

INTRODUCTION

The central holding of the Court of Appeals' decision in *United States v. Philip Morris USA Inc.* is that 18 U.S.C. § 1964(a) "is limited to forward-looking remedies that are aimed at *future violations.*" --- F.3d ---, 2005 WL 267948, at *6-*7 (D.C. Cir. Feb. 4, 2005) (emphasis added). In stark contrast, the central premise of the Government's brief is that it *does not matter* whether remedies are designed to prevent and restrain future violations. Instead the Government contends that remedies are permissible as long as they "are designed to cure the ill *effects* of Defendants' *past unlawful conduct.*" (United States' Memorandum Pursuant to Order #875 "Gov. Mem." at 2 (emphasis added))

The Government's position is strikingly in conflict with the Court of Appeals' unambiguous holding and ignores the plain language of § 1964(a). Indeed, the Government goes so far as to argue that "a clear aim of RICO's civil remedies provision is to divest the [enterprise] of the fruits of its ill-gotten gains" (Gov. Mem. at 7). But that is precisely the argument that it made on disgorgement, and it was flatly rejected by the Court of Appeals. The Court of Appeals held, in language that the Government would now have this Court ignore, that § 1964(a) does not permit remedies that are "focused on remedying the effects of past misconduct." *Philip Morris*, 2005 WL 267948, at *7. This Court's jurisdiction thus does not extend to remedies that "cure the ill effects of Defendants' past unlawful conduct," as the Government argues.

The bulk of the specific non-disgorgement remedies discussed in the Government's brief does not satisfy the holding of the D.C. Circuit in this case. Although direct injunctive relief prohibiting fraudulent conduct could satisfy the "prevent and restrain" requirement, the Government's roster of other relief plainly is designed to address the *effects* of past violations,

not to prevent *future violations*. These proposed remedies are no more permissible than the disgorgement remedy that the Court of Appeals rejected.

Finally, the Government offers a nonsensical argument for delaying its presentation of evidence on remedies. The Court should reject this attempt, just as it rejected a similar attempt last month while the appeal was pending. Long before discovery closed, the Government pled in court filings that it would seek and prove the *very same non-disgorgement remedies* for which it now—in the middle of trial—seeks more time to develop its evidence. The Court of Appeals’ decision cannot be used as an excuse for the Government to delay its “remedies” case. The Court’s decision *forecloses* some of the Government’s sought-after remedies. But nothing in it warrants adding new witnesses or initiating frantic mid-trial discovery to support remedies that the Government has pursued since the beginning of this case. Bifurcation would also be extremely inefficient and prejudice Defendants by forcing Defendants to break up their case; present it before the Government’s case is complete; and call many witnesses twice, all of which would unduly lengthen an already long trial. The Government’s request for bifurcation would also unfairly force Defendants to shorten their “liability” case to reserve hours to cross examine “remedies” witnesses. The Government’s request to bifurcate the trial, so that it can delay presentation of its evidence on remedies, should therefore be denied.

I. THIS COURT’S JURISDICTION IS LIMITED TO PREVENTING AND RESTRAINING FUTURE VIOLATIONS

The Court of Appeals held that disgorgement is not available in a civil RICO case under § 1964(a). The central rationale for the Court’s ruling is that the statute authorizes only remedies that “prevent and restrain” *future RICO violations*, not those that address the consequences of *past violations*. The Court repeated this point throughout the opinion:

- Section 1964(a)'s "prevent and restrain" language "indicates that the jurisdiction is limited to *forward-looking remedies that are aimed at future violations*." 2005 WL 267948, at *7 (emphasis added).
- "The goal of [§ 1964(a)] is to prevent or restrain *future violations*" *Id.* at *6 (emphasis added). "Congress intended to limit relief under § 1964(a) to forward-looking orders." *Id.* at *9.
- The remedies authorized under the statute "are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*." *Id.* at *7 (emphasis in original).
- Disgorgement is *not* an allowable remedy because it "is awarded without respect to whether defendant *will act unlawfully in the future*" and "is measured by *past conduct*." *Id.* (first emphasis added; second in original).
- Based on the remedies listed in the statute, § 1964(a) authorizes only remedies that are "directed toward *future conduct* and separating the criminal from the RICO enterprise to prevent *future violations*." *Id.* at *8 (emphases added).

The Court of Appeals' holding is based on the plain language of § 1964(a), which authorizes courts to "prevent and restrain *violations*," not to prevent and restrain the effects of violations. 18 U.S.C. § 1964(a) (emphasis added). RICO's structure also prohibits remedies that "cure ill effects of past unlawful conduct." As the Court observed, RICO "provides for a comprehensive set of remedies" and "[w]hen Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much." *Id.* at *9. Consequently, although the most obvious effect of Defendants' alleged prior RICO violations is their purported financial gains from those violations, §1964(a) does not authorize disgorgement to undo the effects of past violations.

Indeed, the Court of Appeals rejected the Government's current argument in unmistakable terms. The Government contends that § 1964(a) permits this Court to order remedies "designed to cure the ill effects of Defendants' past unlawful conduct." (Gov. Mem. at 2) But the Court of Appeals flatly held that § 1964(a) does not permit a district court to order

remedies “focused on remedying the effects of past conduct.” 2005 WL 267948, at *7. The Government’s argument is thus diametrically opposed to the Court of Appeals’ express holding.

Nor does the Government even try to identify any support for its position in the Court of Appeals’ decision. To the contrary, the Government’s sole mention of the decision is as part of a plea that this Court should treat the holding as dicta, ignore it, and adopt the exact opposite rule concerning “non-disgorgement remedies.”¹ (Gov. Mem. at 8) The Government’s position is at odds with even the portion of the Court of Appeals’ holding quoted by the Government itself, that “the [district court’s] jurisdiction is limited to forward-looking remedies that are aimed at future violations.” (Gov. Mem. at 2, quoting *Philip Morris*, 2005 WL 267948, at *7)

Simply put, the Court of Appeals clearly ruled that this Court may not award remedies designed to “remedy[] the effects of past conduct” (2005 WL 267948, at *7), but that is precisely what the Government invites this Court to do. The Court must reject this invitation.

II. THE ANTITRUST CASES CITED BY THE GOVERNMENT CANNOT JUSTIFY IGNORING THE COURT OF APPEALS’ CLEAR HOLDING

The Government’s astonishing assertion that § 1964(a) authorizes remedies designed to cure the effects of prior violations is premised entirely on the notion that the antitrust laws authorize such remedies.² This argument is flawed at every level.

¹ The Government seeks to justify its contemptuous treatment of the Court of Appeals’ opinion by arguing that, because disgorgement was the only specific remedy at issue on appeal, the Court’s holding was somehow not binding on the availability of “non-disgorgement remedies.” This is plainly incorrect. The Court of Appeals’ holding necessarily excludes all remedies that do not prevent future violations. For example, the Court’s opinion clearly excludes awarding monetary *damages*, even though that remedy was not directly at issue on appeal, because damages do not prevent and restrain *future violations*. For the same reason, the Court’s decision excludes all other remedies addressed solely to the effects of past violations.

² The Government’s citations to RICO’s legislative history simply confirm that remedies must prevent and restrain *future violations* by “*removing* the corrupting influence,” by “free[ing] the

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Most directly, of course, it simply does not matter whether the antitrust laws allow remedies to cure the effects of prior violations (though they do not) because the D.C. Circuit has made clear that § 1964(a) of RICO does not authorize such remedies. Needless to say, this Court cannot invoke opinions construing the remedies available under an analogous statute to overturn the D.C. Circuit's plain teaching on the precise statute at issue here.

In any event, there is no inconsistency between the antitrust remedies authorized by federal courts and the remedies authorized in this case by the Court of Appeals. The Government extracts out-of-context quotes that appear to describe antitrust remedies in expansive terms, but none of the cases cited by the Government authorized remedies that would merely "ameliorate ongoing and future ill effects of defendants' past violations," as the Government claims. (Gov. Mem. at 4) To the contrary, the decisions the Government cites simply held, consistent with the Court of Appeals' decision in this case, that the antitrust laws authorize courts to enjoin *future conduct by the defendant* that could provide a means of engaging in future anticompetitive behavior.

The government relies most heavily on a snippet from *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950). There, the Court addressed the government's request to expand an antitrust decree that enjoined an unlawful monopoly created through a licensing scheme. The only issue was whether the injunction should be modified to cover other areas of

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channels of commerce from all *illicit activity*," and by prohibiting violators from "*continuing to engage*" in racketeering activity. (Gov. Mem. at 6) Likewise, the Government's invocation of RICO's "liberal construction" clause is unavailing, as the Court of Appeals has already ruled: "This clause may warn us against taking an overly narrow view of the statute, but 'it is not an invitation to apply RICO to new purposes that Congress never intended.'" *Philip Morris*, 2005 WL 267948, at *9 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993)).

the country, more products, and other practices in restraint of trade. *See* 340 U.S. at 82. (“The issues left for determination in this appeal are [whether] to extend the injunctions against *violations of the Sherman Act . . .*”) (emphasis added). The decree at issue was entirely forward-looking, directed to imposing restrictions on the defendants’ future sales and licensing, and did not include any backward-looking relief to compensate consumers or competitors for any injury occasioned by defendants’ past antitrust violations. *Id.*

Similarly, *ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547 (8th Cir. 1991)—which the Government quotes but does not discuss (Gov. Mem. at 5)—did not even address whether the antitrust laws permit remedies that would prevent the future effects of past violations. All that the court did was affirm an injunction that prohibited the defendants from engaging in *future* conduct that was part of the defendants’ past anti-competitive scheme. *See id.* at 556-57 (order prohibited defendants from making future statements disparaging a competitor). *ES Development* also did not involve an interpretation of the “prevent and restrain” limitation. The only issue was whether the district court’s restriction on the defendants’ future speech violated their First Amendment rights. *See id.* at 557-58. And, even in that context, the court recognized that the purpose of the district court’s order was to *prevent a future violation* of the antitrust laws, concluding that the injunction was constitutionally permissible because “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.” *Id.* at 558 (quotation marks and citation omitted).

As this reflects, the Government’s out-of-context snippets from antitrust cases on curing the effects of prior misconduct in no way authorize the broad, compensatory relief of the sort sought by the Government here. Those opinions dealt with only remedies of the sort explicitly mentioned in § 1964 as “preventing and restraining” future violations, such as prohibitory

injunctions and divestment.³ A monopoly or other illegal antitrust combination can accurately be described as a present “effect” of a prior illegal monopoly or a price-fixing agreement.

Dissolution or prohibition of such an ongoing illegal arrangement “cures” the illegal “effect” of the prior unlawful agreement. But the key point is that the continued existence of an illegal cartel or price-fixing arrangement would violate antitrust laws in the future and, thus, prohibiting or breaking up such arrangements directly prevents and restrains future violations. Thus, in the antitrust context, some remedies that directly prevent and restrain future violations can also accurately be described as curing the ongoing effects of a prior illegal arrangement or agreement. But, while the antitrust statutes authorize remedies that prevent future violations, they in no way authorize remedies, like those sought by the Government here, that are plainly designed to ameliorate injuries suffered because of prior unlawful actions. No antitrust case, for example, requires a defendant to encourage consumers to cease using its product or to educate the public about problems with the product, as the Government seeks to do in this case. In short, the purely preventive remedies authorized in the antitrust cases cited by the Government bear no resemblance to the impermissible remedies sought by the Government here.

³ The other cases that the Government cites simply quote *United States Gypsum* or affirmed orders enjoining future conduct by the defendant. See *United States v. United Liquors Corp.*, 77 S. Ct. 208, 209 (1956) (affirming injunction imposing “limitations on [defendants’] activities”); *United States v. Ward Baking Co.*, 376 U.S. 327, 329 (1964) (reversing district court to allow the Government to seek “injunction against conspiring to fix” prices and other conduct); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944) (affirming power of courts to order equitable relief “to wipe out the illegal distribution system,” to dissipate “unlawful restraint of trade,” and to “prevent evasions” of the antitrust laws); *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (quoting *United States Gypsum*); *Wilk v. American Medical Ass’n*, 895 F.2d 352, 369 (7th Cir. 1990) (enjoining the American Medical Association to provide notice to its members of order declaring unlawful policy prohibiting physicians to associate with chiropractors); *United States v. Coca-Cola Bottling Co.*, 575 F.2d 222, 227-29 (9th Cir. 1978) (affirming preliminary injunctive order that antitrust violator rescind agreement creating unlawful monopoly in restraint of trade; “the injunction is forward-looking”).

Indeed, only one case cited by the Government even considers whether antitrust remedies may go beyond preventing future violations to address the future effects of past conduct, and that case *refutes* the Government’s position. In *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231 (9th Cir. 1976), the Ninth Circuit held that section 16 of the Clayton Act did *not* authorize an order requiring vehicle manufacturers to retrofit their cars to incorporate pollution controls and to pay restitution to consumers who already had retrofitted their vehicles. The requested remedies would neither “end[] ongoing violations” nor “alleviat[e] injury to the competitive system.” *Id.* at 236. Instead, the only purpose of the remedies was to alleviate environmental harm resulting from the defendants’ *past* conduct, “which fails to serve any function of the antitrust laws.” *See id.* Likewise, the Government’s requested remedies (*e.g.*, medical monitoring and smoking cessation) are designed—not to prevent RICO violations—but to redress personal injuries. Just as the antitrust laws were not designed to remedy environmental harms, § 1964(a) was not intended to remedy personal injuries resulting from *past* RICO violations: the purpose of § 1964(a) is to “separate[] the criminal from the RICO enterprise to prevent future violations.” *Philip Morris*, 2005 WL 267948, at *8.⁴

III. SPECIFIC REMEDIES IDENTIFIED BY THE GOVERNMENT ARE NOT DESIGNED TO PREVENT AND RESTRAIN FUTURE VIOLATIONS

An injunction against the Defendants prohibiting them from engaging in any “fraudulent and unlawful course of conduct alleged and proven by the United States in this case” (Gov. Mem. at 8) would plainly be within the scope of § 1964(a) under the Court of Appeals’ analysis.

⁴ Indeed, recovery for personal injuries is not allowed under RICO. *See* § 1964(c) (damages for only injury to “business or property”); *see also e.g., Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991) (personal injuries not recoverable under RICO).

But—as Defendants have long urged⁵—much of the remaining relief identified by the Government is outside the scope of § 1964(a), as it has now been construed by the Court of Appeals.

Smoking Cessation. The Government’s proposed “smoking cessation programs” are barred by the Court of Appeals’ decision. A smoking cessation program is aimed at ameliorating the effects of past violations (*i.e.*, the addiction of smokers allegedly deceived by fraudulent conduct).⁶ It has nothing to do with preventing Defendants from violating RICO in the future. Indeed, the Government’s own expert (Dr. Burns) recently testified that the effect of a smoking cessation program would be to “mitigate the damage that has been caused by [Defendants’ past] conduct.” 2/16/05 Tr. (PM) at 13619.

The Government attempts to save this remedy on the convoluted theory that Defendants have in the past discouraged “quit attempts” by “implicitly market[ing]” light cigarettes as “safer or an acceptable alternative to quitting” (Gov. Mem. at 9), which somehow means that Defendants should be required to fund smoking cessation programs in order “to deprive Defendants of the incentive to continue [this] approach.” (*Id.* at 10). Even if this made any logical sense—and it does not⁷—merely “depriving defendants of the incentive” to violate RICO

⁵ See, e.g., Defendants’ Proposed Conclusions of Law (filed July 1, 2004) ¶¶ 416-20.

⁶ See, e.g., *Thompson v. American Tobacco Co.*, 189 F.R.D. 544, 553 (D. Minn. 1999) (smoking cessation remedy is “compensatory damages”); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 484 (E.D. Pa. 1997) (smoking cessation program is “just another form of treatment” and a “disguised request for” damages); *In re Tobacco Cases (II)*, No. JCCP-4042, 2001 WL 34136870, at *9 (Cal. Super. Ct. April 11, 2001) (same).

⁷ As a matter of logic, Defendants would have even greater “incentive” to “discourage” quit attempts if they would be forced to pay the cessation costs of any smoker who chooses to quit. In any event, the Government’s argument is based upon a gross mischaracterization of the evidence, including the testimony of company witnesses.

falls far short of the requisite “prevent and restrain” requirement. Indeed, on this rationale, disgorgement of ill-gotten gains would also be permitted, since the availability of a disgorgement remedy might be said to deprive Defendants of an incentive to violate RICO. But the Court of Appeals rejected this very argument in no uncertain terms:

It is true, as the Government points out, that disgorgement may act to “prevent and restrain” future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. “If this were adequate justification, the phrase ‘prevent and restrain’ would read ‘prevent, restrain, and discourage’ and would allow any remedy that inflicts pain.”

Philip Morris, 2005 WL 267948, at *8 (quoting *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995)). Similarly, merely “reduc[ing] the economic benefit to Defendants” (Gov. Mem. at 10) from selling cigarettes does not “prevent and restrain” future RICO violations.

Medical Monitoring. The Government’s request for an elaborate medical monitoring program is also precluded by the Court of Appeals’ decision, as the Government effectively concedes by relegating its discussion of this proposed remedy to a footnote. (Gov. Mem. at 11 n.12) By its very nature, medical monitoring focuses on the consequences of Defendants’ *past* conduct—monitoring smokers for the onset of smoking-related diseases—and is not aimed at preventing and restraining future conduct. Indeed, medical monitoring is not even injunctive relief, but a form of compensatory *damages*.⁸

The Government’s only argument in support of medical monitoring is that “requiring a wrongdoer to create a fund to pay for diagnostic examinations” would serve “the purpose of

⁸ See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849 (3d Cir. 1990) (“Medical monitoring . . . compensate[s] plaintiffs who have been exposed to various toxic substances.”); see also *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (“[M]edical monitoring relief is appropriate only as an element of damages . . .”).

deterrence of misconduct.” *Id.* (internal quotation marks omitted). This deterrence justification, however, is the same rationale that this Court adopted in denying Defendants’ summary judgment motion on the disgorgement remedy. *See, e.g.*, Order #550 at 10 (“the meaning of deterrence clearly encompasses the concept of both ‘prevent’ and ‘restrain’”). But, as noted, the Court of Appeals clearly rejected this rationale. Indeed, as Judge Williams’s concurrence pointed out, even *Carson* concluded that “pure deterrence was an impermissible objective of orders under § 1964(a).” *Philip Morris*, 2005 WL 267948, at *11 (Williams, J., concurring).

Public Education Campaign / Youth Smoking Prevention. Finally, both the public education campaign and the youth smoking prevention campaign sought by the Government likewise are designed (poorly) to cure the *effects* of RICO violations, not to *prevent* violations from occurring in the future.⁹ The Government’s theory appears to be that these campaigns would tend to inoculate the public against the alleged fraud and thereby protect the public from being negatively impacted by Defendants’ violations. (*See, e.g.*, Gov. Mem. at 12 (youth smoking prevention campaign designed to “counter Defendants’ marketing aimed at people under 21”)) But, as noted above, curing or preventing the purported effects of a violation does not “prevent and restrain” a future violation.

An independent reason for rejecting the Government’s youth smoking prevention program—as well as its recently announced intention to enjoin “continued marketing to young

⁹ *See also, e.g., Texas Carpenters Health Ben. Fund v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 667 (E.D. Tex. 1998), *aff’d*, 199 F.3d 788 (5th Cir. 2000) (plaintiffs sought “injunctive relief ... requiring Tobacco to ... fund a *remedial public education campaign* on the health consequences of smoking”) (emphasis added); *State v. Philip Morris, Inc.*, 686 N.Y.S.2d 564, 568-69 (Sup. Ct. N.Y. Cty. 1998) (“Plaintiffs requested, inter alia, that defendants be enjoined ... [t]o take affirmative steps to *undo public harm* in New York State caused by their deceit . . . , *including the funding of a corrective public education campaign . . .*”) (emphasis added).

people” under age 21 (even though the legal smoking age in nearly all states is 18)¹⁰—is that youth marketing is indisputably not a RICO violation. Rather, the Government contends that Defendants’ alleged *misrepresentations* about whether they marketed to youth amounts to mail or wire fraud under RICO. Any appropriate remedy in his case must be directed at stopping the allegedly illegal conduct—*i.e.*, lying about youth marketing—rather than the youth marketing itself, which is not illegal under RICO.

In sum, selling tobacco products is not illegal under RICO. Therefore remedies requiring the Defendants to fund programs by third parties to reduce consumption of these legal products is not designed to prevent future RICO violations or any other type of unlawful conduct for that matter. Like disgorgement, these anti-smoking efforts will have no effect on whether Defendants “act unlawfully in the future.” *Philip Morris USA Inc.*, 2005 WL 267948, at *7. Consequently, under common English usage and the Court of Appeals’ straight-forward holding, they cannot be described as efforts to prevent and restrain future violations.

IV. THE COURT SHOULD DENY THE GOVERNMENT’S REQUEST TO BIFURCATE TO AFFORD IT MORE TIME TO ADDUCE ITS PROOF

The Court should reject the Government’s renewed request to bifurcate this trial into separate liability and remedies phases, just as the Court has rejected all of the Government’s previous requests for bifurcation.

First, the Government suggests, without any real explanation, that the Court of Appeals’ recent ruling somehow “dramatically changed any assessment of the remedial scheme necessary to prevent and restrain future wrongful conduct by Defendants.” (Gov. Mem. at 13) But the

¹⁰ Although the Government long ago was ordered by this Court to disclose all remedies it was seeking, it has not until now disclosed this proposed remedy. Defendants reserve all rights in connection with the Government’s failure to previously identify this category of relief.

Court of Appeals' decision did not *expand* the remedies available to the Government in this case; it, instead, *foreclosed* some of the relief that the Government has sought all along. Indeed, the Government acknowledges that "the equitable remedies it seeks" had been identified "[i]n numerous submissions throughout the past five and half years, beginning with the initial Complaint filed on September 22, 1999." (Gov. Mem. at 7)¹¹ Under these circumstances, the Government cannot credibly contend it should be afforded more time to identify and develop proof to support any *new* remedies. The Government, rather, must only determine which of the remedies it previously sought are now foreclosed by the Court of Appeals' decision. That effort hardly requires bifurcation of the Government's case into separate "liability" and "remedies" phases.

Second, the Government contends that bifurcation is necessary to prevent "manifest injustice" because the Government is concerned that its proof may not be adequate to support remedies it has sought from the beginning of this case. To shore up its proof, the Government now wants, in the middle of trial, to add more experts, submit more expert reports, and take new discovery. (Gov. Mem. at 14). The Government is correct that it must meet the onerous "manifest injustice" standard before this Court's prior orders¹² concerning discovery deadlines and the presentation of evidence can be altered. *See* Fed. R. Civ. P. 16(e). The Government does not come close to meeting this standard, however.

Any perceived inadequacy in the Government's proof to support its remaining, viable non-disgorgement remedies is not the result of any change in law, but only the Government's

¹¹ *See also, e.g.*, United States' Response to Joint Defendants' Fourth Set of Continuing Interrogatories (served Dec. 14, 2001) (providing detail about these non-disgorgement remedies).

¹² *See, e.g.*, Order Nos. 51, 65, 230, 239, 264, 471, 495, and 531.

own conduct. The Government has had five years to marshal proof in support of its “non-disgorgement” remedies. It has already taken extensive discovery on these remedies and also purports to have evidence to support them through the testimony of certain “remedies-specific” witnesses whose testimony it now seeks to defer and supplement. The Government cannot, in these circumstances, make a showing that “manifest injustice” would result if it were not permitted time, in the middle of trial, to seek to develop proof it should have developed years ago.¹³ See e.g., *Raney v. District of Columbia*, 892 F. Supp. 283, 285 (D.D.C. 1995) (denying motion to amend pre-trial order due to “the time, money and other resources already expended” during pre-trial phase of case); *Canales v Principi*, 220 F.R.D. 627 (D. Colo. 2004) (denying attempt to add new experts before trial).¹⁴

Finally, apart from the poverty of the Government’s proffered justifications, bifurcation would be vastly inefficient and prejudice Defendants, as this Court recognized in denying the Government’s previous bifurcation requests. The issues on the Government’s sought-after equitable relief in this case—e.g., whether the Government can prove a reasonable likelihood of future violations—necessarily overlap with liability issues. Thus, the effect of granting the Government’s request would be to require Defendants to break up their cohesive case; present it before the Government completes its case; and require Defendants to call several witnesses twice, thus further extending the trial. As this Court observed in denying the Government’s first

¹³ If the Government is afforded leave to identify new experts, Defendants will of course request that they be afforded leave to identify opposing experts.

¹⁴ The lone case relied upon by the Government, *Watkins v. Peterson Enterprises, Inc.* 57 F. Supp. 2d. 1102 (W.D. Wash. 1999), is not to the contrary. There, the court permitted a defendant to assert an unpleaded affirmative defense in response to a summary judgment motion that the court permitted the plaintiff to renew in light of a decision by the Washington Supreme

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bifurcation request—made two months before trial—“it’s a little late to be raising that subject after four years of pretrial and two months before trial.” 7/16/04 Tr. at 7. Well, it is even later now.

Indeed, the Government’s current request is no different than its motion to “adjust” the trial that it made just a few weeks ago. The Court recognized, in response to that motion, that the Court of Appeals’ ruling “will undoubtedly greatly impact the future course of this litigation,” but nevertheless postponed only the presentation of *disgorgement* witnesses, not witnesses relating to other proposed remedies. Order #871 at 1. The Court observed that Defendants did not wish to bifurcate the trial because that would force some witnesses to testify separately on issues of “liability” and “remedies.” *Id.* The Court also noted that Defendants “are understandably concerned about attempting to estimate how many of their 265 [trial] hours to reserve for cross-examining Government ‘remedies’ witnesses.” *Id.* The same concerns warrant outright denial of the Government’s renewed request for bifurcation.

The Court of Appeals has now ruled. Under that ruling there will be no disgorgement witnesses. As before, Defendants still do not want to bifurcate this trial, be forced to call the same witness to the stand multiple times, and have to guess at how many trial hours they should reserve for a separate remedies phase. Nothing in the Court of Appeals’ decision justifies imposing these burdens on Defendants. The Government’s obligation—to prepare evidence in support of its proposed remedies—is the same today as it has been all along.

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Court clarifying the applicable law. Here, the Government has pleaded its requested non-disgorgement remedies from the very beginning of this case.

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