questions on two separate fronts: our jurisdiction over this appeal under section 1292(b), and our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal. Unlike the court, I cannot brush these concerns aside.

Regarding our jurisdiction under section 1292(b), the Supreme Court has made clear that an appellate court can review "any issue fairly included within the certified order" because "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) (holding that where the district court decided two issues in the certified order but identified only the damages issue as the controlling question of law, the court of appeals could nonetheless address the other issue). But the "court of appeals may not reach beyond the certified order to address other orders made in the case." *Id.; see also United States v. Stanley*, 483 U.S. 669, 677, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (holding that the court of appeals erred in addressing a claim not raised in the certified order though closely related to it). Both "[c]ommentators and courts have consistently observed that 'the scope of the issues open to the court of appeals is closely limited to the order appealed from [and][t]he court of appeals will not consider matters that were

ruled upon in other orders.'" *Stanley*, 483 U.S. at 677, 107 S. Ct. 3054 (quoting 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3929 (1977)) (second and third alterations in original).

This case falls near the intersection of these commands. For all intents and purposes, Philip Morris asks us to address the 2000 order. Today's decision overturns that order. This court has jurisdiction to do this under *Yamaha* only if the issue addressed in the 2000 order is "fairly included within the certified order." Taking a broad view of "fairly included," the court concludes that because the 2004 order denies dismissal of the government's disgorgement claim, we may review (at a minimum) any basis for summary judgment that is "logically interwoven with the explicitly identified issue." *See* majority op. at 1196. This approach not only gives us jurisdiction over the issue decided by the district court in the 2000 order, but also over the district court's 2002 determination, made in denying Philip Morris's motion for a jury trial, that disgorgement is an equitable remedy rather than a legal one, *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 8-11 (D.D.C. 2002). I ndeed, although the concurrence apparently does not share this approach, *see* sep. op. at 1206 (Williams, J., concurring), the majority opinion suggests that any issue which would result in "*complete dismissal* of the Government's claim for disgorgement with prejudice" lies within our jurisdiction "regardless of the grounds the District Court gave for its decision," *see* majority op. at 1194. By this logic, we may also have interlocutory jurisdiction to review the district court's denial of the tobacco companies' 2000 motion to dismiss, where they claimed that the government has not "adequately alleged that Defendants' racketeering

activity will continue into the future," 116 F. Supp. 2d at 147-50, and even the district court's denial of Liggett's 2000 motion to dismiss, where the company argued that (as to it) the government could not show two elements required for a RICO claim, *id.* at 152-53. Because victory for the tobacco companies on the first issue (and, for Liggett, victory on the second) could also trigger dismissal of the government's disgorgement claims, under the court's theory our interlocutory jurisdiction may extend to these issues as well.

The court's approach is problematic in several respects. Most significantly, it curtails the district court's section 1292(b) certification role. In this case, the district court had neither an opportunity to exercise "first line discretion to allow interlocutory appeal[ ]," *Swint*, 514 U.S. at 47, 115 S. Ct. 1203, on the broader issue resolved in its 2000 order nor notice that Philip Morris would raise this issue with us. In future cases, district courts will lose their flexibility to certify discrete issues for review, since the certification of one order may give this court jurisdiction over all sorts of prior orders. Today's situation illustrates this: under the court's theory, we have jurisdiction in this interlocutory appeal to review at a minimum two prior orders, neither of which Philip Morris sought to certify. Moreover, by reducing the opportunity for tailored review, the court's jurisdictional theory threatens this circuit with interlocutory overload. Parties who persuade us to accept an interlocutory appeal may feel encouraged to raise any or even all issues decided in prior orders that fall within our newfound jurisdiction especially since, according to the court, issues raised in prior orders are "preserved" for section 1292(b) purposes, *see* majority

op. at 1196, and not simply for the purpose of appeal after final judgment.

By contrast, no harm of consequence would result from holding, as I would, that the only issues "fairly included" within a certified order are those decided in the district court's accompanying memorandum—exactly the situation with the issue reached by the Supreme Court in *Yamaha*, 516 U.S. at 203-05, 116 S. Ct. 619. There, the Court found "fairly included" an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law, *see Calhoun v. Yamaha Motor Corp., USA*, No. 90-4295, 1993 WL 216238 (E.D. Pa. June 22, 1993). While the Court did not explicitly rely on this point, it is relevant to determining whether *Yamaha*'s "fairly included" language stands for the proposition that appellate courts have interlocutory jurisdiction over all possible bases for reversing a summary judgment denial (as my colleagues read it) or only over bases which the district court considered and resolved in this denial (as I read it).

My approach, moreover, respects the Court's instruction in *Stanley* that we should "not consider matters that were ruled upon in other orders." 483 U.S. at 677, 107 S. Ct. 3054 (citation omitted); *cf. Briggs v. Goodwin*, 569 F.2d 10, 25 (D.C. Cir. 1977) (noting that any possible justification for addressing "all other issues relevant to the result reached by [a certified] order" would "be substantially diminished . . . where the order certified for appeal is a separate order from the one [containing the other issues]"); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 840 (2d Cir. 1998) (finding that the certified order referred to rather than incorporated a prior order and concluding that no

interlocutory jurisdiction existed over the issue decided in the prior order). It is thus hardly surprising that the court today points to no case in which an appellate court has exercised interlocutory jurisdiction over an issue decided in a different order from the one under certification. True, under my approach a party seeking an interlocutory appeal on a matter split across two orders would need to seek certification of both orders to bring the matter fully to this court. But that seems a small burden. If the party fails to make this effort (as in this case) and we conclude that it would be inappropriate to address only the issues raised in the certified order (as I would here), then we have discretion under section 1292(b) to refuse to permit the interlocutory appeal altogether—a point this court overlooks.

In addition to resting on a dubious interpretation of section 1292(b), the court's decision to review the broader issue runs counter to this circuit's general rules regarding waiver. Parties may raise here only those arguments they presented to the district court in their papers seeking (and opposing) the order under review, since only in exceptional circumstances will we consider an argument not made to the district court. *See United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 887-88 (D.C. Cir. 2004) (finding waiver based on a party's failure to appear and defend a privilege claim in the proceedings resulting in the interlocutory appeal, even though the party had asserted the privilege in a related proceeding in the same case); *see also id.* at 892 (refusing to consider argument not raised below) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C. Cir. 2002)). Here, as discussed earlier, Philip Morris never argued the broader issue in the relevant pleadings; a sentence-long footnote stating "respectful disagree-

ment" is not an argument, particularly when offered in such a cursory fashion. *Cf., e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (per curiam) (observing that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion' with only 'bare-bones arguments'"); *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997) (declining to address argument made in a footnote). Although it is true, as the court points out, that in the two just-cited cases the issues were apparently never raised at an earlier stage, here we are reviewing not the entire case but only the certified 2004 order, which sets the bounds of both our jurisdiction and waiver doctrine. Moreover, while we sometimes make exceptions to our waiver rules, I would not do so here given Philip Morris's questionable tactics. Even under my colleagues' jurisdictional theory, only by exercising our discretion to accept an argument not raised in the district court—and further exercising our discretion to accept the interlocutory appeal—does the broader issue stand before us.

In sum, whether viewed in terms of jurisdiction or waiver, only Philip Morris's narrower challenge is properly before us. True, this means we should dismiss the appeal altogether, as it makes little sense to decide the narrower question at this time when the broader question might be appealed later. But Philip Morris itself created this problem. It had several ways it could properly have brought the broader issue to our attention. In its 2004 motion for summary judgment, it could have reargued the broader question and asked the district court to reconsider its decision; the district court's denial of reconsideration would have brought the issue fairly into the challenged order. Even more

appropriately, Philip Morris could have asked the district court to certify both the 2000 and 2004 orders and candidly explained that it wished this court to review the earlier order as well. Either way, the district court, having fair notice that Philip Morris wanted to raise both issues with us, could have performed its section 1292(b) gatekeeping function. Taking neither approach, Philip Morris instead not only jumped the fence at the district court level, but also circumvented our own screening process by waiting until after the government's opposition to raise the broader issue with the motions panel. This court should not be rewarding such tactics by exercising its discretion to hear this appeal.

I would therefore dismiss the interlocutory appeal. I reach this conclusion reluctantly because I certainly understand how hearing this interlocutory appeal could be helpful to Judge Kessler, who is presiding over a long and difficult trial. In my view, however, preserving section 1292(b)'s integrity and discouraging the kind of litigating tactics reflected in this record far outweigh the efficiency that hearing this interlocutory appeal might produce in this concededly complex case.

But the court disagrees with my position. The appeal stands before us, so in the following sections I exercise a dissenter's prerogative to address the merits. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 291, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (Souter, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 18, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (Stevens, J., dissenting); *Larson v. Valente*, 456 U.S. 228, 258, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982) (White, J., dissenting).

II.

Like my colleagues, I begin with the structure and language of RICO's remedial provisions. RICO authorizes criminal penalties and civil remedies against those engaging in patterns of racketeering behavior. 18 U.S.C. § 1963 sets out the criminal penalties: guilty persons shall "be fined under this title or imprisoned . . . or both, and shall forfeit to the United States" any illegally acquired interest. Section 1964 provides for the civil remedies. At issue in this case is subsection (a), which states:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Another subsection, § 1964(c), authorizes injured persons to sue RICO violators for treble damages and to recover attorneys' fees. Finally, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (codified in a note following 18 U.S.C. § 1961)—a provision that, if it "is to be applied anywhere, [should be applied] in § 1964, where RICO's

remedial purposes are most evident," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

The government argues that district courts have authority to order any remedy, including disgorgement, within their inherent equitable powers. More narrowly, the government argues that assuming the district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, disgorgement—by reducing the incentives for the tobacco companies to violate RICO in the future—will accomplish that purpose in this case. These two distinct arguments present very different consequences for district courts: under the first theory, courts may order disgorgement any time they find the remedy necessary to ensure complete relief, while under the second theory courts may order disgorgement only to prevent ongoing or future violations. In this case, the district court accepted only the second argument. *See* 321 F. Supp. 2d at 74-80. The court today rejects both.

A.

In dismissing the argument that district courts may impose any equitable remedy for RICO violations, the court distinguishes—unconvincingly, in my view—the two Supreme Court cases relied on by the government, *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960). I believe these two cases control this case and compel the conclusion that district courts may impose any equitable remedy for RICO violations.

In *Porter*, the Supreme Court considered whether a district court had authority to order restitution in a suit

brought by the Price Control Administrator against a landlord who had violated the Emergency Price Control Act (EPCA) by charging too much rent. The act contained no specific provision for restitution or disgorgement, but—like RICO—authorized a broad array of other remedies, both criminal and civil. On the criminal side, offenders could be fined and imprisoned. EPCA, § 205(b)-(c), 56 Stat. 23, 33 (1942). On the civil side, injured individuals could sue for treble damages plus attorneys' fees, and if they were not entitled to sue or the statutory period for their suit had passed, the Administrator could sue for the same remedy on behalf of the United States. *Id.* § 205(e), 56 Stat. at 34, *as amended by* Stabilization Extension Act of 1944, 7 § 108(b), 58 Stat. 632, 640-41. The Administrator could also sue to suspend a violator's license. *Id.* § 205(f)(2), 56 Stat. at 35.

In the section most at issue in *Porter*, the act further provided that

> [w]henever in the judgment of the Administrator any person has engaged or is about to engage in [violations of the act], he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Id. § 205(a), 56 Stat. at 33. Although this section clearly authorized injunctions aimed at future behavior, it made no express provision for restitution and did not, contrary to my colleagues' suggestion, explicitly

"grant[] general equitable jurisdiction" to the district courts, *see* majority op. at 1197. Indeed, in *Porter*, the Eighth Circuit had held that district courts were without authority to order restitution as a remedy for violations of the EPCA. *Bowles v. Warner Holding Co.*, 151 F.2d 529, 532 (8th Cir. 1945) (concluding that the district court had no authority to order restitution because "[i]t is well settled 'That where a statute creates a right and provides a special remedy, that remedy is exclusive' ") (citations omitted).

The Supreme Court reversed. Discussing "the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act," 328 U.S. at 397-98, 66 S. Ct. 1086, the Court concluded—and I quote at length since the language is so critical to the disposition of this case—that

> [s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Un-

> less a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398, 66 S. Ct. 1086 (citations omitted). The Court concluded that because the EPCA, despite the very detailed and specific nature of the authorized remedies, did not rule out restitution by a "necessary and inescapable inference," the district court could order restitution even if not expressly authorized by the statute. *See id.* at 398-400, 66 S. Ct. 1086; *see also Mitchell*, 361 U.S. at 291, 80 S. Ct. 332 (discussing *Porter*).

Indeed, the Court further suggested that restitution could be considered an "other order" to enjoin or enforce compliance within section 205(a) in either of two ways. First, it could be "considered as an equitable adjunct to an injunction decree" since "where, as here, the equitable jurisdiction of the district court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." 328 U.S. at 399, 66 S. Ct. 1086. Second, restitution could "be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400, 66 S. Ct. 1086. The Court then remanded for the district court to "exercise the discretion that belongs to it" and decide whether to order restitution. *Id.* at 403, 66 S. Ct. 1086.

Porter was not unanimous. "It is not excessive to say that perhaps no other legislation in our history has equaled the Price Control Acts in the wealth, detail,

precision and completeness of its jurisdictional, procedural and remedial provisions," *id.* at 404, 66 S.Ct. 1086, wrote Justice Rutledge in dissent. "The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared." *Id.* "Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer." *Id.* at 405, 66 S. Ct. 1086. "[E]ven courts of equity may not grant relief in disregard of the remedies specifically defined by Congress." *Id.* at 408, 66 S. Ct. 1086.

The court's opinion today sounds a lot like the *Porter* dissent. The court observes that the language of section 1964(a)—a court has "jurisdiction to prevent and restrain violations"—does not explicitly open the door to all of equity, but neither did EPCA section 205(a) (a court may issue orders "enjoining" violations or "enforcing compliance"). The court asserts that reading full equitable jurisdiction into RICO will render section 1964(a)'s language largely meaningless, but *Porter* rejected just this concern with regard to EPCA section 205(a). The court emphasizes that RICO "already provides for a comprehensive set of remedies," majority op. at 1200, but the EPCA had at least as comprehensive a remedial structure. The court further points out that should restitution be available, the government could obtain duplicative recovery (given RICO's criminal forfeiture provisions) and also escape the applicable statutes of limitations, but the *Porter* majority dismissed similar concerns, 328 U.S. at 401-02, 66 S. Ct. 1086; *see also id.* at 406-08, 66 S. Ct. 1086 (Rutledge, J., dissenting). Finally, the court attempts to distinguish *Porter* on the grounds that the EPCA had a different policy goal than RICO (preventing inflation rather than

seeking to eradicate organized crime), but this has no effect on *Porter*'s essential holding that "the court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances," *see id.* at 398, 66 S. Ct. 1086. In sum, the court offers no basis for concluding that RICO's structure and language get the statute past *Porter*'s high bar for finding by a "necessary and inescapable inference" that Congress intended to empower district courts to order only limited equitable relief.

Nor does Philip Morris point to anything in RICO's legislative history that creates such a "necessary and inescapable inference." Only one remark even gives me pause. The Senate Committee report stated, "Subsection [1964](a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S. Rep. No. 91-617, at 160 (1969); *accord* H. Rep. No. 91-1549, at 57 (1970). The second part of this "limit"—requiring due provision for the rights of innocent persons—poses no concern, for it describes equity rather than constricts it. *See, e.g.*, *Holly v. Domestic & Foreign Missionary Soc'y*, 180 U.S. 284, 295, 21 S. Ct. 395, 45 L. Ed. 531 (1901) ("[A] court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."). But the first part of this "limit"—that remedies should accomplish the aim of removing the corrupting influence—does more than simply restate an equitable principle. Suggesting that the remedies must remove the corrupting

influence, it allows one to infer that remedies may accomplish *only* this aim. But that inference is, to use *Porter*'s words, neither "necessary" nor "inescapable." One could also infer that remedies must accomplish this aim as a lower limit (i.e., no corrupting influence may remain), but may also accomplish other aims—just as remedies must make due provision for the rights of the innocent, but may presumably do much more. Indeed, this reading comports with how RICO's sponsor, Senator McClellan, described the bill when he introduced it: the "ability of our chancery courts to formulate a remedy to fit the wrong is one of the greatest benefits of our system of justice. This ability is not hindered by the bill." 115 Cong. Rec. 9567 (1969).

Mitchell, the second Supreme Court decision the government relies on, considered whether district courts could order restitution of wages lost from unlawful discharge in suits brought by the Secretary of Labor under section 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 217 (1960). Relying on *Porter*, the Court concluded that where the statute provided that "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217, district courts had full equitable powers, 361 U.S. at 291-95, 80 S. Ct. 332; *see also id.* at 289, 80 S. Ct. 332. Reaffirming *Porter's* strong presumption in favor of finding equitable relief fully available, the Court stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of

the legislature.'" *Id.* at 291-92, 80 S. Ct. 332 (quoting *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203, 10 L. Ed. 123 (1839)) (omission in original); *see also Califano v. Yamasaki*, 442 U.S. 682, 704-06, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (using the *Porter* presumption to conclude that district courts could order injunctive relief not explicitly authorized by the Social Security Act). The *Mitchell* Court thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA section 16, 29 U.S.C. § 216 (1960), duplicative recovery might occur. 361 U.S. at 292-93, 80 S. Ct. 332. *But see id.* at 303, 80 S. Ct. 332 (Whittaker, J., dissenting) (concluding that the statutory scheme "seems plainly to show that Congress intended by § 16(c) to allow recovery of unpaid minimum wages and overtime compensation at the instance of the Secretary only in an action at law, brought under that subsection, and triable by a jury").

Mitchell reinforces the proposition that district courts may order any equitable relief in civil RICO suits brought by the government. My colleagues suggest that in "the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA." Majority op. at 1199. The only jurisdictional hook in the FLSA's text, however, was its language: "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217. If this language opens the door to all equitable relief, then RICO's language—"[t]he district courts . . . shall have jurisdiction to prevent and restrain violations"—certainly does the same. And if the possibility of duplicative recovery did not circumscribe the district court's equitable

authority under the FLSA, then neither should that possibility under RICO do so.

Not surprisingly, in the wake of *Mitchell* and *Porter*, circuit courts including this one have read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it. In *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989), we held that district courts may order disgorgement under the Security Exchange Act's sections 21(d) and (e), 15 U.S.C. § 78u(d)-(e) (1989), which provide that the district courts "shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding" compliance with the act and regulations made under it. *See* 890 F.2d at 1230 (relying on *Porter* and *Mitchell*). "Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e) . . . vest jurisdiction in the federal courts." *Id.; see also SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *SEC v. Wash. County Util. Dist.*, 676 F.2d 218, 227 (6th Cir. 1982). Other circuits have reasoned similarly in interpreting other acts. *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Federal Trade Commission Act); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1183-86 (1st Cir. 1980) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Motor Carrier Act, though noting that "[i]f we were writing on a blank slate, we might agree with the district court that the language of the Motor Carrier Act cannot justify" the remedy of restitution); *CFTC v. Hunt*, 591 F.2d 1211, 1221-23 (7th Cir.1979) (applying *Porter* in holding that courts may

order disgorgement as a remedy for violations of the Commodity Exchange Act).

Instead of following *Porter* and *Mitchell*, the court relies on a later Supreme Court decision, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996). In *Meghrig*, the Supreme Court considered whether private citizens could seek restitution under the Resource Conservation and Recovery Act (RCRA) for the cost of having cleaned up a prior landowner's toxic waste. The statute provided that the "district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing" to waste problems, "to order such person to take such other action as may be necessary, or both." *Id.* at 482 n.*, 116 S. Ct. 1251 (quoting 42 U.S.C. § 6972(a)). The Court held that it was "apparent from the two remedies described . . . that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts." *Id.* at 484, 116 S. Ct. 1251. While not explicitly defining the limits of the two remedies described, the court suggested that these remedies should be equated with prohibitory and mandatory injunctions. *Id.* Moreover, relying in part on the fact that an analogous statute expressly authorized damages, the Court concluded that "neither remedy . . . contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Id.* at 484-85, 116 S. Ct. 1251. According to the Court, it "is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 488, 116 S. Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*,

453 U.S. 1, 14- 15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)).

The *Meghrig* Court noted that in arguing that the district court had inherent authority to award equitable remedies, the plaintiffs relied on *Porter* and its progeny. *Id.* at 487, 116 S.Ct. 1251. Without expressly distinguishing those cases, the Court explained that "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions [of the analogous statute], amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* Notably for our purposes, *Meghrig* did not overrule *Porter.* Indeed, even after *Meghrig,* the Supreme Court has cited *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent . . . an 'inescapable inference' to the contrary." *Miller v. French*, 530 U.S. 327, 340, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

At one level, reconciling *Meghrig* with *Porter* and *Mitchell* is difficult. *Meghrig* suggests that "to restrain" only authorizes prohibitory injunctions. By contrast, *Mitchell* holds that this language imposes no limit on the district court's full equitable powers. *Meghrig,* relying on a version of the canon *expressio unius est exclusio alterius*, observes that courts should be "chary" in reading remedies into a statute which expressly provides for other remedies. By contrast, *Porter* indicates that in the context of equity jurisdiction, the general *expressio unius* canon gets inverted,

meaning that district courts possess all equitable powers unless the statute "inescapabl[y]" provides to the contrary. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18-20, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974) (discussing these competing canons).

These tensions cannot be dealt with simply by dismissing *Porter* and *Mitchell*. *Meghrig* not only left both cases intact, but also suggested that the "limited remedies" in RCRA, together with the "stark differences" between RCRA and the analogous statute, explain the different outcomes. Given this, our responsibility is to follow the Supreme Court's oft-cited instruction that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (reaffirming this requirement).

In my view, *Porter* and *Mitchell*, not *Meghrig*, "directly control" this case. Several reasons support this conclusion, and nothing points the other way. First, RICO's statutory scheme resembles the EPCA more than the RCRA. Both RICO and the EPCA stand alone in grappling with a broad social issue, whereas the RCRA had a closely related statute on which the Court in *Meghrig* relied heavily. Second, as in both *Porter* and *Mitchell*, the government brought the suit rather than a private party like the *Meghrig* plaintiff, and *Porter* makes clear that district courts may have "even broader and more flexible" equitable powers

where the public interest is involved, 328 U.S. at 398, 66 S. Ct. 1086. This point has particular traction if the government is the only party that may seek equitable relief under RICO. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1083-89 (9th Cir. 1986) (holding that equitable relief under RICO is available only to the government). *But see Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001) (holding that private plaintiffs can seek equitable relief under RICO), *rev'd on other grounds*, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Finally, *Meghrig*'s suggestion that "restrain" in the RCRA refers only to prohibitory injunctions cannot apply to section 1964(a), since that section explicitly authorizes other remedies —e.g., divestment—to "prevent and restrain" RICO violations. For these reasons, in determining whether the phrase "prevent and restrain" limits the district court's equitable powers, I think it makes more sense to look to *Porter* and *Mitchell*, not *Meghrig*.

The court "[r]ead[s] *Porter* in light of" the statement in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), that "'[f]ederal courts are courts of limited jurisdiction'" and "'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" Majority op. at 1197. But "'[j]urisdiction,' it has been observed, 'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citation omitted). *Kokkonen* simply makes the unremarkable point that federal courts have subject-matter jurisdiction over cases only if the Constitution or Congress so provides, 511 U.S. at 377, 114 S. Ct. 1673, and the Supreme Court has since clarified that it is "unrea-

sonable" to apply subject-matter jurisdiction principles where a statute uses the term jurisdiction "merely [in] specifying the remedial *powers* of the court," *Steel Co.*, 523 U.S. at 90, 118 S. Ct. 1003.

Finally, while Congress modeled section 1964(a) on the antitrust laws, *see* 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan); *see also* 15 U.S.C. § 4 (the "district courts . . . are invested with jurisdiction to prevent and restrain violations"); *accord* 15 U.S.C. § 25, I disagree with Philip Morris that the Supreme Court's antitrust decisions provide useful guidance as to whether the phrase "prevent and restrain" limits the equitable remedies available to district courts. On the one hand, the Court once ignored, though did not explicitly reject, an invitation by Justice Douglas to apply *Porter* to antitrust actions. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 366-67, 67 S. Ct. 1634, 91 L.Ed. 2077 (1947) (Douglas, J., dissenting in part); *cf. United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952) (emphasizing that in antitrust actions the purpose of injunctive relief is to "forestall future violations"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-47, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (declining to fashion and apply a common law right of contribution in the antitrust context). On the other hand, some antitrust cases suggest that courts may impose equitable remedies beyond those intended merely to stop future violations from occurring. *E.g., United States v. Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S. Ct. 254, 89 L. Ed. 160 (1944) (although the district court ordered a remedy said to "exceed any reasonable requirement for prevention of future violations," the "Court has quite consistently recognized in this type of Sherman Act case that

the government should not be confined to an injunction against further violations. . . . Those who violate the Act may not reap the benefits of their violations"); *cf. United States v. U.S. Steel Corp.*, 251 U.S. 417, 452, 40 S. Ct. 293, 64 L. Ed. 343 (1920) (observing that the Sherman Act is "clear in its direction that the courts of the nation shall prevent and restrain [monopolies] (its language is 'to prevent and restrain violations of' the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"); *Schine Chain Theatres v. United States*, 334 U.S. 110, 128, 68 S. Ct. 947, 92 L. Ed. 1245 (1948) (suggesting that "[l]ike restitution," divestment "merely deprives a defendant of the gains from his wrongful conduct" and upholding it as a remedy under the Sherman Act), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 763 n.8, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). As these cases illustrate, antitrust precedent offers little reason to doubt the applicability of *Porter* and *Mitchell* to the case at hand.

To sum up, *Porter* and *Mitchell* rather than *Meghrig* control this case, and no "necessary and inescapable inference" limits the district court's jurisdiction in equity. If the district court concludes that the government has shown that the tobacco companies have committed RICO violations by advertising to youth despite assertions to the contrary and by falsely disputing smoking's addictive, unhealthy effects, then it may order whatever equitable relief it deems appropriate. Of course, the court must work within the bounds of equitable doctrines, recognizing defenses like laches and unclean hands, paying due regard for the rights of

the innocent, and generally exercising its discretion. With these principles in mind, the district court can "do complete rather than truncated justice," *Porter*, 328 U.S. at 398, 66 S. Ct. 1086.

B.

In addition to rejecting the government's argument that district courts may impose any equitable remedy on RICO violators, the court rejects the government's alternative, narrower argument—that even if district courts may order only remedies that "prevent and restrain" RICO violations, disgorgement can appropriately accomplish that purpose. Because the court's analysis of this argument is as flawed as its analysis of the government's broader argument, I add this discussion of the issue. In my view, the court transforms what should be a question of fact—what remedies appropriately prevent and restrain future violations—into a question of statutory interpretation in a way that disregards section 1964(a)'s plain language and ignores Supreme Court precedent recognizing the equitable flexibility of district courts.

Under section 1964(a), district courts may issue "appropriate orders" to prevent and restrain" RICO violations. "Prevent" has many meanings. The first nonarchaic one listed in *Webster's Third New International Dictionary* (1961) is "to deprive of power or hope of acting, operating, or succeeding in a purpose." "Restrain" can mean "to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure)" and "to limit or restrict to or in respect to a particular action or course: keep within bounds or under control." *Webster's Third New International Dictionary* (1961).

The government offers expert testimony to the effect that a disgorgement order will deter the tobacco companies from violating RICO in the future—in the dictionary's language, it will deprive them of the hope of succeeding in benefiting from future RICO violations and hold them back from committing such violations. In essence, the government claims that the tobacco companies, having engaged in a persistent pattern of deceptive representations over decades, will be less likely to continue this illegal behavior if they must surrender their past ill-gotten profits. Treating the government's expert testimony as correct, as we must at this stage of the litigation, *see Anderson*, 477 U.S. at 255, 106 S. Ct. 2505, I think it enough to forestall summary judgment in Philip Morris's favor. Indeed, the Supreme Court has accepted just this theory of deterrence, stating in *Porter* that restitution "could be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S. Ct. 1086. If restitution helps enforce compliance, then we should have little doubt that disgorgement helps prevent and restrain violations.

This court does not conclude that disgorgement can never have a restraining effect on future conduct of the defendants—the only conclusion that could justify a holding that district courts can never order disgorgement under section 1964(a). Instead, the court offers several unpersuasive reasons for its conclusion that as a matter of statutory interpretation disgorgement is not a permissible remedy under section 1964(a).

First, the court states that disgorgement "is a quintessentially backward-looking remedy." Majority

op. at 1198. Although I agree that a court sitting in equity cannot order disgorgement that exceeds a defendant's past ill-gotten profits, *see Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 95 L. Ed .2d 365 (1987) (observing that "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant'") (quoting *Porter*, 328 U.S. at 402, 66 S.Ct. 1086), this does not mean disgorgement is always backward-looking and can never have a forward-looking effect on the defendants. The Supreme Court made this clear in *Porter*, 328 U.S. at 400, 66 S.Ct. 1086, and *Meghrig* nowhere rejects *Porter*'s conclusion that a disgorgement order can impact future conduct—indeed, there was no evidence in *Meghrig* that the defendants were likely to commit future RCRA violations, and in any event, as discussed *supra* at 1220-21, *Porter* and *Mitchell* are the cases most directly on point for our purposes.

Second, the court concludes that district courts are limited not merely by the words "prevent and restrain," but also "by those [three remedies] explicitly included in the statute" by application of the canons *noscitur a sociis* and *ejusdem generis*. *See* majority op. at 1200; *cf. United States v. Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004) (defining these canons). Even assuming we should apply these canons, however, they spell out nothing more than what everyone agrees on: that the only "appropriate" orders under this section are equitable ones. *See West v. Gibson*, 527 U.S. 212, 225-26, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (Kennedy, J., dissenting) (observing that these canons "suggest the appropriate remedies authorized by [a statute using the word 'including'] are remedies of the same nature as re-

instatement, hiring, and backpay—*i.e.*, equitable remedies" and noting that "the phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity").

More important, I doubt the canons apply here at all. While the canons can prove useful where there is otherwise "no general principle in sight," *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir.1 997); *see also Wash. State Dep't of Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (applying the canons in interpreting the last listed term of "execution, levy, attachment, garnishment, or other legal process"), here the statute provides the general principle of preventing and restraining violations. Indeed, the Supreme Court declined to use these canons altogether in interpreting a statute which gave the EEOC the power of enforcement "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," 42 U.S.C. § 2000e-16(b). *See West*, 527 U.S. at 218, 119 S. Ct. 1906 (stating that the "word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow that word"); *cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89, 100 S. Ct. 1889, 64 L. Ed. 2d 525 (1980) (declining to apply *ejusdem generis* canon where Congress used "expansive language"). I see no reason why we should do otherwise here, especially since section 1964(a) uses the even more expansive language: "including, but not limited to." Finally, *noscitur a sociis* and *ejusdem generis* should not be used to limit the types of equitable relief available to district courts given Congress's instruction that RICO "shall be liberally construed to effectuate its remedial purposes," *see supra* at 1215, one of which is preventing

and restraining future violations—an aim that, far from being a "new purpose[ ] that Congress never intended," *see* majority op. at 1201 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)), expressly appears in the statute's text. If an equitable remedy achieves this goal, then the statute authorizes it.

Third, the court suggests that disgorgement should be unavailable because it allows the government to achieve relief "similar in effect" to criminal forfeiture, raising concerns that the government can achieve duplicative recovery and evade the procedural safeguards girding the forfeiture provision. *See* majority op. at 1200-01. To be sure, such concerns are relevant in considering whether to infer additional causes of action. As discussed earlier, *supra* at 1217, however, given the Supreme Court's explicit rejection of similar concerns in *Porter* and *Mitchell*, they cannot carry the day. Nor should such concerns stop a court from issuing equitable orders that accomplish the express statutory purpose of preventing and restraining RICO violations, whether the remedies are specifically listed in section 1964(a), e.g., divestment, or available as other "appropriate orders." Discussing RICO, the Supreme Court has observed that "Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions." *United States v. Turkette*, 452 U.S. 576, 585, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). The converse should hold as well. If an equitable remedy prevents and restrains RICO violations —one of the remedial purposes which we should liberally construe the statute to effectuate—it is untenable to claim that the existence of criminal provisions

renders this remedy nonetheless beyond the scope of district court authority.

Of course, that disgorgement may sometimes serve to prevent and restrain defendants from committing RICO violations does not mean that it will always accomplish that purpose. As the district court here recognized, a court must first find that the defendants are likely to commit future RICO violations. 321 F. Supp. 2d at 75-76. This is not a foregone conclusion. In *Carson*, for example, while the Second Circuit recognized that disgorgement can sometimes serve to prevent and restrain RICO violations, it was rightly skeptical that disgorgement of the "gains ill-gotten long ago by a retiree" who had long since left the union position that he had abused in accepting kickbacks would accomplish this purpose. 52 F.3d at 1182. Assuming district courts are limited to remedies that prevent and restrain, *but see supra* Part II.A, I also share the Second Circuit's apparent conclusion that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations, *see* 52 F.3d at 1182. *But see Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 355 (5th Cir. 2003) (leaving open the possibility that disgorgement might be ordered solely to deter other possible offenders). Because any remedy imposed for a solely exemplary purpose (i.e., to dissuade others from committing RICO violations) would amount to punishment, it goes beyond what Congress intended, *see* S. Rep. No. 91-617, at 81, as well as pushes the boundaries of what equity permits, *cf. Tull*, 481 U.S. at 422, 107 S. Ct. 1831. In this case, however, the government offers evidence that the defendant companies themselves are likely to commit future RICO violations by misleading the public about the health consequences

of smoking and the addictive effects of nicotine, as well as by persisting in marketing to young people.

According to Philip Morris, only injunctions are "appropriate orders" under section 1964(a) because, in its view, they will always adequately prevent past lawbreakers from committing future violations, particularly given the threat of heavy contempt penalties. Refining this point, the concurrence finds it "almost inconceivable" that disgorgement can change the incentives governing a defendant's future behavior given RICO's other provisions. *See* sep. op. at 1204 (Williams, J., concurring). The concurrence thus concludes that as a matter of law, Congress intended to exclude disgorgement from those remedies appropriate to prevent and restrain RICO violations. *See id.* at 1204-05. I think this approach is flawed in several respects.

To begin with, as noted above, *Porter* indicated that disgorgement may encourage guilty defendants to obey the law in the future. Interpreting a statute replete (like RICO) with other remedies, the Court concluded that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S. Ct. 1086. We are without license to ignore the Supreme Court's views on this point.

Moreover, Philip Morris's suggestion that only injunctions provide "appropriate" relief under section 1964(a) not only cuts against the statute's plain language—Congress would hardly have included divestment in its list of sample remedies if it thought injunctions alone would be adequate—but also ignores the equitable flexibility the statute was designed to preserve, *see, e.g.*, 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan). Indeed, nothing in the statute requires courts to prefer contempt penalties (not explic-

itly named in section 1964(a)) to disgorgement (also not explicitly named). Rather, no single remedy is always appropriate. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S. Ct. 587, 88 L. Ed. 754 (1944)). Sometimes injunctive relief alone will make the most sense; other times, different equitable remedies or combinations of equitable remedies, perhaps including disgorgement, might prove as or more effective.

To be sure, given RICO's comprehensive remedial scheme, disgorgement orders may prove appropriate in preventing and restraining future violations only in rare circumstances. But "[i]n equity, as nowhere else, courts [should] eschew rigid absolutes," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 n.39, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) (internal quotation marks and citation omitted), and precisely what remedy or combination of remedies, within the bounds of the equitable doctrines discussed earlier, will serve to prevent and restrain defendants from committing RICO violations is an issue of fact, not statutory interpretation. For these determinations, we must rely in the first instance not on what we appellate judges can or cannot imagine will "prevent or restrain," but on tried and true methods of fact-finding before district courts—including cross-examination and presentation of contrary evidence. *Cf. id.* at 780, 96 S. Ct. 1251 (noting district courts' " 'keener appreciation' of peculiar facts and circumstances") (citation omitted).

Finally, and again as noted earlier, record evidence in this case suggests that disgorgement will in fact "prevent and restrain" defendants from committing future RICO violations. As one of the government's experts stated, "[R]equiring defendants to pay proceeds will affect their expectations . . . about the returns from future misconduct." Appellee's App. at 813. The expert added that, even if coupled with an injunction laden with contempt penalties, disgorgement will "provide additional economic incentives to deter future misconduct" by "strengthen[ing] the credibility of existing laws" which the defendants have allegedly violated in the past. *Id.* at 814. Disagreeing, the concurrence offers its own "expert opinion" of the incentives driving the behavior of past RICO violators. *See* sep. op. at 1203-05, 1205-06. According to the concurrence, the most appropriate deterrence will stem from the "spotlight of the lawsuit," if properly "amplif[ied]" by "transparency-enhancing and prior-approval measures." *Id.* at 1205. Perhaps so, but "on summary judgment, the evidence should be viewed in favor of the nonmoving party, not," as the concurrence would have it, "the other way around." *Langon v. Dep't Health & Human Servs.*, 959 F.2d 1053, 1059 (D.C. Cir. 1992) (reversing district court grant of summary judgment where that court disregarded admissible expert testimony); *see also Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 553 F.2d 1378, 1381-83 (D.C. Cir. 1977) (holding that district court inappropriately granted summary judgment where experts disagreed about whether certain data constituted a "trade secret" from which an intelligent competitor could gain information). At this stage of the litigation, then, we must assume that the government expert is correct and that disgorgement will "prevent and restrain" future RICO violations. Should Philip

Morris offer expert testimony along the lines suggested by the concurrence, then it will be up to the district court to evaluate the competing evidence and make appropriate findings of fact. Should either party appeal, this court, unrestrained by the inferences required at summary judgment, would then review that factual determination pursuant to Rule 52's clear error standard. *See* Fed. R. Civ. P. 52 advisory committee's note (observing that judgment under this standard "differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court"); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2585 (2d. ed. 1994) (noting that under Rule 52 a reviewing court need not view the evidence in the light most favorable to the appellee).

C.

In sum, were this case properly before us, I would hold, in accordance with *Porter* and *Mitchell*, that district courts have authority to order any remedy, including disgorgement, necessary to ensure complete relief. As the concurrence points out, sep. op. at 1206 (Williams, J., concurring), my approach would create a circuit split, since *Carson* did not apply *Porter* and *Mitchell* to RICO (and, indeed, the parties do not appear to have brought these cases to the Second Circuit's attention). Even if, as *Carson* holds, district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, I would still affirm the denial of summary judgment, leaving it to the district court to determine, on the basis of a fully developed record, whether disgorgement will help accomplish this purpose. I disagree with my colleagues' conclusions not because they have created a circuit split of their own by

rejecting *Carson*'s holding that disgorgement may prevent and restrain RICO violations, but because they have done so by accepting an interlocutory appeal that we should not hear and by disregarding both Supreme Court precedent and section 1964(a)'s plain language.

III.

This leaves one final, distinct issue. Philip Morris claims that the government's disgorgement model fails as a matter of law to measure the tobacco companies' ill-gotten profits. Because the district court decided this issue in the certified order, it is—unlike the issue the court does resolve—properly before us. *See Yamaha*, 516 U.S. at 205, 116 S. Ct. 619.

In calculating disgorgement, the government first identifies what it calls the "Youth Addicted Population" (YAP), namely, all people who were smoking an average of at least 5 cigarettes a day at the time they turned 21. The government next calculates that from RICO's effective date in 1970 to 2001, the tobacco companies earned profits of $280 billion through sales to these people. The government arrives at this calculation by (1) determining the gross revenue from these total sales minus the direct costs (excluding overhead and taxes) and (2) adjusting for the time value of money. Philip Morris asserts that the government has failed to show that these profits are attributable to the companies' alleged RICO violations, relying on admissions by government experts that it would be "highly unlikely" to say that "nobody under the age of 21 would have ever smoked regularly . . . but for the defendants' alleged RICO violations."

Philip Morris cannot prevail on this issue at summary judgment because the government need not show that

nobody under 21 would have smoked but for the RICO violations. As we held in *First City Financial*, 890 F.2d at 1229, "disgorgement need only be a reasonable approximation of profits causally connected to the violation." In *First City Financial*, we found that the district court appropriately ordered disgorgement of *all* profits on a stock sale where the defendants failed to make a material disclosure, purchased stock whose value would likely have already risen had the disclosure been made, and then sold the stock for a killing after the undisclosed news broke. *See id.* at 1229-32. Although the government never proved that all increases in the stock's value stemmed from the violation, we rejected the defendants' argument that because the increase in price may have depended on other factors, disgorgement of all profits was "simplistic, quite unrealistic, and so *de facto* punitive." *See id.* at 1231. Noting that "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task," we held that "the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied" its "burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." *Id.* at 1231-32. Although recognizing that this might result in "actual profits becoming the typical disgorgement measure," we observed that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* at 1232; *see also SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

Disentangling the tobacco companies' legal and illegal profits might also be a "near-impossible task." The government offers evidence that the tobacco companies

not only fraudulently suggested that smoking was harmless and nonaddictive, but did so through a comprehensive, decades-long pattern of deliberate behavior. The government further offers evidence that advertising is a "very substantial influence on young people starting to smoke," *see* Appellee's App. at 783, and that the tobacco companies committed RICO violations in advertising to young people while publicly denying that they were doing so. Under *First City Financial*, then, the government's calculations serve as a reasonable approximation: just as we permit actual profits in insider trading cases to serve as a proxy for ill-gotten gains, so too can actual profits from sales to the YAP meet the government's initial burden of reasonably approximating the tobacco companies' unlawful gains. The burden would thus shift to Philip Morris to "demonstrate that the disgorgement figure was not a reasonable approximation," 890 F.2d at 1232, and the district court would have to sort out who is right.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. CIV.A.99-2496 GK

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP MORRIS INCORPORATED, ET AL.,
DEFENDANTS

Sept. 28, 2000

MEMORANDUM OPINION

KESSLER, District Judge.

I. *Introduction*

Plaintiff, the United States of America ("the Government"), brings suit against eleven tobacco-related entities ("Defendants")[1] to recover health care expenditures the Government has paid for or will pay

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[1] The eleven Defendants are: Philip Morris, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co. ("R.J.Reynolds"), Brown & Williamson Tobacco Co. ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), The Liggett Group, Inc. ("Liggett"), American Tobacco Co. ("American Tobacco"), Philip Morris Cos., B.A.T. Industries p.l.c. ("BAT Ind."), British American Tobacco (Investments) Ltd., 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.

for to treat tobacco-related illnesses allegedly caused by Defendants' tortious conduct. The Government also asks 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.

The Government makes four claims against Defendants under three 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 parties with a cause of action to recover treble damages due to injuries they received from a defendant's unlawful racketeering activity, and to seek other equitable remedies to prevent future unlawful acts.

This matter is now before the Court on Defendants' motions to dismiss for failure to state a claim.[2] Upon consideration of the motions, oppositions, replies, the applicable case law, the arguments presented at the

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[2] Defendant BAT Ind.'s motion to dismiss for lack of personal jurisdiction is addressed in a separate Memorandum Opinion issued the same day as this Opinion.

motions hearing, and the entire record herein, for the reasons discussed below, the Non-Liggett Defendants' motion to dismiss for failure to state a claim [# 72] is **granted** as to the MCRA claim (Count 1), **granted** as to the MSP claim (Count 2), and denied as to the RICO claims (Counts 3 and 4). Liggett's separate motion to dismiss for failure to state a claim [# 70] is denied.

Summary of Legal Conclusions

The United States Government has brought this massive civil action against the tobacco industry, seeking billions of dollars in damages for what it alleges to be a lengthy unlawful conspiracy to deceive the American public about the health effects of smoking and the addictiveness of nicotine. In order to prevail on these allegations, the Government has offered three distinct legal theories of liability. Two of these theories are being rejected, and therefore, Counts 1 and 2 of the Complaint will be dismissed. A significant portion of the Government's case, however, will go forward, namely its claims under RICO for disgorgement of all profits Defendants derived from activities, beginning in 1953 and continuing to the present, related to the alleged pattern of racketeering activity. Consequently, Counts 3 and 4 of the Complaint will proceed. In sum, while the Government's theories of liability have been limited, the extent of Defendants' potential liability remains, in the estimation of both parties, in the billions of dollars. The scope and complexity of this case will continue to pose significant challenges to the parties and to the Court.

1. The Government's Medical Care Recovery Act claim will be dismissed. The congressional intent in enacting MCRA in 1962—at which time Medicare did not exist and the Federal Employees Health Benefits

Act ("FEHBA")[3] was still in its infancy—was to provide a means for the Government to recover from third-party tortfeasors[4] medical expenses it had furnished for (primarily military) employees. Applying the principles from a recent U.S. Supreme Court decision, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), this Court concludes that Congress did not intend that MCRA be used as a mechanism to recover Medicare or FEHBA costs. The Court reaches this conclusion after examining the broad context in which MCRA has existed for 38 years—including its legislative history, the construction given it by those agencies charged with its interpretation, a body of long- standing state and federal case law, and its total non-enforcement by the Department of Justice for thirty-seven of those thirty-eight years.

2. The Government's Medicare Secondary Payer claim will also be dismissed. MSP permits the Government to seek reimbursement from insurance entities, when Medicare has paid for health care expenses for which those entities should have paid. Although MSP also allows the Government to bring suit against non-insurance entities required to pay for health care costs under a "self-insured plan," the Government's Complaint contains no allegation that Defendants have at any time maintained a "self-insured plan," as that term is defined by MSP and the relevant regulations. Further, it is clear that Congress did not intend MSP to be used as an across-the-board procedural vehicle for

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[3] FEHBA is codified at 5 U.S.C. § 8901 *et seq.*

[4] A "tortfeasor" is an individual or entity that commits a civil wrong for which a remedy, usually monetary damages, may be obtained. *See* Black's Law Dictionary (7th ed. 1999).

suing tortfeasors, which is precisely how the Government attempts to use the statute in this case.

3. The Government's Racketeer Influenced and Corrupt Organization Act claims will be permitted to go forward. The Government has adequately alleged, which is all it must do at this early stage in the litigation, the necessary elements of a RICO claim: that Defendants formed an "enterprise" which engaged in the requisite "pattern of racketeering activity." In addition, given the nature and scope of Defendants' alleged prior misconduct, the Government has adequately pleaded its basis for requesting injunctive relief, including the specific remedy of disgorgement.[5]

II. *Standard of Review*

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). At the motion to dismiss stage, "the only relevant factual allegations are the plaintiffs'," and they must be presumed to be true. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985); *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). Despite the sweeping breadth and seriousness of the Government's allega-

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[5] "Disgorgement" is defined as the "act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *See* Black's Law Dictionary (7th ed.1999).

tions, their validity is not for this Court to judge at this time.

III. *Statement of Facts*

The Government's Complaint describes in detail what it alleges to be a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of manufacturing safer and less addictive tobacco products. Complaint ("Compl.") at ¶ 3. Defendants' conspiratorial activity includes making numerous "false and deceptive" statements and concealing documents and research in an attempt to cover-up their deceit. Compl. at ¶ 5. According to the Government, Defendants continue to "prosper and profit" from their actions and will continue to do so into the future, unless restrained by this Court. Compl. at ¶ 6. The specifics of the alleged conspiracy are described below.

"In the 1940's and early 1950's, scientific researchers published findings that indicated a relationship between cigarette smoking and diseases, including lung cancer." Compl. at ¶ 30. Tobacco companies "closely monitored" this research, conscious that if the public became aware of these findings, the companies' profits would likely decline and they would "face the prospect of civil liability and government regulation." Compl. at ¶ 31. To combat these possibilities, the chief executives of Defendants American Tobacco, Brown & Williamson, Lorillard, Philip Morris, and R.J. Reynolds met in late 1953 in New York City, where they devised a concerted strategy to preserve and expand the market for, and profits from, cigarettes. Compl. at ¶ 32.

According to the Government, the underlying strategy Defendants adopted was simple: to deny that smoking caused disease and to consistently maintain that whether smoking caused disease was an "open question." Compl. at ¶ 34. To maintain and further this strategy, Defendants 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. Compl. at ¶ 36.

One of the first major steps Defendants took was to announce the formation of an entity initially known as the Tobacco Industry Research Committee ("TIRC") and which later became known as the Council for Tobacco Research ("CTR" or "Council").[6] This entity, which Defendants publicized widely as an objective research body, published in January 1954 a full-page statement that ran in 448 newspapers throughout the United States. Titled "A Frank Statement to Cigarette Smokers," the statement asserted that, according to "distinguished authorities," "there is no proof that cigarette smoking is one of the causes" of lung cancer. Compl. at ¶ 37. Defendants further stated: "We believe the products we make are not injurious to health" —even though Defendants' own employees had by this time "identified the carcinogenic substances in tobacco smoke." Compl. at ¶ ¶ 37, 38. Promising to aid and assist research into all phases of tobacco use and health and to provide complete information to the public, the publication stated that the newly formed Council would

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[6] According to the Government, Defendant Liggett did not join the Council until 1964. Compl. at ¶ 41.

perform independent, objective, and reliable research about the allegations against smoking. Compl. at ¶ 37.[7]

According to the Government, CTR was not independent, objective or reliable. Its purpose was not to research issues of concern to the public, but rather to serve as a "front" or "cover" for Defendants' conspiracy to conceal the truth about smoking's health risks. Compl. at ¶ 60. Defendants used CTR to fund "Special Projects" that were devised to counter evidence of smoking's adverse health effects by providing alternative explanations for tobacco-related diseases. Compl. at ¶ 65.

The Government alleges that these projects were designed largely to generate research data and witnesses for use in defending lawsuits and opposing tobacco regulation, rather than to ascertain or improve the safety of Defendants' products. To accomplish this objective, Defendants put attorneys in control of the Council's research and devised strategies to withhold from civil discovery critical information about the health effects of cigarette smoking by improperly invoking the attorney-client privilege and work-product doctrine. *Id.* If CTR research ever "threatened to confirm the link between smoking and disease," Defendants exerted pressure on the scientists conducting the research, so as to alter the results, terminate the research, and/or conceal the findings. Compl. at ¶ 67.

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[7] Defendants also established a Scientific Advisory Board ("SAB"), which they claimed was an independent research arm of the CTR. Compl. at ¶ 61. The Government disputes this, alleging that the SAB was "closely controlled" by Defendants to prevent it from approving research that suggested any link between smoking and disease. Compl. at ¶ 62.

In 1958, Defendants created another entity, the Tobacco Institute ("TI"), a "public relations organization" whose function was to keep the public, the medical establishment, the media and the government in the dark about tobacco's health risks, especially the "connection between smoking and disease." Compl. at ¶ 42.

Defendants also entered into what they termed a "gentleman's agreement" not to perform in-house research on smoking, health, or the development of "safe" cigarettes. Compl. at ¶ 45. Each Defendant enforced this agreement—a central tenet of the conspiracy—by obstructing research efforts by any other company. Even when individual companies performed limited in-house research, the fundamental understanding remained intact: information that would tend to establish the harm caused by cigarette smoking would be suppressed and concealed. Compl. at ¶ 48.

The Government alleges that over the course of the conspiracy, Defendants have made numerous misstatements concerning one item in particular: nicotine. Defendants continually denied that nicotine is addictive, even in the face of overwhelming evidence to the contrary. Compl. at ¶ ¶ 71-72. For example, Defendant Brown & Williamson acknowledged internally in 1963 that "we are . . . in the business of selling nicotine, an addictive drug." Comp. at ¶ 72. Researchers hired by Philip Morris in the 1980's concluded that "in terms of addictiveness, 'nicotine looked like heroin'." Compl. at ¶ 73. Instead of making these results public, however, Defendant Philip Morris threatened the researchers with legal action, killed the lab animals, removed the lab equipment and closed the lab down entirely. *Id.*

And in 1963, Defendant Brown & Williamson deliberately withheld from the Surgeon General research on the addictiveness of nicotine. Compl. at ¶ 74. When the Surgeon General finally concluded, based on independent research, that nicotine is in fact addictive, TI attacked and criticized the report as "an unproven attempt to find some way to differentiate smoking from other behaviors." *Id.* Defendants have engaged in these and numerous other acts of deception because they recognize that "getting smokers addicted to nicotine is what preserves the market for cigarettes and ensures their profits." Compl. at ¶ 71.

Not only have Defendants denied the addictive powers of nicotine, but it is alleged that they have also taken non-public actions to increase its potency and make cigarettes even more addictive. Despite having used "highly sophisticated technologies," including the selective breeding and cultivation of tobacco plants, to manipulate and increase the potency of nicotine in their cigarettes, Compl. at ¶ 77, Defendants have repeatedly denied that they manipulated the level of nicotine in their products. Compl. at ¶ 79. A 1994 R.J. Reynolds advertisement, for example, states: "We do not increase the level of nicotine in any of our products in order to addict smokers." Compl. at ¶ 81. Defendants also marketed "light" or "low tar/low nicotine" cigarettes as being less hazardous to smokers, Compl. at ¶ 86, even though individuals who smoke such cigarettes are "not appreciably reducing their health risk." Compl. at ¶ 88.

The Government also alleges that Defendants suppressed research regarding less hazardous cigarettes. Phillip Morris, for example, conducted research which concluded that a "medically acceptable low-carcinogen cigarette may be possible," but this finding was never

released to the public. Compl. at ¶ 105. Indeed, Defendants have refused to acknowledge the possibility of such a cigarette. Compl. at ¶¶ 108, 109.

The Government charges that Defendants have "aggressively targeted their campaigns to children." Compl. at ¶ 96. R.J. Reynolds' Joe Camel campaign is just one of the most well-known examples of such tactics. Compl. at ¶ 97. Defendants have advertised in stores near high schools, promoted brands heavily during spring and summer breaks, given away cigarettes at places where young persons congregate, paid for product placement in movies with youth audiences, placed advertisements in magazines with high youth readership, and sponsored sporting events, rock concerts, and other events of interest to children. Compl. at ¶ 96. Defendants have consistently made false and misleading statements that their expenditures on advertising and marketing were directed exclusively at convincing current smokers to switch brands, not at enticing children. Compl. at ¶ 100.

The Government maintains that all the above misstatements, and fraudulent and conspiratorial activity are ongoing. Although Defendants have now admitted that there is "a substantial body of evidence which supports the judgment that cigarette smoking plays a causal role in the development of lung cancer and other diseases in smokers," Compl. at ¶ 116, and have conceded that cigarettes are "addictive," as that term is used by the public at large. Compl. at ¶ 120, Defendants still market their products in deceptive and unlawful ways; they conceal documents relating to the health effects of cigarettes, nicotine and the true nature of CTR; and they continue to pose a threat "to the

health and well-being of the American public." Compl. at ¶ 124.

The Government alleges that the harm caused by the Defendants' decades-long conspiracy has compelled numerous entities, including the government, to expend immense resources to treat, alleviate and minimize the resulting disease and devastation. Compl. at ¶ 6. In this action, the Government seeks to recover some or all of the "$20 billion annually" it has spent to treat the "injuries and diseases caused by defendants' products." Compl. at ¶ 5. It also seeks various forms of equitable relief, including the disgorgement of Defendants' profits, to deter Defendants and others from engaging in similar conduct in the future.

IV. *Defendants' Motion To Dismiss*[8]

A. The Government's Medical Care Recovery Act Claim

In 1962, Congress enacted the Medical Care Recovery Act ("MCRA"), which provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish [or pay for][9] hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease, . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased

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[8] Section IV specifically addresses arguments raised by the Non-Liggett Defendants but applies equally to Liggett, which has joined in this Motion.

[9] The bracketed language was added by a 1996 amendment. *See* Pub.L. No. 104-201, § 1075, 110 Stat. 2442, 2663 (1996).

> person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person . . .

42 U.S.C. § 2651(a), Pub. L. No. 87-693, § 1, 76 Stat. 593 (1962).

At first blush, MCRA's language might seem quite clear. The statute generally provides the Government with a means to recover from tortfeasors the health care costs it has expended on behalf of victims of tortious conduct. If the Government has "paid for" or "furnished" such care, it may seek reimbursement from the individual or entity that caused the injury. The statute is broadly worded: Congress could have restricted the Government's ability to obtain reimbursement in any number of ways, both substantively and procedurally, but it did not.

However, the specific question before this Court—and it is a difficult one the resolution of which has enormous ramifications—is whether MCRA, a statute enacted in 1962 and amended in a minor fashion in 1996, covers, or was intended by Congress to cover, payments made by the United States Government under Medicare and the Federal Employees Health Benefits Act ("FEHBA")[10] to treat tobacco-related illnesses allegedly caused by Defendants' tortious conduct.

Only a few months ago, the Supreme Court grappled with an equally difficult issue of statutory interpretation in *FDA v. Brown & Williamson Tobacco Corp.*,

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[10] FEHBA is codified at 5 U.S.C. § 8901 *et seq.*

529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), a case in which it had to decide whether the Food and Drug Administration possessed authority to regulate tobacco products as customarily marketed. While this Court fully recognizes that the present case, unlike *Brown & Williamson*, does not involve "an administrative agency's construction of a statute," thereby triggering the two-step *Chevron* analysis,[11] 120 S. Ct. at 1300 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)), the general analytical approach followed in *Brown & Williamson* as it relates to statutory construction and congressional intent is nevertheless instructive and illuminating. Like the Supreme Court in *Brown & Williamson*, this Court's obligation is to ascertain congressional intent by viewing a particular statute in the context of relevant congressional action taken during and subsequent to its enactment. Accordingly, there are significant principles articulated by the *Brown & Williamson* Court that speak to how the instant case should be resolved.

One such principle is that subsequent legislative action may shed light on congressional intent. "At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can

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[11] Even assuming that the Department of Justice should be considered an "agency" for purposes of *Chevron* analysis, it is entitled to no deference for its interpretation of MCRA, FEHBA or Medicare, because it is not the agency entrusted to administer those statutes. "[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference." *Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1400 (D.C. Cir. 1988) (citations and internal quotations omitted).

shape or focus those meanings." 120 S. Ct. at 1306.[12] In adopting subsequent statutes, Congress is presumed to act "against the backdrop" of agency statements regarding the parameters of the agency's authority to act under the original statute. *Id.* at 1306-07.

Another such principle is that agency "interpretations and practices" should be given "considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Davis v. United States*, 495 U.S. 472, 484, 110 S. Ct. 2014, 109 L. Ed. 2d 457 (1990). In fact, congressional action (or inaction) can, in certain circumstances, be viewed by courts as having "effectively ratified" an agency's long-standing position. 120 S. Ct. at 1307.[13]

A final principle announced by the Supreme Court—and one which has more concrete application in the instant case—is that Congress, "for better or for worse, has created a distinct regulatory scheme for tobacco products." 120 S.Ct. at 1315. In conjunction with this scheme, "Congress has persistently acted to

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[12] To the extent that the Government contends that the question presented can be resolved by resort to MCRA's language alone, *see* Govt's Opp'n at 14-15, its argument is flatly inconsistent with *Brown & Williamson*'s requirement that statutes like MCRA be viewed in the context of "subsequent acts."

[13] *Brown & Williamson* was certainly not the first occasion in which the Supreme Court expressed such a view. In *FTC v. Bunte Bros*, 312 U.S. 349, 352, 61 S. Ct. 580, 85 L. Ed. 881 (1941), the Court stated: "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *See also Bankamerica Corp. v. United States*, 462 U.S. 122, 130, 103 S. Ct. 2266, 76 L. Ed .2d 456 (1983).

preclude a meaningful role for any administrative agency in making policy on the subject of tobacco and health." *Id.* at 1313; *see also id.* at 1309 (Congress' intent was to "preclude any administrative agency from exercising significant policymaking authority on the subject of smoking and health"); *id.* at 1315 (Congress has "repeatedly acted to preclude any agency from exercising significant policymaking authority in the area").

The principles delineated above lead this Court to the conclusion that Congress did not intend MCRA to cover Medicare or FEHBA expenses.

1. Legislative History

Recourse to MCRA's legislative history cannot by itself answer the question presented (*i.e.*, whether MCRA applies to Medicare and FEHBA expenses), since the record relating to the statute's enactment is virtually non-existent. Nevertheless, even the sliver of legislative history that does exist provides the Court with "guidance" in understanding how Congress meant MCRA to be interpreted. *See National Wildlife Federation v. Snow*, 561 F.2d 227, 237 (D.C. Cir. 1976); *American Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 166 (D.C. Cir. 1977) ("Legislative history can be and often is an important instrument in the determination of congressional intent.") (Bazelon, C.J., dissenting).

The parties agree, and the legislative history confirms, that MCRA was enacted in response to a 1947 Supreme Court decision, *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947), which held that the Government lacked a common law cause of action to recover from tortfeasors expenses the

Government had incurred in treating military personnel under its health care programs. *Id.* at 314-16, 67 S. Ct. 1604. *Standard Oil* narrowly construed the Government's authority to recover such expenditures and directed Congress to enact appropriate legislation if it wished to provide the Government with more expansive authority. *Id.* at 315-16, 67 S. Ct. 1604.

For over a decade, Congress apparently ignored *Standard Oil* and did nothing to provide the Government with a statutory cause of action to recover the medical expenses resulting from care it had provided. Finally, in 1960, thirteen years after *Standard Oil* was handed down, the Comptroller General of the United States submitted a Report to Congress entitled "Report On Review Of The Government's Rights And Practices Concerning Recovery Of The Cost Of Hospital And Medical Services In Negligent Third-Party Cases." *See* Govt's Opp'n, Appendix ("App.") at 5. The Report's purpose was to "ascertain the extent, adequacy, and consistency of the rights and practices of the Government to recover" the costs of health care it furnished to tort victims. *Id.* In particular, the Report reviewed the ability of four government agencies to recover their medical costs: the Department of Defense, the Veterans Administration, the Department of Health Education and Welfare's Public Health Service, and the Labor Department's Bureau of Employees' Compensation. *Id.* at 6.

The Report explicitly referred to *Standard Oil* and what the Comptroller General determined the consequence of that decision to be, namely, that "each year the Government is not recovering several million dollars of costs in negligent third-party cases." *Id.* at 14. The Report labeled this outcome "inequitable" and

declared that "the Government should have the right in all cases to recover its costs of treating those injured as a result of the negligence of third parties." *Id.* at 10. The Comptroller General therefore recommended that Congress adopt one of two options for remedying the problem: enact legislation "in the form of either a general bill" or amend the statutes governing "the specific agencies involved." *Id.* at 10, 20-21. It should be remembered that Medicare, enacted in 1965, did not exist when the Comptroller General issued his report, in 1960, but FEHBA did.

In response to the Comptroller General's Report, Congress chose the alternative of enacting "a general bill" rather than amending statutes agency by agency. According to the Senate Report on MCRA, the statute's "purpose" was to

> provide for the recovery by the United States from negligent third persons for the cost of hospital, medical, surgical, or dental care and treatment furnished by the United States, pursuant to authority or requirement of law, to a person who is injured or suffers a disease under circumstances creating a tort liability upon such third person.

S. Rep. No. 87-1945 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2637, 2637 (under heading "Purpose"). Both the House and Senate Reports state that MCRA would enable the Government to recover expenses under "[s]tatutes providing for care by the Department of Defense to military personnel and their dependents, the Public Health Service to Coast Guard personnel and other classes of persons, and the Veterans' Administration to veterans." *Id.* at 2639; H. Rep. No. 87-1534, at 5 (1962).

While this language would, by itself, suggest an intent to limit MCRA to the cost of health care provided to members of the military, the very next paragraph of the Senate Report discusses the manner in which the Government would be able to recover payments made under the Federal Employees' Compensation Act ("FECA").[14] Since that statute covers civilian employees, it is clear that MCRA was not meant to be restricted to the military.

The three documents described above (the Comptroller General's Report, the Senate Report and the House Report) constitute MCRA's entire legislative history. However, even more significant than what the legislative history does contain (very little) is what it does not. Despite the fact that the Comptroller General's Report expressly refers to FECA—which both parties agree is covered under MCRA—nowhere in the Report is any mention made of FEHBA, the wide-ranging civilian health insurance program which had been enacted several years earlier, and which the Government now claims is also covered by MCRA. Nor did the Senate or House Reports refer to FEHBA, even in passing. These omissions are, if not in direct conflict, at least in sharp tension with the Government's position that MCRA applies to FEHBA. Surely, Congress knew of FEHBA's existence, especially since that statute had been enacted only five years before MCRA.

Although the legislative history, and particularly Congress' failure to make any mention of FEHBA after specifically mentioning other programs covered by the statute, would by itself suggest that MCRA was not

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[14] FECA is codified at 5 U.S.C. § 8132, and provides for unemployment compensation benefits.

meant to apply to FEHBA, the paucity of legislative history necessitates a review of other considerations relating to congressional intent.[15]

2. Agency Interpretations

Another tool for ascertaining congressional intent is to examine the statements, rulings and interpretations of government agencies—particularly those agencies entrusted to administer the relevant statute. Because the Health Care Financing Administration ("HCFA") is the agency charged with administering MCRA, its approach to enforcing that statute should be given special attention.

As an initial matter, it cannot be overlooked that HCFA has issued no MCRA-specific regulations pro-

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[15] The Government contends that there is an additional piece of legislative history relating to Medicare, not MCRA, which supports its interpretation of MCRA. The Senate Report accompanying the original Medicare Act states that Medicare will not pay "for any item or service furnished an individual if neither the individual nor any other person (such as a prepayment plan) has a legal obligation to pay for or provide the services," and that under such a circumstance, "the third-party liability statute 42 U.S.C. §§ 2651-2653 [MCRA] would not apply." S. Rep. No. 89-404, at 48 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1989. Although the Government argues that this is a clear indication that Congress intended MCRA to apply to Medicare expenses, Govt's Opp'n at 17, the Court finds this "oblique reference" to the MCRA statute inconclusive at best, especially when it is evaluated in the larger context of near total congressional silence concerning any connection between MCRA and the mammoth Medicare program. *See Regular Common Carrier Conference v. United States*, 820 F.2d 1323, 1328 (D.C. Cir. 1987) (finding that "it strains credulity to suggest . . . that [a] Senate Report's oblique reference" to a certain exemption "reflects an otherwise unarticulated intent" to apply that exemption in a way never otherwise mentioned in the legislative history).

viding for recovery of Medicare or FEHBA costs. In contrast, agencies that do have, and have always had, an undisputed and established right to recovery under MCRA, such as those governing the armed services, do have such regulations in place. *See* 32 C.F.R. § 199.12 (Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS") MCRA regulations); 32 C.F.R. §§ 842.115-842.125 (Air Force MCRA regulations); 32 C.F.R. § § 757.11-757.20 (Navy MCRA regulations); 33 C.F.R. § 25.131 (Coast Guard MCRA regulations).[16] No

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[16] For example, the regulations governing MCRA-recovery of expenses incurred under CHAMPUS require any person furnished care and treatment under CHAMPUS

> (i) To provide complete information regarding the circumstances surrounding an injury as a condition precedent to the processing of a CHAMPUS claim involving possible third-party liability.
>
> (ii) To assign in writing to the United States his or her claim or cause of action against the third person to the extent of the reasonable value of the care and treatment furnished, or to be furnished, or any portion thereof;
>
> (iii) To furnish such additional information as may be requested concerning the circumstances giving rise to the injury or disease for which care and treatment are being given and concerning any action instituted or to be instituted by or against a third person;
>
> (iv) To notify the responsible recovery judge advocate, the CHAMPUS fiscal intermediary or General Counsel, OCHAMPUS, or other officer who is representing the interests of the government at the time, of a settlement with, or an offer of settlement from a third person; and,
>
> (v) To cooperate in the prosecution of all claims and actions by the United States against such third person.

such structure has ever been established by HCFA to collect Medicare or FEHBA expenses under the general MCRA framework.

Moreover, several agencies have explicitly concluded that MCRA does not provide the Government with a cause of action to recover Medicare costs. First, in 1968, the General Counsel of the Federal Bureau of Health Insurance (which administered Medicare at that time) issued an Opinion to that effect, stating that Medicare payments are "insurance benefits," as distinguished from the health care "provided directly by the federal government" to which MCRA clearly applied. *See Subrogation Rights Under Medicare*, For the Defense, Apr. 1970, at 44 (Defs.' Mem., App. J at 67). Second, in 1979, HCFA issued a ruling that, in cases in which the Government was liable for an injury under the Federal Tort Claims Act ("FTCA") and Medicare paid the medical expenses, the victim could retain all payments the Government made to her under the FTCA. *See* HCFA Ruling 79-4 (1979), *reprinted in* 52 Fed. Reg. 26,088, 26,090 (1987). The rationale underlying this ruling (that Medicare was not to receive any reimbursement for the care it had provided to the injured person) was that Medicare was "in the nature of social insurance." *Id.*

Since MCRA's enactment in 1962, neither HCFA nor any other administrative agency has ever indicated, or even suggested, that MCRA applies to Medicare or FEHBA expenses. These agency statements and silences, taken in conjunction with the absence of regula-

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32 C.F.R. § 199.12(e)(2). None of the above mentioned actions is required of recipients of health care under Medicare or the FEHBA program.

tions that would formalize and facilitate the Government's recovery of Medicare or FEHBA costs under MCRA, lend further credence to Defendants' position that MCRA was never meant to apply to Medicare or FEHBA expenses.

3. Application of the *Brown & Williamson* Principles

Having considered both the legislative history and agency interpretations of MCRA, the Court's final task is to apply the *Brown & Williamson* principles enunciated in Section IV.A.1 to discern what Congress' intent was in enacting MCRA in 1962 and amending it in 1996. Based on this examination, the Court must conclude that MCRA does not provide the Government with a cause of action to recover Medicare or FEHBA expenses. The legislative history and relevant agency conduct, when taken together, overwhelmingly support the notion that MCRA was never intended to be used in the way the Government now advocates.

First, it is significant that even though FEHBA existed *before* MCRA's enactment, MCRA makes *no* reference to FEHBA—either in the statute itself, in the legislative history or in agency interpretations.

Second, it is striking that the Government had never, prior to the initiation of this lawsuit in 1999, attempted to recover Medicare or FEHBA costs under MCRA. Although the Government is correct that mere nonuse of a statute cannot cause the Government to forfeit powers granted thereunder, *see United States v. Morton Salt Co.*, 338 U.S. 632, 647-48, 70 S. Ct. 357, 94 L. Ed. 401 (1950), nonuse can be highly significant. When, despite many opportunities to do so, a government agency refuses to take advantage of the wide-

ranging powers seemingly implicated by a statute's plain language, courts may presume that Congress did not intend the statute to be given the meaning that its language, in a vacuum, might imply. *See Brown & Williamson*, 120 S. Ct. at 1306-07; *see also Bankamerica Corp.*, 462 U.S. at 130-31, 103 S. Ct. 2266 (holding that where Government had not applied a statute in a particular way in 60 years, it had effectively acknowledged that it lacked authority to do so); *Bunte Bros.*, 312 U.S. at 352, 61 S. Ct. 580; *National Classification Comm. v. United States*, 746 F.2d 886, 892 (D.C. Cir. 1984). This is particularly true in this instance, where the broader interpretation of MCRA (*i.e.*, that every conceivable type of government expenditure, even under Medicare and FEHBA, can be recovered under MCRA) had *never* been advanced by any government entity until thirty-seven years after the statute's enactment.

Third, Congress is presumed to act "against the backdrop" of HCFA's interpretations of the statutes HCFA is entrusted to administer. *See Brown & Williamson, 120 S. Ct. at 1306-07. HFCA consistently indicated that it did not understand MCRA to cover Medicare or FEHBA expenses, and Congress never expressed any disapproval with HFCA's readings of MCRA. In fact, Congress' enactment of the 1996 amendment to MCRA, which the parties agree codified the existing manner in which MCRA was being enforced, can be viewed as a ratification of HFCA's consistent and narrow interpretation of that statute. 120 S. Ct. at 1307. Congress had the opportunity to express its displeasure with the restrictive way in which MCRA was being enforced, but it did not do so.*

Finally, given Congress' intense involvement in legislative regulation of tobacco,[17] and its keen awareness of "tobacco's health hazards and its pharmacological effects," 120 S. Ct. at 1313, it is simply impossible to conclude that the Government's current interpretation of MCRA, either in its original or in its 1996 amended form, is one that Congress intended. In fact, the Government's reading is in direct tension with Congress' recognized intent to create a "distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA." *Id.* at 1313. It is therefore particularly difficult to believe that Congress would have intended to subject tobacco companies to extraordinary financial liability under MCRA, when those entities are not even subject to rudimentary FDA regulation.

Congress has, through hearings and legislation, closely monitored the cigarette industry. While, over the years, it may not have adopted the aggressive, pro-consumer and pro-health stance that many activists have continually fought so hard for, the inescapable fact is that Congress chose, as a legislative body, to use only limited measures to regulate tobacco products and minimize their health hazards to the public. In light of all these considerations, it is simply inconceivable that the executive branch possessed for so many years (thirty-seven for FEHBA and thirty-four for Medicare) a statutory weapon that could wield the economic, and therefore regulatory, clout MCRA would carry if enforced as the Government advocates. This is especially true given that there has never been any congressional

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[17] For a detailed chronology of congressional action in this area, *see Brown & Williamson*, 120 S. Ct. at 1305-12.

recognition that this substantial power existed or congressional demand that it be utilized. Congress' total inaction for over three decades "preclude[s] an interpretation" of MCRA that would permit the Government to recover Medicare and FEHBA expenses.[18] *See Brown & Williamson*, 120 S. Ct. at 1312.

Accordingly, the Government's MCRA claim must be dismissed.

B. The Government's Medicare Secondary Payer Provisions Claim

The Medicare Secondary Payer provisions ("MSP"), a series of amendments to Medicare enacted in 1980 and further amended thereafter,[19] provide the Government

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[18] There is an additional reason that the Court reaches this conclusion. When Congress enacted the 1996 amendment, there was an existing body of case law concerning the "collateral source" doctrine in which federal and state courts have consistently and uniformly declared Medicare to be a separate and distinct "social insurance" fund into which citizens contribute. *See, e.g., District of Columbia v. Jackson*, 451 A.2d 867, 871-872 (D.C. 1982); *Molzof v. United States*, 6 F.3d 461, 466 (7th Cir. 1993); *Titchnell v. United States*, 681 F.2d 165, 174-76 (3d Cir. 1982). According to these cases, it is not the Government, but rather individuals, who "pay for" Medicare. If this Court were to rule in favor of the Government on the MCRA Count, it would effectively be declaring that the Government "pays for" Medicare, thus undermining the viability of a substantial and long-standing body of case law to the contrary.

[19] Pub.L. No. 97-35, § 988, 95 Stat. 604 (1981). The amendments are codified at 42 U.S.C. § 1395y, which provides in pertinent part:

> In order to recover payment under this subchapter for such an item or service, the United States may bring an action against any entity which is required or responsible (directly, as a third-party administrator, or otherwise) to make payment

with statutory authority to obtain reimbursement for certain Medicare expenditures. MSP essentially makes Medicare a "secondary" payer where another entity is required to pay under a "primary plan" for an individual's health care. *See* 42 U.S.C. § 1395y(b)(2). If the "primary" payer has an obligation to pay for such costs, but does not and cannot "reasonably be expected" to do so, Medicare may make a "conditional payment" and later demand reimbursement from the primary plan. 42 U.S.C. § 1395y(b)(2)(A) and (B)(ii). If the entity administering the primary plan refuses to reimburse, the Government may then bring suit against it to recover the Medicare payments.

A "primary plan" is defined in the statute as "a group health plan or large group health plan, . . . a workmen's compensation law or plan, an automobile or liability insurance policy or plan (*including a self-insured plan*) or no fault insurance . . ." 42 U.S.C. § 1395y(b)(2)(A) (emphasis added). A "self-insured plan" is in turn defined in the implementing regulations as an "*arrangement*, oral or written . . . to provide health benefits or medical care or [to] assume legal liability for injury or illness" under which an entity "carries its own risk instead of taking out insurance with a carrier." *See* 42 C.F.R. § § 411.21 (defining the term "plan") (emphasis added) and 411.50(b) (defining the term "self-insured plan").

It is this last phrase—"self-insured plan"—on which the Government rests its legal basis for Count 2 of this lawsuit. The Government's theory, as expressed in its

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with respect to such item or service (or any portion thereof) under a primary plan . . .

42 U.S.C. § 1395y(b)(2)(B)(ii).

Opposition to Defendants' Motion to Dismiss, is that Defendants have themselves assumed the liability stemming from tobacco-related tort suits and, therefore, as "self-insured" entities, may be sued under MSP.

To survive a motion to dismiss, a complaint "must allege all the material elements of [a] cause of action." *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997) (internal citations omitted); *see also Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 n.2 (D.C. Cir. 1999); *Alicke v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997).

The MSP Count of the Government's Complaint states simply that "defendants are required and responsible to make payment for the health care costs of Medicare beneficiaries that were caused by defendants' tortious and unlawful conduct, which costs have been and will be unlawfully shifted to the United States." Compl. at ¶ 170. The Complaint does allege, in other words, that Defendants are "required or responsible . . . to make payment" for certain health care costs, thus tracking a portion of the statute's language. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii).

However, there are a number of "material elements"[20] of an MSP cause of action conspicuously absent from the Complaint. First, the Complaint does not allege, in even the most conclusory fashion, the existence of any "primary plan" under which Defendants pay health care costs, despite the fact that the statute on which the Government bases its claim applies only to entities required to make payment "under a primary plan." *See* 42 U.S.C. § 1395y(b)(2)(B)(ii). In fact, the Complaint does not even allege the existence of any

[20] *See Taylor*, 132 F.3d at 761.

elements of a "primary plan," such as a "plan" or an "arrangement." *See* 42 C.F.R. § 411.21. Even if the Complaint had made such allegations, it still fails to allege, or even suggest, that Defendants specifically maintain any form of "*self-insured* plan" (emphasis added), even though this is the *only* theory on which the Government bases Defendants' liability.[21] Indeed, the Complaint does not allege that Defendants are "self-insured" in any way.

In those instances in which the Government has used MSP to seek recovery from entities that are unquestionably providers of insurance, as is certainly the typical factual scenario,[22] there has been no dispute

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[21] Although the Government argues *in its brief* that Defendants are a "self-insured plan," it does not make this allegation in the Complaint. In fact, the term "self-insured" appears only once in the entire Complaint. *See* Compl. at ¶ 168 (MSP provisions "provide that the Medicare Program will not pay for the cost of medical care if certain third parties—such as liability insurance plans, including self-insured plans—have paid, or can reasonably be expected to pay promptly for those costs). Indeed, the entire MSP Count occupies only slightly more than one page of the 87-page Complaint.

[22] Courts have uniformly recognized that the statute's clear purpose was to grant the Government a right to recover Medicare costs from insurance entities. *See, e.g., Perry v. United Food and Commercial Workers Dist. Unions 405 and 442*, 64 F.3d 238, 243 (6th Cir. 1995); *Baptist Memorial Hosp. v. Pan Am. Life Ins. Co.*, 45 F.3d 992, 998 (6th Cir. 1995); *Evanston Hosp. v. Hauck*, 1 F.3d 540, 544 (7th Cir. 1993); *see also Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 427 n.* (D.C. Cir. 1994) ("[T]he MSP statute plainly intends to allow recovery only from an insurer.") (Henderson, J., concurring). What little legislative history exists is consistent with this interpretation. *See* H.R. Conf. Rep. No. 96-1479 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5903, 5924. As of this time, there are no reported decisions in which the Government has sued a tortfeasor under MSP. One case, in which a private party has

regarding whether defendants maintain a "primary plan," since that term expressly includes a "group health plan," a "liability insurance policy or plan," and other traditional forms of insurance. *See* 42 U.S.C. § 1395y(b)(2). In those cases, the Government's allegation that defendants are "responsible" for certain health care costs is sufficient to state an MSP claim, as it gives "sufficient information to suggest that there exists some recognized legal theory upon which relief can be granted." *See Wells v. United States*, 851 F.2d 1471, 1473 (D.C. Cir. 1988) (internal citations and quotations omitted).

In the instant case, however, the claim of "responsibility" to make health care payments is entirely conclusory, since Defendants are clearly not insurance entities and the Complaint is devoid of any allegation that they have established a "plan" or "arrangement" under which they would be considered self-insured entities subject to MSP's reach. Without alleging the existence of such a "plan" or "arrangement," the Complaint's assertion that Defendants are "required and responsible to make payment" for certain health care costs fails to give Defendants even the most rudimentary notice of the Government's theory of liability. *See Wells*, 851 F.2d at 1473. Accordingly, the MSP count must be dismissed.

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brought such a suit, is currently being litigated. *See Mason v. American Tobacco Co.*, Civ. No. 7-97CV- 293-X (N.D. Tex.).

C. The Government's Racketeer Influenced and Corrupt Organizations Claim

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § § 1961-1968, prohibits individuals or entities from engaging in racketeering activity associated with an "enterprise."[23] To successfully state a RICO claim, the Government must allege "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)).

An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *United States v. Turkette,* 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (quoting 18 U.S.C. § 1961(4)). "Racketeering activity" includes, among other things, acts prohibited by any one of a number of criminal statutes. 18 U.S.C. § 1961(1). A "pattern" is demonstrated by two or more instances of "racketeering activity" ("predicate acts") that occur within ten years of one another. 18 U.S.C. § 1961(5). In this case, the alleged predicate acts are violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud).

The Government brings its RICO counts (Counts 3 and 4) under two specific subsections of § 1962. Count 3 is brought under subsection (c), which makes it unlawful to "conduct or participate, directly or indirectly," in

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[23] Although RICO was originally enacted to "combat organized crime," its application has expanded far beyond that arena. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

an enterprise through a "pattern of racketeering activity." Count 4 is brought under subsection (d), which makes it unlawful to "conspire to violate" subsection (c).

RICO provides both legal and equitable remedies. Plaintiffs may seek treble damages—that is, three times the value of the damages inflicted on them by a defendant's unlawful racketeering activity. 18 U.S.C. § 1964(c). In addition, the Court may in its discretion order equitable remedies, "including but not limited to" restricting defendants from taking future actions and even dissolving or restructuring the "enterprise."[24] In the instant case, the Government seeks to "disgorge" Defendants' past profits associated with and derived from their alleged unlawful racketeering activity, and to enjoin them from committing future RICO violations.[25]

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[24] Section 1964(a) states in full:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, *including, but not limited to,* prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (emphasis added).

[25] Specifically, the Government requests that the Court issue a "permanent injunction" to prohibit Defendants and their agents, employees and successors from (1) associating with persons known "to be engaged in [similar] acts of racketeering"; (2) participating in the management or control of CTR or TI; (3) making misleading

1. Future Injunctive Relief

Except for Liggett,[26] Defendants do not dispute that the Government has adequately alleged the elements of a RICO claim (*i.e.*, "enterprise," "racketeering activity, and "pattern"). What they do dispute is whether the Government has adequately alleged that Defendants' racketeering activity will continue into the future, so as to warrant the broad equitable relief sought.

The Government contends that the pattern of the past four decades in which the tobacco companies have made countless false and deceptive statements, concealed and destroyed documents, and improperly asserted legal privileges to evade legitimate civil discovery and government requests, establishes a "reasonable likelihood," *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992), that Defendants will continue to violate the law. Accordingly, the Government requests equitable relief in the form of disgorgement of the profits they have realized from their criminal activities,

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statements concerning cigarettes; and (4) engaging in "any public relations endeavor that misrepresents, or suppresses information concerning, the health risks associated with cigarette smoking or the addictive nature of nicotine." Compl. § VII.B.2.

The Government also requests that Defendants be ordered to (1) fund, but have no influence or control over, "a legitimate and sustained corrective public education campaign"; (2) disclose and disseminate documents relating to the targeting of children; (3) make "corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine"; (4) fund, but have no influence or control over, "sustained [cigarette smoking] cessation programs"; and (5) fund, but have no influence or control over, "a sustained educational campaign devoted to the prevention of smoking by children. *Id.*

[26] Liggett's separate arguments will be addressed in Section V of this Opinion.

for the purpose of deterring Defendants and others from committing such acts in the future. Govt's Opp'n, at 92.

Defendants concede that "past allegations may be relevant to whether . . . a 'reasonable likelihood' exists" that such acts will continue into the future, Defs.' Mem. at 65, but argue that the Government's exclusive reliance on these past violations and its speculative allegations of future misconduct are too "conclusory" to justify equitable relief. Defs.' Mem. at 68. Defendants contend that, under the law of this Circuit, the Government may not rely solely on allegations of earlier unlawful activity to warrant the imposition of equitable relief. Defs.' Mem. at 66 n.* (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989)). Defendants also argue that, because the RICO predicate acts in this case involve mail and wire fraud, the command of Federal Rule of Civil Procedure 9(b) that allegations of fraud be made with "particularity" is applicable, and that the Government has failed to make the particularized showing required by this Rule. Defs.' Mem. at 67-68.

Finally, Defendants argue that the Master Settlement Agreement ("MSA") which they entered into with the States enjoins Defendants from engaging in the same unlawful activity which the Government believes will occur in the future. Defendants point to various specific M.S.A. § provisions that they contend will make equitable relief in this action unnecessary and unwarranted. Accordingly, they argue that their "business" (manufacturing, selling and marketing tobacco products) will not present "opportunities to violate the law in the future," Defs.' Mem. at 66 n.* (citing *First City*, 890 F.2d at 1228).

The Government responds that, applying the three factors announced in *First City*, there is indeed a "reasonable likelihood" that Defendants' past unlawful conduct will continue into the future. Govt's Opp'n at 86. The Government maintains it would be able to prove at trial that the past conduct alleged "would provide strong support for an inference of a risk of future wrongdoing," and that, to the extent that Defendants argue that the Government is required to make such a showing now, at the motion to dismiss stage, rather than at trial, they are simply mistaken. Govt's Opp'n at 87. The Government also denies that it is required to plead the likelihood of Defendants' future acts of fraud with particularity under Fed. R. Civ. P. 9(b). It argues that the core purpose of 9(b) is to protect defendants from reputational harm and "strike" suits, and to provide them with "sufficient information to respond to plaintiff's claims." *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996). Finally, the Government contends that Defendants' reading of Rule 9(b) would "demand access to a crystal ball," Govt's Opp'n at 90, because it would force plaintiffs to describe the detailed contours of acts which have not yet occurred.

To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting *SEC v. Savoy Ind., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)); *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994).

To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was

isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." *First City*, 890 F.2d at 1228 (citing *Savoy Indus.*, 587 F.2d at 1168); *Bilzerian*, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." *First City*, 890 F.2d at 1228 (citing *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984)).

The Government has clearly and overwhelmingly satisfied each of the three *First City* factors. First, Defendants cannot possibly claim that their alleged conspiratorial actions were "isolated." On the contrary, the Complaint describes more than 100 predicate acts spanning more than a half-century. Second, Defendants cannot contend that the alleged RICO violations are "technical in nature." The Government alleges that Defendants' numerous misstatements and acts of concealment were made intentionally and deliberately, rather than accidentally or negligently, as part of a far-ranging, multi-faceted, sophisticated conspiracy. Third, Defendants' business of manufacturing, selling and marketing tobacco products clearly "present[s] opportunities to violate the law in the future." *First City*, 890 F.2d at 1228. As the Government points out, as long as Defendants are in the business of selling and marketing tobacco products, they will have countless "opportunities" and temptations to take unlawful actions, just as it is alleged they have done since 1953. Govt's Opp'n at 87.

Defendants' contention that the M.S.A. § precludes such opportunities is not persuasive. *See* Defs.' Mem. at

70-77. In arguing that the M.S.A. § obviates the need for injunctive relief, Defendants implicitly ask the Court to make the following two assumptions: that Defendants have complied with and will continue to comply with the terms of the MSA, and that the M.S.A. § has adequate enforcement mechanisms in the event of non-compliance. Even assuming the Court could take judicial notice of the MSA, that document's existence certainly does not mean that the Court can or should assume that the M.S.A. § will be fully enforced or otherwise accomplish its intended objectives.

Further, the decisions Defendants cite for the proposition that past allegations of wrongdoing alone cannot warrant injunctive relief are inapposite, because those cases all discuss the standard for *proving* a reasonable likelihood of future violations, not for *pleading* it at the motion to dismiss stage. *See, e.g., SEC v. Commonwealth Chem. Secs*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978).

Indeed, the sole decision cited by Defendants which does address the injunctive relief standard appropriate for a motion to dismiss, *SEC v. Cassano*, 61 F. Supp. 2d 31 (S.D.N.Y. 1999), clarifies the distinction between those two very different legal standards. In *Cassano*, the court recognized that it was "obliged to accept the truth" of the Government's allegation that defendants are "likely to violate securities laws in the future," "for purposes of this motion to dismiss, and so this aspect of the defendants' motion must be denied. Whether the [Government] can prove the allegation remains to be seen." *Id.* at 34. The same can be said of the instant case.

Finally, Defendants' contention that the Government "must allege "a 'reasonable likelihood' of future viola-

tions—future frauds—with the specificity required by Rule 9(b)," Defs.' Mem. at 67, simply defies common sense. It is difficult to see how a plaintiff could ever allege with "particularity" an offense which has not yet happened. Defendants are able to cite only two decisions, both of which are from other circuits, in support of this contention: *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) and *Continental Realty Corp. v. J.C. Penney Co.*, 729 F. Supp. 1452 (S.D.N.Y. 1990).

In *Menasco*, the defendant's actions "involved a limited purpose," "one perpetrator," "one set of victims," and the racketeering transaction "took place over approximately one year." 886 F.2d at 684. The court specifically held that defendant's acts, as alleged, did not "suggest a 'distinct threat of long-term racketeering activity, either implicit or explicit.'" *Id.* (quoting *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. 2893). It was on this basis, and these facts, that the court determined that plaintiff's allegations of on-going fraud missed the Rule 9(b) mark. In *Continental Realty*, the court observed that plaintiff's attempt to "infer a threat of repeated fraud from a single alleged scheme would in effect render [RICO's] pattern requirement meaningless." 729 F. Supp. at 1455. Therefore, the court declared that plaintiff's allegations did not pass Rule 9(b) muster.

In neither decision—nor any other decision cited by Defendants, for that matter—did the plaintiff allege as many predicate acts (116), as long a duration of racketeering activity (45 years), as many significant participants (11 entities, which together control virtually the entire tobacco products market), as many victims (hundreds of millions of individuals, scores of government entities, the federal government) or as much money

derived from the racketeering acts (hundreds of billions of dollars).

Based on the sweeping nature of the Government's allegations, and the fact that the parties have barely begun discovery to test the validity of these allegations, it would be premature for the Court to rule on the propriety of injunctive relief in this case. At a very minimum, the Government has stated a claim for injunctive relief; whether the Government can prove it, "remains to be seen."

2. The Specific Equitable Relief of Disgorgement

Defendants contend that even if the Government has alleged the likelihood of future illegal activity, it is still not entitled to the remedy of disgorgement,[27] because that particular remedy is never available under a civil RICO count. Defendants contend that civil RICO remedies must be forward-looking, while disgorgement is, by its very nature, backward-looking. *See* Defs.' Mem. at 80. They argue that the Government is impermissibly attempting to convert its civil RICO count into a criminal one by asking for disgorgement, which is akin to criminal forfeiture of the proceeds of unlawful activity (and permitted only under criminal, not civil, RICO suits). Defendants contend that RICO is to be "read *in pari materia* with the Clayton Act, from which it is in large part derived," Defs.' Mem. at 80, and that disgorgement is not permitted under that act. Finally, Defendants argue that disgorgement in this case would be "impermissibly punitive" and would constitute a double recovery, since the Government already seeks

[27] The Government seeks to disgorge all the profits that Defendants derived from past unlawful conduct related to the alleged RICO enterprise, beginning in 1953 and continuing to the present.

billions of dollars in damages under the Complaint's MCRA and MSP counts. Defs.' Mem. at 82.

The Government argues that disgorgement is an available and appropriate remedy for civil violations of RICO, and that Defendants' claims to the contrary are, in addition to being legally incorrect, premature at this stage. The Government argues that RICO's plain language does not foreclose disgorgement, and that the Supreme Court has held disgorgement generally available unless a particular statute, "by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). The Government rejects Defendants' argument that disgorgement is backward-looking and punitive, arguing that it is in fact remedial and may properly serve as a deterrent to Defendants and others who may contemplate committing similar offenses. In addition, the Government contends that disgorgement in this case would in fact serve a forward-looking purpose, namely, to prevent Defendants from using proceeds from prior illegal activities as "capital available for the purpose of funding or promoting [future] illegal conduct." Govt's Opp'n at 98 n.70 (quoting *United States v. Private Sanitation Indus. Ass'n*, 914 F. Supp. 895, 901 (S.D.N.Y. 1996)).

The only court of appeals to consider the question of whether disgorgement is an appropriate civil RICO remedy, the Second Circuit, has answered in the affirmative. *See United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995). The Second Circuit concluded, based on § 1964's plain language[28] and its legislative history, that disgorgement is permitted in civil RICO suits. The

[28] *See supra* note 24 for the relevant text of § 1964.

court stated that "the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary.'" *Id.* at 1181-82 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969)).

Even before the Second Circuit's decision in *Carson*, district courts within the Second Circuit had reached the same conclusion. *See United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1442-49 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989); *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1151-52 (E.D.N.Y. 1992); *United States v. Int'l Bhd. of Teamsters*, 708 F. Supp. 1388, 1408 (S.D.N.Y. 1989). Given that the only circuit to have addressed the issue has declared, in a well-reasoned and persuasive opinion, that disgorgement is permissible in civil RICO claims, and given that Defendants cannot point to a single federal court that has declared otherwise, this Court is not inclined to categorically rule out that remedy at the motion to dismiss stage.

Defendants argue that because RICO was modeled after the Clayton Act, 15 U.S.C. § 26, and because a judge of this District Court has declared disgorgement to be unavailable under the Clayton Act, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 40-42 (D.D.C. 1999) (Hogan, J.), disgorgement should likewise be unavailable under civil RICO. Defendants do not explain, however, why this Court should rely on non-binding federal district court case law under a different statute, when there is persuasive case law—albeit from another circuit—on the precise statute at issue.

Further, the Supreme Court has not, as Defendants contend, declared that the Clayton Act and RICO

should be read "*in pari materia*."[29] Defs.' Mem. at 80. Rather, the Supreme Court has held that while the "Clayton Act analogy is *generally* useful in civil RICO cases," particular case law interpreting the Clayton Act "may not apply without modification in every civil RICO case." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 180, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (emphasis added). Equally important is the fact that Judge Hogan's primary concern in *Mylan Labs*—the possibility of "duplicative recoveries"—is not applicable in this case, since the Court is granting Defendants' motion to dismiss the non-RICO claims. Accordingly, the Government is provided with only one "route to defendants' allegedly ill-gotten gains," namely, its civil RICO suit. 62 F. Supp. 2d at 41.

The Court of Appeals in *Carson* observed that whether disgorgement is appropriate in a particular case depends on whether there is a "*finding* that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1182 (emphasis added). This Court has not made such a finding, nor could it at this stage. So long as disgorgement is permitted in civil RICO suits as a matter of law, as the Court so concludes, it would not be appropriate to ask, at the present stage, whether the Government has proved that it has an

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[29] In fact, this Latin phrase, which roughly translated means "on the same matter," and which would suggest that the Clayton Act and RICO should be read in a way to avoid inconsistencies in their respective interpretations, is not even used in either *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997), or *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), the two Supreme Court decisions Defendants cite.

adequate basis for seeking such a remedy. Accordingly, the Court will permit the Government to pursue the remedy of disgorgement and the motion to dismiss as to this claim must be **denied**.

V. *Liggett's Motion To Dismiss RICO Counts*

Although Liggett joins the other Defendants' "broad arguments of general applicability to the Complaint," Memorandum of Liggett in Support of Motion to Dismiss the Complaint ("Liggett Mem.") at 1, it has filed its own motion to dismiss the Complaint's RICO counts, advancing some additional grounds in support thereof.

A. The RICO Elements

Liggett argues that the Government has not sufficiently alleged, as to it, two of the four elements required for a RICO claim: "enterprise" and "pattern of racketeering activity".[30]

1. RICO's "Enterprise" Element

As defined earlier, an "enterprise," as that term is used in a RICO claim, is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Turkette*, 452 U.S. at 580, 101 S. Ct. 2524. It need not have a formal hierarchy or framework, "so long as it involves some structure, to distinguish an enterprise from a mere conspiracy." *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) (internal citations and quotations omitted). The three elements necessary to establish an enterprise are: "(1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988).

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[30] *See supra* Section IV.C, at 33-35.

Liggett argues that the Government has not adequately alleged the existence of an enterprise. Specifically, Liggett contends that the Government has failed to show that the putative enterprise had the requisite "organization." According to Liggett, the Complaint makes only conclusory allegations, without describing how the enterprise operated, who its leaders were, or how its decision-making process functioned. *See* Liggett Mem. at 25-26.

The Court concludes that the Complaint properly alleges the existence of an enterprise, and Liggett's involvement therein. "It is clear an enterprise can be established through an informal group of people who come together for the common purpose of obtaining financial gain through criminal activity." *United States v. Cooper*, 91 F. Supp .2d 60, 68 (D.D.C. 2000) (Joyce Green, J.) (citations omitted). The enterprise can be as simple as an "amoeba-like infra-structure that controls a secret criminal network." *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978).

Liggett's argument that the Government must spell out the mechanics or logistics of the enterprise is unsupported by the case law. Numerous courts, in this Circuit and others, have established that the kind of allegations contained in the Government's Complaint are easily sufficient to survive a Rule 12(b)(6) motion. For example, in *Perholtz*, the complaint stated: "Defendant . . . constituted an enterprise . . . to wit, a group of individual, partnerships, and corporations associated in fact to unjustly enrich themselves from the proceeds of government contracts . . ." 842 F.2d at 351, n.12. And in *Private Sanitation Ind. Ass'n*, 793 F. Supp. 1114, the complaint stated that the enterprise was "a group composed of, but not limited to" 112

defendants "associated-in-fact for the purpose of controlling the waste disposal industry in Long Island." *Id.* at 1126. In both cases, the allegations were deemed sufficient to survive a motion to dismiss. In the instant case, the Complaint alleges that Defendants decided on a joint objective to "preserve and expand the market for cigarettes and to maximize" their profits and "agreed that the strategy they were implementing was a 'long-term one' that required defendants to act in concert with each other on the current health controversy, as well as on issues that would face them in the future." Compl. at ¶¶ 33-34. The nature of these allegations is at least as detailed as those made in *Perholtz* and *Private Sanitation*, if not more so. Accordingly, the Government has adequately pleaded the enterprise element.

2. RICO's "Pattern Of Racketeering Activity" Element

A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity" committed within a ten year period. In this case, as already noted, the Government relies on violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud) as the "predicate acts" which transform Defendants' alleged misconduct into "racketeering activity." 18 U.S.C. § 1961(5). The mail fraud statute[31] provides that "[w]hoever, having devised or intending to devise any scheme or artifice to

[31] The mail fraud and wire fraud statutes are construed identically. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1335 n. 6 (D.C. Cir. 1983) (citations omitted). At any rate, since thirteen of the fourteen acts of racketeering alleged against Liggett are mail fraud, and since a "pattern of racketeering activity" requires two or more acts, it is the mail fraud, not the wire fraud, analysis which is dispositive in this case.

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do," mails or causes the mailing of any matter, is guilty of mail fraud. 18 U.S.C. § 1341.

Liggett argues that the Complaint does not allege convergence between the party deceived (individual smokers) and the party whose property was injured (the Government); according to Liggett, it was the Government that suffered economic injury, not individual smokers. Liggett Mem. at 29-30. Liggett's convergence argument misstates the relevant case law. A defendant who uses the mail with the *intent* of defrauding someone of property is guilty (or in this case, liable), whether the attempt succeeds or not. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 26-27, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987); *United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976). According to the Complaint's allegations, Defendants did *intend* to defraud individual smokers of their property (*i.e.*, the money they spent on cigarettes).[32] Moreover, the Complaint also alleges—though it need not—that Defendants *succeeded* in defrauding individual smokers. *See* Compl. at ¶ ¶ 204(b)—(d).

Liggett also argues that the Complaint fails to meet the pleading standard of Federal Rule of Civil Procedure 9(b), which requires that "the circumstances constituting fraud . . . shall be stated with particularity."

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[32] The Complaint states: "Defendants and others known and unknown did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and obtain money and property from, members of the public." Compl. at ¶ 204(a).

To satisfy this standard, a complaint must specify "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Firestone*, 76 F.3d at 1211 (internal quotations and citation omitted).

The Appendix to the Complaint does describe the time, place, and content of each allegedly fraudulent act, states the fact(s) misrepresented, and names the particular Defendants involved. *See* Appendix at ¶¶ 13, 17, 22, 28, 31, 44, 66, 67, 70, 73, 77, 88, and 112. Although each allegation does not, in its body, include a statement of "what was retained or given up as a consequence of the fraud," *Firestone*, 76 F.3d at 1211, the Complaint does allege elsewhere that the item "given up" was the money the Government spent on tobacco-related health care. *See* Compl. at ¶ 6. Accordingly, the Complaint alleges the mail fraud acts with sufficient particularity.

B. Liggett's Alleged Withdrawal From the Conspiracy

Liggett also argues that, regardless of whether the Government has generally satisfied the RICO elements, Liggett has "withdrawn" from the enterprise, and accordingly the Complaint fails to adequately allege the "enterprise" element as to Liggett and/or the need for injunctive relief against it.

Liggett contends that the "public record" amply demonstrates that it is no longer acting in concert with the other Defendants, and that there is no reasonable likelihood it will commit unlawful acts in the future to warrant injunctive relief. Even if the Court were precluded from considering these outside sources, Liggett contends that it is "plain from the face of the Complaint

that Liggett poses no risk of committing future acts of racketeering activity" and that the Complaint "does not, and indeed cannot, make any allegation that Liggett poses a risk of any future violations of RICO." Liggett Mem. at 19.

The Government responds that this Court is "limited to consideration of the facts alleged in the four corners of the complaint," which do not indicate that Liggett has withdrawn. Opp'n to Liggett at 10. The Government also contends that it would be premature, at this early stage, for the Court to determine whether Liggett threatens to commit future illegal acts or not.

Although courts may take the "public record" into account when deciding motions to dismiss,[33] that record includes only certain official documents, not mere newspaper articles.[34] Liggett's evidentiary support for its claim to have withdrawn from the enterprise consists almost exclusively of quotations from newspaper articles or from government reports that are neither part of a public record nor matters for judicial notice.[35]

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[33] *See, e.g., Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222, 1226 n.6 (D.C. Cir. 1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979).

[34] Public records are "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . or (C) in civil actions and proceedings . . ., factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8).

[35] The Court is aware of only one relevant document cited by Liggett which is possibly part of the public record: a report issued by the Federal Trade Commission entitled "Competition and the Financial Impact of the Proposed Tobacco Settlement" (Sept. 1997). *See* Liggett Mem. at 3. However, Liggett does not quote

See Liggett Mem. at 5-10. Accordingly, the Court may not take these documents into account.

Without reference to the sundry newspaper clippings Liggett cites, its claim to have withdrawn from the enterprise is wholly unpersuasive. To establish that it is no longer a member of the enterprise, Liggett must show that it "withdrew from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy." *See In Re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 886 (D.C. Cir. 1981). Because withdrawal is an affirmative defense, the affirmative acts listed above must "clearly appear [ ] on the face of the complaint." *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

The Complaint is devoid of any affirmative acts by Liggett that would indicate its withdrawal from the RICO enterprise. On the contrary, the Complaint expressly states that "[f]rom at least the early 1950's and *continuing up to and including the date of the filing of this complaint* . . . Liggett . . . did unlawfully, knowingly and intentionally" conduct and participate in, and conspire to participate in, the enterprise's affairs. Compl. at ¶¶ 172, 201 (emphasis added).

Despite Liggett's attempt to use the Complaint's language to show that it is now a fully law-abiding corporate citizen, the above quoted language from the Complaint adequately alleges that Liggett is likely to commit certain racketeering acts in the future. In addition, given the complex nature of the Government's allegations, and the fact that numerous allegations simply refer to "Defendants"—without expressly ex-

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from the report or indicate in any way how it would establish Liggett's withdrawal from the enterprise.

cluding Liggett[36]—it would be premature at this time to preclude the Government from pursuing injunctive relief.

Accordingly, Liggett's separate motion to dismiss the Government's RICO Count must be denied.

V. *Conclusion*

For the reasons stated at length above, Certain Defendants' Motion to Dismiss for Failure to State a Claim [# 72] is **granted in part and denied in part**. The motion is granted as to Count 1 (the Medical Care Recovery Act claim), **granted** as to Count 2 (the Medicare Secondary Payer claim), and denied as to Counts 3 and 4 (the Racketeer Influenced and Corrupt Organization Act claims). The Liggett Group Inc.'s Motion to Dismiss for Failure to State a Claim [# 70] is **denied**.

An Order will issue with this Opinion.

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[36] *See, e.g.*, Compl. at ¶ 208 ("After a span of more than forty-five years of deception and fraud, it would be unreasonable to believe that *defendants* will voluntarily cease their unlawful conduct, or that their pattern of racketeering activity will cease without intervention by this Court.") (emphasis added).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV.A.99-2496 GK

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP MORRIS USA, INC. F/K/A
PHILIP MORRIS, INC. ET AL, DEFENDANTS

May 21, 2004

MEMORANDUM OPINION

KESSLER, District Judge.

This matter is now before the Court on Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim ("Motion"). Upon consideration of the Motion, the Government's Opposition, the Reply, the Surreply[1] and the entire record herein, and for the reasons stated below, the Motion is **denied.**

[1] On December 1, 2003, the Court entered ORDER # 445, granting the United States' Unopposed Motion for Leave to File a Surreply to Defendants' Reply Brief in Further Support of Their Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim.

I. BACKGROUND

Plaintiff, the United States of America (the "Government") has brought this suit against the Defendants[2] pursuant to Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*[3] Defendants are manufacturers of cigarettes and other tobacco-related entities. The Government seeks injunctive relief and disgorgement of $280 billion dollars[4] of ill-gotten gains for what it alleges to be Defendants' unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of

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[2] Defendants are Philip Morris USA Inc. (f/k/a Philip Morris Incorporated), R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company), Lorillard Tobacco Company, Altria Group Inc. (f/k/a Philip Morris Companies, Inc.), British American Tobacco (Investments), Ltd., The Council for Tobacco Research-U.S.A., Inc., the Tobacco Institute, Inc., and The Liggett Group, Inc.

[3] The Complaint originally contained four claims under three statutes. On September 28, 2000, the Court dismissed Count One (pursuant to the Medical Care Recovery Act, 42 U.S.C. § 2651, *et seq.*) and Count Two (pursuant to the Medicare Secondary Payer provisions of the Social Security Act, 42 U.S.C. §§ 1395y(b)(2)(B)(ii) & (iii)). *See United States v. Philip Morris*, 116 F. Supp. 2d 131 (D.D.C. 2000).

[4] As a result of corrections made to the Youth Addicted Population and the resulting proceeds' calculation, the amount of disgorgement sought by the Government is $280 billion, rather than $289 billion initially identified in the United States' Preliminary Proposed Conclusions of Law. *See* Govt's Opp'n., at 1.

manufacturing safer and less addictive tobacco products. Amended Complaint ("Am. Compl.") at ¶ 3.

II. ANALYSIS

Defendants seek partial summary judgment dismissing the Government's disgorgement claim on the ground that it fails to meet the standard set forth in 18 U.S.C. § 1964(a), the provision which provides statutory remedies for RICO violations. Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by both the text of Section 1964(a) itself and the holding in *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), interpreting that section.

To justify the $280 billion disgorgement award it seeks, the Government has developed an economic model approximating the ill-gotten gains of Defendants. *See* United States' Proposed Concl. Law, § IV.A.3. The model purports to calculate all of Defendants' proceeds from cigarettes smoked between 1971 and 2000 by persons who have been included within the Government-defined "youth addicted population." See Motion, at 3 (terms in quotes are defined within the Government's economic model). Defendants claim that the Government's economic model fails to distinguish between ill-gotten gains, which can be disgorged under Section 1964(a), and legally-gotten gains, which cannot. In addition, Defendants argue that the Government's economic model must be rejected because it does not limit disgorgement to those ill-gotten gains that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," a standard that Defendants argue is required by Section 1964(a). Motion, at 21-22 (citing *Carson*, 52 F.3d at 1182). The Government responds that its economic

model need only reasonably approximate the ill-gotten gains of Defendants. Finally, the Government argues that the *Carson* limitation on disgorgement on which Defendants rely should be rejected because it is overly-restrictive and contrary to the text and purposes of RICO.

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S. Ct. 2505. *See Washington Post Co. v. United States Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

Additionally, "if the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986). At the summary judgment stage, "the court is not to make credibility determinations or weigh the evidence." *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 761 (D.C. Cir. 2002).

B. Any Order of Disgorgement Must Rest upon a Showing of a Reasonable Likelihood of Future RICO Violations

Both the plain language of Section 1964(a) as well as the very nature of equitable remedies permitted under it require a showing of a reasonable likelihood of future RICO violations before a court may order any equitable remedy, including disgorgement.[5]

The text of Section 1964(a) explicitly limits the Court's jurisdiction to remedies that "prevent and restrain" future RICO violations.[6] Moreover, the three examples of permissible remedies set forth in Section

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[5] Moreover, it is well-established that the nature, seriousness, and extent of past violations may well lead to an inference of reasonable likelihood of future violations. "The likelihood of future wrongful acts is frequently established by inferences drawn from past conduct." *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401, 409 (3d Cir. 1989). *See also SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994); *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228-29 (D.C. Cir. 1989).

[6] Section 1964(a) states in full:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a).

1964(a)—divestiture, restrictions on future activities, and dissolution/reorganization—are all forward looking and focus on the goal of preventing future RICO violations. *See Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354 (5th Cir. 2003). Accordingly, the plain language of Section 1964(a) requires a showing of a reasonable likelihood of future RICO violations before a court may order disgorgement. *See Carson*, 52 F.3d at 1182. ("the jurisdictional powers of 1964(a) serve the goal of foreclosing future violations and do not afford broader redress"); *United States v. Sasso*, 215 F.3d 283, 290-91 (2d Cir. 2000) (awarding relief pursuant to Section 1964(a) turns on "whether the disgorgements [sic] ordered here are designed to prevent and restrain *future* conduct rather than to punish *past* conduct") (emphasis in original); *Richard*, 355 F.3d at 354 (equitable remedies under Section 1964(a) "are available only to prevent ongoing and future conduct").

In addition, the very nature of the equitable remedies permitted under Section 1964(a) requires a showing of reasonable likelihood of future RICO violations. *See Carson*, 52 F.3d at 1181-82; *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974) ("Pursuant to Section 1964 . . . whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future.") (interpreting equitable remedies under the provision which would later become Section 1964(a)); *Local 30*, 871 F.2d at 408 (same).

Accordingly, the Court concludes that the plain language of Section 1964(a), particularly the "prevent and restrain" provision, and the very nature of those equitable remedies permitted under it, require a

showing of a reasonable likelihood of future RICO violations prior to entering any order of injunctive relief or disgorgement in this action.

C. The Extremely Restrictive Limitation *Carson* Has Engrafted onto Section 1964(a) Must Be Rejected

The scope of disgorgement permitted under Section 1964(a) is a matter of first impression in this Circuit. The only other circuits to have considered this question are the Second and the Fifth. *See generally*, *Carson*, 52 F.3d 1173 and *Richard*, 355 F.3d 345. Defendants argue that the Court should follow the *Carson* standard requiring that disgorgement under Section 1964(a) be limited to those ill-gotten gains "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Motion, at 20-21. The Government argues that *Carson's* limitation on the scope of disgorgement is overly-restrictive and contrary to the text of RICO and the purposes of RICO disgorgement.[7]

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[7] In *Philip Morris*, 116 F. Supp. 2d 131, the Court denied in part and granted in part Defendants' motion to dismiss. It also adopted *Carson's* holding that disgorgement is a permissible remedy under Section 1964(a). It did not, however, as Defendants' claim, adopt the *Carson* legal standard relating to the scope of disgorgement.

The Court's reference to the *Carson* standard was made in response to Defendants' argument in their motion to dismiss that disgorgement is *never* available in civil RICO cases. The Court noted that it was premature to speculate as to whether disgorgement would eventually be appropriate (as opposed to available) in this case. Any apparent endorsement of *Carson* as to the specific standard for the *scope* of disgorgement would have been premature as this issue had not yet been addressed by the parties or the Court.

For the reasons set forth below, the Court declines to adopt *Carson's* limits on the scope of disgorgement.

1. The *Carson* holding

Carson involved a civil RICO action against a former union officer who had previously been convicted of embezzling union funds and taking illegal kickbacks from employers who wanted a guarantee of labor peace. The district court ordered Carson to disgorge the $16,200 in kickbacks he had received thirteen years earlier. On appeal, Carson argued, *inter alia*, that the district court had exceeded its jurisdiction when it ordered him to disgorge all his ill-gotten gains. *Carson*, 52 F.3d at 1176. The Second Circuit held, as a threshold matter, that such disgorgement is an available remedy under Section 1964(a), a holding previously endorsed by this Court as "well reasoned and persuasive." *Philip Morris*, 116 F. Supp. 2d at 151.

The Second Circuit also held that disgorgement of gains which were ill-gotten long in the past would not ordinarily "prevent and restrain" future RICO violations under Section 1964(a) unless such gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. This standard rests on the Second Circuit's interpretation of the phrase "prevent and restrain." Emphasizing that the examples of available remedies listed in the statute are "forward looking," *see* discussion *infra*, § II B, *Carson* treats the issue presented as "whether the disgorgements [sic] ordered here are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *Carson*, 52 F.3d at 1182 (emphasis in original). Noting that the funds ordered disgorged had been acquired thirteen years earlier, the Second Circuit concluded that

> [c]ategorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to "prevent and restrain" future RICO violations. If this were adequate justification, the phrase "prevent and restrain" would read "prevent, restrain and discourage," and would allow any remedy that inflicts pain.

Id.

2. *Carson's* limitation on the scope of disgorgement is inconsistent with the text of Section 1964(a)

The text of Section 1964(a) confers on the district court jurisdiction to "prevent and restrain" RICO violations. In *Carson*, the Second Circuit concluded that disgorgement of ill-gotten gains in Section 1964(a) RICO actions is proper only when such gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson*, 52 F.3d at 1182. The Second Circuit offered virtually no support for its rewriting of Section 1964(a), a rewriting which cannot be reconciled with the text of the provision for the following three reasons.

First, the plain text of Section 1964(a) does not support *Carson's* limitation on disgorgement. In order to overcome this obstacle, *Carson* interpreted the "prevent and restrain" language to preclude disgorgement unless there is a finding that "the [ill-gotten] gains are being used to fund or promote the illegal conduct or constitute capital available for that purpose," reasoning that "to prevent and restrain" does not include "to deter" or "to discourage." *Id.* However, *Carson's* narrow interpretation of Section 1964(a) cannot be squared

with Congress' intention that this provision be read broadly. *See* S. Rep. No. 91-617, at 160 (1969) (stating that RICO provides the courts with the authority to "craft equitable relief broad enough to do all that is necessary").

Moreover, the Second Circuit never explained why jurisdiction to "prevent and restrain" RICO violations fails to authorize equitable relief designed to deter defendants from committing unlawful acts in the future. Indeed, the meaning of deterrence clearly encompasses the concept of both "prevent" and "restrain." *See* BLACK'S LAW DICTIONARY (6th ed. 1991) (defining "deter" as "[t]o discourage or stop by fear; to stop or *prevent* from acting. . . ."") (emphasis added); OXFORD ENGLISH DICTIONARY (2d ed. 1989), at *http://dictionary.oed.com* (defining "deter" as "1. [t]o *discourage* and turn aside or *restrain* by fear; to frighten from anything; to *restrain* or keep back from acting or proceeding by any consideration of danger or trouble") (emphasis added); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997) (defining "deter" as "to turn aside, *discourage* or *prevent* from acting") (emphasis added). Although there are minor differences of nuance amongst the words "deter," "discourage," "prevent," and "restrain," it is clear that those differences are slight, and surely not sufficient to justify the differing treatment accorded them by the Second Circuit.

Second, the Supreme Court concluded more than a half century ago that the full scope of a court's equitable jurisdiction must be recognized and applied except where "a statute in so many words, *or by a necessary and inescapable inference*, restricts the court's jurisdiction" or where there is a "clear and valid legislative command" limiting jurisdiction. *Porter v.*

Warner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) (emphasis added). *Carson's* restriction on the scope of disgorgement under Section 1964(a) cannot be reconciled with this holding. The *Carson* court refused to recognize the full scope of equitable jurisdiction under Section 1964(a) even though the statutory phrase "prevent and restrain" encompasses no "clear legislative command" to limit the scope of disgorgement to exclude deterrence. Morever, as there is no language in the statute specifically limiting disgorgement to funds that are being used or remain available to fund future RICO violations, any inference of such a limitation is not "necessary and inescapable."

Given the remedial purpose of RICO, the limitation *Carson* imposes on the Court's equitable jurisdiction is particularly inappropriate in the case of Section 1964. *See Sedima, SPRL v. Imrex Co. Inc.*, 473 U.S. 479, 492 n.10, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) ("if Congress' liberal-construction mandate is to be applied anywhere, it is in Section 1964, where RICO's remedial purposes are most evident") (private civil RICO case).

Third, *Carson's* interpretation of RICO's "prevent and restrain" language is inconsistent with the interpretations of numerous federal courts of similarly worded equitable relief provisions in other regulatory statutes. For example, the Securities and Exchange Act of 1934 provides, in relevant part, that whenever "any person is engaged or is about to engage in acts or practices constituting a violation [of the Securities Act]," courts have jurisdiction "to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be

granted. . . ." *See* 15 U.S.C. § 78u(d).[8] Although this provision, like RICO's Section 1964(a), seeks to "restrain" future violations and does not explicitly provide for disgorgement, this Circuit as well as others have held that there is jurisdiction under the Securities Act to order disgorgement of proceeds obtained from a wrongdoer's past unlawful acts. *See First City Fin. Corp.*, 890 F.2d at 1229-1231; *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103-05 (2d Cir. 1972).

Moreover, in interpreting the scope of the Securities Act's relief provision, no court has ruled that such disgorgement must be limited to proceeds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Rather, courts have recognized that disgorgement of ill-gotten gains is essential in order to achieve the remedial purposes of the Securities Act: "to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *First City Fin. Corp.*, 890 F.2d at 1230.

Similarly, the Commodity Exchange Act authorizes courts "to enjoin" and issue a "restraining order" when a "person has engaged, is engaging, or is about to

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[8] The Securities Act states in relevant part:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d).

engage in any act or practice constituting a violation of [the Act]." *See* 7 U.S.C. § 13a-1. Courts have held that this forward looking provision, which also does not explicitly provide for disgorgement, authorizes disgorgement of ill-gotten gains from past violations because it "may serve to deter future violations" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Commodity Fut. Trad. Comm'n v. Co Petro Marketing Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982). Moreover, it "would frustrate the regulatory purposes of the Act to allow a violator to retain his ill-gotten gains." *Id. See Commodity Futures Trad. Comm'n v. British Amer. Commod. Opt. Corp.*, 788 F.2d 92, 94 (2d Cir. 1986).

In addition, courts have consistently concluded that other forward looking remedial statutes permit broad disgorgement. *See generally*, *Porter*, 328 U.S. at 398, 66 S. Ct. 1086 (permitting disgorgement of profits acquired in violation of Emergency Price Control Act of 1942, *see* 50 U.S.C. § 901, although the Act does not specifically provide such a remedy); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996) (allowing broad disgorgement under the Federal Trade Commission Act, *see* 15 U.S.C. § 53(b), in order to effectuate the Act's deterrent purpose even though the statute does not specifically authorize disgorgement).

Accordingly, *Carson's* limitation on the scope of disgorgement allowed under Section 1964(a) finds no support in the plain language of the statute or in the interpretations by other federal courts of similar statutory language.

3. *Carson's* limitation on the scope of disgorgement is inconsistent with the purposes of RICO

The Supreme Court has recognized that one of the purposes of civil remedies under Section 1964(a) is "to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (addressing the availability of broad civil remedies under Sections 1964(a) and (c)). In reaching this conclusion, the Court did not restrict divestiture to ill-gotten gains that remain available for distribution. Moreover, our Circuit has concluded that "[d]isgorgement is . . . designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating" the law. *First City Fin. Corp.*, 890 F.2d at 1230. This is true whether or not those funds are presently being used for illegal purposes or can serve as capital to promote future illegal conduct.

In addition, in the Senate Report accompanying the RICO legislation, Congress emphasized that RICO provided the courts with authority to craft "equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity" and to "prohibit[ ]" persons who committed a pattern of racketeering activity "from continuing to engage in this type of activity in any capacity." *See* S. Rep. No. 91-617 at 79, 82 (1969).

Defendants argue that the purposes for disgorgement upon which the Government relies "are not derived from RICO cases but from cases decided under the *securities* laws." Defs.' Mem. in Opp'n., at 11 (emphasis in original). However, neither the Second Circuit nor Defendants offer any reason to conclude that disgorgement in RICO cases does not serve the very

same purposes (deterrence and deprivation of unjust enrichment) as it does in securities cases. This Court already has recognized that "the purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains." *United States v. Philip Morris*, 273 F. Supp. 2d 3, 10 (D.D.C. 2002). As explained above, because disgorgement deters violations of the law through depriving violators of ill-gotten gains, it is forward looking and serves to "prevent and restrain" future RICO violations consistent with the jurisdiction granted in Section 1964(a).

Indeed, under the *Carson* standard, even if the Court finds a reasonable likelihood of future RICO violations, it could not order the disgorgement of illegally-acquired funds if those funds have already been spent and are therefore unavailable "to fund or promote the illegal conduct." However, our Court of Appeals has held that a rule that would limit disgorgement to only those "actual assets unjustly received," as *Carson* would require, "would lead to absurd results." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000). In *Banner Fund Int'l*, the defendant argued that he could not comply with the disgorgement order because he did not have access to the assets that were at issue. The Court of Appeals upheld the disgorgement order, noting that district courts are not limited to "the actual property obtained by means of [the] wrongful act" because what mattered was the "amount by which the defendant was unjustly enriched." *Id.* at 617. Our Court of Appeals reasoned that under the defendant's approach

> a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of

> disgorgement. [That] would be a monstrous doctrine for it would perpetuate rather than correct an inequity.

Id.

The Circuit's strong language is directly applicable to the issue presently before this Court. Here, under the reasoning in *Carson,* so long as a defendant had disposed of all illegally-acquired gains (whether through payment of dividends or capital distributions to shareholders or investment in new manufacturing facilities), such gains would be unavailable to fund present or future illegal conduct and therefore could escape disgorgement. Neither *Carson,* nor the Defendants, explain why this result is not just as "absurd" in a civil RICO case as our Circuit found it to be in a securities case or why it would not "perpetuate rather than correct an inequity."

Carson seems to assume that disgorgement which is not limited to gains which "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose" would be inherently punitive, in violation of Section 1964(a). However, because disgorgement of ill-gotten gains serves a deterrent purpose, it can "prevent and restrain" future RICO violations without being designed to punish. In fact, by limiting the district court's ability to deter violations through disgorgement, *Carson's* restriction would weaken the court's ability to "prevent and restrain" future violations as provided in Section 1964(a). *See Richard,* 355 F.3d at 356 (Wiener, J, dissenting) ("It has to be self-evident to courts and litigants alike that a prayer for disgorgement of profits . . . is intended to prevent and restrain similar future conduct. . . . By its very nature, disgorgement is designed to prevent

manufacturers of similar products from engaging in such conduct in the future.") (internal citation omitted).[9]

In short, the Court does not find persuasive *Carson's* rationale for limiting disgorgement under Section 1964(a) to funds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," *Carson*, 52 F.3d at 1182, and will not engraft onto a broad remedial statute such as RICO that narrow limitation.

D. Whether the Government's Economic Model Is Accurate, Adequate, or Appropriate Is a Fact-Intensive Inquiry to Be Decided at Trial

Defendants seek partial summary judgment dismissing the Government's disgorgement claim on the ground that its economic model fails to meet the standards for disgorgement under Section 1964(a). The Government's model calculates "proceeds" on cigarettes smoked by the "youth- addicted population." *See* Motion, at 3. Defendants argue that such a calculation does not estimate the effect of their alleged RICO violations on past cigarette sales. *Id.* at 9. Specifically, Defendants assert that the Government's attempt to

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[9] In *Richard*, the Fifth Circuit relied on *Carson* and rejected a claim for disgorgement under Section 1964(a). However, *Richard* is distinguishable from the instant case on its facts. In *Richard*, the parties from whom disgorgement was sought were no longer operating the business in which they had committed the racketeering acts. Moreover, unlike the Government in this case, the party seeking disgorgement in *Richard* failed to argue that disgorgement would prevent and restrain future violations. The Fifth Circuit concluded that "[a]bsent this argument, [plaintiff's] disgorgement claim seems to do little more than compensate for the alleged loss." *Richard*, 355 F.3d at 355. Accordingly, the analysis in *Richard* is not applicable to the instant case.

recapture all the "proceeds" from Defendants' sales to the "youth-addicted population" from 1971 to 2000 includes both gains from alleged RICO violations and gains from legitimate sales during this period. *Id.* at 4-5. Thus, Defendants argue, the Government has failed to meet its burden of identifying which proceeds are ill-gotten and therefore subject to disgorgement. *Id.* at 8.

In addition, Defendants contend that the Government improperly made an "additional gains" adjustment to its calculation of the economic model, which resulted in pre-judgment interest of $204 billion, or 73 percent of the $280 billion sought. *Id.* at 14-15. Defendants also maintain that the Government failed to tailor its disgorgement request to amounts necessary to "prevent and restrain" future RICO violations, as Section 1964(a) requires. *Id.* at 18. In light of these and other alleged flaws in the Government's model, Defendants claim that the Government cannot satisfy the legal standards for obtaining disgorgement.

In response, the Government argues that its economic model need only be a reasonable approximation of ill-gotten gains. *See* Govt's Opp'n., at 5. The Government asserts that, in light of Defendants' massive and pervasive scheme to defraud, the law does not require a precise calculation of ill-gotten gains because "separating legal from illegal profits exactly may at times be a near-impossible task." *Id.* In addition, the Government claims that the "additional gains" adjustment to its economic model is well established and appropriate. *Id.* at 6.

The foregoing recitation of the parties' positions makes it eminently clear that there are genuine disputes over material facts which must be considered in the calculation of any disgorgement that may be

ordered by this Court upon a finding of liability. In order to make any judgment about the proper calculation of disgorgement amounts, the Court must hear the full explanations from the parties' experts about the economic models used. In short, a determination of whether the Government's economic model is accurate, adequate, or appropriate under Section 1964(a) is a fact-intensive inquiry that can only be resolved at trial. Summary judgment is, therefore, inappropriate.

III. CONCLUSION

For all the foregoing reasons, Defendants are not entitled to partial summary judgment dismissing the Government's disgorgement claim, and their Motion is **denied.**

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. A. 99-2496 (GK)

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP MORRIS USA, INC. F/K/A
PHILIP MORRIS, INC. ET AL, DEFENDANTS

June 25, 2004

MEMORANDUM ORDER #579

GLADYS KESSLER, United States District Judge.

Defendants[1] have filed a Motion to Certify Order #550 for Interlocutory Appeal. Upon consideration of the Motion, the Government's Opposition, the Defendants' Reply, and the entire record in this case, the Court concludes for the following reasons, that the Motion should be granted.

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[1] Defendants are Philip Morris USA Inc., Altria Group, Inc., J.R. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. (individually and as successor by merger to the American Tobacco Company), Lorillard Tobacco Company, British American Tobacco (Investments) Limited (f/k/a British-American Tobacco Company Limited), The Council for Tobacco Research-U.S.A., Inc., The Tobacco Institute, Inc., and Liggett Group, Inc.

Section 1292(b) of Title 28 of the United States Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such an order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Defendants request certification of Order #550, issued May 24, 2004, for interlocutory review. In that Order, and the accompanying Memorandum Opinion, the Court made two separate rulings in denying the Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim.

First, the Court rejected the holding in *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995), that the disgorgement allowed under 18 U.S.C. § 1964(a) is limited to those ill-gotten gains which are "being used to fund or promote the illegal conduct or constitute capital available for that purpose."

Second, the Court rejected Defendants' argument that partial summary judgment was warranted because

the Government's economic model fails to meet the appropriate standards for disgorgement under Section 1964(a). Instead, it ruled that "a determination of whether the Government's economic model is accurate, adequate, or appropriate under Section 1964(a) is a fact-intensive inquiry that can only be resolved at trial." *See* Mem. Op. to Order #550, at 20.

Defendants seek interlocutory appeal of only the first ruling. Section 1292(b) sets forth three requirements for certification of such an appeal. The District Court must find that its order (i) "involves a controlling question of law," (ii) "as to which there is substantial ground for difference of opinion," and (iii) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." This Court is "of the opinion" that all three requirements are satisfied.

I. WHETHER THE *CARSON* STANDARD SHOULD APPLY IS A "CONTROLLING QUESTION OF LAW"

The Government seeks $280 billion in disgorgement in this massive case which has been in litigation for almost five years. The proper standard to be used for determining the amount of disgorgement to be ordered is clearly a "controlling question of law." At a very minimum, the definitive resolution of this central legal issue will "significantly impact the action." *APCC Servs. Inc. v. Sprint Communications Co.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003) (quoting *Judicial Watch Inc. v. Nat'l. Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). Whatever decision the Court of Appeals reaches on the scope of disgorgement under RICO will dramatically affect the shape and length of the trial which is set to begin on September 13, 2004.

The Government argues that, whatever decision the Court of Appeals reaches on the issue, it will undoubtedly remand to this Court for specific findings on what, if any, ill-gotten gains should be disgorged by Defendants pursuant to its ruling. While the Government's prediction may well be correct about the likelihood of remand, the fact remains that the precise delineation of the scope of disgorgement will unquestionably "significantly impact the action," establish a road map for the ensuing trial, and determine "the future course of the litigation." *Judicial Watch*, 233 F. Supp. 2d at 19.

II. THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION OVER THE APPROPRIATE DISGORGEMENT STANDARD

It is clear that this second requirement for certifying an order for interlocutory appeal is met in this case. Our Court of Appeals has not yet addressed the issue of the scope of disgorgement under RICO. The Second Circuit did address the issue in *Carson* and reached a different conclusion than did this Court. The Fifth Circuit is the only other court in the country to have addressed this issue, although it did so in a very summary opinion. See *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003). In short, there is a direct conflict between the lengthy analysis by this Court and by the Second Circuit in *Carson* examining the text, the legislative history, and the purpose of Section 1964(a). While this Court believes that its analysis is correct, it is obvious that the arguments to the contrary in *Carson* are neither insubstantial nor frivolous.

III. AN IMMEDIATE INTERLOCUTORY APPEAL WILL MATERIALLY ADVANCE THIS LITIGATION

The third requirement for certifying an order for interlocutory appeal, that such an appeal may materially advance the ultimate termination of the litigation, turns on whether "[a]n immediate appeal would conserve judicial resources and spare the parties from possibly needless expense." *APCC Servs.*, 297 F. Supp. 2d at 100. There is no question that an interlocutory appeal of this discrete and central legal issue would conserve the resources of the Court and the parties. By answering this purely legal question in advance of trial, an interlocutory decision will, of necessity, greatly impact the examination and cross-examination of at least nine expert witnesses, as well as the admission of complex statistical data and voluminous exhibits. A decision on the appropriate legal standard to be applied in determining what amount of disgorgement, if any, should be ordered will, in the long run, conserve judicial resources and spare the parties the expenditure of significant time and expense.

CONCLUSION

The Court is well aware of the general policy disfavoring interlocutory appeals. Indeed, in an earlier opinion in this case, it has acknowledged that "interlocutory appeals under 28 U.S.C. § 1292(b) are rarely allowed . . . and movants . . . bear the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *United States v. Philip Morris USA Inc.*, No. 99-2496, slip op. at 7 (D.D.C. September 2, 2003) (Order #399). These circumstances, as opposed to those presented in

Order #399, are indeed "exceptional." While the Court fully recognizes the many demands made upon our Court of Appeals and the heavy nature of its docket, it is to be hoped that the appeal will be accepted and briefing expedited so that the issue can be decided as close to the September 13, 2004, trial date as possible.

Finally, it must be noted that Section 1292(b) states clearly that "application for an appeal . . . shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." This Court has no intention of staying any of the proceedings, including the trial. The trial will proceed, as long planned, on September 13, 2004.

The Government has already submitted its Trial Outline. Significantly, that Trial Outline lists "Remedies," i.e., the Government's disgorgement request, as the last major topic on which evidence will be presented. Thus, it is highly unlikely that any party will be prejudiced by proceeding with trial on the long-established schedule which this Court has laid down. By the time the Government completes presentation of its evidence on topics I-VI of its Trial Outline, there is a high probability that the Court of Appeals will have ruled on the appropriate scope of disgorgement standard. That decision will unquestionably determine "the future course of the litigation." *Judicial Watch*, 233 F. Supp. 2d at 19.

WHEREFORE, it is hereby

ORDERED that Defendants' Motion to Certify Order #550 for Interlocutory Appeal is granted.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
September Term, 2003

No. 04-8005
99cv02496

IN RE: PHILIP MORRIS USA, INC. F/K/A
PHILIP MORRIS, INC. ET AL, PETITIONERS

[July 15, 2004]

Before: EDWARD, RANDOLPH, and TATEL, Circuit Judge

ORDER

Upon consideration of the emergency motion to expedite, the response thereto, and the reply; and the emergency petition for permission for leave to appeal pursuant to 28 U.S.C. § 1292(b), the opposition thereto, and the reply, it is

ORDERED that the petition for leave to appeal be granted. *See* 28 U.S.C. § 1292(b). Approval of the petition is without prejudice to reconsideration by the merits panel. It is

FURTHER ORDERED that the following briefing schedule apply:

Appellants' Brief and Appendix	July 23, 2004
Appellees' Brief	August 24, 2004
Appellants' Reply Brief	August 31, 2004

The Clerk is directed to schedule the case for oral argument on the first appropriate date after the completion of briefing.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R. App. P. 5 and collect the mandatory docketing fee from appellants. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will be assigned a general docket number.

Per Curiam
[Signatures Illegible]

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
September Term, 2004

No. 04-5252
99cv02496
UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA, INC. F/K/A
PHILIP MORRIS, INC. ET AL, APPELLANTS

PHARMACIA CORPORATION AND PFIZER INC.,
APPELLEES

Filed: Apr. 19, 2005

BEFORE: GINSBURG, Chief Judge, and EDWARDS,** SENTELLE, HENDERSON,* RANDOLPH, ROGER, ** TATEL, ** GARLAND, and ROBERTS, * Circuit Judges

ORDER

The petition of the United States of America for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the

* Circuit Judges Henderson, Garland, and Roberts did not participate in this matter.

** Circuit Judges Edward, Rogers, and Tatel would grant the petition for rehearing en banc.

court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY:
Nancy G. Dunn
Deputy Clerk

APPENDIX G

18 U.S.C.:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person

that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.