UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	**Civil Action No.**
v.	:	**99-2496 (GK)**
	:	
PHILIP MORRIS USA, Inc.,	:	
f/k/a Philip Morris, Inc.	:	
et al.	:	
Defendants.	:	

ORDER #586

This matter is now before the Court on the United States' Motion for Partial Summary Judgment Dismissing Defendants' Affirmative Defenses Asserting Res Judicata, Collateral Estoppel, Release, Accord and Satisfaction, and Mootness ("Motion"). Upon consideration of the Motion, the Opposition, the Reply, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, the Motion is **granted**; it is further

ORDERED that the following affirmative defenses are **DISMISSED:**

Philip Morris, USA Inc.: Affirmative Defenses 8, 9, and 10

Altria Group, Inc.: Affirmative Defenses 9, 10, and 11

R.J. Reynolds, Tobacco Co.: Affirmative Defenses 39, 40, and 41

Brown & Williamson Tobacco Co.: Affirmative Defense 26 and 27

British American Tobacco (Investments) Limited: Affirmative Defense 19

Lorillard Tobacco Company: Affirmative Defense 3 and 46

The Liggett Group, Inc.: Affirmative Defense 30, 31, and 32

Council for Tobacco Research - USA: Affirmative Defense 6, 18, and 26

The Tobacco Institute: Affirmative Defenses 7, 8, and 9.

July 7, 2004

__/s/________________________________
Gladys Kessler
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
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Plaintiff,	:	
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Defendants.	:	

MEMORANDUM OPINION

This matter is now before the Court on the United States' Motion for Partial Summary Judgment Dismissing Defendants' Affirmative Defenses Asserting Res Judicata, Collateral Estoppel, Release, Accord and Satisfaction, and Mootness ("Motion"). Upon consideration of the Motion, Defendants' Opposition, the Reply and the entire record herein, and for the reasons stated below, the Motion is **granted.**

I. BACKGROUND

Plaintiff, the United States of America (the "Government") has brought this suit against Defendants[1] pursuant to Sections 1962 (c)

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

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

Defendants deny all the Government's claims and assert a variety of affirmative defenses in their Answers, responses to interrogatories, and in the Joint Defendants' Preliminary Proposed Conclusions of Law Regarding Affirmative Defenses. Some of those

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

[3] As a result of corrections made to the Youth Addicted Population and the resulting proceeds' calculation, the amount of disgorgement sought by the Government is $280 billion, rather than the $289 billion initially identified in the United States' Preliminary Proposed Conclusions of Law. See United States' Mem. of Points and Authorities in Opp. To Defs.' Mot. for Partial Sum. J. Dismissing Govt's Disgorgement Claim, at 1.

affirmative defenses are based upon the Master Settlement Agreement ("MSA"), a settlement between all but two of the Defendants and the 50 states and the District of Columbia to resolve state tobacco litigation. Defendants argue that the MSA, in and of itself, either precludes the Government's litigation of its RICO claims or renders this action moot because the MSA already provides much of the relief which the Government seeks. See Defs.' Opp'n, at 5. In this Motion, the Government seeks partial summary judgment dismissing these affirmative defenses.

II. SUMMARY JUDGMENT STANDARD

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

Additionally, under Rule 56(c), in order to defeat summary judgment dismissing any affirmative defense, Defendants must make

a showing sufficient to establish the existence of an element essential to that affirmative defense. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. THE MSA DOES NOT, AS A MATTER OF LAW, RENDER THE GOVERNMENT'S CLAIMS MOOT

Defendants' affirmative defense of mootness rests entirely on the MSA. They claim that the Government is not entitled to any of the relief it seeks because that relief is duplicative of existing and effective mechanisms provided by the MSA. See Defs.' Opp'n, at 5. However, Defendants continue to confuse the two fundamental components of every lawsuit, namely liability and remedy. Affirmative defenses apply only to the issue of liability, not remedy. This Court has already held on two occasions that the MSA, in and of itself, does not preclude a finding of RICO liability in this action.[4] See Mem. Op. to Order #537, at 4-8 (May 6, 2004); United States v. Philip Morris, 116 F.Supp.2d at 149. For all the reasons set forth in those two opinions, existence of and compliance with the MSA, even if proven, does not render the Government's claims for liability moot.[5]

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[4] Moreover, the MSA explicitly states that it makes no findings of, nor does any party make admissions of, liability. See MSA § XVIII.

[5] By granting the Government's Motion, the Court is not, as Defendants argue, ruling that, if and when it reaches the issue of remedy, it will ignore the MSA. At this point, the Court is ruling on dismissal of the affirmative defense of mootness not the evidentiary issue of admissibility of the MSA with regard to (continued...)

IV. THE GOVERNMENT IS ENTITLED TO SUMMARY JUDGMENT ON ALL AFFIRMATIVE DEFENSES WHICH DEFENDANTS DID NOT ADDRESS

With respect to the affirmative defenses of res judicata, collateral estoppel, release, and accord and satisfaction, Defendants, in their Opposition, neither contest material facts declared by the Government nor counter its arguments as to why it is entitled to judgment as a matter of law. Defendants relegate the discussion of three of these four defenses (release is never mentioned at all) to a single footnote in which they cite no legal authority but ask that these defenses not be dismissed because "they are plainly applicable." See Defs.' Opp'n, at 6 n.4.

Accordingly, Defendants have effectively failed to oppose the Government's Motion as to these defenses. See Local R. 7.1(b); United States v. Real Property Identified as Parcel 03179-005R, 287 F.Supp.2d 45, 61 (D.D.C. 2003) ("when [defendant] files opposition to motion for summary judgment addressing only certain arguments

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[5](...continued)
remedy.

With that in mind, Defendants may be concerned about the second reason discussed by the Court in its Opinion denying their Motion for Summary Judgment on the Grounds There Is No Reasonable Likelihood of Future RICO Violations. Specifically, the Court noted

> "the MSA provides that it shall not be 'offered or received in evidence in any action ... for any purpose other than in an action ... arising under or relating to this Agreement.' While the Defendants argue to the contrary, it is clear that the Government's lawsuit is not 'an action ... relating to this Agreement."

Mem. Op. to Order #537, at 6. In reviewing that Opinion, the Court acknowledges that this language may have been too broad and unnecessary to the final ruling.

raised by [plaintiff], court may treat those arguments that [defendant] failed to address as conceded under local rule"). Thus, the Government is entitled to judgment as a matter of law dismissing the affirmative defenses of res judicata, collateral estoppel, release, and accord and satisfaction.

V. CONCLUSION

For all the foregoing reasons, the Government is entitled to partial summary judgment on the affirmative defenses of res judicata, collateral estoppel, release, accord and satisfaction, and mootness, and its Motion is **granted**.

An **Order** will accompany this opinion.

July 7, 2004

__/s/________________________________
Gladys Kessler
United States District Court Judge