UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, -against- PHILIP MORRIS USA INC., *et al*., Defendants.	99 Civ. No. 2496 (GK) Next Scheduled Court Appearance: February 24, 2011 Oral Argument Requested

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

The Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), changed the law by invalidating the "effects" test as a presumed measure of Congress's intent to regulate extraterritorially. The pertinent decisions of this Court and the D.C. Circuit rested squarely on the "effects" test and on BATCo's foreign conduct. This Court has ruled that RICO is "silent" as to extraterritorial reach, and therefore the presumption against extraterritoriality is dispositive. The government's welter of new arguments for imposing liability against BATCo on alternative grounds should be rejected because they were not presented to this Court in the trial or post-trial proceedings (and thus have been waived), and are meritless.

The government attempts to explain away *Morrison* by portraying that case as relevant only to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). It also attempts to rewrite the prior decisions in this case. It does not deny that it could have, but failed to, preserve its various alternative arguments for RICO liability, and offers no reason why it is not subject to the same waiver rules that apply to all litigants. If the Court is persuaded to address the merits of these waived arguments, however, it should reject them. Although the government repeats that this case involves ample domestic conduct by *other* RICO defendants, or turns on a rule supposedly unique to government-initiated RICO cases under 18 U.S.C. § 1964(a), its legal theories are plainly not so limited. Indeed, if accepted, the government's breathtakingly broad arguments founded on *Bowman*, *Pasquantino*, and a "conspiracy" theory of extraterritoriality (singly and collectively) would extend civil RICO – including for private RICO plaintiffs – far beyond what even the now-repudiated "effects" test would have accomplished, which is no doubt why the government chose not to press these arguments before.

I. *MORRISON* INVALIDATED THE LEGAL BASIS FOR THE LIABILITY DETERMINATION AND REMEDIES ENTERED AGAINST BATCO

In our motion, we explained (at 1, 3-7, 10-12) that *Morrison* rejected the "effects" test applied by this Court and the D.C. Circuit in upholding BATCo's liability under RICO. We also urged (at 10-11) this Court to follow the lead of both Judge Rakoff, author of a leading treatise on RICO, and the Second Circuit, in concluding that *Morrison* applies to RICO. See *Norex Petrol. Ltd. v. Access Indus., Inc.*, No. 07-4553-cv, 2010 WL 4968691 (2d Cir. Dec. 8, 2010) (per curiam); *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010). We pointed out (at 13-15) that *Morrison* applies here under the retroactivity principles of *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), and that neither the law-of-the-case doctrine nor the mandate rule presents any obstacle to BATCo's motion. Finally, we explained (at 15-16) that the government's nominal efforts to distinguish *Morrison* are without merit.

The government does not dispute that *Harper* sets forth the relevant retroactivity principles or that the law-of-the-case doctrine is no barrier to reconsideration here if (as we say) *Morrison* changed the law. Instead, the government challenges our underlying premise, arguing that *Morrison* "did not impose an intervening change in law" and has no application except to "the scope of the Securities Exchange Act itself." U.S. Reply, at 4. Under that absurdly cramped reading of *Morrison*, the "effects" (and "conduct") tests would presumably remain valid and available for application by courts to all other federal statutes, including RICO, as long as the statute "itself is silent as to its extraterritorial application." *United States v. Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 197 (D.D.C. 2007) (quotation marks omitted). That would certainly come as news to the *Morrison* majority, which as a threshold matter rejected the "effects" and "conduct" tests used by the Second Circuit on general grounds having nothing to do with the Securities Exchange Act – and declared that the presumption against extraterritoriality applies

"in all cases." 130 S. Ct. at 2878-81. It would also come as a surprise to concurring Justices Stevens and Ginsburg, who faulted the majority for "seek[ing] to transform the presumption from a flexible rule of thumb into something more like a clear statement rule" – and not just in cases involving the Securities Exchange Act. *Id.* at 2891 (concurring opinion). As explained in our motion (at 15-16), there is no plausible argument that *Morrison*'s emphatic rejection of the "effects" test was dicta. See also 130 S. Ct. at 2884 n.9 (describing earlier conclusion that Section 10(b) had no extraterritorial reach as "a necessary first step in the analysis").

Equally incorrect is the government's related suggestion (Reply, at 14-15) that "*Morrison*'s criticism" of the "effects" test was "limited to a line of cases unique to the securities laws." The Court plainly condemned the "effects" (and "conduct") tests as based on a "fundamental methodology" that was improper because it involved judges in "balancing interests and arriving at what seemed the best policy." 130 S. Ct. at 2878, 2880. The Court endorsed scholarly criticism of the "effects" test that "using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application." *Id.* at 2881. The Court also rejected the "effects" test as unduly vague, unpredictable, and susceptible to being deployed to circumvent the presumption against extraterritoriality. "Rather than guess anew in each case," the Court declared, "we apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects." *Ibid.* (emphasis added). The Court hardly meant only "all cases" involving the Securities Exchange Act.[1]

---

[1] Far from suggesting it would be "impermissible" for Congress to regulate overseas conduct under Section 10(b), see U.S. Reply, at 15 n.22, BATCo acknowledged Congress's recent amendment of the securities laws in the Dodd-Frank Act, which creates broader jurisdiction over extraterritorial conduct in certain kinds of cases. BATCo Motion, at 25 n.17. Nor is BATCo's reading of *Morrison* inconsistent with applying Section 10(b) to transactions on stock exchanges located within the United States (which was not an issue in *Morrison* since the stocks there were "traded on foreign exchanges" (130 S. Ct. at 2875)). Compare U.S. Reply, at 15 n.22. The government also argues (*id.* at 14) that "*Morrison*'s imposition of the 'transaction' test for Section 10(b) of the Exchange Act rested specifically upon an analysis of that

Next, the government says (Reply, at 5, 13-15) that our reading of *Morrison* would effectively overrule "years of appellate and [Supreme Court] precedent" recognizing the "territorial effects" doctrine, under which "a country can regulate conduct outside its territory that causes harmful results within its territory." Not so. That line of cases deals with an entirely distinct legal doctrine (although one with a similar name). The "territorial effects" doctrine, also known as the "objective territorial" theory of legislative jurisdiction, is a rule of *international* law that (along with several others) sets the *outer boundary* of Congress's (or any sovereign's) *power* to legislate. See *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). In contrast, the presumption against extraterritoriality – and the "effects" test repudiated in *Morrison* – are judge-made rules of *statutory construction* addressing whether Congress intended to exercise its power to legislate extraterritorially in enacting a specific statute. This key distinction is recognized in the cases cited by the government, see, *e.g.*, *Marc Rich & Co. v. United* States, 707 F.2d 663, 666 (2d Cir. 1983) (discussing Congress's "intent" separately from its "authority" under "international law"); *United States v. Cotten*, 471 F.2d 744, 749-50 (9th Cir. 1973) (same), in *Morrison* itself (130 S. Ct. at 2884 (quoted in U.S. Motion, at 7)), and in an *amicus* brief submitted by 18 law professors in support of BATCo's petition for certiorari. See Brief of Law Professors as *Amici Curiae*, at 14-15, 2010 WL 1186417 (U.S. filed on Mar. 24, 2010) (No. 09-980).[2]

---

provision." But it is Section III.A of the *Morrison* opinion that invalidates the "effects" test, not the later discussion of the Exchange Act's "transaction" test in Section IV.A.

[2] For this reason, *Strassheim*, *Laker Airways*, and the other cases cited by the government on this point (Reply, at 14 & n.20) are inapposite, with two exceptions that are of no help to the government. In *United States v. Goldberg*, 830 F.2d 459, 463-64 (3d Cir. 1987), the defendant committed the crime entirely from within the United States. In *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4, 6 (1st Cir. 1997), the court simply restated the Supreme Court's well-established conclusion that Congress intended the Sherman Act to apply extraterritorially, and held (uncontroversially) that the presumption against extraterritoriality applies in both civil and criminal antitrust cases.

The government wrongly suggests (Reply, at 15 n.21) that our interpretation of *Morrison*, if accepted, would mean that the antitrust laws would no longer reach foreign conduct that causes substantial domestic effects. Not so, again. Because the Supreme Court has "found the presumption [against extraterritoriality] to be overcome with respect to our antitrust laws," that issue is "governed by precedent." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting). What is more, Congress has *codified* the "effects" test in the antitrust laws, thus evincing the very intent to regulate extraterritorially that was missing in *Morrison*. See 15 U.S.C. § 6a(1)(A), (2); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158-59 (2004). Nothing in *Morrison* prevents *Congress* from deciding to regulate extraterritorially and using the "effects" test as the measure of a statute's overseas reach.

The government points to the D.C. Circuit's statement that it was *not* deciding whether RICO has "*true* extraterritorial reach." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1130 (D.C. Cir. 2009) (per curiam) (emphasis added).[3] But the D.C. Circuit's view that the presumption against extraterritoriality "does not apply" if the "effects" test is satisfied is no less dependent on the now-invalidated "effects" test. The D.C. Circuit's use of the "effects" test to avoid applying the presumption is also foreclosed by *Morrison*'s holding that courts must "apply the presumption *in all cases*." 130 S. Ct. at 2881 (emphasis added). Beyond that, the D.C. Circuit's novel definition of "extraterritorial" (566 F.3d at 1130) is logically incompatible with *Morrison*, which used that term (consistent with its ordinary meaning and a long line of Supreme

[3] Both this Court and the D.C. Circuit rested their decisions concerning BATCo's liability on the application of the "effects" test to RICO. See BATCo Motion, at 3-7 & nn. 2-3, 16. Although the government at various points suggests that the D.C. Circuit's holding with respect to BATCo's liability under RICO did not rest exclusively on foreign conduct, that argument is refuted by the D.C. Circuit's opinion. See *id.* at 5-6 & n.3. It is also flatly inconsistent with the government's own prior characterization of the D.C. Circuit's opinion. See Brief for the United States in Opposition ("U.S. BIO"), at 67, 2010 WL 2132056 (U.S. filed on May 25, 2010) (Nos. 09-976, -977, -979, -980 and -1012) ("The court of appeals based its decision on the 'substantial domestic effects' of BATCo's overseas conduct.").

Court cases) to mean that "a statute applie[d] abroad" – regardless of whether the foreign conduct it reached caused domestic effects. 130 S. Ct. at 2883.

Morrison's invalidation of the "effects" test is also *directly implicated* by the D.C. Circuit's vacatur of Section II.A.4 of the injunction and remand for reentry of a revised version of that provision consistent with the "effects" test. 566 F.3d at 1138. The government incorrectly asserts (Reply, at 2 n.3) that this issue "does *not* arise upon remand." Contrary to the government's suggestion (*id.* at 1 n.1), nothing in this Court's scheduling order barred BATCo from raising the meaning of Section II.A.4, which is inextricably related to the other issues raised in BATCo's motion concerning *Morrison*. The government's assurance (Reply, at 1 n.1) that it will "*not* seek to enforce the injunction to the overseas sales of cigarettes" does not go far enough, because the issue on remand is not what the government might refrain from enforcing, but rather the content of a new version of Section II.A.4 that will be entered on remand. This Court should make clear, in ruling on BATCo's motion, how *Morrison* applies to that question.[4]

II. THE GOVERNMENT'S ALTERNATIVE LIABILITY ARGUMENTS HAVE BEEN WAIVED AND IN ANY EVENT ARE MERITLESS

The government reiterates its five alternative grounds on which RICO liability and the injunction against BATCo supposedly could be salvaged notwithstanding *Morrison*'s invalidation of the basis for those rulings. These arguments have been waived. Regardless, they should be rejected because they are meritless, challenge determinations made by this Court, and would (if accepted) extend RICO's notoriously open-ended commands and draconian penalties worldwide.

---

[4] This Court's clarification of how *Morrison* applies to the injunction will also facilitate analysis of BATCo's contention (BATCo Motion, at 38), which the government does not address, that there is no basis – given Brown & Williamson's dismissal and the attenuated and ancient nature of BATCo's U.S. contacts – on which this Court could conclude that there is any need going forward to "prevent and restrain" BATCo's conduct under 18 U.S.C. § 1964(a). See also note 6, *infra*.

A. The Government Has Waived Its New Arguments

As explained in our motion (at 1, 17-21), this Court should not address the government's new arguments because (as the government cannot deny) they were never raised in this Court in either trial or post-trial proceedings. It is far too late for the government to raise alternative bases for BATCo's RICO liability. In the earlier proceedings before this Court, the government relied exclusively on the argument that (i) RICO applied extraterritorially by virtue of the "effects" test, and (ii) therefore reached BATCo's foreign conduct that supposedly violated the statute and caused substantial domestic effects. The government could have argued previously *that there was no need to reach* the issue of RICO's extraterritorial scope because of *Bowman*, or its recently minted "conspiracy" theory, or because of domestic conduct *by BATCo* that violated RICO. It failed to do any of this and offers no valid excuse because none exists.[5]

Seeking to obfuscate the issue, the government says that if "BATCo is now allowed to argue that *Morrison* does in fact warrant a modification of the Court's Order, then obviously the United States must be permitted to show how this case is inapposite." U.S. Reply, at 2. But as the placement of our waiver argument at the beginning of Section II of our motion (and this reply brief) demonstrates, our waiver argument does not prevent the government from seeking to distinguish *Morrison* (as it attempts without success). It also does not prevent the government from

---

[5] The government contends (Reply, at 2 & n.3) that rules of waiver do not apply to it because BATCo's motion constitutes a "new claim under Fed. R. Civ. P. 60(b)." This ignores the extensive legal authority that BATCo presented in its motion (at 8-9, 39-43) for the proposition that its motion is properly brought under Rule 54(b). It also fails to explain why rules of waiver do not apply to Rule 60(b) motions – and, in fact, they do apply. See *S. Pac. Commc'ns Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011, 1019 (D.C. Cir. 1984); *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373-74 (6th Cir. 2007). Further, *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003), does not support the government's contention (Reply, at 2 n.4) that it is free to pursue new alternative theories, because in that case the defendant signed a consent decree, so there *was no prior litigation* in which the government should have raised its alternative theory. See 335 F.3d at 605 ("Rueth made the conscious decision . . . not to contest that issue. It would render the consent decree worthless to allow him to do so now."). Moreover, prior to the parties' entry of the consent decree, the government *did* assert its alternative theory in its complaint. *Id.* at 601.

arguing that *Morrison* does not vitiate the legal basis on which this Court (and the D.C. Circuit) actually relied. Instead, the waiver argument prevents the government from urging alternative bases for RICO liability that it could have advanced at trial. This is apples and oranges.

The government says that "throughout this litigation," it has "repeatedly emphasized *the defendants'* domestic conduct taken in furtherance of the scheme to defraud American consumers." U.S. Reply, at 2 (emphasis added). These carefully chosen words are revealing. The government does not say – because it is not true – that it has ever emphasized *BATCo's* domestic conduct. In relation to BATCo, the government's focus throughout this litigation has been on BATCo's foreign conduct, and overwhelmingly so at trial. The government did not previously make the strained and far-reaching arguments it is now pressing. And the government made that decision with its eyes wide open. As explained in our motion (at 19-20), this Court's opinion acknowledged that the issue of RICO's extraterritorial reach, if any, and the appropriateness of using the "effects" test in this setting were unresolved in the D.C. Circuit (and the subject of disagreement among other courts). Despite that, the government rested its case on the "effects" test, and there is no earthly reason why it should not be held to the same waiver standards that have been applied to BATCo in this litigation. See BATCo Motion, at 21 n.14.

In a final gambit to avoid the waiver doctrine, the government unveils *yet another new argument*, suggesting that BATCo somehow *waived its argument* that RICO does not apply extraterritorially. U.S. Reply, at 2-3. Tellingly, this was not even mentioned in the government's motion to compel. There, the government vaguely faulted BATCo for not presenting its extraterritoriality argument in a motion for a "dispositive ruling" (U.S. Motion, at 9 n.3), without citing anything to support such a requirement or making any waiver argument. Now, the government suggests for the first time (but again, without any authority) that BATCo perhaps should have

raised its extraterritoriality arguments earlier, such as in an answer or a Rule 12(b)(6) motion. U.S. Reply, at 2-3. The government even goes so far as to suggest that BATCo *never raised its RICO extraterritoriality arguments in this Court*, citing pages of BATCo's post-trial brief that – on their face – clearly maintain that "the Government's claims against BATCo must be dismissed" because, among other things, BATCo "engages in no business or other activities in the United States" and "there is no evidence that BATCo's future extraterritorial conduct" will have any effects in the United States. Corrected Post-Trial Brief of Joint Defendants, at 125-26 (D.C.C. filed on Sept. 7, 2005 and corrected on Sept. 13, 2005).[6]

This novel submission comes far too late. If the argument had any merit (and it has none), the D.C. Circuit would not have resolved BATCo's appeal on the extraterritoriality issue. Notably, in response to BATCo's separate appeal brief (most of which was devoted to the extraterritoriality issue), the government never suggested that BATCo had not adequately preserved this argument. Nor did the Solicitor General's office make such an argument in opposing BATCo's petition for certiorari. U.S. BIO, at 62-63, 66-67. Accordingly, the government's waiver argument has clearly been waived. See, *e.g.*, *United States v. Layeni,* 90 F.3d 514, 522 (D.C. Cir. 1996) ("The government, however, has waived the waiver argument by not raising it."); *Lennon v. U.S. Theatre Corp*., 920 F.2d 996, 1000 (D.C. Cir. 1990) (same).

---

[6] The government's argument rests on a purported distinction between the argument that BATCo "cannot be held liable under RICO" (which the government says BATCo never made in the trial court) and the argument that the government had failed to prove any need to "prevent and restrain" BATCo in the future (and thus failed to carry its burden of entitlement to any relief under 18 U.S.C. § 1964(a)). U.S. Reply, at 3. That characterization is directly at odds with the government's own brief in the D.C. Circuit, which addressed BATCo's RICO extraterritoriality argument under a heading arguing that this Court had correctly determined that "BATCo violated RICO" – and did so before arguing, in a separate section, that this Court had also correctly ruled that the likelihood of future violations warranted injunctive relief. Brief for the United States, at 170, 176-82, 2008 WL 2682546 (D.C. Cir. filed on May 19, 2008) (No. 06-5267). The government's brief in opposition similarly represented the question at issue as "BATCo's liability under RICO." U.S. BIO, at 66.

B. The Government's *Bowman* Argument Is Meritless

We explained in our motion (at 21-25) that the government's reliance on *United States v. Bowman*, 260 U.S. 94 (1922), is misplaced. *Bowman* is limited to *criminal* cases involving crimes *against the government itself*. The case also turned on the unusual nature of the crime involved there (defrauding the government with respect to ships on the high seas). Courts and commentators alike have long recognized these limitations on *Bowman*'s holding – as the government itself has done in several OLC opinions.

Without attempting to explain away its prior inconsistent OLC opinions, the government asks this Court to place itself in conflict with the authorities cited in our motion and adopt a broad, utterly acontextual reading of *Bowman* under which a "presumption *in favor of* extraterritoriality" should be applied whenever the failure to do so would "curtail" a statute's "scope and usefulness" and "leave open" an "immunity" for international offenses. U.S. Motion, at 20 (emphasis in original). That standard, however, would be satisfied in virtually every case. Notably, the government has been unable, in response to our challenge (BATCo Motion, at 23), to locate a *single civil case* in which *Bowman* has been applied. It is no answer that RICO can also be enforced criminally, since this case is plainly civil.[7] Taken together, the government's proposed unprecedented extension of *Bowman* to the civil context – as well as to every statute whose "usefulness" would be "curtailed" if limited to domestic conduct – would go far toward nullifying the presumption against extraterritoriality, in direct conflict with *Morrison*.

---

[7] The government is wrong to say (Reply, at 22 n.35) that a civil RICO enforcement action requires nothing more of the government than a criminal prosecution. Under 18 U.S.C. § 1964(a), the government is required before it is entitled to obtain *any* of the enumerated forms of relief to demonstrate that there is a need to "prevent and restrain" future conduct by a RICO defendant. When applied to crimes against the government itself, the *Bowman* doctrine arguably makes sense, especially where drawing a line at the United States' borders would effectively gut a statute. The same logic does not support applying *Bowman* to prevent garden-variety fraud against private individuals.

There is, however, no need to address the inconsistency between *Morrison* and the government's sweeping reading of *Bowman*, because *Bowman* is inapposite to this civil case involving a statute not aimed at protecting the government itself.[8] Moreover, *Bowman* is distinguishable because the nature of the statute there (which Congress amended to protect the U.S.-owned Emergency Fleet Corporation) was such that violations were *especially likely* to occur outside the territorial boundaries of the U.S., on the high seas. See *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (in criminal case involving illegal immigration, noting that "'the natural inference from the character of the offense[s]' is that an extraterritorial location 'would be a probable place for [their] commission'") (quoting *Bowman*, 260 U.S. at 99); *ibid.* ("It makes no sense to presume that such a statute applies only domestically."); *Rocha v. United States*, 288 F.2d 545, 547 & n.3 (9th Cir. 1961) (same). The same cannot be said of RICO.

C. The Government's Sweeping Conspiracy Theory Of Extraterritoriality Is Wrong

We explained in our motion (at 25-29) that, in addition to being waived, the government's "conspiracy" theory of extraterritoriality – under which the domestic conduct of BATCo's codefendants may be "attributed" to BATCo as a basis for extending RICO to BATCo's foreign conduct – is flawed for at least three reasons. First, it conflates principles of *joint and several liability* with the distinct issue of Congress's *intent to regulate* beyond the Nation's borders. Second, Congress knows how to pass a statute that extends overseas regulation to conspirators whose co-conspirators commit actions within the United States, has done so in multiple statutes cited in our motion (at 27 & n.19), but has not done so in RICO. Third, this theory is even more far-reaching than the "effects" test expressly repudiated in *Morrison* and, if

[8] In its reply (at 23 n.38), the government cites a list of cases that supposedly applied *Bowman* when the government was not defending itself. It is hard to see how murder of a government agent, *e.g.*, *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), illegal immigration, *e.g.*, *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), and terrorism, *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), are unrelated to government self-defense, or are anything like the private fraud alleged in this case.

credited, would largely gut the presumption against extraterritoriality (or at least allow it to be easily circumvented). We further noted (at 27 n.18) that the Supreme Court has rejected this argument as "frivolous" in a case involving Congress's intent in enacting an antitrust statute on which RICO was patterned: *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 380, 384 (1953).

The government's responses are unpersuasive. It brushes aside *Bankers Life* on the ground that the case involved venue and this case does not (but rather involves "a merits question" under *Morrison*). U.S. Reply, at 12 n.16. As here, the issue in *Bankers Life* was Congress's intent in enacting a statute. The Court dismissed as "frivolous" the notion that, in creating venue over any defendant who "resides or is found or has an agent" in a federal district, Congress intended without saying so to import principles of substantive conspiracy liability so that a nonresident conspirator would be deemed to reside in a district based on the activities there of a co-conspirator. 346 U.S. at 380. The government makes the same argument here: because BATCo's alleged co-conspirators took certain actions in the U.S., those activities are properly attributed to BATCo, thus allowing RICO to be applied to BATCo even though BATCo's own conduct was foreign. But in RICO, unlike the various statutes cited in our motion, Congress has *not* extended the statute's application to the extraterritorial conduct of co-conspirators. The argument is as unpersuasive here as it was in *Bankers Life*. See also BATCo Motion, at 27 n.18 (citing personal jurisdiction cases that rely on *Bankers Life* to reject the conspiracy theory of personal jurisdiction even though that theory does not involve any question of venue).

Equally unpersuasive is the government's suggestion (Reply, at 13) that its potentially limitless conspiracy theory of extraterritoriality is really quite limited – and would not permit easy circumvention of the presumption against extraterritoriality – because it requires a proponent to prove the existence of an agreement, the defendant's agreement to join the conspiracy,

and an overt act in the United States. Putting aside the notoriously lenient requirements for proof of a conspiracy,[9] the government's argument ignores the fact that issues concerning a statute's extraterritorial reach (like other issues of Congress's intent and statutory meaning) are questions of law ordinarily resolved at the threshold of litigation, not issues of fact (such as the existence of an agreement) that merge with the underlying merits and thus require a full trial. For precisely this reason, Judge Posner has said that the "conspiracy" theory of personal jurisdiction is problematic. *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992) (Posner, J.) ("[T]o resolve the [personal jurisdiction] issue in advance would require the district court to conduct an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits – either that or permit a nonresident to be dragged into court on mere allegations."), *cert. denied*, 506 U.S. 1034 (1992). Thus, the conspiracy theory of extraterritoriality is unworkable in practice.

In response, the government again invokes cases that do not involve Congress's intent to regulate extraterritorially but rather the international-law limits on Congress's legislative *power*. That argument is no more persuasive in this setting than as an asserted ground for avoiding the clear meaning of *Morrison* (discussed above at page 4). See, *e.g.*, *United States v. Inco Bank & Trust Corp.*, 845 F.2d 919, 920 (11th Cir. 1988) (per curiam) ("It is well settled that the government *has the power* to prosecute every member of a conspiracy that takes place in United States territory, even those conspirators who never entered the United States.") (citing *Ford v. United*

[9] The "agency" relationship among co-conspirators is highly attenuated when compared with true agency. See Stuart M. Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 524 (1984) ("In conventional agency, the focus is on the principal's control or authorization. In conspiracy, however, 'authorization' is attenuated at best; indeed, a conspirator can be held to have 'authorized' acts he did not know about by persons he did not know about.") (footnote omitted). Compare RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

States, 273 U.S. 593, 620-24 (1927)) (emphasis added).[10] The cases cited by the government hold that the United States has the power to prosecute criminal conspiracies directed at the United States, but they do *not* hold that Congress intended to exercise that jurisdiction in every conspiracy case. In "all cases," *Morrison* makes clear (130 S. Ct. at 2881), the presumption against extraterritoriality must be applied to determine whether Congress *intended* a statute, including one aimed at criminal conspiracies, to apply to foreign conduct.[11]

As BATCo explained in its motion (at 26, 28 & n.20), the conspiracy cases invoked by the government are further distinguishable because they were *criminal* prosecutions – and most involved actual or threatened damage to sovereign interests or functions. As such, they implicate the *Bowman* rule, which as explained above is *not* implicated in this case involving only civil harm to private individuals.[12] There is a good reason why, as the government points out (Reply,

---

[10] Indeed, in *Ford* itself, this analysis was dicta because the United States properly had jurisdiction over the charges under a treaty with Great Britain. See Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1130 (1982). Further, because *Ford* – like most of the cases cited by the government – dealt with prescriptive jurisdiction rather than the presumption against extraterritoriality, there was no reason for the *Morrison* Court to refer to these cases, much less explicitly overrule them. The government's interpretation of these cases as vitiating the presumption against extraterritoriality is untenable after *Morrison*.

[11] Only four of the cases cited by the government address congressional intent at all. In two, the court concluded based on the nature of the underlying criminal statute – *not* based on a conspiracy charge – that Congress intended the statute to encompass the defendant's extraterritorial conduct. See *Benitez*, 741 F.2d at 1317; *United States v. Busic*, 592 F.2d 13, 20 (2d Cir. 1978). In *United States v. Winter*, 509 F.2d 975, 982 n.24 (5th Cir. 1975), the court stated in dicta (only prescriptive jurisdiction had been challenged) that it "might" have had to consider congressional intent if the substantive crime (instead of the thwarted conspiracy to import marijuana) had been charged. And in the fourth case, the court concluded that a statute prohibiting conspiracy to export goods from the United States to embargoed countries applied to the defendant's *domestic* overt act – based in part on jurisdictional language in the statute – despite the fact that the defendant's co-conspirators had participated in the conspiracy from abroad. *United States v. McKeeve*, 131 F.3d 1, 11 (1st Cir. 1997).

[12] Many of the cases cited by the government involved conspiracies to import drugs or other contraband. See, *e.g.*, *Ford*, 273 U.S. at 600; *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); *Marin v. United States*, 352 F.2d 174 (5th Cir. 1965). In addition to arguably implicating the defense of the government itself, such crimes will usually include extraterritorial conduct. See, Blakesley, *supra*, at 1146 ("Obviously, as the crime of conspiracy itself is designed to be a

at 12 n.17), most of these cases do not cite *Bowman* despite implicating its principles: they *do not address* the presumption against extraterritoriality, but rather, as explained above, the distinct question of congressional power.

As the government readily admits (Reply, at 12), its conspiracy theory of extraterritorial application would allow courts to bypass any examination of Congress's intent to extend a statute abroad, resulting in an irrebutable presumption that conspiracy statutes always apply extraterritorially. As BATCo explained in its motion (at 27 & n.19), Congress is fully aware of the presumption *against* such a reading of its statutes as it has explicitly provided for certain conspiracy statutes to apply extraterritorially when at least one co-conspirator is otherwise subject to the statute's reach. It has not done so, however, in 18 U.S.C. § 1962(d).[13]

D. The Court Should Reject The Government's Argument Based On RICO Predicate Crimes That Are Irrelevant To This Case And On Boilerplate Language in RICO

The government offers no valid reason for failing previously to argue that RICO applies extraterritorially because of (i) certain recently added RICO predicate crimes that have nothing to do with this case, (ii) boilerplate references to "any enterprise" and "interstate and foreign commerce" in 18 U.S.C. § 1962, and (iii) several references in RICO's voluminous legislative history to such matters as organized crime's impact on "interstate and foreign commerce." U.S. Reply, at 17-22 & n.33. As our motion explains (at 29-33), to prevail on these arguments the government must not only overcome its waiver of these arguments and this Court's prior deter-

---

tool of prophylaxis, it must have an extraterritorial application *if it is to regulate importation*.") (emphasis added).

[13] The government also relies on the theory of co-conspirator liability under *Pinkerton v. United States*, 328 U.S. 640 (1946), and *Salinas v. United States*, 522 U.S. 52 (1997). As explained in our motion (at 26-27), however, this theory addresses only substantive conspiracy liability, not extraterritorial application. Because *Pinkerton* and *Salinas* raised no questions of extraterritorial application, *Morrison* had no occasion to overrule them. Cf. U.S. Reply, at 13.

mination that "RICO itself is silent as to its extraterritorial application" (477 F. Supp. 2d at 197), but also persuade this Court to place itself in direct conflict with *Norex* and *Cedeno*, the only two courts to address this argument since *Morrison*.

Faced with this Court's statement that "RICO itself is silent as to its extraterritorial application," the government buries its head in the sand. Its only response, tucked away in a footnote (Reply, at 17 n.25), is to suggest that an identical statement in *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046 (2d Cir. 1996), was "dicta" and meant "nothing more than RICO does not have a provision saying 'this law applies abroad.'" As stated in our motion (at 29-30), however, the Second Circuit recently held that this statement in *Al-Turki* was *not* dicta but rather a necessary prerequisite to that court's decision to apply the "effects" test (which is also true here). See *Norex*, 2010 WL 4968691, at *3. If the government is suggesting that *this Court's* statement meant nothing more than that RICO lacks a provision specifically saying "this law applies abroad," the suggestion is meritless. In unambiguously concluding that "RICO itself is silent" (477 F. Supp. 2d at 196-97), this Court cited several cases that had reached conflicting conclusions based on an analysis of the text and legislative history of the statute. See, *e.g.*, *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) (noting among other things that the "procedural mechanisms contained within [18 U.S.C. §] 1965" governing service of process "are, on their face, limited to U.S. territory"). This Court made clear that it was conducting an "inquiry into Congressional intent," which must "always *begin* with an examination of the statute." 477 F. Supp. 2d at 197 (emphasis added). The government offers no reason why, under the law-of-the-case doctrine, it may ask to reopen this Court's ruling.

Even if the Court were to revisit its prior holding that "RICO itself is silent" with regard to extraterritoriality, the government's arguments are unpersuasive. The RICO predicates cited

by the government are irrelevant to this case and thus cannot provide any basis for "piggy-back[ing]." U.S. Reply, at 19. In any event, they do not help the government's cause because "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 130 S. Ct. at 2882-83. The government is mistaken in contending (Reply, at 18 n.28) that this Court's prior holding concerning RICO's silence somehow renders certain RICO predicates "superfluous." The fact that a RICO predicate offense, viewed in isolation, might have extraterritorial reach does not mean that Congress necessarily intended to punish a defendant's actions outside the United States in "conduct[ing] or participat[ing]" in the "conduct of a [RICO] enterprise's affairs" "through a pattern of racketeering activity." 18 U.S.C. § 1962. "[P]rohibited activit[y]" under Section 1962, in other words, can be limited to domestic conduct even if some of the predicate acts, if charged as independent crimes, would extend to foreign conduct. Even if that were not the case, moreover, any predicate offense that supposedly *must* be committed abroad (see U.S. Motion, at 22), would still retain an independent function and meaning if RICO were applied extraterritorially in cases (unlike this case) that *involve such predicates*.[14]

Beyond that, *Morrison* rejected an argument quite similar to the government's, noting that it would be "odd for Congress to indicate the extraterritorial application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad."

---

[14] It is doubtful that such "foreign-conduct-only" predicates exist, given that RICO defines "racketeering activity" to include acts that are "indictable" under the enumerated criminal statutes (see 18 U.S.C. § 1961(1)) and the government could indict a defendant for a predicate crime that *must* be committed abroad based solely on the defendant's aiding-and-abetting conduct in the United States. See 18 U.S.C. § 2; *United States v. Strevell*, 185 F. App'x 841 (11th Cir. 2006) (upholding conviction of defendant who never left the United States for attempting to travel in foreign commerce to engage in commercial sex with a minor). The government's theory of RICO conspiracy liability would also permit a conviction based on purely domestic conduct in a case where the RICO predicate crimes must be committed abroad.

130 S. Ct. at 2882.[15] Although the government attempts (Reply, at 18-19) to distinguish its predicate-based argument from the one rejected in *Morrison*, it never explains why it would be any less odd for Congress to indicate the extraterritorial application of *all* of RICO through language in *some* (but not all) of the *separate statutes* referenced in RICO.[16]

The government falls back on generic, boilerplate language that cannot overcome *Morrison*'s presumption. In *Small v. United States*, 544 U.S. 385 (2005), the Court declined to read "convicted in *any* court" to encompass foreign convictions, relying on the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 388 (quotation marks omitted). The Court reached that conclusion even without relying on the presumption against extraterritoriality, which was not implicated because the defendant's charged conduct was purely domestic. *Id.* at 387, 389. The government purports (Reply, at 20 n.32) to distinguish *Small* on the ground that the Court's holding there also served to avoid "potential unfairness" and "anomalies." 544 U.S. at 393, 394, 398. Applying the federal racketeering law to a British tobacco company for consumer fraud – based solely on attenuated connections to the United States over the course of 50 years – would be no less unfair and anomalous.

---

[15] In *Norex*, the Second Circuit correctly applied *Morrison*'s reasoning to dispose of the same argument the government makes here. 2010 WL 4968691, at *3. The government (at 19 n.30) rejects the Second Circuit's conclusion, based in part on the incorrect assertion that the difference between RICO's predicate statutes and RICO itself is irrelevant when assessing RICO's extraterritorial application. The government offers scant support for its contention that RICO automatically takes on the extraterritorial scope of its predicate acts: most of the cases it cites involve conspiracy and other inchoate crimes; none involves RICO. Unlike inchoate crimes and their underlying substantive offenses, RICO does not simply "piggyback" on its predicate acts – as the government itself acknowledges, RICO requires *more* than the commission of multiple predicate acts.

[16] Acceptance of the government's argument would also produce significant uncertainty. It is far from clear how the government's method of providing for extraterritoriality would actually function in practice, given that the RICO predicates it identifies as applying extraterritorially have widely varying extraterritorial provisions.

Nor does RICO's reference to "interstate or foreign commerce" provide any indication (much less a "clear" one) that Congress meant to regulate extraterritorially. The government says (Reply, at 19-21) that *Morrison*'s rejection of an argument based on such jurisdictional language is not binding because the statute there referred to foreign commerce in a separate definitional provision, but fails to explain why that should matter. It did not matter in *New York Central R.R. v. Chisholm*, 268 U.S. 29, 31 (1925), which rejected the argument that Congress intended extraterritorial reach in passing a statute with "foreign commerce" language *exactly parallel* to RICO's and *not* located in a separate definitional section. See 45 U.S.C. § 51 ("Every common carrier by railroad while engaging in commerce between any of the several States . . . or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages . . . ."); see also *Norex*, 2010 WL 4968691, at *3 (explaining that *Morrison* "forecloses" the government's "foreign commerce" argument relating to RICO).[17]

Contrary to the government's contention (Reply, at 21-22 & n.34), the factual distinctions between this case and *Norex* and *Cedeno* do not render those cases inapplicable. Although *other* claims in this case are unarguably based on domestic conduct, the ones against *BATCo* are, like the claims in *Cedeno* and *Norex*, "essentially extraterritorial in focus." *Cedeno*, 733 F. Supp. 2d at 473. The presence of domestic racketeering activity by domestic defendants does not matter because the government's case against BATCo was predicated exclusively on BATCo's foreign conduct. See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954-55 (D.C. Cir. 1990) (conduct prohibited by RICO is "the commission of the predi-

[17] Contrary to the government's assertion (Reply, at 20-21), the type of commerce in which a RICO enterprise engages does not "go to the heart of the statute's operative text." Compare *United States v. Weingarten*, No. 09-2043-cr, 2011 WL 135763, at *6 (2d Cir. Jan. 18, 2011) (finding extraterritorial application where the criminalized activity, under 18 U.S.C. § 2423(b), was "travel[ing] in foreign commerce, for the purpose of engaging in any illicit sexual conduct").

cate acts *only* when those acts were the vehicle through which a defendant *conducted or participated* in the conduct of the enterprise's affairs") (emphasis added, internal quotation marks and alterations omitted).

Finally, our motion identifies (at 12-13 & n.9) substantial affirmative evidence in both the text and legislative history of RICO showing that Congress intended the statute *not* to have any extraterritorial reach.[18] The government wrongly suggests (Reply, at 21 n.33) that this evidence is overcome by a handful of scattered references in RICO's voluminous legislative history mentioning that organized crime syndicates in the United States do not completely restrict their operations to this country and sometimes affect "interstate and foreign commerce." Those references are unusual. See Brief of Int'l Ass'n of Defense Counsel as *Amicus Curiae*, at 21-25, 2010 WL 1186418 (U.S. filed on Mar. 24, 2010) (No. 09-980) ("[i]t is striking that, in hundreds if not thousands of pages of legislative history, there is scarcely *any* reference to activity outside the United States . . . much less any reference to foreign enforcement efforts"). Because the negligible value of the "evidence" invoked by the government does not neutralize, much less overcome, the persuasive evidence of Congress's intent that RICO *not* apply extraterritorially, the government cannot meet its burden of overcoming the presumption. BATCo Motion, at 32-33.

E. The Government's Argument Based On The Wire- And Mail-Fraud Predicates And *Pasquantino* Is Meritless

The premise of the government's argument – that BATCo's acts of receiving and sending communications by mail and wire *in England* qualify as domestic conduct – directly challenges

---

[18] RICO's service of process provisions (see 18 U.S.C. § 1965) is one piece of such evidence. The fact that some courts have allowed RICO plaintiffs to borrow a provision *outside* of RICO (namely Fed. R. Civ. P. 4) to effectuate international service of process (U.S. Reply, at 17 n.26) hardly undercuts the value of this evidence. Further, the government fails to acknowledge that some of the most powerful evidence of Congress's exclusively domestic concern in enacting RICO that we cited is contained in *legislative findings* that are *included in the statute itself*. See BATCo Motion, at 12-13.

this Court's conclusion (also accepted by the D.C. Circuit) that "many of BATCo's *Racketeering Acts* took place *outside the United States*." 449 F. Supp. 2d at 872 (emphasis added); *id.* at 873; 566 F.3d at 1130 ("the district court found that [BATCo's] 'activities and statements took place outside of the United States'") (quoting 449 F. Supp. 2d at 873). The government calls it a "fallacy" and "mischaracteriz[ation]" (Reply, at 7) to say that "BATCo's Racketeering Acts took place outside the United States," but that is exactly what this Court's opinion says.[19]

On the merits, the government's argument is also wrong for the reasons explained in our motion (at 33-36). First, *Pasquantino v. United States*, 544 U.S. 349 (2005), did *not* conclude that the wire-fraud statute applies to extraterritorial conduct. Because the defendants' conduct in *Pasquantino* (including the *interstate* phone calls *placed from New York*) was almost entirely domestic, the majority found it unnecessary to decide the statute's extraterritoriality. Second, the government's argument that BATCo's conduct *in England* was really U.S. conduct relies on the mistaken assumption that the standards for mail- and wire-fraud violations are equivalent to the standards for RICO violations, when in fact RICO punishes something quite different. See BATCo Motion at 35-36 (citing *Yellow Bus Lines*, 913 F.2d at 954-55). Third, BATCo's use of U.S. mails and wires was merely peripheral to the foreign conduct on which BATCo's liability was premised.

In its reply (at 9-10), the government presents an inaccurate reading of *Pasquantino* to support its argument that *any* use of the U.S. mails and wires is automatically domestic conduct. It claims that when the Court stated that the "offense was complete the moment [the defendants]

---

[19] The government repeatedly asserts that findings on this issue are "uncontested" or stipulated. U.S. Reply, at 7, 8, 10 & nn.10, 12. But BATCo has vigorously contested – ever since the government first raised the argument – the idea that any of BATCo's domestic conduct, or its use of U.S. mails and wires, could support RICO liability. See Reply Brief for BATCo at 3-10, 2008 WL 2682540 (D.C. Cir. filed on May 19, 2008) (No. 06-5267).

executed the scheme inside the United States," 544 U.S. at 371, it was referring *only* to the defendants' interstate telephone calls initiated in New York (U.S. Reply, at 9 & n.13) but that is not what the Supreme Court said. In fact, the scheme had been described in the fact section of the opinion. 544 U.S. at 353.[20] It was evident from those facts that the "scheme" relied on extensive U.S. conduct by the defendants. The same cannot be said for BATCo's activity in this case.

Further, if the mere use of U.S. mails and wires was necessarily territorial conduct, as the government contends, there could be no such thing as an "extraterritorial" violation of the mail- and wire-fraud statutes. If that were the case, it would be hard to understand the discussion between the majority and the dissent in *Pasquantino* as to whether the wire fraud there was extraterritorial; according to the government, there should have been "no plausible dispute" that it was territorial, given the defendants' use of U.S. wires. U.S. Reply, at 11. Under the government's strained logic, the mail- and wire-fraud statutes – used in many RICO cases as "jurisdictional hooks," in large part because "even 'innocent' mailings and wire transmissions are subject to the mail- and wire-fraud statutes," U.S. Motion, at 14 n.6 (citing *Schmuck v. United States*, 489 U.S. 705, 715 (1989)) – would render foreign actors all over the world liable under RICO for using the U.S. mails and wires in furtherance of *foreign* schemes. Here, as a case in point, BATCo's RICO liability was premised on predicate acts directed toward foreign consumers, Parliament, and foreign courts. These foreign acts do not subject BATCo to RICO liability.

---

[20] As described by the Court, *all* of the defendants' activities occurred in the United States until the very end of the scheme. *Pasquantino*, 544 U.S. at 353 ("[T]he Pasquantinos, while in New York, ordered liquor over the telephone from discount package stores in Maryland"; they "employed Hilts and others to drive the liquor [into Canada]"; and before entering Canada, Hilts and the other drivers "hid[] the liquor in their vehicles"). In other words, the use of interstate as opposed to international wires is only one of several ways to distinguish *Pasquantino* from this case. See U.S. Reply, at 8 n.11.

F. The Government's Domestic Conduct Argument Is Meritless

As explained in our motion (at 36-39), none of the other occasional U.S. contacts by BATCo identified by the government support its eleventh-hour contention that "BATCo's liability is premised primarily upon [BATCo's] domestic conduct." U.S. Reply, at 5.

As the Supreme Court recognized in *Morrison*, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." 130 S. Ct. at 2884. For this reason, the *Morrison* Court explained, the presumption against extraterritorial application of U.S. statutes is not "a craven watchdog" that retreats "to its kennel whenever *some* domestic activity is involved in the case." *Ibid.* The government's argument ignores that admonition. Thus, the government invokes a scattering of U.S. contacts by BATCo, none of which constitute RICO violations – that is, conduct or participation by BATCo in the enterprise's racketeering activity. See *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999); see also *Yellow Bus Lines*, 913 F.2d at 954-55.

In the government's own words (U.S. Motion, at 1), the enterprise's racketeering activity here was "an extensive scheme to defraud American consumers" out of the purchase price of cigarettes. Not once in this marathon litigation, however, did the government show that BATCo made even a single public statement to American consumers, and no evidence was submitted that BATCo ever engaged in any marketing of cigarettes in this country. Instead, the government urged the Court to premise liability against BATCo on the theory that BATCo sought to defraud foreign consumers, courts and regulators to prevent them from reaching positions that could negatively undermine the alleged U.S. campaign of deceit. Ultimately, this Court concluded on the basis of this evidence that "[w]hile it is true that many of BATCo's activities and statements took place outside of the United States," this foreign conduct "had substantial direct effects on the United States." 449 F. Supp. 2d at 873; see also *id.* at 129, 728 (concluding that BATCo's

foreign actions were intended to prevent "a resultant domino effect" whereby the discovery abroad of information about smoking and health and the tobacco industry's knowledge of this information would result in similar revelations in the United States).

By contrast, none of BATCo's U.S. contacts mentioned in the government's submissions constitute conduct or participation in the affairs of the RICO enterprise. Indeed, this was never the government's theory of the case against BATCo in this Court. It is not a RICO violation to have "made repeated trips to the U.S.," U.S. Reply, at 10, including to attend meetings with U.S. tobacco companies. The government does not dispute that it "presented no evidence that BATCo did or said anything at these meetings [or on these U.S. trips] to encourage U.S. tobacco companies or trade associations to defraud U.S. smokers, or to assist them in concealing material information that they otherwise had a legal duty to disclose." BATCo Motion, at 39.

Nor is it a RICO violation to have historically manufactured cigarettes outside the United States that were later sold in *de minimis* quantities *by third parties* in the United States. See U.S. Reply, at 10. The government does not dispute our submission (BATCo Motion, at 38) that "there is no record evidence that BATCo ever marketed any cigarettes sold in the U.S. (fraudulently or otherwise)."

Moreover, the existence of a Y-1 tobacco farm in North Carolina (U.S. Reply, at 10 & n.14) also does not constitute a domestic RICO violation by BATCo. There is no record proof that BATCo co-owned a Y-1 farm with B&W,[21] and even if there were such proof, the government cites no evidence from the record that Y-1 tobacco was developed in an effort to defraud

[21] While this Court concluded in its then-final decision that "BATCo and B&W developed" Y-1 at "an experimental farm" in North Carolina (449 F. Supp. 2d at 345), the record evidence shows that this was B&W's (not BATCo's) farm. See BATCo Motion, at 39 n.30 (citing testimony by government witnesses David Kessler and Jeffery Wigand that B&W developed Y-1).

U.S. consumers. As explained in our motion (at 39 n.30), and not disputed by the government, "this Court never concluded that B&W developed Y-1 to create more addictive cigarettes, rather than, as B&W explained, 'to develop a less hazardous cigarette.'" Trying to make safer cigarettes is not a RICO violation.[22]

The government's attenuated "domestic conduct" theory of liability would subject foreign companies and individuals to notoriously open-ended RICO liability – including in civil suits for treble damages brought by private plaintiffs – based on no more than something akin to the "minimum contacts" required for a court to assert personal jurisdiction. In sum, while the government unsurprisingly can point to "*some* domestic activity" by BATCo over the past 60 years from the massive record in this case, it cannot credibly claim that these territorial acts themselves constituted RICO violations, or that the government ever presented this theory of BATCo's liability to this Court.

CONCLUSION

For all of the foregoing reasons, the Court should (1) grant BATCo's motion for reconsideration and enter judgment in BATCo's favor on the government's claims under RICO (or at least declare that Section II.A.4 of Order #1015 does not apply extraterritorially); and (2) deny the government's motion to compel compliance.

---

[22] The government appears rightly to have abandoned its other scattershot theories of domestic conduct by BATCo, all of which fall well short of domestic RICO violations. In particular, it is not a RICO violation to "engage in activities that affect interstate commerce (U.S. Motion, at 7-8), to be amenable to the personal jurisdiction of a U.S. federal court (*id.* at 8-9)," or "to have, or to communicate with, a U.S. subsidiary/affiliate. *Id.* at 9 n.3." BATCo Motion, at 38. The government does not dispute these points. While the government frequently asserts that there is "ample" evidence of other domestic activities by BATCo (see U.S. Reply, at 6, 7, 10), it never says what this "ample" evidence is, nor does it provide any record citations to support these assertions.

Dated: February 21, 2011

Respectfully submitted,

By /s/ David L. Wallace
David L. Wallace
A Member of the Firm
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

By /s/ David L. Wallace *for*
Alan E. Untereiner
(D.C. Bar No. 428053)
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER
& SAUBER LLP
1801 K Street, N.W., Suite 411L
Washington, DC 20006
(202) 775-4500

Attorneys for Defendant British American Tobacco (Investments) Limited