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 22, 2011 Oral Argument Requested

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED'S COMBINED MOTION FOR RECONSIDERATION AND OPPOSITION TO GOVERNMENT'S MOTION TO COMPEL COMPLIANCE

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BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED'S COMBINED MOTION FOR RECONSIDERATION AND OPPOSITION TO GOVERNMENT'S MOTION TO COMPEL COMPLIANCE

Pursuant to Fed. R. Civ. P. 54(b), Defendant British American Tobacco (Investments) Limited ("BATCo") respectfully moves this Court for reconsideration of the determination of liability and order of relief entered against BATCo. As explained below, those rulings rested on this Court's legal conclusion (later affirmed by the D.C. Circuit) that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. ("RICO"), extends extraterritorially to reach the foreign conduct of a foreign corporation provided that such conduct meets the "effects" test (*i.e.*, has a direct and substantial effect within the United States).

While those rulings were on direct appeal, the U.S. Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which categorically rejected the "effects" test and thus invalidated the sole basis for the liability decision and injunction against BATCo. The government's nominal efforts to distinguish *Morrison* are unavailing, and its welter of eleventh-hour arguments for imposing liability against BATCo on new, alternative grounds should be rejected since they were never presented to this Court in the trial or post-trial proceedings and thus clearly have been waived. Beyond that, all of the government's alternative grounds fail because they either challenge determinations already made by this Court, are foreclosed by *Morrison*, or are otherwise lacking in merit. Accordingly, and for the reasons detailed below, this Court should grant BATCo's motion and enter judgment in BATCo's favor on the government's RICO claims. Alternatively, even if the Court declines to grant that relief, it should at a minimum declare that Section II.A.4 of the injunction has no extraterritorial effect.

The government's motion to compel BATCo's compliance – not now, but if and when the Court denies BATCo's reconsideration motion – is little more than an effort to distract the

Court from the serious issues raised by *Morrison* and unfairly paint BATCo in an unflattering light. See U.S. Motion To Compel BATCo's Compliance ("Gov't Motion"), at 38-39 & n.31. At bottom, it rests on the false premise that BATCo has claimed "the authority to excuse itself from complying with the Court's order" and has said it "will not comply." *Id.* at 1. In fact, BATCo unambiguously told the government that "BATCo has no intention of *not* complying" with this Court's orders once they become final and effective. 11/5/2010 Ltr. From D. Wallace To A. Ravel, at 2 (Gov't Motion Ex. 2) (emphasis added). To be sure, BATCo and the government appear to have a good-faith disagreement about whether this Court's partially vacated injunction – which is now in the process of being revised through cooperative discussions by the parties and otherwise – currently has operative effect. Recognizing that disagreement, BATCo several months ago offered to "join the government in a motion for clarification" of that issue – a fact that, remarkably, the government never even bothers to mention. See 11/22/2010 Ltr. From D. Wallace To A. Ravel, at 1 (copy attached as Ex. 1). Instead of taking BATCo up on that constructive suggestion, the government has filed the instant motion to compel. BATCo would welcome this Court's resolution of the parties' disagreement about whether any portion of Order #1015 is currently in force, as well as whether BATCo has any current obligation to pay the government's costs.[1] The government's motion is factually and legally unfounded and should be denied.

[1] The government's repeated suggestion that BATCo is somehow flouting or "defying" this Court's orders by not having yet "paid its portion of the government's court costs" (Gov't Motion, at 4; see also *id.* at 39) is especially puzzling because, as the government well knows (see BATCo's November 24, 2010 Status Report, at 11 (filed on Nov. 24, 2010); BATCo's Praecipe Regarding Bill Of Costs, at 1-2 (filed on Sept. 28, 2010)), BATCo's position on that issue rests on a stipulation *joined by the government* under which BATCo's obligation to pay costs arises only after there is a "final resolution of all appeals in this matter, if the Government remains the prevailing party." Joint Praecipe Regarding Bill Of Costs, at 1 (filed on Oct. 23, 2006) (copy attached as Ex. 2).

PROCEDURAL BACKGROUND

The United States initiated this massive civil RICO action in 1999, alleging among other things that five U.S. tobacco manufacturers, two U.S. trade groups created by those domestic manufacturers, and BATCo – a corporation organized under the laws of England and Wales, with its principal place of business in England – had engaged in a scheme, beginning in the 1950s, to deceive American consumers about the health risks of smoking. In particular, the government contended that the U.S. tobacco industry defendants – and BATCo – violated RICO by conducting or participating in the conduct of a racketeering enterprise's affairs through a pattern of racketeering activity (or conspiring to do so). Based on those allegations, the government, pursuant to 18 U.S.C. § 1964(a), sought forward-looking equitable remedies aimed solely at "prevent[ing] and restrain[ing]" the scheme from continuing in the future. After extensive discovery and a nine-month trial, this Court ruled in 2006 that the defendants had violated 18 U.S.C. §§ 1962(c) and 1962(d) of RICO, relying largely on conduct that involved defendants other than BATCo. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). The Court's finding of liability against BATCo was premised on eleven predicate acts of wire or mail fraud, all of which involved unpublished communications occurring more than 25 years ago (and more than 15 years before this lawsuit was filed) between BATCo in England on the one hand and its then-U.S. subsidiary/affiliate, Brown & Williamson Tobacco Corporation ("B&W"), in the United States, on the other.

1. In its 2006 opinion, this Court rejected BATCo's argument that, in light of the well-settled presumption against extraterritoriality, RICO has no extraterritorial application and thus did not reach BATCo's overseas conduct. As a threshold matter, the Court acknowledged that "many of BATCo's Racketeering Acts *took place outside the United States*." 449 F. Supp. 2d at 872 (emphasis added); accord *id.* at 873 ("it is true that many of BATCo's activities and state-

ments took place outside of the United States"). Nevertheless, the Court reasoned, because RICO "is an expansive statute" and is "broadly construed to reach a wide array of activity," the statute "may apply to conduct which occurs outside the United States as long as it has a substantial direct effect on the United States." *Id.* at 872-73. It then explained:

> In determining whether RICO applies extraterritorially, allegations must meet either the "conduct" test or the "effects" test. . . . Under the "effects" test, RICO applies when the foreign conduct at issue has "substantial" effects within the United States. *Consolidated Gold Fields PLC v. Minorco, S.A.,* 871 F.2d 252, 261-62 (2nd Cir. 1989). . . . .
>
> While it is true that many of BATCo's activities and statements took place outside of the United States, they nevertheless had substantial direct effects on the United States. First, many of BATCo's *statements and policies* at issue in this case concerned U.S. subsidiary/affiliate [B&W] and potential litigation in the United States. Second, and most importantly, BATCo's activities and statements furthered the Enterprise's overall scheme to defraud, which had a tremendous impact on the United States, as demonstrated in the Findings of Fact.

Id. at 873 (emphasis added); see also *ibid.* (emphasizing impact "on interstate commerce" of "all Defendants taken together" having "bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce since 1954").[2]

In Section II.A.4 of its remedial order (Order #1015), this Court permanently enjoined BATCo and the other defendants, among other things, "from conveying any express or implied health message or health descriptor for any cigarette brand either in the brand name or on any packaging, advertising or other promotional, informational or other material." *Id.* at 938.

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[2] This Court did not specify which of BATCo's foreign activities or "statements and policies" had "substantial direct effects" in the United States. Elsewhere in its opinion, however, the Court discussed three broad categories of foreign conduct by the company: (1) BATCo participated in international tobacco industry groups, which worked toward a common goal with U.S. industry groups; (2) BATCo communicated and shared its proprietary research with its then-subsidiary/affiliate, B&W, which in turn elected not to share that research with the U.S. Surgeon General; and (3) two of BATCo's foreign affiliates (in Canada and Australia, respectively) allegedly destroyed documents that might have been relevant to subsequent foreign litigation, but that had no demonstrated impact on this litigation or on any other litigation in the United States. See 449 F. Supp. 2d at 300-01, 815-31.

With the other defendants, BATCo moved for clarification and other relief as to the scope of certain provisions in this Court's remedial order, including the applicability (if any) of Section II.A.4's directives to conduct outside the territorial United States. This Court granted the motion in part and denied it in part. See *United States v. Philip Morris USA, Inc.*, 477 F. Supp. 2d 191 (D.D.C. 2007). Among other things, this Court rejected defendants' argument that Section II.A.4's prohibition on the use of express or implied health messages or descriptors applied *only* to statements made by defendants *in the United States* (and to cigarettes sold by them in this country). *Id.* at 198 (explaining that injunction's commands "do apply to actions of the Defendants taken outside the United States"). In reaching that conclusion, the Court took note that other "courts have expressed differing views" on whether RICO "applies extraterritorially" (*id.* at 196 (citing conflicting decisions)); acknowledged that the D.C. Circuit "ha[d] not yet been presented with this issue" (*ibid.*); and proceeded to conduct "an examination of the statute" (*id.* at 197). "[T]hat examination," this Court next concluded, "yields no useful results since *RICO itself is silent* as to its extraterritorial application[.]" *Ibid.* (emphasis added; internal quotation marks omitted). Having discerned nothing in RICO suggesting any extraterritorial reach, the Court once again borrowed and applied the "effects" test from "anti-trust and securities fraud cases," concluding that RICO applies extraterritorially to foreign conduct directly causing substantial effects in the United States. *Ibid.*

2. The D.C. Circuit affirmed in part, vacated the judgment in part, and remanded for further proceedings. *United States v. Philip Morris USA Inc.,* 566 F.3d 1095 (D.C. Cir. 2009) (per curiam). Like this Court, the court of appeals rejected BATCo's submission that it could not be held liable under RICO based on its wholly foreign conduct because the statute does not have any extraterritorial reach. *Id.* at 1130-31. As a foundational matter, the D.C. Circuit acknowl-

edged this Court's finding "that [BATCo's] 'activities and statements took place outside of the United States.'" *Id.* at 1130 (quoting 449 F. Supp. 2d at 873). Relying on that determination, the appellate court declined to accept BATCo's argument that RICO has no extraterritorial reach – an argument that rested on the traditional presumption against extraterritoriality, the absence of evidence that Congress intended RICO to apply extraterritorially, and affirmative evidence in RICO's text and legislative history that Congress did *not* intend the statute to apply beyond U.S. borders. In the D.C. Circuit's view, because this Court had "found BATCo liable on the theory that its conduct had substantial domestic effects," the "presumption against extraterritoriality does not apply." *Id.* at 1130. Finally, the D.C. Circuit concluded that this Court had correctly determined that BATCo's foreign conduct satisfied the "effects" test, pointing to BATCo's overseas activities in (a) conducting proprietary nicotine research in England that BATCo shared with its then-subsidiary/affiliate, B&W, and (b) participating in various international organizations, as well as on (c) "the tremendous domestic effects of *the fraud scheme generally*." *Id.* at 1130-31 (emphasis added).[3]

The D.C. Circuit also applied the "effects" test in reviewing the defendants' challenge to the extraterritorial reach of the injunction. 566 F.3d at 1138. Although the government conceded on appeal that the directives in Section II.A.4 "should not be read to govern overseas activities with no domestic effect," the D.C. Circuit noted that the injunction "contains no such limiting language" and, accordingly, "vacate[d] that provision and remand[ed] for the district court

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[3] With regard to BATCo's involvement in international organizations, the D.C. Circuit emphasized that BATCo, along with other defendants, had "founded, funded, and actively participated in various international organizations, which Defendants themselves saw as instrumental to their efforts to perpetuate what the district court found to be their fraudulent scheme in the United States." 566 F.3d at 1131. As an "example" of how the "Defendants themselves saw" those international organizations as "instrumental," the panel cited an admission by the Tobacco Institute (a U.S. trade group to which BATCo never belonged) as well as TI's praise for a foreign trade organization (INFOTAB) of which BATCo was a member. *Ibid.*

to reformulate it so as to exempt foreign activities" that did not satisfy the "effects" test (because those activities "have no substantial, direct, and foreseeable domestic effects"). *Ibid.*

3. BATCo filed a petition for a writ of certiorari seeking review of the D.C. Circuit's holdings that RICO reached BATCo's foreign conduct, that the "effects" test was an appropriate measure of RICO's extraterritorial reach and was satisfied here, and that the traditional presumption against extraterritoriality was irrelevant. On June 28, 2010, the Supreme Court denied the petition. 130 S. Ct. 3502 (2010) (order). Four days earlier, however, the Court had issued its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which addressed the extraterritorial reach of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). In *Morrison*, the Court rejected the "effects" test as impermissibly "vague" and "unpredictable" as well as an illegitimate end run around the traditional presumption against extraterritoriality, which (the Court emphasized) must be applied "in all cases." Because both this Court and the D.C. Circuit had relied exclusively on the "effects" test, borrowed from the securities context, in upholding BATCo's liability under RICO, BATCo petitioned the Supreme Court for rehearing of its order denying the petition for certiorari.[4] On September 3, 2010, the Supreme Court denied the rehearing petition without explanation. 131 S. Ct. 57 (2010) (order).

In July 2010, the D.C. Circuit's mandate issued. This Court issued an order adopting that mandate on July 29, 2010. Since then, the parties have worked to resolve the remaining outstanding issues so that a new final judgment resolving all claims as to all parties may be entered by this Court. Accordingly, and consistent with the briefing schedule entered by this Court on December 22, 2010, BATCo now files this motion for reconsideration of the July 29, 2010 order

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[4] Specifically, BATCo asked the Supreme Court to grant certiorari, vacate the D.C. Circuit's opinion, and remand to that court for reconsideration of the intervening change in the law announced in *Morrison*. Such a "GVR" order, BATCo contended, would serve judicial efficiency by avoiding yet another round of litigation in this Court concerning *Morrison*'s effect on this case.

as well as the Court's 2006 determination of liability and the remedial order entered against BATCo, based on the intervening change in the governing law announced in *Morrison*. BATCo also incorporates its opposition to the government's motion to compel compliance.

ARGUMENT

Under Rule 54(b), this Court may reconsider its prior orders at any time before the entry of a final judgment. See Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time* before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.") (emphasis added); see also *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 509-13 (6th Cir. 2001) (reversing district court holding that "Rule 54(b) has no application after a claim has been heard on appeal" where there has been a partial vacatur of a final judgment by an appellate court and a remand for further proceedings in the district court). District courts have broad discretion to reconsider interlocutory orders. *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000). In this Circuit, a court may revise a nonfinal order "as justice requires," with a relevant consideration being "whether a controlling or significant change in the law has occurred." *Isse v. Am. Univ.*, 544 F. Supp. 2d 25, 29 (D.D.C. 2008). To obtain reconsideration under Rule 54(b), a movant generally must show that "some harm, legal or at least tangible, would flow from a denial of reconsideration" – including being subjected to an injunction predicated on an incorrect legal standard. *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005). For the reasons set forth below, that standard is easily satisfied here.[5] Accordingly, this Court should grant

[5] Although there was a final judgment in this case in 2006, the D.C. Circuit's partial vacatur of the remedy deprived the judgment of its finality and left certain remedial issues (as yet unresolved) to be decided by this Court on remand. See *Catlin v. United States*, 324 U.S. 229, 233 (1945); *United States v. W. Elec.*

BATCo's motion for reconsideration and enter judgment in favor of BATCo on the government's RICO claims (or at least declare that Section II.A.4 of the injunction has no extraterritorial effect). The Court should also deny the government's motion.

I. RECONSIDERATION IS WARRANTED BECAUSE *MORRISON* HAS INVALIDATED THE LEGAL BASIS FOR THE LIABILITY JUDGMENT AND INJUNCTION ENTERED AGAINST BATCO

While BATCo's appeal from this Court's 2006 judgment was pending, the Supreme Court issued its decision in *Morrison.* *Morrison* changed the law concerning the use of the "effects" test to measure extraterritoriality and invalidated the legal basis for both the D.C. Circuit's and this Court's rulings with respect to BATCo's RICO liability. In light of the Supreme Court's dispositive, intervening decision, this Court should now reconsider its determination of RICO liability together with its order of injunctive relief against BATCo, and order judgment in BATCo's favor on the government's RICO claims. In its motion to compel compliance, the government does not dispute that *Morrison* applies retroactively to this case, nor does it (or could it) suggest that either law-of-the-case principles or the mandate rule present any obstacle to BATCo obtaining reconsideration. Although the government makes a tepid effort to argue that *Morrison* is inapplicable to RICO, that argument is meritless.

Co., 777 F.2d 23, 26 (D.C. Cir. 1985); *Burrell v. United States*, 467 F.3d 160, 164 (2d Cir. 2006) (Sotomayor, J.). This Court's July 29, 2010 order entering the D.C. Circuit's mandate as the judgment of this Court is not a final judgment, because there has been no final resolution of all the claims and requests for relief as to all the parties. This Court's reconsideration of its prior interlocutory orders is therefore subject to Rule 54(b), rather than to Rule 60(b) (which applies to a request for relief from a final judgment). Nevertheless, out of an abundance of caution, BATCo also requests, in the alternative, relief under Rule 60(b). See *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863 (1988) ("Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)."). Even assuming a final judgment has been entered, relief is clearly warranted both under Rule 60(b)(5), because "applying" the liability determination and order of relief "prospectively is no longer equitable" given *Morrison*'s change in the controlling legal principles, or under Rule 60(b)(6), because that change is a "reason that justifies relief."

A. *Morrison* Rejected The "Effects" Test As A Judicially Imposed Measure Of Congress's Intent To Regulate Extraterritorially, Thus Undermining The Previous Rulings In This Case That RICO Reaches BATCo's Foreign Conduct

The *Morrison* Court changed the law governing the extraterritorial reach of federal statutes in two significant ways. First, it repudiated the "effects" test (and the related "conduct" test), which lower courts had adopted in a line of securities cases in an effort to "divin[e] what Congress would have wanted" regarding the Securities Exchange Act's extraterritorial reach. 130 S. Ct. at 2877-81. The "effects" test, the Supreme Court explained, was "judicial-speculation-made-law[]" that impermissibly "excised," "ignored," "discarded," or "disregard[ed] [] the presumption against extraterritoriality" and, beyond that, was hopelessly "vague," "not easy to administer," and in the end utterly "unpredictable." *Id.* at 2878-81, 2887. Second, the Court strengthened the background presumption against extraterritoriality, clarifying that (contrary to the D.C. Circuit's decision in this case) the presumption applies in every case and is not subject to "judge-made" exceptions aimed at "resolving matters of policy" or "divining what Congress would have wished if it had addressed the problem." *Id.* at 2880-81 (internal quotation marks omitted).[6] "Rather than guess anew in each case," the Court explained, judges must "apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis added).

Morrison is directly relevant to RICO and to this case. Although *Morrison* involved securities laws, its logic is not so limited. Not surprisingly, both of the courts that have addressed *Morrison*'s applicability to RICO have had no difficulty concluding that it applies to the statute. See *Norex Petrol. Ltd. v. Access Indus., Inc.*, No. 07-4553-cv, 2010 WL 4968691, at *1-*3 (2d

[6] See also *Morrison*, 130 S. Ct. at 2891 (Stevens, J., joined by Ginsburg, J., concurring in the judgment) (suggesting that the majority opinion "seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule").

Cir. Dec. 8, 2010) (per curiam) (copy attached as Ex. 3); *Cedeno v. Intech Group, Inc.*, No. 09-9716-cv, 2010 WL 3359468, at *2 & n.3 (S.D.N.Y. Aug. 25, 2010) ("Although *Morrison* does not address the RICO statute, its reasoning is dispositive here.") (copy attached as Ex. 4). Moreover, this Court's decisions to impose liability on BATCo under RICO, and to enter an injunction that regulates conduct beyond the territorial United States, rested squarely on the legal determination that RICO "has extraterritorial effect where illegal activity abroad causes a 'substantial effect' within the United States." 477 F. Supp. 2d at 197; accord 449 F. 2d at 872-73. In reaching that conclusion, this Court expressly borrowed the "effects" test from antitrust and securities case law and applied it to RICO, while at the same time acknowledging that "'RICO itself is silent as to its extraterritorial application.'" 477 F. Supp. 2d at 197 (quoting *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004)); see also 449 F.2d at 872-73. In affirming the liability determination against BATCo and partially vacating the injunction, the D.C. Circuit also applied the "effects" test to RICO, rejecting BATCo's argument that the presumption against extraterritoriality was dispositive and that RICO did not regulate BATCo's conduct overseas. Thus, *Morrison* unambiguously rejects the rationales underlying the D.C. Circuit's (and this Court's) extraterritoriality decisions concerning RICO.[7]

Once the "effects" test is eliminated and the presumption against extraterritoriality is applied to RICO, it is clear that the statute has no extraterritorial application in this case. When Congress enacted RICO in 1970, it included no indication in the text or legislative materials that

[7] *Morrison* also overrules some of the legal authorities on which the D.C. Circuit relied, including *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), which suggested that the presumption "is generally not applied" in instances "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." Cf. Gov't Motion, at 10-11 (relying on *Massey*).

the statute was intended to reach the foreign conduct of foreign defendants.[8] As *Morrison* makes clear, "[w]hen a statute gives *no clear indication* of an extraterritorial application, *it has none*." 130 S. Ct. at 2878 (emphasis added). But more, this Court has *already determined* that RICO is, at most, *silent* on the issue of extraterritoriality – a point that the government conspicuously failed to dispute either at trial or on appeal in the D.C. Circuit. See pages 18-19, *infra*. Under *Morrison*, that ends the matter: RICO *does not apply* extraterritorially.

In any event, we note that there is strong *affirmative* evidence in both the statute itself and the legislative history of Congress's intent *not* to apply RICO extraterritorially. As the district court correctly pointed out in *Jose v. M/V Fir Grove*, 801 F. Supp. 349 (D. Or. 1991), the "procedural mechanisms contained within [18 U.S.C. §] 1965" governing service of process "are, on their face, limited to U.S. territory." *Id.* at 357.[9] The government admits as much. U.S. DEPT. OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 160 (1988) ("While the RICO Act authorizes nationwide service of process in civil RICO actions, it *does not authorize service in a foreign country*.") (emphasis added). Beyond that, Congress's declared purpose in enacting RICO in 1970 was limited to "seek[ing] the eradication of organized crime *in the United States.*" Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added). Congress made no mention of regulating foreign conduct, and indeed relied on legislative findings concerning only domestic conditions, noting that "*organized crime activities in the United States* weaken the stability of the Nation's economic system" and that

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[8] Significantly, even today RICO contains no standard for determining any extraterritorial reach of RICO liability and "Congress failed to provide any mechanisms for overseas enforcement" of RICO and failed to "address[] the subject of conflicts with foreign laws and procedures." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991).

[9] See, *e.g.,* 18 U.S.C. § 1965(b) (authorizing service of process only "in any judicial district of the United States"); *id.* § 1965(c) (same for service of subpoenas); *id.* § 1965(d) (same for "[a]ll other process"). The enforcement mechanisms concerning civil investigative demands under RICO are similarly limited. See 18 U.S.C. §§ 1968(g), (h).

"organized crime *in the United States*" had become "widespread." *Id.* at 922-23 (emphasis added); see also *United States v. Turkette*, 452 U.S. 576, 588-89 (1981). And contrary to the government's suggestion (Gov't Motion, at 23 n.18), the legislative history strongly confirms Congress's exclusive focus on "organized crime *in the United States*." 115 CONG. REC. S5872 (Mar. 11, 1969); see also 115 CONG. REC. S9566-67 (Apr. 18, 1969) (RICO aimed at "stamp[ing] out organized crime in the United States"; "organized crime is increasingly taking over organizations in our country").

B. *Morrison* Must Be Applied Retroactively To BATCo Because This Case Was On Direct Review When *Morrison* Was Decided And, Even Now, There Is No Final Judgment

It is a fundamental principle of the law of retroactivity that, when the Supreme Court announces a new rule of law in a civil case and "applies" it "to the parties before" the Court, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). This rule prevents the unfairness and differential treatment of similarly situated litigants that would otherwise result from the "selective application of new rules." *Ibid.* (quotation marks omitted). It is a "legal imperative" that also prevents "the erection of selective temporal barriers to the application of federal law in noncriminal cases." *Id.* at 97-98. Here, the validity of the "effects" test as a judicially imposed measure of the extraterritorial reach of a federal statute, and the scope of the presumption against extraterritoriality, are both undoubtedly questions of federal law. Both questions were decided in *Morrison*, and the Court's holdings were applied to the parties in that case.

Finality for the purposes of the retroactive application of a new rule is clear-cut: a case is considered "pending on direct review" until either the time to file a petition for certiorari has elapsed, or a petition for certiorari has been filed and denied. See *Griffith v. Kentucky*, 479 U.S.

314, 321 & n.6 (1987). There is no question that this case was still "pending" on direct review when *Morrison* was decided. Indeed, since the Court has yet to enter a final judgment on remand, even now the case remains pending and open to further appellate review. In moving to compel BATCo's compliance, the government makes various arguments (discussed below) for why *Morrison* should not alter the result in this case, but it pointedly does not dispute that the rule of *Morrison* applies to this case under *Harper*. Application of *Morrison* is not only required by *Harper* but necessary to avoid irrationality, since the D.C. Circuit vacated a portion of this Court's injunction and remanded for reconsideration of its extraterritorial reach under the "effects" test – an issue that requires consideration of *Morrison* and on which *Morrison* unquestionably is controlling.

C. Neither The Law-Of-The-Case Doctrine Nor The Mandate Rule Prevents Reconsideration Where, As Here, There Has Been An Intervening Change In The Law

A district court's discretion to revisit an interlocutory order at any time prior to entry of a final judgment is generally bounded by the law-of-the-case doctrine, which is a "family of rules embodying the general concept that a court . . . should not re-open questions decided . . . by that court or [by] a higher one in earlier phases" of the same litigation. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Where, as here, an issue has been decided on appeal, the rule applied is actually a subset of the law-of-the-case doctrine known as the mandate rule, which directs a trial court to abide by the appellate mandate on all questions within the mandate's scope. *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 348 (D.C. Cir. 1977).

Law-of-the-case rules, however, are prudential rather than jurisdictional – and they are subject to exceptions. *Crocker*, 49 F.3d at 739-40. A well-established exception applies when the controlling law has changed since the order under reconsideration. In that circumstance, the "'prior decision . . . must yield,'" because the "'[l]aw of the case cannot be substituted for the

law of the land.'" *Id.* at 740 (quoting *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 752 n.14 (D.C. Cir. 1990)).[10] The change-in-the-law exception applies if the intervening legal change is "material to the outcome of [the] previous ruling." *McKesson Corp. v. Islamic Rep. of Iran*, 52 F.3d 346, 350-51 (D.C. Cir. 1995). As explained above, *Morrison* is not only material to but also dispositive of this Court's (and the D.C. Circuit's) previous rulings on BATCo's RICO liability and on the scope of Section II.A.4 of the injunction.

D. The Government's Efforts To Distinguish *Morrison* Are Unavailing

In its motion to compel compliance, the government attempts to distinguish *Morrison* on the ground that the decision "rested on a statutory analysis of the Securities Exchange Act, which is inapposite to any proper reading of the RICO statute." Gov't Motion, at 1-2; see also *id.* at 6-8. This argument is meritless.

The government argues that *Morrison* is somehow not controlling because it "did not turn *principally* on the presumption against extraterritoriality, but rather on the Court's" construction of the Securities Exchange Act, a different statute from RICO. Gov't Motion, at 8 (emphasis added). The highlighted language shows that not even the government can bring itself to say that *Morrison*'s threshold, emphatic rejection of the "effects" test was dicta. In *Morrison*, the Court in Section III.A of its opinion first addressed, and resolutely rejected, the "effects" and "conduct" tests. 130 S. Ct. at 2877-81. In thus rejecting the rationale on which the Second Circuit's decision had rested, the Supreme Court reasoned that the presumption against extraterritoriality ap-

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[10] See also 18B C. WRIGHT, ET AL., FED. PRAC. & PROC. § 4478.3, at 748 & nn.24-30 (2d ed. 2002) (noting that courts may depart from an appellate mandate "[i]f final judgment has not yet been entered" on remand "when events outside the particular action establish a clear change in controlling law"); *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 92 F.3d 1102, 1105-06 (11th Cir. 1996) (rejecting argument that the appellate court's prior decision was the "law of the case" for the purposes of applying an intervening Supreme Court decision retroactively under *Harper*); *Morrow v. Dillard*, 580 F.2d 1284, 1297 (5th Cir. 1978) (holding that district court, "even if bound by the doctrine of 'law of the case,'" properly reconsidered its prior award of attorneys' fees on remand despite the award having been largely affirmed on appeal).

plies "in all cases" and imposes a heavy burden on the proponent of an argument for extraterritoriality to demonstrate a "clear indication of an extraterritorial application." *Id.* at 2878, 2881. Having laid this groundwork in Section III.A, the Court then proceeded in Section III.B to determine whether the plaintiffs had satisfied that heavy burden by examining the text of the Securities Exchange Act. As this description makes clear, the Court's rejection of the "effects" and "conduct" tests – and its adoption of a more robust variant of the presumption against extraterritoriality – were essential to the decision. Nor can there be any serious dispute that the decisions of both the D.C. Circuit and this Court concerning BATCo's liability under RICO hinged on the now-repudiated "effects" test. See pages 3-7 & notes 2-3, *supra*.

As explained above, both of the courts that have addressed *Morrison*'s applicability to RICO have concluded that the decision applies to the statute, contrary to the government's argument here. In *Norex*, the Second Circuit, based on supplemental briefing submitted by the parties (and an uninvited rehearing petition submitted by the United States government) recently applied *Morrison* in upholding the dismissal of a RICO conspiracy claim that "primarily involve[d] foreign actors and foreign acts." 2010 WL 4968691, at *1 (copy attached as Ex. 3); see also note 16, *infra* (discussing U.S. rehearing petition). Similarly, in *Cedeno*, Judge Rakoff – the author of a leading treatise on RICO – dismissed a RICO claim that targeted conduct outside the United States, explaining that "[a]lthough *Morrison* does not address the RICO statute, its reasoning is dispositive here." 2010 WL 3359468, at *2 (copy attached as Ex. 4); see also J. RAKOFF & H. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (2010). This Court should reach the same conclusion.

II. THE GOVERNMENT CANNOT SALVAGE THE LIABILITY DETERMINATION AGAINST BATCO BASED ON NEW LEGAL THEORIES AND ARGUMENTS THAT WERE NOT PRESERVED AT TRIAL AND ARE MERITLESS

In moving to compel BATCo's compliance, the government advances a variety of alternative grounds on which, in its view, the RICO liability determination and injunction against BATCo could be salvaged even if *Morrison*'s rejection of the "effects" test invalidates the basis for those rulings. The government makes five principal arguments: (1) under *United States v. Bowman*, 260 U.S. 94 (1922), the presumption against extraterritoriality does not apply to RICO and indeed "RICO enjoys a presumption of extraterritoriality" (Gov't Motion, at 6, 19-20, 25-27); (2) for purposes of determining RICO's extraterritorial applicability to BATCo, the domestic conduct of BATCo's *co-defendants* is properly attributable to BATCo because this case involves a RICO conspiracy (*id.* at 2, 6, 27-29); (3) the presumption that RICO does not extend extraterritorially is rebutted by evidence in RICO's text and legislative history showing that RICO *does* extend beyond U.S. borders (*id.* at 2, 20-23, 26-27); (4) under *Pasquantino v. United States*, 544 U.S. 349 (2005), BATCo's eleven predicate acts of wire or mail fraud, which involved communications more than 25 years ago between BATCo in England and its then-U.S. subsidiary/affiliate, B&W, in the United States, involved domestic conduct and violated the wire- and mail-fraud statutes, which regulate extraterritorially (Gov't Motion, at 7-13, 19); and (5) BATCo itself engaged in "extensive American conduct" on which RICO liability could alternatively be based (*id.* at 2, 6, 8, 14-19).

These arguments have one thing in common: they were never raised in this Court in the trial or post-trial proceedings. Accordingly, all have been waived by the government. Beyond that, these new arguments should all be rejected because, as explained below, they either run up against contrary determinations of this Court, are foreclosed by *Morrison*, or are otherwise lacking in merit.

A. The Government Should Not Be Permitted, At The Eleventh Hour Of This Marathon Litigation, To Raise New Arguments That It Failed To Present To This Court At Trial

BATCo raised its extraterritoriality challenge to liability in the post-trial briefing and in its post-trial proposed findings of fact. Specifically, BATCo explained in the proposed findings of fact that the company does not conduct any business or research or make any public statements in the United States, and that its foreign activities were "not intended to, and do not have, any direct or substantial effects on the American public." Joint Defendants' Proposed Findings Of Fact: Chapter Twelve, at 148-56 & n.32 (filed on Aug. 15, 2005). In its post-trial brief, BATCo identified the longstanding "presumption against extraterritoriality," noted that "the RICO statute is silent as to any extraterritorial application," and maintained that it would be "speculative to find that any of *BATCo*'s past or future extraterritorial conduct had a direct and substantial effect on the U.S. public because this record is simply devoid of any evidence of such effect." Corrected Post-Trial Brief Of Joint Defendants, at 125-34 (filed on Sept. 7, 2005 and corrected on Sept. 13, 2005).[11]

In response to these arguments, the government *never disputed* that RICO was at best silent on the issue of extraterritorial reach; it argued only that BATCo's foreign conduct was reachable under RICO because "BATCo's *extraterritorial actions* have a direct effect on the United States." Reply Memo. In Support Of The Post-Trial Brief Of The United States, at 44-45 (filed on Sept. 19, 2005) (emphasis added); see also *ibid.* ("[T]he evidence adduced at trial demonstrates that *BATCo's actions* to suppress information and research *around the world* . . . have

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[11] The government faults BATCo for not seeking a "dispositive ruling" from this Court on whether "government enforcement of civil RICO does not apply extraterritorially." Gov't Motion, at 9 n.3. But BATCo asked this Court to hold that BATCo could not be held liable under RICO because the statute did not have any extraterritorial reach and because the basis for the government's action against BATCo was foreign conduct by the company. It is difficult to imagine how a ruling could be any more "dispositive" than a determination that a defendant is not liable.

had . . . an impact . . . in the United States.") (emphasis added). Similarly, in response to the defendants' motion for clarification of the extraterritorial reach of Section II.A.4 of this Court's injunction, the government contended that the injunction should extend to overseas conduct that would have the effect of "undermin[ing] the health and safety of the American public." United States' Memo. In Opposition To Certain Defendants' Motion For Clarification, at 19 (filed on Sept. 8, 2006).

As the foregoing demonstrates, the government never raised any of the five arguments it is now pressing when the extraterritoriality issue was previously adjudicated by this Court. Instead, the government elected to rest solely on its contention that BATCo could be held liable under RICO (and the injunction could reach overseas conduct) because the "effects" test applied to RICO and was satisfied here. There was no mention in this Court of *Bowman*; or of any "conspiracy" theory of extraterritoriality; or of how BATCo's use of U.S. mails from abroad, or its occasional and sporadic U.S. contacts, supposedly qualified as domestic RICO violations obviating the need to decide RICO's extraterritorial reach; or of how the inclusion of certain predicate offenses in RICO supposedly showed that the statute was intended to regulate overseas conduct. Indeed, on these last two points, this Court's decisions include statements that are *inconsistent* with the government's newly minted arguments. See 449 F. Supp. 2d at 872 (acknowledging that "many of BATCo's Racketeering Acts" of wire and mail fraud "took place *outside* the United States") (emphasis added); 477 F. Supp. 2d at 197 (explaining that "an examination of the statute . . . . yields no useful results since RICO itself is *silent* as to its extraterritorial application") (emphasis added; internal quotation marks omitted). Finally, the government previously chose to rely exclusively on the "effects" test even though, as this Court observed, other courts had divided over whether RICO has any extraterritorial effect at all – and the applicability of the

"effects" test to RICO was an unsettled issue in the D.C. Circuit. See 477 F. Supp. 2d at 196 (noting that other "courts have expressed differing views" on whether RICO "applies extraterritorially" and that the D.C. Circuit "ha[d] not yet been presented with this issue").[12]

Having failed to preserve its five current arguments, the government denied both BATCo and this Court the benefit of evaluating them before the Court entered its original liability decision and BATCo appealed that decision. At this very late date, the government should not be permitted to raise new arguments that it could have raised before. Indeed, this Circuit has recognized the importance of "requir[ing] that all viable arguments be vigorously pursued throughout the proceedings, thereby allowing for earlier decision, rather than permitting parties to pick and choose which claims will be presented on appeal and which will be held back until a later time." *Wash. Post Co. v. U.S. Dep't of Health and Human Servs*., 865 F.2d 320, 327 & n.9 (D.C. Cir. 1989) (declining to "excus[e] the government from the general rule that a party cannot raise anew on remand an issue that it failed to pursue in the appeal" which led to the remand).[13] Here,

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[12] It was not until it filed its appellate opposition brief in the D.C. Circuit that the government attempted to suggest any alternative grounds for the liability judgment against BATCo. See Brief For The United States, at 176-81, 2008 WL 2682546 (D.C. Cir. filed on May 19, 2008) (No. 06-5267) (making truncated arguments for the first time based on BATCo's domestic conduct and use of the U.S. mails and wires). By then it was too late, as BATCo pointed out in its reply brief in the D.C. Circuit. See Reply Brief For BATCo at 8-10, 2008 WL 2682540 (D.C. Cir. filed on May 19, 2008) (No. 06-5267) (objecting to "new-found domestic conduct argument" which government "never argued" below). Not surprisingly, the D.C. Circuit never addressed these unpreserved arguments. The government's "conspiracy" theory of extraterritoriality first appeared in its opposition to BATCo's petition for certiorari. Brief For The United States In Opposition, at 62-63, 66-67, 2010 WL 2132056 (U.S. filed on May 25, 2010) (Nos. 09-976, -977, -979, -980 and -1012). The government's *Bowman* argument and its argument based on analysis of certain RICO predicate acts with purported extraterritorial application debuted in the government's instant motion. The latest edition of the government's RICO manual for federal prosecutors, in its discussion of the extraterritoriality of civil RICO, makes no mention of *Bowman* or the newly minted "conspiracy" theory of extraterritoriality. See U.S. DEPT. OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A MANUAL FOR FEDERAL PROSECUTORS 300-03 (5th ed. Oct. 2009) ("2009 DOJ RICO MANUAL").

[13] Other Circuits have similarly concluded that "[a] question not timely raised at a first trial may not be raised at a second trial of the same action." *The Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 n.4 (10th Cir. 1990) (refusing to permit defendant "upon remand" to raise "non-jurisdictional issues waived earlier in the proceedings").

"there is no reason to give [the government] a second chance to flesh out a claim that should have been fleshed out the first time around." *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (refusing to remand for further proceedings to allow the government to "flesh out" its attempted monopolization claim against Microsoft, given the government's prior failure "to make their case on [this claim] both in the District Court and before [the D.C. Circuit]").

The government is simply not entitled to a second bite at the apple (much less five) at this exceedingly late date, more than a decade after this lawsuit was initiated and long after conclusion of the massive and lengthy trial.[14] In any event, as next explained, the government's new arguments should all be rejected as meritless.

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

The government argues that the Supreme Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922), establishes a broadly applicable "presumption *in favor of* extraterritoriality" that not only applies to RICO and this case but also somehow survives *Morrison*. Gov't Motion, at 19-20, 25-26 (emphasis in original). The government is wrong on both counts.

Contrary to the government's suggestion, *Bowman* has no relevance to this case. *Bowman* involved the federal crime of conspiring to defraud *the United States government* by submitting fraudulent invoices for the expenses of a government-owned steamship while it was "on the high seas, out of the jurisdiction of any particular state, and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States." 260 U.S. at 95-96. The district court dismissed the indictment for lack of jurisdiction, reasoning

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[14] When the shoe has been on the other foot, this Court has not hesitated to reject arguments made by BATCo that the Court concluded were untimely. For example, the Court precluded BATCo from "present[ing a] brand new argument" as to why BATCo could not produce, under applicable foreign law, documents of its Australian affiliate, on the ground that these foreign-law based arguments "should have been submitted months ago when [the] issue was first being litigated." Order #411, Memo. Op., at 8 (D.D.C. Oct. 3, 2003). Here, the government's alternative arguments are at least five years too late.

that although "the United States as a sovereign may regulate the ships under its flag and the conduct of its citizens while on those ships" and "private and public ships of the United States on the high seas were constructively a part of the territory of the United States," Congress "had always expressly indicated it when it intended that its laws should be operative on the high seas" and its failure to do so in the criminal statute at issue was therefore dispositive. *Id.* at 97.

Reversing, the Supreme Court first acknowledged the presumption *against* extraterritoriality applied to federal crimes against "private" individuals:

> Crimes *against private individuals* or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, *and frauds of all kinds*, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

Id. at 98 (emphases added). Next, the Court distinguished "criminal statutes" that "are enacted because of the government's right to protect itself":

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the *right of the government to defend itself* against obstruction, or fraud wherever perpetrated, *especially if committed by its own citizens, officers, or agents*. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by *citizens* on the high seas and in foreign countries as at home.

Ibid. (emphases added). The Court then explained that many of this latter type of statute, including the crime of conspiring to defraud the government at issue in the case before it, were codified in a section of the United States Code entitled "Offenses against the Operation of the Government." *Id.* at 98-99. The crimes in this section, the Court added, included forging a ship's papers, enticing desertions from naval service, and bribing a naval officer – acts that "would naturally often occur at sea." *Id.* at 99. Finally, the Court noted that the same was true of the federal

crime of conspiring to defraud the United States government (including a naval officer), which Congress had recently amended in 1918 specifically to include the "Emergency Fleet Corporation," the government corporation that owned the ship in question and that "was expected to engage in, and did engage in, a most extensive ocean transportation business." *Id.* at 101-02. On this reasoning, the Court held that the underlying criminal statute applied to the high seas.

Bowman has no relevance to RICO for at least three reasons. *First*, RICO is *not* aimed at proscribing criminal offenses against the federal government's operation. It is not aimed at protecting the *government itself* from criminal activity. Indeed, most of RICO's predicate acts, about which the government makes so much, fall squarely within the first category of cases identified in *Bowman* – they are racketeering crimes "against private individuals" such as assault, murder, robbery, arson, and fraud. In this case, the government has invoked RICO essentially to bring a massive, garden-variety consumer fraud claim based on predicate acts of mail and wire fraud (which again falls squarely within the first category in *Bowman*). The government claims that the victims of the fraud are U.S. smokers, not the government.[15]

Second, *Bowman* is irrelevant because this case involves the *civil* use of RICO, not a criminal prosecution. (Indeed, the government dismissed its criminal investigation of the defendants on the same day it filed this lawsuit.) We are unaware of a single decision by a U.S. court invoking the *Bowman* exception to the presumption against extraterritoriality in a civil case. *Third*, *Bowman* is properly understood as narrowly limited to crimes committed aboard U.S.-owned ships on the high seas, where there was abundant evidence (from the surrounding statu-

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[15] See Compl., at ¶ 3 (filed on Sept. 22, 1999) ("Defendants . . . and their co-conspirators have for many years *sought to deceive the American public* about the health effects of smoking.") (emphasis added); Gov't Motion, at 1 (arguing that BATCo engaged in a "scheme to defraud American consumers").

tory provisions as well as from Congress's actions in amending the statute) that Congress intended the criminal provision in question to apply to such ships on the high seas.

Many courts and commentators have recognized these limits on *Bowman*'s actual holding. See, *e.g.*, *United States v. Gatlin*, 216 F.3d 207, 211 n.5 (2d Cir. 2000) (*Bowman* limited to "[s]tatutes prohibiting crimes" that are "*against the United States government*") (emphasis in original); *Kollias v. D&G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994) (same); *United States v. Martinelli*, 62 M.J. 52, 57-58 (C.A.A.F. 2005) (same); *United States v. Gladue*, 4 M.J. 1, 4-5 (C.M.A. 1977) (same); Ellen Podgor and Daniel Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585, 588-89, 595 (2007) (same). Indeed, the United States government itself has recognized these limitations on *Bowman* in other settings. See, *e.g.*, *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. 321, 330-31 (1989) (*Bowman* does not apply to Posse Comitatus Act); *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 167 n.6 (1989) (characterizing *Bowman* as involving "the government's right to defend itself"). Indeed, in *Bowman* itself, the government's brief "limit[ed] its request for relief" to cases involving crimes that were "'not against persons and property *but against the sovereignty of the United States and the operations of its Government*.'" Ellen Podgor and Daniel Filler, *supra*, 44 SAN DIEGO L. REV. at 595 (quoting Brief For The United States, at 17, *United States v. Bowman*, No. 69) (emphasis as in government brief).[16]

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[16] In *Norex*, the government, though not a party, filed a rehearing petition ("U.S. *Norex* Reh'g Pet.") (copy attached as Ex. 5) in which it similarly urged the Second Circuit to adopt a broad reading of *Bowman*. See *id.* at 2-3, 6. There, as here (Gov't Motion, at 20), the government invoked the Second Circuit's decision in *United States v. Yousef*, 327 F.3d 56, 86-88 (2003), even though that case made only passing reference to *Bowman* and in fact turned on "[t]he text of the applicable federal statutes" (18 U.S.C. § 32(a), prohibiting aircraft destruction), which "ma[de] [] clear that Congress intended § 32(a) to apply extraterritorially." 327 F.3d at 86. Notably, the government's *Norex* rehearing petition failed to cite the Second Circuit's prior decisions in *Gatlin* and *Kollias*, which had rejected the government's broad

Thus, the government is quite wrong to suggest that *Bowman* stands for the sweeping proposition that courts should apply statutes extraterritorially if (as is true in the case of virtually every statute proscribing a crime) limiting them to domestic application would "curtail" their "usefulness" or "leave open" an "immunity" for overseas conduct. Gov't Motion, at 20; *id.* at 24 (arguing that RICO should be applied extraterritorially because failing to do so would "diminish" the statute's "effectiveness"). Compare *Morrison*, 130 S. Ct. at 2886 ("It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."). Nor does *Bowman* stand for the proposition that federal criminal statutes that "do[] not depend on the locality of the defendants' acts" "enjoy a presumption *in favor of* extraterritoriality." Gov't Motion, at 20 (emphasis in original; internal quotation marks omitted). Even if such broad and untethered interpretations of *Bowman* were plausible prior to *Morrison* (and they were not), they do not survive *Morrison*.[17]

C. The Government's Argument Based On A Conspiracy Theory Of Extraterritoriality Is Also Meritless

Next, the government argues that, even if RICO does not apply extraterritorially to

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reading of *Bowman*. Although the government attaches great significance to the *Norex* court's addition of a sentence on rehearing expressing no opinion about issues not before it (see Gov't Motion, at 29-30), that sentence does not endorse the government's interpretation of *Bowman*, nor could it have done so without creating an inconsistency with *Gatlin* and *Kollias*.

[17] The government's suggestion that *Bowman* might require courts to read RICO in a schizophrenic fashion, as having extraterritorial reach in civil cases brought by the *government* under 18 U.S.C. § 1964(a), but not in civil actions brought by *private parties* under 18 U.S.C. § 1964(c), is at best difficult to reconcile with the statutory text, which suggests no such distinction. See also note 9, *supra* (noting, among other things, that the enforcement mechanisms concerning civil investigative demands under RICO, which apply *only* to government RICO civil actions and prosecutions, are limited to domestic mechanisms); 18 U.S.C. §§ 1968(g), (h). There is no evidence that Congress intended such an unusual bifurcated scheme of extraterritoriality to apply to RICO. Compare Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P(b), 124 Stat. 1376 (2010) (creating, in aftermath of *Morrison*, broader jurisdiction in district courts over certain government enforcement actions under the securities laws). For that reason as well, there is no merit to the government's efforts (Gov't Motion, at 29-31 & n.25) to distinguish *Norex* and *Cedeno* on the ground that those civil RICO cases involve private rather than government plaintiffs.

BATCo's foreign conduct, the statute can be applied to BATCo based on the *domestic* conduct of BATCo's *co-defendants* in this case. Gov't Motion, at 2, 6, 27-29. The government grounds this argument on the fact that BATCo was found liable for civil conspiracy under 18 U.S.C. § 1962(d), and the notion that, under the substantive liability rules governing conspiracies, a conspirator is liable for the acts of its co-conspirators undertaken in furtherance of the conspiracy. As noted above, the government first advanced this "conspiracy" theory of extraterritoriality – which, to BATCo's knowledge, has never been applied in any civil case (or case involving RICO) by *any* American court – in its brief in opposition to BATCo's petition for certiorari. Brief For The United States In Opposition, at 62-63, 66-67, 2010 WL 2132056 (U.S. filed on May 25, 2010) (Nos. 09-976, -977, -979, -980 and -1012). Even if the Court rejects BATCo's waiver argument and considers this argument at this exceedingly late juncture (which it should not), the argument is wrong for at least three reasons.

First, it conflates principles of *substantive liability* with the issue of congressional intent to regulate extraterritorially. As *Morrison* makes clear, the default assumption "in all cases" is that when Congress legislates, it is concerned with "domestic, not foreign matters." 130 S. Ct. at 2877, 2881. That is why, "in all cases," courts must apply the strong presumption against extraterritoriality. Once that presumption is applied to RICO, the question under *Morrison* becomes whether the government – as the proponent of extraterritorial reach – has any evidence that Congress clearly intended RICO to reach foreign conduct anywhere in the world by foreign defendants as long as the government (or a private plaintiff) alleges or proves a RICO conspiracy that involves domestic conduct by a co-conspirator. The government points to no such evidence of Congress's intent, and we are aware of none. This assumes (we would say incorrectly) that the issue of such evidence remains open in the face of this Court's prior determination that RICO is

"silent" as to extraterritorial reach.[18]

Second, Congress knows how to provide expressly for the extraterritorial applicability of a criminal statute to co-conspirators. Compare, *e.g.*, 18 U.S.C. §§ 2332b(b)(2) (criminalizing acts of terrorism transcending national boundaries; jurisdiction exists over co-conspirators and accessories after the fact if at least one of the jurisdictional bases listed in the statute "is applicable to at least one offender"), 2332g(b) (antiaircraft missile offenses; can be committed outside the U.S. if, among other possibilities, "an offender . . . conspires with any person over whom jurisdiction exists under this subsection to commit an offense under this section").[19] Congress has not, however, done so in RICO.

Third, the government's "conspiracy" theory of extraterritoriality should be rejected because it is far-reaching and would allow plaintiffs in civil cases (and the government in criminal cases) to circumvent the territorial limits on federal statutes with the stroke of a pen, merely by adding a conspiracy claim (or count) to a complaint (or indictment). That would effectively ren-

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[18] The Supreme Court has rejected as "frivolous" a quite similar argument concerning Congress's supposed intent in enacting the venue provisions of the antitrust laws on which RICO was modeled. See *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 380, 384 (1953). In that case, which involved allegations of a conspiracy to violate the Sherman and Clayton Acts, the plaintiff argued that the applicable venue provision, which provided for venue in any district where a defendant "'resides or is found or has an agent,'" was satisfied with respect to a defendant who was not a resident of the Southern District of Florida, where the suit was filed. *Id.* at 380 (quoting 15 U.S.C. § 15). The plaintiff argued that the nonresident defendant nevertheless was "found or has an agent" in the Southern District of Florida because he was "a member of a conspiracy whose other members were residing and carrying on the illegal business of the conspiracy" there. *Ibid*. The Court rejected as "frivolous" the plaintiff's effort to use the principles of substantive conspiracy liability to inform Congress's intent with respect to the venue provision. *Id.* at 384. This Court should do the same for the government's "conspiracy" theory of extraterritoriality with respect to RICO. Relying on *Bankers Life*, many courts have similarly rejected the so-called "conspiracy" theory of personal jurisdiction (whereby the forum contacts of one conspirator are attributed to other co-conspirators for purposes of establishing "minimum contacts"). See, *e.g.*, *Nat'l Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769, 773 (Tex. 1995); *Hewitt v. Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995).

[19] See also 18 U.S.C. §§ 2332h(b) (radiological dispersal devices; same); 2339B(d)(1) (providing material support to foreign terrorists; jurisdiction exists if "an offender . . . conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a)"); 2339D(b) (receiving training from a foreign terrorist organization; same).

der the presumption against extraterritoriality a dead letter, in clear violation of *Morrison*'s teachings. *Morrison* held that even foreign conduct that *produces* direct, substantial and foreseeable U.S. effects is not reachable by a U.S. statute (however desirable such a result may be from a policy perspective), unless there is evidence of a clear intent by Congress for the statute at issue to apply extraterritorially. It would constitute an obvious end-run around *Morrison*, therefore, if the *mere agreement* of a foreign co-conspirator to engage in unlawful conduct in the United States – regardless of whether such an agreement actually produced *any* U.S. effects – could serve as the basis for prescriptive jurisdiction over the defendant's foreign conduct.[20] In short, the government advances an argument that would quickly swallow the general prohibition against extraterritorial application.

In virtually *every* criminal case involving a federal statute lacking extraterritorial reach, the government could sidestep that limitation, and extend criminal proscriptions worldwide, through the simple expedient of adding a conspiracy count under 18 U.S.C. § 371 and making

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[20] If accepted, the government's "conspiracy" theory of extraterritoriality would also permit the easy circumvention of the proper limits on the *Bowman* exception to the presumption against extraterritoriality. This concern is not speculative or hypothetical. Many of the decisions cited by the government in support of its conspiracy theory of extraterritoriality (Gov't Motion, at 28-29 & n.24) involve *criminal* conspiracies that clearly implicate the *Bowman* exception. See, *e.g.*, *Ford v. United States*, 273 U.S. 593 (1927) (conspiracy to import liquor into the United States in violation of Prohibition laws); *United States v. McKeeve*, 131 F.3d 1, 11 (1st Cir. 1997) (conspiracy to export goods to Libya, an embargoed country at the time, in violation of International Emergency Economic Powers Act); *United States v. Inco Bank & Trust Corp*., 845 F.2d 919, 919-20 (11th Cir. 1988) (per curiam) (money-laundering and cash-smuggling conspiracy that would enable drug traffickers "to avoid payment of federal income taxes"); *United States v. Benitez*, 741 F.2d 1312, 1313, 1317 (11th Cir. 1984) (conspiracy to murder, rob and assault U.S. DEA agents), *cert. denied*, 471 U.S. 1137 (1985); *United States v. Busic*, 592 F.2d 13, 16 (2d Cir. 1978) (conspiracy to commit aircraft piracy resulting in death in connection with the takeover of T.W.A. Flight 355). Other cases cited by the government (Gov't Motion, at 28-29 & n.24) involve drug trafficking, which some courts have held implicates the *Bowman* exception. See, *e.g.*, *United States v. Winter*, 509 F.2d 975, 978-79 (5th Cir. 1975); *Rivard v. United States*, 375 F.2d 882, 886-88 (5th Cir. 1967). See also Christopher Blakesley, *U.S. Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1153 (1982) (suggesting that "the damage drug trafficking and drug abuse causes[ ] could all possibly be construed as threats to United States[']integrity, or even to its security . . . . since drug smuggling bypasses United States customs laws and directly challenges that governmental function").

the same argument it does in this case. If the government's argument were accepted here, there also would be nothing to prevent it, on exactly the same facts alleged in *Morrison*, from bringing a criminal prosecution for violations of the securities laws under 15 U.S.C. § 78ff and 18 U.S.C. § 371. That cannot be right.[21]

D. The Court Should Reject The Government's Untimely Argument Based On RICO Predicate Crimes That Are Irrelevant To This Case And Were Added To RICO After This Lawsuit Began

Without ever acknowledging this Court's previous determination that "RICO itself is silent as to its extraterritorial application" (477 F. Supp. 2d at 197 (internal quotation marks omitted)), the government next invites the Court to reopen that determination by pointing to (i) various recently added RICO predicate crimes that have nothing to do with this case, and (ii) alleged evidence in RICO's legislative materials showing that Congress intended RICO to extend abroad. Gov't Motion, at 20-23. Even if the government overcomes our waiver objection, this argument is flawed at every turn.

To begin with, the government has offered no good reason why this Court should reexamine its prior determination concerning RICO's silence as to extraterritoriality. Here, the Second Circuit's *Norex* decision is instructive. The court there rejected a similar argument by a private RICO plaintiff because the Second Circuit has ruled previously that RICO was "silent" with respect to any extraterritorial application. *Norex*, 2010 WL 4968691, at *3 ("Our Court's precedent holds that 'RICO is silent as to any extraterritorial application.'") (quoting *N. S. Fin. Corp.*

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[21] The government's heavy reliance on *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010), see Gov't Motion at 10, 24, 26, is misplaced for several reasons. First, the case involved a criminal prosecution, not a civil action. See page 23, *supra*. Second, the defendant's alleged conduct in *Leija-Sanchez* occurred *entirely* within the United States, despite the fact that the murder itself, planned and ordered by the defendant in Illinois, took place in Mexico. 602 F.3d at 801. Third, the Seventh Circuit relied in part on two principles that were rejected in *Morrison*: the idea that the statute's reference to "foreign commerce" confers extraterritorial jurisdiction, *id*. at 800, and the notion that it is appropriate to borrow the "effects" test from antitrust cases, *id*. at 801.

v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)) (copy attached as Ex. 3). The Second Circuit also rejected the plaintiff's argument that it should "consider this statement dicta," explaining that "we cannot do so." *Ibid.* "The finding that RICO is silent as to its extraterritorial application," the court explained, "is a key holding of the opinion, because it is only upon finding RICO silent as to its extraterritorial application that the *Al-Turki* court turned to its now-abrogated analysis of RICO's extraterritorial application under the conduct and effects test." *Ibid.* The same thing can be said about this Court's previous decision regarding RICO's silence on extraterritoriality.

Beyond that, the Second Circuit in *Norex* ruled that "[e]ven if [it] were to revisit *Al-Turki*," it would reject plaintiff's arguments for avoiding *Morrison*. *Ibid.* Of particular relevance here, the Second Circuit explained that *Morrison* itself "forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach." *Ibid.* The *Norex* court pointed in particular to the Supreme Court's discussion in *Morrison* of Section 30(b) of the Exchange Act, 15 U.S.C. § 78dd(b), which can be interpreted to apply abroad, but as to which the Supreme Court said: "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2882-83. Similarly, in *Cedeno*, Judge Rakoff rejected the RICO plaintiffs' "attempt to sidestep *Morrison* by arguing that their complaint alleges predicate acts of money laundering that involved transfers into and out of this District by U.S. banks." *Cedeno*, 2010 WL 3359468, at *2 (copy attached as Ex. 4). He explained that "[p]laintiffs' superficial argument – that since the federal statutes prohibiting money laundering are (they say) extraterritorial in nature, a RICO action predicated on violations of those

statutes should be given extraterritorial application" – must be rejected because it "entirely misapprehends both the teachings of *Morrison* and the nature of RICO." *Ibid.* So, too, here.

The various RICO predicate crimes that the government says have extraterritorial reach (Gov't Motion, at 20-21 & nn.14-15) have nothing to do with this case, which involves only wire- and mail-fraud predicates. The government unsuccessfully made exactly the same argument in its rehearing petition in *Norex*, citing RICO predicates with no relevance to that case; in response, the Second Circuit declined to alter its conclusion that *Morrison* "forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach." *Norex*, 2010 WL 4968691, at *3 (copy attached as Ex. 3); U.S. *Norex* Reh'g Pet., at 3-5 (copy attached as Ex. 5).[22]

Further, as the government noted in its *Norex* rehearing petition (but neglects to tell this Court), a "significant number" of these "new extraterritorial statutes" were "added . . . as RICO predicates" by Congress *only in 2001* or more recently – in response to 9/11. U.S. *Norex* Reh'g Pet., at 4, n.2 (copy attached as Ex. 5); see generally 2009 DOJ RICO MANUAL, at 6-16 (describing history of amendments to RICO, including successful efforts to expand it in 2001 to combat terrorism and *failed* attempts to add a provision that would have expressly provided for extraterritorial jurisdiction over terrorism offenses).[23] This case, of course, was initiated in 1999 and

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[22] Tellingly, the Justice Department's RICO manual for prosecutors asserts that *criminal* RICO "applies extraterritorially at least where the alleged racketeering offenses apply extraterritorially" (2009 DOJ RICO MANUAL, at 291-92), but never suggests that such a result could be justified on the basis of RICO predicates that are *not* alleged as part of a criminal prosecution. See also *id.* at 298-99 (suggesting that Congress's inclusion in RICO of predicate offenses that apply extraterritorially demonstrates that Congress "intended a pattern *of those predicate offenses* . . . to apply extraterritorially") (emphasis added). It is difficult to see why this same limitation would not apply *a fortiori* to *civil* cases involving RICO.

[23] Of the 30 supposedly extraterritorial predicate crimes cited by the government in footnotes (see Gov't Motion, at 21 nn. 14-15), five involve conduct "in interstate or foreign commerce." See 18 U.S.C. §§ 1952(a) ("travel[ling] in interstate or foreign commerce or us[ing] the mail or any facility in interstate or foreign commerce" in aid of racketeering), 2421 ("transport[ing] any individual in interstate or foreign commerce" for prostitution), 2422 (coercing an individual to travel in interstate or foreign commerce to

involves conduct stretching back to the 1950s, decades before RICO was enacted in 1970. For that reason as well, the government's reliance on RICO predicates added to the statute only after 2001 is misplaced. At most, it would be evidence that Congress sought – in certain cases unlike this one – to expand RICO overseas *after* this litigation was initiated.[24]

Finally, even if the Court were to overlook all the faults with the government's position on remand and consider these newly enacted RICO predicates, the government's argument should still be rejected. As explained above (at pages 12-13 & n.9), there is very substantial affirmative evidence in both the text and legislative history of RICO showing that Congress intended the statute *not* to have any extraterritorial reach. This evidence more than neutralizes any contrary evidence the government invokes to carry its heavy burden of overcoming the presumption against extraterritoriality that applies "in all cases." *Morrison*, 130 S. Ct. at 2881. See also *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 174 (2004) (even if "the more natural reading" of a statute encompasses foreign activity, courts "should adopt" alternative interpretation limiting statute to domestic application if "the statute's language reasonably permits" such

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engage in illegal sexual activity), 2423(a) (transporting a minor in interstate or foreign commerce for the purposes of illegal sexual activity), 2423(b) (sex tourism). As *Morrison* makes clear, the Supreme Court "'ha[s] repeatedly held that even statutes that contain broad language in their definitions of 'commerce' . . . do not apply abroad.'" 130 S. Ct. at 2882 (quoting *Arabian Am. Oil Co.*, 499 U.S. at 251). See also *Norex*, 2010 WL 4968691, at *3 (explaining that Morrison "forecloses" the argument that such language renders a statute extraterritorial in scope). Of the remaining 25 provisions, 21 were added in 2001 or later. See, *e.g.*, 18 U.S.C. §§ 175(a), 351(i), 832(b), 1751(k), 2332b(e), 2423(c). The remaining four predicate offenses, which were enacted in 1986 and 1988 (after BATCo's predicate acts in this case), either are aimed at protecting the institutions of the government itself (such as witness tampering) or are limited to U.S. citizens. See 18 U.S.C. §§ 1512(h) (witness tampering), 1513(d) (retaliation against witnesses), 1956(f) (money laundering; extraterritorial jurisdiction if conduct is by a U.S. citizen or occurs in part in the United States, and transactions involve more than $10,000), 1957(d)(2) (financial transactions of illegal proceeds committed by a "United States person").

[24] Invoking lower-court decisions predating *Morrison* that make the same mistake, the government repeatedly suggests that 18 U.S.C. § 1961(1)'s reference to "any" act that is indictable and "any" offense involving certain laws is evidence of Congress's intent to regulate extraterritorially. Gov't Motion, at 20, 26-27 (citing *United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990)). That argument is inconsistent with *Small v. United States*, 544 U.S. 385, 387-94 (2005), which held that the phrase "convicted in any court" does not include convictions in foreign courts.

an interpretation).[25]

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

Next, the government argues that BATCo's liability under RICO can be upheld under *Pasquantino v. United States*, 544 U.S. 349 (2005), because it is based on eleven predicate acts of wire or mail fraud involving private communications occurring more than 25 years ago between BATCo in England and its then-U.S. subsidiary/affiliate, B&W, in the United States. Gov't Motion, at 7-13, 19. As already explained, that argument was never previously raised in this Court and thus should be treated as waived. If the Court elects to reach this argument, it should be rejected as incorrect.

Significantly, this argument challenges a factual premise plainly accepted not only by this Court in its 2006 decision but also by the D.C. Circuit. See 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). This Court also found – again contrary to the government's argument – that "many of BATCo's *Racketeering Acts* took place *outside the United States*." 449 F. Supp. 2d at 872 (emphasis added); accord *id.* at 873 ("it is true that many of BATCo's activities and statements took place outside of the United States"). This Court was quite correct in that determination: every single one of the ancient mailings and wire transmissions at issue here in-

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[25] The government's broad extraterritorial reading of RICO should also be rejected because it would extend this nebulous and controversial statute throughout the world, which inevitably would raise serious comity concerns with respect to other countries. This point was explained in detail by several of the *amicus* briefs filed in support of BATCo's petition for certiorari. See, *e.g.*, Brief of *Amicus Curiae* KBR, Inc., 2010 WL 1186414, at *5-18 (U.S. filed on Mar. 24, 2010) (No. 09-980); Brief of Int'l Chamber of Commerce, United Kingdom As *Amicus Curiae*, 2010 WL 1186415, at *1-10, 15 (U.S. filed on Mar. 24, 2010) (No. 09-980); Brief of Law Professors As *Amici Curiae*, 2010 WL 1186417, at *15-16, 21-25 (U.S. filed on Mar. 24, 2010) (No. 09-980).

volved conduct by BATCo "outside of the United States" (*ibid.*) – namely, the company's acts of sending or receiving letters or wires *in England*.

Contrary to the government's contention, *Pasquantino* does not establish that the wire- or mail-fraud statutes (without more) reach extraterritorial conduct. In *Pasquantino*, the majority *avoided* the question of whether the wire fraud statute, 18 U.S.C. § 1343, applies extraterritorially. See 544 U.S. at 371 (noting that "our interpretation of the wire fraud statute does not give it 'extraterritorial effect'"). That issue was not presented for decision because the case involved a fraudulent scheme that included, among other things, *extensive domestic conduct* by the defendants, including their use of *interstate* phone calls placed from New York to order liquor from package stores in Maryland and their employment of confederates to drive the liquor from Maryland into Canada (without paying Canadian customs taxes). *Id.* at 353. It was this substantial "domestic element" of *the defendants' own conduct* that made it unnecessary, in the view of the *Pasquantino* majority, to address the extraterritoriality issue. *Pasquantino* is thus plainly distinguishable from this case.[26]

The government suggests that the mere fact that BATCo *sent or received* mail or wires *in England* destined for (or received from) the United States eliminates any question of extraterritoriality, because "such conduct does not involve extraterritorial application of" the wire- and mail-fraud statutes. Gov't Motion, at 13. That argument evidently borrows dicta from the majority

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[26] If mere use of U.S. wires transformed the defendants' scheme to avoid paying Canadian excise taxes into domestic conduct, there would have been no need for the majority to have discussed the defendants' *other* extensive domestic conduct. 544 U.S. at 362, 365, 371-72. Notably, two of the four dissenting Justices in *Pasquantino* took the view that the wire fraud statute had no extraterritorial reach, and thus objected to applying it to schemes that involved substantial domestic conduct and use of interstate wires as well as *some* foreign conduct and effects. See *id.* at 372-80 (Ginsburg, J., joined in part by Breyer, Scalia, and Souter, JJ., dissenting).

opinion in *Pasquantino*.[27] But the government's effort to convert this dicta into a principle of law is foreclosed by *Morrison*, which held that "even statutes that contain broad language in their definitions of commerce . . . do not apply abroad." 130 S. Ct. at 2882 (internal quotation marks omitted). See also note 23, *supra*; *Pasquantino*, 544 U.S. at 378 n.7 (Ginsburg, J., dissenting).

Finally, the government's heavy reliance on *Pasquantino* and the wire- and mail-fraud statutes rests on the flawed assumption of equivalence between the acts that violate or are indictable as predicate offenses under RICO and the "prohibited activities" specifically targeted by 18 U.S.C. § 1962. Recognizing this fallacy, Judge Rakoff recently rejected this very argument as "superficial," explaining that it "entirely misapprehends both the teachings of *Morrison* and the nature of RICO." *Cedeno*, 2010 WL 3359468, at *2 (copy attached as Ex. 4). Judge Rakoff explained:

> So far as RICO is concerned, it is plain on the face of the statute that the statute is focused on how a pattern of racketeering affects an enterprise: it is these that the statute labels the "Prohibited activities," 18 U.S.C. § 1962. But nowhere does the statute evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality. . . .
>
> RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts.

Ibid. See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 913 F.2d 948, 954-55 (D.C. Cir. 1990) ("Congress, in enacting the RICO statute, did not purport to outlaw the commission of the predicate acts. It sought rather to outlaw the commission of the predicate acts only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the] enterprise's affairs.'") (quoting 18 U.S.C. § 1962(c)); see also

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[27] See 544 U.S. at 371-72 (noting, after concluding that the defendants' substantial domestic conduct obviated the need to address the extraterritoriality question, that "[i]n any event, the wire fraud statute punishes frauds executed 'in interstate and foreign commerce,' 18 U.S.C. § 1343 . . . so this is surely not a statute in which Congress had only domestic concerns in mind") (internal quotation marks omitted).

Morrison, 130 S. Ct. at 2886-87 (rejecting the United States' reliance on *Pasquantino* because unlike the Securities Exchange Act, which punishes "not deception alone, but deception with respect to certain purchase or sales," the wire fraud statute prohibits "fraud *simpliciter*").

Through 18 U.S.C. § 1962, RICO regulates a defendant's conduct or participation in the enterprise's racketeering activity. See *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999). For that reason, several Circuits have held that RICO "predicate acts" of U.S. mail or wire fraud are insufficient to overcome the presumption against extraterritoriality when (as here) they are at most "merely preparatory" or "peripheral" to the defendant's fraudulent foreign conduct. *Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008); *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *Al-Turki*, 100 F.3d at 1052-53. If anything, the bar is much higher today than when these cases were decided in light of *Morrison*'s rejection of not only the "conduct" test but also the more demanding "significant and material" conduct test urged by the government. See *Morrison*, 130 S. Ct. at 2886-88. BATCo's alleged predicate acts of mail and wire fraud here consisted of sending cover letters enclosing materials for publication in the U.K. and an agenda for foreign research conferences, and receiving comments from B&W about the same. 449 F. Supp. 2d at 961, 965, 950-72, 979. At most, these communications were "preparatory" or "peripheral" to BATCo's foreign conduct. For that reason as well, the government's argument should be rejected.

F. The Government's Domestic Conduct Argument Is Meritless

As a final alternative basis for liability, the government argues that BATCo itself engaged in "extensive American conduct" on which RICO liability could be based. Gov't Motion, at 2, 6, 8, 14-19. As previously explained, that argument has been waived; and to the extent it hinges on BATCo's decades-old actions in England in sending and receiving wires or mail destined for or originating from the United States, the argument is refuted above. To the extent this argument

relies on *other* conduct by BATCo in the United States that the government has gleaned from the massive record of fifty years of conduct by the tobacco industry, the argument is an uphill battle after *Morrison* that fails on the merits.

In *Morrison*, the plaintiffs also maintained that there was evidence of "*some* domestic activity" by defendants that rendered the presumption against extraterritoriality irrelevant. 130 S. Ct. at 2883-84 (emphasis in original). Specifically, plaintiffs alleged that Florida was where defendants' "senior executives engaged in the deceptive conduct of manipulating" the company's "financial models" and "made misleading public statements." *Ibid.* Giving that argument the back of the hand, the Supreme Court explained: "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 2884 (emphasis in original).[28] Finally, the Court also rejected the United States' more demanding test under which "significant" conduct in the United States that is material to the fraud's success would trigger application of the Securities Exchange Act. See *id.* at 2886-88. Here, there is no conduct on BATCo's part that remotely approaches that standard. See also *Norex*, 2010 WL 4968691, at *3 (rejecting domestic conduct argument in RICO case as foreclosed by *Morrison*) (copy attached as Ex. 3); *Cedeno*, 2010 WL 3359468, at *2 (same) (copy attached as Ex. 4).

Nor is the government correct in suggesting that either the D.C. Circuit or this Court relied on BATCo's domestic conduct in rejecting BATCo's extraterritoriality arguments. The list of exclusively extraterritorial acts recited by both the D.C. Circuit and this Court clearly demon-

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[28] The Court in *Morrison* also took note of several of its earlier decisions rejecting a similar argument. See 130 S. Ct. at 2884 (noting, for example, that in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), the argument was rejected even though the "plaintiff had been hired in Houston, and was an American citizen").

strate that those were the only basis for imposing liability on BATCo. See notes 2-3, *supra*; see also Compl., at ¶ 206 (filed on Sept. 22, 1999); Appendix to Compl., at ¶¶ 30, 50, 51, 57 (filed on Sept. 22, 1999) (citing communications between BATCo and its former U.S. subsidiary/affiliate about positions BATCo took, or intended to take, with foreign legislatures, such as the U.K. Parliament).

Although the government, unsurprisingly, can point to evidence in the massive record of this case of "*some* domestic activity" by BATCo over the past 60 years, that proves only that this is not the "rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Morrison*, 130 S. Ct. at 2884 (emphasis in original). The government cannot credibly claim that these scattered U.S. acts themselves constituted RICO violations. It is obviously not a RICO violation to engage in activities that affect interstate commerce (Gov't Motion, at 7-8), to be amenable to the personal jurisdiction of a U.S. federal court (*id.* at 8-9), or to manufacture cigarettes sold by third parties "in the United States" (here "through an agreement with an R.J. Reynolds subsidiary"). *Id.* at 14. Beyond this, there is no record evidence that BATCo ever marketed any cigarettes sold in the U.S. (fraudulently or otherwise).[29] Likewise, it is not a RICO violation to have, or to communicate with, a U.S. subsidiary/affiliate. *Id.* at 9, n.3. Significantly, that U.S. company – B&W – was recently dismissed from the case on consent due to the absence of any reasonable likelihood that it would engage in future racketeering activity. See Order #7, at 1 (D.D.C. Dec. 22, 2010). *A fortiori*, BATCo's past interactions with B&W – which was a party to every one of the eleven predicate acts attributed to BATCo at trial – cannot serve as the basis for establishing a likelihood of future RICO violations by BATCo.

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[29] The BATCo-brand cigarettes once sold in the U.S. by third parties have never comprised more than a *de minimis* share of the U.S. market, estimated most recently as 0.02 percent. See Written Direct Of G. Read, at 70:09-71:17 (filed on Mar. 14, 2005) (copy attached as Ex. 6).

Finally, the scattered facts of BATCo's occasional and sporadic contacts with the United States over the course of nearly six decades add no gloss to the government's argument. That BATCo employees occasionally visited the United States for business meetings (Gov't Motion, at 15-16) hardly suffices to send the presumption against extraterritoriality into retreat. The government presented no evidence that BATCo did or said anything at these meetings 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. To the contrary, this Court found that BATCo attended these U.S. meetings as a member of a *European* trade organization established "to respond to smoking and health risk challenges *worldwide*," not challenges within the territorial boundaries of the United States *per se*. 449 F. Supp. 2d at 131 (emphasis added). At most, these isolated actions were merely "preparatory" or "peripheral" to BATCo's otherwise extraterritorial conduct.[30]

III. THE GOVERNMENT'S MOTION TO COMPEL COMPLIANCE SHOULD BE DENIED

Despite *Morrison*'s clear invalidation of the basis for the liability judgment and injunction issued against BATCo, the government asks this Court to compel BATCo's compliance – not now, but sometime in the future *if and when* the Court denies BATCo's reconsideration motion. This is a transparent attempt to distract the Court from the serious issues raised by *Morri-*

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[30] The government's assertion that BATCo developed a Y-1 tobacco farm in the United States misrepresents the record. See Gov't Motion, at 16. "Y-1" tobacco was "[d]eveloped at [a] B&W experimental farm in North Carolina," not by BATCo. 449 F. Supp. 2d at 345; see also 9/23/2004 (a.m.) Trial Tr. at 513-515 (government witness, Dr. David Kessler, testifying that B&W developed Y-1) (copy attached as Ex. 7). In any event, 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." 499 F. Supp. 2d at 345. Even the government's own cigarette design expert (who was a former B&W scientist) conceded in his written direct testimony that B&W developed Y-1 because "it was felt that with the higher nicotine tobacco that B&W could manage the tar to nicotine ratio of its cigarettes and in the process move toward a safer product." Written Direct of J. Wigand, at 101:16-102:05 (filed on Jan. 24, 2005) (copy attached as Ex. 8).

son and unfairly cast BATCo in an unflattering light. See Gov't Motion, at 38-39 & n.31. It should be denied as legally and factually unfounded.

The government's motion is built on a false premise – that BATCo claims "the authority to excuse itself from complying with the Court's order" and has said it "will not comply." Gov't Motion, at 1. As explained above (at page 2), that is simply untrue. By the same token, the government is wrong to suggest that BATCo is somehow defying this Court's orders by insisting on its right, clearly embodied in a stipulation joined by the government, not to pay court costs until its appellate remedies have been exhausted. See note 1, *supra*. BATCo is indeed "[un]like every other defendant in this litigation" (Gov't Motion, at 4) because its liability under RICO rests on a determination by this Court that has been invalidated by *Morrison*, and BATCo has not exhausted its appellate remedies on that issue. To be sure, BATCo and the government disagree about whether this Court's partially vacated injunction – which is now in the process of being revised including through ongoing, cooperative discussions by the parties in which BATCo has been a full participant – currently has operative effect. Recognizing this disagreement, BATCo several months ago offered to "join the government in a motion for clarification" to this Court on that issue – a fact that the government remarkably never mentions. See 11/22/2010 Ltr. From D. Wallace To A. Ravel, at 1 (copy attached as Ex. 1). BATCo would welcome the Court's clarification as to whether any part of Order #1015 is currently effective despite the absence of a final judgment.

The government's motion to compel rests on the legally mistaken assumption that Order #1015 is enforceable *right now* even though it *undeniably is in the process of being revised.* Although "affirm[ing] in large part the finding of liability" and "largely affirm[ing] the remedial order," the D.C. Circuit vacated Order #1015 "with regard to four discrete issues" and remanded

with directions "for further proceedings." 566 F.3d at 1105. Two of these "discrete issues" were recently resolved – the dismissal of CTR and TI, and the agreed dismissal of B&W (Order #7, at 1 (D.D.C. Dec. 22, 2010)) – but this Court has yet to reformulate its prohibition on "the use of health messages or descriptors" outside the territorial United States consistent with *Morrison* and the D.C. Circuit's instruction "to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects." 566 F.3d at 1150. Also remaining to be resolved is the question "whether inclusion of Defendants' subsidiaries" in Order #1015 "satisfies Rule 65(d)." *Id.* at 1136.[31] In addition to these various unresolved remedial questions, there are at least two major legal questions that have arisen since Order #1015 was issued and the D.C. Circuit wrote its May 2009 decision – the legal impact of *Morrison* on BATCo's liability and on the remanded issue of the scope of Section II.A.4 of the injunction; and whether enactment of the Family Smoking Prevention and Tobacco Control Act, which was signed into law on June 22, 2009, extinguishes the Court's jurisdiction in this case, or at a minimum, requires modification of certain injunctive remedies.

In BATCo's view, until these issues have been resolved and the further proceedings contemplated by the D.C. Circuit's mandate are completed, Order #1015 does not conclude this liti-

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[31] The D.C. Circuit ordered this Court to "confine the [corrective] statements to purely factual and uncontroversial information," so as to comply with the First Amendment. 566 F.3d at 1144 (internal quotation marks omitted). It also directed this Court to account "for the rights of innocent persons, either by abandoning this part of the remedial order or by crafting a new version reflecting the rights of third parties" consistent with the requirements of 18 U.S.C. § 1964(a). 566 F.3d at 1142 (quotation marks omitted). Here, too, the parties are without a meeting of minds, and the Court has yet to resolve the issue. In addition to those issues, the Court "has not yet determined the content of the corrective statements" that Order #1015 requires defendants to disseminate on their websites, in U.S. media, as package onserts, and in retail displays. *Id.* at 1144. The Court cannot even begin this last task until after February 3, 2011, when the government has promised to deliver revised "corrective statements" that are being tested by the government's "scientists and researchers." United States' Status Report, at 14 (filed on Nov. 24, 2010). Yet another question that the parties to date have been unable to resolve and that accordingly requires judicial decision before Order #1015 can be finalized is how defendants' documents are to be bibliographically coded for publication on their websites.

gation as to "the rights and liabilities of all the parties" and therefore it "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Indeed, with its instant motion, BATCo is asking this Court to revisit and vacate its liability finding against BATCo based on *Morrison*. And, of course, the government has known since September 7, 2010 that BATCo intended to file this motion. See Defendants' Praecipe Regarding The Court's August 12, 2010 Order, at 8-10 (filed on Sept. 7, 2010). Under these circumstances, the government's suggestion that BATCo is somehow flouting any currently effective order of this Court is nothing short of baffling.

Finally, the government overlooks the reality that, in the D.C. Circuit, "[a] final decision is one which disposes of the whole subject, gives all the relief that was contemplated, [and] provides with reasonable completeness, for giving effect to the judgment and *leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree*." *United States v. W. Elec. Co*., 777 F.2d 23, 26 (D.C. Cir. 1985) (emphasis added; quotation marks omitted). "In damage and injunction actions, a final judgment in a plaintiff's favor declares not only liability but also the consequences of liability – what, if anything, the defendants must do as a result." *Franklin v. Dist. of Columbia*, 163 F.3d 625, 628 (D.C. Cir. 1998). Under that test, Order #1015 is not yet final because it does not declare all "the consequences of liability" (*Franklin*, 163 F.3d at 628), and leave nothing to be done save the mere ministerial tasks associated with entering a final decree. *W. Elec. Co*., 777 F.2d at 26. Although the government correctly noted that courts often define finality in the context of appealability (see Gov't Motion, at 33 & n.27), the D.C. Circuit has acknowledged that "the role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well." *Redding & Co. v. Russwine Constr. Corp*., 417 F.2d 721, 727 (D.C. Cir. 1969); see also

Seminole Nation of Okla. v. Norton, No. 01-5418, 2002 WL 1364249, at *1 (D.C. Cir. May 24, 2002) (citing *Redding* in recognition of the interplay between finality for injunctive enforcement purposes and finality for appealability). That makes perfect sense. Treating finality for appellate purposes coterminously with finality for enforcement purposes is consistent with the federal judiciary's longstanding policy "preference for a unitary appellate disposition." See 10 J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 54.22[2][b] (3d ed. 1997).[32] The government's approach, in contrast, would lead to piecemeal appeals and a proliferation of stay motions – exactly the opposite of the orderly process of resolving the outstanding issues that has occurred here.

Contrary to the government's repeated suggestion, BATCo is fully mindful of its obligation to comply with a final decision of this Court: it has "no intention of not complying with any injunctive orders that [the Court] might enter once the remaining issues in this case have been fully adjudicated, a revised final judgment has been entered, and (assuming that judgment is adverse to BATCo) the injunction takes effect." See 11/5/2010 Ltr. From D. Wallace To A. Ravel (Gov't Motion Ex. 2). The government's motion should be denied as legally and factually meritless.[33]

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[32] Although the D.C. Circuit does not seem to have directly addressed the operation of Rule 54(b) in connection with remand proceedings, the Sixth Circuit has done so – and squarely held that Rule 54(b) applies with full force. See *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 509-13 (6th Cir. 2001) (reversing district court holding that "Rule 54(b) has no application after a claim has been heard on appeal"). The Sixth Circuit explained that nothing in this language of Rule 54(b) "encourages us to believe that the Rule is any less applicable to proceedings in the district court after the case has been heard in a first appeal than before it," and held that "the Rule must be complied with during all stages of litigation in the district court, not just the period before a first appeal." *Id.* at 513.

[33] If the Court rejects BATCo's interpretation of Rule 54(b) and holds that certain portions of Order #1015 are currently in effect despite the absence of a final judgment, BATCo respectfully requests that this Court allow BATCo the opportunity to request a stay of that decision in an orderly fashion. Under BATCo's understanding of Rule 54(b), there is no need for a stay now – and certainly no need for this Court to adjudicate a stay request that BATCo has not yet filed, as the government suggests.

CONCLUSION

For all of the foregoing reasons, the Court should (1) grant BATCo's motion for reconsideration and either 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.

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Respectfully submitted,

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