**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INC., et al.,<br><br>Defendants. | Civil Action<br>No. 99-2496 (GK)<br><br>Next scheduled court appearance<br>11/02/00 |

**UNITED STATES' MOTION TO MODIFY THE MEMORANDUM OPINION OF THE COURT GRANTING B.A.T INDUSTRIES P.L.C.'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND INCORPORATED STATEMENT OF POINTS AND AUTHORITIES**

**MOTION**

Pursuant to Rule 60 of the Federal Rules of Civil Procedure,[1] Plaintiff United States respectfully moves the Court to modify the Memorandum Opinion accompanying its September 28, 2000 Order granting B.A.T Industries P.L.C.'s Motion To Dismiss the Complaint for Lack of Personal Jurisdiction. In its opinion, the Court adopted a test for proving a conspiracy under Section 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, that is inconsistent with the decision of the Supreme Court in Salinas v. United States, 522 U.S. 52 (1997). This is an issue that was not previously briefed by the United States.[2] By this Motion, the United States asks the Court to replace certain language from its

[1] Alternatively, should the Court consider its September 28 Order a final judgment, the Court may consider the instant Motion to be filed pursuant to Fed. R. Civ. P. 59(e).

[2] B.A.T Industries P.L.C. ("BAT Ind.") apparently raised the issue for the first time in its reply brief, although the BAT Ind. brief was unclear as to whether it was referring to § 1962(c) or § 1962(d). See BAT Ind.'s Reply Memorandum of Points and Authorities in Support of Its Motion To Dismiss the Complaint for Lack of Personal Jurisdiction at 28 n.21.

opinion with language that is consistent with the standards of RICO conspiracy law adopted in Salinas. Upon considering this Motion, the Court may also wish to reconsider its dismissal of BAT Ind.

**STATEMENT OF POINTS AND AUTHORITIES**

The Court's opinion stated that to be liable for RICO conspiracy, a defendant must personally commit two acts of racketeering that constitute a "pattern of racketeering activity" as defined at 18 U.S.C. § 1961(5). Slip op. at 9, 14, 16, 18 & 19. In Salinas v. United States, 522 U.S. 52 (1997), however, the Supreme Court applied long standing conspiracy principles[3] in holding that the United States is not required to prove that a defendant committed any racketeering act in order to establish a RICO conspiracy offense under § 1962(d).[4]

In Salinas, the defendant argued that he could not be liable for a RICO conspiracy "unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO

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[3] Those principles establish that conspiracy is an inchoate offense and that, therefore, a defendant may be liable for a conspiracy offense even if the offense that is the object of the conspiracy was not actually committed by the defendant or any other conspirator. See, e.g., United States v. Feola, 420 U.S. 671, 694 (1975); United States v. Bayer, 331 U.S. 532, 542 (1947); United States v. Rabinowich, 238 U.S. 78, 86 (1915). Indeed, a defendant may be liable for a conspiracy offense even if he was incapable of committing the substantive offense. See Rabinowich, 238 U.S. at 86.

[4] Prior to Salinas, every federal Court of Appeals that had decided the issue had agreed that a defendant's liability for a RICO conspiracy does not require proof that a defendant committed any racketeering act. See, e.g., United States v. Zauber, 875 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986) (collecting cases); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); United States v. Brooklier, 685 F.2d 1208, 1222-23 (9th Cir. 1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1971).

offense under § 1962(c)." Salinas, 522 U.S. at 61 (emphasis added). The Supreme Court rejected this argument and explained:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
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> It makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Id. at 65 (citation omitted) (emphasis added).[5] Thus, it is clear that to establish a violation of § 1962(d) (RICO conspiracy), the United States is not required to prove that the defendant – or any defendant – actually committed two racketeering acts.

Accordingly, the United States respectfully requests that the Court strike the portions on pages 9, 14, 16, 18, and 19 of the slip opinion that are inconsistent with Salinas,[6] and replace

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[5] Indeed, § 1962(d) does not require any overt act at all by a conspirator. Section 1962(d) is "even more comprehensive than the general conspiracy offense" under federal law because the RICO provision contains "no requirement of some overt act or specific act." Salinas, 522 U.S. at 63.

[6] The portions of the Court's opinion that concern the United States are as follows:

- "In addition, because the Government accuses BAT Ind. of participating in a conspiracy under RICO, an additional element is added to the . . . definition of a common law civil conspiracy. Under RICO, each defendant must have committed 'at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . .

those portions with language that makes clear that a defendant may be liable for a RICO conspiracy under 18 U.S.C. § 1962(d) if the evidence establishes that the defendant agreed that it or another member of the RICO conspiracy would commit two racketeering acts in furtherance of the affairs of the RICO enterprise, even if no racketeering acts were committed by any defendant, or facilitated or knowingly agreed to facilitate the commission of a RICO offense by another conspirator. Salinas, 522 U.S. at 65-66; accord Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 967 (7th Cir. 2000); United States v. Phillips, 874 F.2d 123, 127-28 & n.4 (3d Cir. 1989); and cases cited supra at n.4.

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. after the commission of a prior act of racketeering activity.' 18 U.S.C. § 1961(5). The Government has failed to make a prima facie showing of the four elements of a civil conspiracy as well as the fifth element necessary to its claim that BAT Ind. participated in a RICO conspiracy . . . ." Slip op. at 9.

- "Under RICO, a conspiracy consists of two or more acts of racketeering committed within a ten year period." Slip op. at 14.
- "[T]he Government must show that BAT Ind. committed at least two acts of racketeering within ten years of each other." Slip op. at 16.
- "The Government alleges that BAT Ind. participated . . . in a RICO conspiracy . . . . Thus the Government fails to make a prima facie showing of a RICO pattern of racketeering . . . ." Slip op. at 18.
- "In addition to its failure to show that BAT Ind. participated in two particular, specific acts of racketeering . . . the Government also fails to show that BAT Ind. participated in the creation and organization of the alleged conspiracy." Slip op. at 19 (emphasis added).

## CONCLUSION

For the foregoing reasons, the United States' Motion to Modify the Memorandum Opinion of the Court Granting B.A.T Industries P.L.C.'s Motion To Dismiss the Complaint for Lack of Personal Jurisdiction should be granted. The Court may also decide, in light of this Motion, to reconsider its dismissal of BAT Ind. for lack of personal jurisdiction.

Respectfully submitted,


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