ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA,
Appellee

v.

PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INCORPORATED, *et al.*,
Appellants

PHARMACIA CORPORATION AND PFIZER INC.,
Appellees

On Appeal From the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS SUPPORTING APPELLANTS AND URGING REVERSAL

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August 3, 2004

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On Appeal From the United States District Court
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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS TO PARTICIPATE AS *AMICI CURIAE*

The Chamber of Commerce of the United States (the "Chamber") and the National Association of Manufacturers (the "NAM") hereby respectfully move for leave to participate in this action as *amici curiae*.

A motion for an enlargement of time to file both this motion to participate as *amicus curiae* and the *amicus* brief itself was denied on August 2, 2004. Accordingly, pursuant to Federal Rules of Appellate Procedure 29(e) and 26(a) and Circuit Rule 29(c), this brief is due today, seven business days after the principal brief of the parties being supported was filed. The Appellants consent to the *amici*'s participation, but the United States as appellee does not.

RULE 26.1 STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber and the NAM, through the undersigned counsel of record, hereby submit the following Corporate Disclosure Statement.

The Chamber is a not-for-profit business federation composed of more than three million businesses and organizations of every size, in every sector and region of the country. The Chamber's purpose is to promote the general commercial, professional, legislative and other interests of its members. None of its members has any ownership interest in the Chamber. The Chamber has no parent company and no publicly held company has a 10% or greater ownership interest in it.

The NAM is an unincorporated association composed of 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM's purpose is to promote the general commercial, professional, legislative and other interests of American manufacturers. None of its members has any ownership interest in the NAM. NAM has no parent company and no publicly held company has a 10% or greater ownership interest in it.

INTERESTS OF THE *AMICI CURIAE*

The Chamber is the world's largest business federation, and the NAM is the nation's largest industrial trade organization. Insofar as RICO is intended to preserve the integrity of the business community by deterring the infiltration of legitimate business enterprises by criminal activity, the Chamber and the NAM recognize the value in a strong, consistent and disciplined application of the RICO statute. Yet, at the same time, the Chamber and the NAM see the danger in, and their members have a strong interest in avoiding, an unauthorized and

unprecedented expansion of the RICO statute – particularly where, as here, a novel interpretation of RICO threatens the demise of an entire industry. The district court's opinion – which markedly expands the civil RICO statute to permit a broad disgorgement remedy, and does so to support a claim in a staggering monetary amount ($280 billion) that no litigant in history has previously sought – sets an unacceptable precedent that will disrupt the business community and have profound consequences beyond the present case.

RICO serves as a broad umbrella statute, incorporating many different causes of action and giving rise to many different theories under which a suit against a business may be brought. It is frequently used in civil litigation when the adverse party is a business or professional organization. As a civil litigant, the government has vast resources and, equipped with this broadened remedy, will be able to bring even more pressure to bear on its adversaries, forcing them to settle in order to avoid the risk of having to turn over their entire working capital. Even when less than an entire industry is at stake or a more modest amount of disgorgement is being sought, the district court's novel interpretation of RICO – if allowed to stand – will have a widespread detrimental effect. Important business decisions depend on some degree of predictability in the law. Where laws are creatively expanded to fashion extreme remedies, instability results and the interests of business are put at peril.

REASONS WHY AN *AMICUS* BRIEF IS DESIRABLE; RELEVANCE OF THE MATTERS DISCUSSED

Both the Chamber and the NAM regularly advance the interests of their members in courts throughout the country on issues of critical concern to the business community. The *amici* are particularly experienced in briefing issues relating to the scope of the civil RICO statute: both

the Chamber and the NAM have participated as *amicus curiae* in numerous civil RICO cases.[1] As noted above, the tobacco companies that are named as defendants in this action are not, by any means, the only parties that will be affected by the outcome of this case. The questions presented by this appeal – whether and under what circumstances the government can seek disgorgement under the civil RICO statute – will affect a broad range of business interests. Because the Chamber and the NAM are well-positioned to represent those interests, their *amicus* brief is likely to be helpful to the Court.

The proposed *amicus* brief presents three arguments. First, it contends that the expansion of civil RICO is contrary to the interests of legitimate business enterprises. Second, it argues that the sweeping civil remedy fashioned by the district court allows the government to make an end run around the procedural protections that Congress imposed when it enacted the criminal RICO statute. And third, it explains that the decision to allow disgorgement under RICO represents a sharp break with a long line of precedent holding that RICO's remedy provisions should be interpreted in accord with the construction of the remedy provisions of the Clayton Act – under which disgorgement has never been allowed. All three of these arguments go directly to the heart of the matters at issue in this appeal, and they are therefore highly relevant to the disposition of the case.

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[1] The Chamber filed amicus briefs in, among other cases, *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings*, 268 F.3d 103 (2d Cir. 2001); and *Andrews v. AT&T*, 95 F.3d 1014 (11th Cir. 1996). The RICO cases in which NAM has filed amicus briefs include *H.J., Inc.*; *PacifiCare Health Systems*; *RJ Reynolds Tobacco Holdings, Inc.*; *Neder v. United States*, 527 U.S. 1 (1999); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); and *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*, 185 F.3d 957 (9th Cir. 1999).

CONCLUSION

For the foregoing reasons, the Court should permit the Chamber and the NAM to participate in this appeal as *amici curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of August, 2004, a copy of the foregoing Motion for Leave to Participate as Amici Curiae was delivered by hand to:

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A) PARTIES AND *AMICI*

All parties, intervenors, and *amici* are listed in the Appellants' Brief except for the following: *Amici* The Chamber of Commerce of the United States and The National Association of Manufacturers.

B) RULINGS UNDER REVIEW

References to the rulings at issue appear in the Appellants' Brief.

C) RELATED CASES

The case on review has been before this Court. The name and numbers of the prior appeals are *United States v. Philip Morris Inc., et al.*, No. 02-5210, and *United States v. Philip Morris Inc., et al.*, Nos. 04-5207, 04-5208.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Chamber of Commerce of the United States (the "Chamber") and The National Association of Manufacturers (the "NAM"), through the undersigned counsel of record, hereby submit the following Corporate Disclosure Statement.

The Chamber is a not-for-profit business federation composed of more than three million businesses and organizations of every size, in every sector and region of the country. The Chamber's purpose is to promote the general commercial, professional, legislative and other interests of its members. None of its members has any ownership interest in the Chamber. The Chamber has no parent company and no publicly held company has a 10% or greater ownership interest in it.

The NAM is an unincorporated association composed of 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM's purpose is to promote the general commercial, professional, legislative and other interests of American manufacturers. None of its members has any ownership interest in the NAM.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

STATUTES AND RULES:

Clayton Act, 15 U.S.C. § 12 *et seq.*:

MISCELLANEOUS:

PERTINENT STATUTES

Excerpts of portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), are attached to Appellants' Brief.

INTRODUCTION SETTING FORTH THE INTERESTS OF THE *AMICI CURIAE*

Amici Curiae The Chamber of Commerce of the United States (the "Chamber") and The National Association of Manufacturers ("NAM") respectfully submit this *amicus* brief in support of the interlocutory appeal filed by Appellants in *United States of America v. Philip Morris USA Inc.*, No. 04-5252.[1]

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community and has participated as *amicus curiae* in numerous cases addressing the RICO statute.[2] The NAM is the nation's largest industrial trade organization. It represents 14,000 member companies and 350 member associations serving manufacturers and

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[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

[2] These cases include *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings*, 268 F.3d 103 (2d Cir. 2001); and *Andrews v. AT&T*, 95 F.3d 1014 (11th Cir. 1996).

employees in every industrial sector and all 50 states. The NAM has also participated as *amicus curiae* in numerous cases addressing the RICO statute.[3]

Insofar as RICO is intended to preserve the integrity of the business community by deterring the infiltration of legitimate business enterprises by criminal activity, the Chamber and the NAM recognize the value in a strong, consistent and disciplined application of the RICO statute. Yet, at the same time, the Chamber and the NAM see the danger in, and have a strong interest in avoiding, an unauthorized and unprecedented expansion of the RICO statute – particularly where, as here, a novel interpretation of RICO threatens the demise of an entire industry. The district court's opinion – which expands RICO's remedy provisions to include a broad remedy of disgorgement, and does so to support a claim in a staggering monetary amount ($280 billion) that no litigant in history has previously sought – sets an unacceptable precedent that will disrupt the business community and have profound consequences beyond the present case.

RICO serves as a broad umbrella statute, incorporating many different causes of action and giving rise to many different theories under which a suit against a business may be brought. It is frequently used in civil litigation when the

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[3] In addition to the cases cited in note 2 *supra* (with the exception of *Andrews v. AT&T*), the NAM has filed briefs in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *Neder v. United States*, 527 U.S. 1 (1999); and *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999).

adverse party is a business or professional organization. As a civil litigant, the government has vast resources and, equipped with this broadened remedy, will be able to bring even more pressure to bear on its adversaries, forcing them to settle in order to avoid the risk of having to turn over their entire working capital. Even when less than an entire industry is at stake or a more modest amount of disgorgement is being sought, the district court's novel interpretation of RICO – if allowed to stand – will have a widespread detrimental effect. Important business decisions depend on some degree of predictability in the law. Where laws are creatively expanded to fashion extreme remedies, instability results and the interests of business are put at peril.

SUMMARY OF THE ARGUMENT

The district court's decision – which admittedly takes the unprecedented step of recognizing a new and broad disgorgement remedy under RICO – is contrary to the interests of legitimate business enterprises. It effectively allows the government to conduct an end-run around the criminal forfeiture provisions of the RICO statute which were specifically enacted to assure procedural fairness whenever the government attempts to seize assets alleged to be the ill-gotten gains of racketeering activity. The district court's decision also violates long-standing doctrine refusing to recognize a disgorgement remedy under similar provisions of the Clayton Act that have traditionally been construed in tandem with RICO.

ARGUMENT

I. UNDISCIPLINED EXPANSION OF RICO IS CONTRARY TO THE INTERESTS OF LEGITIMATE BUSINESS ENTERPRISES.

Legitimate business enterprises, including public corporations and their investors, depend on a stable legal environment in which statutory text and long-standing doctrine can be relied on to establish the relevant legal rules. It is generally presumed that if extreme remedies are to be fashioned, they must first pass through the legislative process and be based on more than an inference from the implied meaning of a statutory text. The tobacco companies recognize that the government may attempt to seek prospective equitable remedies to "prevent or restrain" any future misconduct. But no business would expect that the government could seek disgorgement of past proceeds – years after the fact – based on a novel interpretation of what is at best only implicit in a statute. The district court's decision suggests that no company's working capital is ever secure, because a judicially-crafted remedy could someday put such funds in jeopardy, even without a clear legislative mandate.

Recognizing that it was taking a bold new step, the district court adopted an expansive and unprecedented reading of RICO, which broadens not only the reach of the statute but also its potential for abuse. The district court adopted this broad approach despite widespread recognition by courts and commentators of the propensity of civil litigants to abuse the RICO statute, and despite recent legislative

efforts to rein in RICO's scope. *See, e.g., Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting); Philip A. Lacovara & Geoffrey F. Arnow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 New Eng. L. Rev. 1 (1985-86); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (amending 18 U.S.C. § 1964(c) to preclude private plaintiffs from bringing RICO claims sounding in securities fraud).

Several commentators have already questioned the government's motives in filing this case against the tobacco companies, noting that the government is seeking new and broad reforms through litigation rather than through the legislature. *See, e.g.,* Jonathan Turley, *A Crisis in Faith: Tobacco and the Madisonian Democracy*, 37 Harv. J. on Legis. 433 (2000) (criticizing decision to use courts when Congress refused to pass legislation further regulating the tobacco industry); Robert B. Reich, "Don't Democrats Believe in Democracy?," Wall St. J., Jan 12, 2000, at A22. Now the district court has gone far beyond the legislated limits imposed by the statute's text, holding that while no RICO provision expressly authorizes any kind of monetary relief in a civil case brought by the government, 18 U.S.C. § 1964(a) implicitly allows for disgorgement of an entire industry's proceeds from the sale of its product for a period of over 50 years.

Should the Panel affirm this decision, the effect will be to disrupt and injure those lawful businesses which Congress intended RICO to protect.

Perhaps more than any other statute, RICO has been subject to unjustified expansion and abuse. As the Supreme Court has recognized, RICO's broad civil provisions have invited its routine use as a means of invoking federal jurisdiction and seeking damages from the "deep pockets" in countless business disputes. *See, e.g., Sedima S.P.R.L.*, 473 U.S. at 500 (recognizing that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors"); *id.* at 504 ("[Private] litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions . . . .) (Marshall, J., dissenting); Hon. William H. Rehnquist, *Get RICO Cases Out of My Court*, Wall St. J., May 19, 1989, at A14 (noting that "[a]ny good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court"). Because of RICO's broad scope and its inventive use in the hands of plaintiffs, civil RICO cases account for a large portion of the federal docket. *See, e.g.,* Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5 (1989) (noting large number of civil RICO cases filling the federal docket); Hon. Jed. S. Rakoff & Howard W. Goldstein, *RICO: Civil And Criminal Law And Strategy* § 2.03 at 2-33 (1999) (referring to "substantial" rate of civil RICO filings, continuing at an average of eighty to ninety per month since 1986).

The district court's ruling would give the government – and potentially private litigants – a powerful new reason to continue to pursue RICO in new and untested ways, namely, to seek disgorgement of past profits regardless of whether such profits are currently being used to fund any illegal acts. Companies will stand at risk of having to turn over all of their remaining earnings should they lose at trial. Given RICO's already expansive scope, the pressure that such high stakes places on defendants will often result in settlements induced by a small probability of an immense judgment – or, as Judge Friendly called them, "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The threat of huge civil liabilities and litigation costs inevitably has a serious chilling effect on legitimate business activities to the detriment of consumers and investors nationwide. Indeed, Congress itself has recognized civil RICO's potential for abuse. As part of the Private Securities Litigation Reform Act, it amended RICO to prohibit private plaintiffs from suing corporations based on claims sounding in securities fraud. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (amending 18 U.S.C. § 1964(c)).

As the largest federation of American businesses, the Chamber is greatly concerned about the indiscriminate expansion of civil RICO and has testified before Congress regarding this issue. *Statement of the Chamber of Commerce of the United States on Racketeering Influenced and Corrupt Organizations Act,*

Before the Criminal Justice Subcommittee of the House Judiciary, Oct. 9, 1985. Many of the Chamber's members who are well respected in the business community have been faced with civil RICO claims. The NAM has confronted similar issues and shares similar concerns. Neither the Chamber nor the NAM condone any kind of unlawful or unethical conduct, regardless of the legitimacy of the business itself. However, the Chamber and the NAM believe that an unprecedented and unjustified expansion of RICO to allow for a sweeping disgorgement remedy on the basis of a minimal evidentiary showing will serve no purpose other than to promote instability within the business community and to provoke an even faster rate of increase in suits brought solely for their settlement value.

II. THE GOVERNMENT SEEKS AN END-RUN AROUND THE PROCEDURAL PROTECTIONS THAT CONGRESS ENACTED AS PART OF RICO'S CRIMINAL FORFEITURE PROVISIONS.

While the district court has taken an admittedly novel route by which it claims to have found an implied disgorgement remedy in the language of section 1964(a), it is clear that the RICO statute already expressly provides a means for the government to recover a racketeering enterprise's ill-gotten gains – through the criminal forfeiture provisions of section 1963(a)(3). RICO's criminal forfeiture provisions make clear that Congress considered a wide array of potential remedies, and included express statutory terms for those it wished to enact, carefully

delimiting the circumstances in which each potential remedy could be applied. More importantly, in adopting provisions for forfeiture, Congress recognized that certain procedural safeguards are necessary to make sure that such a powerful remedy is not wrongly applied or abused – such safeguards include the heightened standard of proof beyond a reasonable doubt and clear notice in a charging document of the specific money or property sought to be obtained. By authorizing the equivalent of forfeiture through a disgorgement remedy said to be present in Section 1964(a), the district court is effectively empowering the government to employ a drastic and far-reaching remedy without any of the procedural protections that Congress specifically prescribed as a necessary check when the government seeks to exercise such power. Such an end-run around the protections that RICO and other similar forfeiture statutes have traditionally provided to defendants whose money or property is sought by the government should not be permitted.

Section 1963 provides a specific, detailed framework to govern the criminal forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3). That framework demonstrates that when Congress authorized the forfeiture of proceeds obtained in violation of RICO, it proceeded carefully, authorizing forfeiture only in limited circumstances and only in conjunction with

procedural safeguards designed to protect defendants from potential overreaching by the government. *Cf.* Barry L. Johnson, *Purging The Cruel And Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States V. Bajakajian*, 2000 U. Ill. L. Rev. 461, 462 (2000) ("Commentators also have expressed concern that the strong financial interest many law enforcement agencies have in forfeited property skews enforcement incentives toward overly aggressive use of forfeiture provisions.") (citations omitted). The procedural safeguards recognized in the context of RICO's forfeiture provision include requirements that the government: (i) prove its case beyond a reasonable doubt; (ii) allege in the indictment or information the extent of the interest or property subject to forfeiture, *see* Fed. R. Crim. P. 7(c)(2) and 32.2(a); (iii) convince a jury, upon the defendant's request, that the requisite nexus between the property and offense committed exists, *id.* at 32.2(b)(4); and (iv) satisfy the additional procedural safeguards set forth in 18 U.S.C. § 1963. In addition, the finding of forfeitability must be embodied in a judgment. *See* 18 U.S.C. § 1963(e).

The disgorgement remedy fashioned by the district court is the functional equivalent of forfeiture in that it allows the government to seize a defendant's allegedly ill-gotten gains from a prior pattern of racketeering activity. But because this remedy is imposed in the context of a civil action, the criminal RICO statute's

procedural prerequisites and limitations are inapplicable. The sole evidentiary requirement imposed by the district court – that the government must demonstrate that disgorgement will serve to deter future misconduct – is no limitation at all and serves only to blur the distinction between remedies addressed respectively to past and future violations. To the extent that it is punitive in nature, any forfeiture, like any disgorgement, may have some deterrent effect. *See Libretti v. United States*, 516 U.S. 29, 39 (1995) (forfeiture of proceeds obtained in violation of RICO is "clearly a form of monetary punishment") (quoting *Alexander v. United States*, 509 U.S. 544, 558 (1993)); *see also Russello v. United States*, 464 U.S. 16, 28 (1983) (criminal forfeiture of proceeds derived in contravention of RICO is intended to punish). Yet, notwithstanding the similarity between disgorgement and forfeiture, the disgorgement remedy fashioned by the district court carries none of the procedural protections that RICO brings to bear whenever forfeiture is sought.

As essentially a forfeiture provision unchaperoned by any procedural safeguards, the disgorgement remedy created by the district court invites the government to obtain a defendant's money and property without adhering to any of the requirements that have traditionally accompanied the use of such a severe remedy. If a disgorgement remedy continues to be recognized as available in this case, the government will stand to gain $280 billion based on a simple preponderance-of-the-evidence standard without any specific notice in a charging

document, oversight by a jury or compliance with other specific provisions enacted by Congress as part of Section 1963.[4] The result would be to permit the government to destroy an entire industry by taking advantage of "lighter evidentiary burdens and weaker procedural safeguards than criminal forfeiture would require." *United States v. Michelle's Lounge*, 126 F.3d 1006, 1007 (7th Cir. 1997) (citation omitted).[5] Such an end-run around RICO's forfeiture provision should not be countenanced based on a questionable inference drawn from a different section of the statute.

III. THE INTERPRETATION OF SIMILAR LANGUAGE IN THE REMEDIAL PROVISIONS OF THE CLAYTON ACT WEIGHS AGAINST THE DISTRICT COURT'S CONCLUSION.

The district court's conclusion that disgorgement is an available remedy under RICO is untenable for another reason. It contradicts a long line of Supreme Court precedent and a well-established body of case law recognizing that Congress intended RICO's remedy provisions to mirror those of the Clayton Act and that

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[4] In the case *sub judice*, the government elected to close its criminal investigation of the defendants and bring a civil action against them.

[5] Commentators have loudly opposed the use of civil forfeiture proceedings, even where provided for by Congress, due to the lack of the procedural safeguards in such proceedings. *See, e.g.*, Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1912 (May 1998) (describing civil forfeiture as "a tool of tyranny"); Johnson, *supra,* at 467 (noting that commentators have described civil forfeiture law as "a virtual smorgasbord of injustices" and "virtually bereft of constitutional protections") (citations omitted).

interpretation of the remedial provisions of both statutes should therefore be in accordance with a uniform scheme. Because courts have consistently declined to recognize a disgorgement remedy under the Clayton Act, any recognition of a disgorgement remedy under RICO is contrary to congressional intent and threatens to cause an unprecedented dichotomy in what has otherwise been a uniform interpretive scheme.

As the Supreme Court has recognized, "there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). Indeed, "Congress consciously patterned civil RICO after the Clayton Act." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151-52 (1987) ("The use of an antitrust model for the development of remedies against organized crime was unquestionably at work when Congress considered the bill that eventually became RICO."). For that reason, the Supreme Court has consistently interpreted RICO by looking to the almost identical provisions of the Clayton Act and the legal doctrine that has arisen under them. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992) (citing cases) (Where Congress used the same words in the RICO and antitrust statutes, "we can only assume it intended them to have the same meaning that courts had already given them.").

Section 15 of the Clayton Act contains the same language as RICO Section 1964(a). Specifically, both sections confer upon the district courts jurisdiction "to prevent and restrain" violations of their respective statutes' substantive terms. 15 U.S.C. § 25 and 18 U.S.C. § 1964(a). No court has recognized a disgorgement remedy under the Clayton Act. To the contrary, courts have rejected the attempt to infer such a remedy from the Act's terms. In *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976) and *FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25, 40-41 (D.D.C. 1999), courts considering Section 16 of the Clayton Act, which authorizes injunctive relief against "threatened loss or damage," concluded that neither restitution nor disgorgement is an available remedy under the Clayton Act because the only remedies available under the statute are forward-looking in nature and do not undertake to account for past harm. Because the Supreme Court has recognized that the remedial provisions of Section 15 of the Clayton Act are even narrower than those of Section 16, *California v. American Stores Co.*, 495 U.S. 271, 281 (1990) ("Indeed, we think it could plausibly be argued that § 16's terms are . . . more expansive [than section 15's terms]."), Section 15 must be seen as providing even less of a basis for the backward-looking remedy of disgorgement.

Because the Supreme Court has consistently treated the remedial provisions of the Clayton Act and the RICO statute as cognate provisions, subject to a similar

interpretive scheme, the district court's decision – inferring a disgorgement remedy in a statutory context where other courts have refused to infer one before – stands out as flawed.

CONCLUSION

The district court improperly recognized a disgorgement remedy arising under Section 1964(a). Its decision should be overturned on appeal.

Respectfully submitted,

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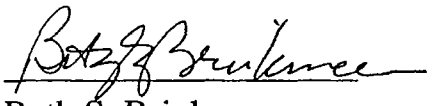

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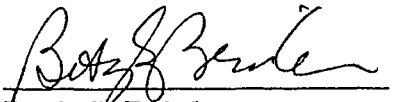
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Circuit Rules 28(e)(1) and 32(a), I hereby certify that this Brief has been prepared in proportionally-spaced "Times New Roman" 14-point typeface, and contains 3,416 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedures 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).



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I hereby certify that on this 3d day of August, 2004, two copies of the foregoing Brief Of *Amici Curiae* The Chamber Of Commerce Of The United States And The National Association Of Manufacturers Supporting Appellants And Urging Reversal was delivered by hand to:

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