

In their opposition to the United States' Memorandum Regarding Non-Disgorgement Remedies Pursuant to Order #875 ("U.S. Mem."), Defendants contend that this Court is barred, as a matter of law, from ordering the remedies that the United States seeks – even if the Court determines that the remedies will prevent and restrain future unlawful conduct by these Defendants. Defendants are wrong.

Moreover, in order to allow the United States a full and fair opportunity to present its evidence to support its non-disgorgement remedies, the Court should grant the United States' proposal that such presentation occur after Defendants present their defense to liability.

1. Under Defendants' view of the Court of Appeals' decision, this Court may do little more than issue an order that bars Defendants from violating the law in the future, and sanction them for contempt if they violate that order. See Defs. Mem. at 1, 8-12.¹ This narrow view of forward-looking relief is at odds with substantial jurisprudence that supports courts' equitable powers to fashion appropriate remedies – including requiring wrongdoers to undertake affirmative actions – to ameliorate the future ill effects of a defendant's conduct. The narrow view taken by Defendants also ignores the evidence supporting the ability of the relief identified by the United States to prevent and restrain in the future the conduct that forms the basis of the United States' claims.

Defendants instead argue that the Court need not even receive evidence in support of these remedies, because in their view, the Court **cannot** conclude that such relief will prevent and restrain future violations. However, nothing in the Court of Appeals' decision warrants or

¹ Defendants' position flies in the face of Section 1964(a). See 18 U.S.C. § 1964(a) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, **including, but not limited to**: ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, **including, but not limited to**, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . .") (emphasis added); U.S. Mem. at 5-6. Thus, Congress plainly authorized district courts to order equitable remedies in addition to those specifically listed in the statute.

requires the exclusion of evidence of equitable remedies simply because Defendants baldly claim that it will not prevent and restrain their future unlawful conduct. That is a judgment for the Court to make.

In attempting to foreclose any presentation of evidence as to the equitable relief sought by the United States, Defendants repeat three times a cherry-picked phrase from the Court of Appeals' decision – “focused on remedying the effects of past conduct” – to suggest the United States' non-disgorgement remedies conflict with the ruling of the Court of Appeals. See Defs. Mem. at 1, 4. They do not. The sentence from the Court of Appeals' opinion actually reads: “**Disgorgement**, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo.” United States v. Philip Morris USA Inc., 2005 WL 267948, *7 (D.C. Cir. Feb. 4, 2005) (emphasis added).² In this respect, the equitable remedies the United States described in its opening memorandum (U.S. Mem. at 8-12) – including the smoking cessation program, the public education program, the comprehensive youth smoking prevention campaign, and medical monitoring³ and research – differ substantially from disgorgement as viewed by the Court of Appeals. None of them is “a quintessentially backward remedy.” Rather, as previously explained, the United States' witnesses will offer testimony to support a conclusion by the Court that these remedies will in fact prevent and restrain these Defendants from successfully continuing their fraudulent conduct in the future.

See U.S. Mem. at 8-12. For example, Defendants continue to market “light” cigarettes

² Of course, the United States respectfully maintains its disagreement with the Court of Appeals' conclusion, and intends to seek en banc rehearing of the decision. Nevertheless, Defendants' extraction of this snippet from its context illustrates the danger of Defendants' contention that the Court of Appeals' decision definitively resolves matters that were not before the Court of Appeals at all and were not discussed in the decision.

³ Defendants (Defs. Mem. at 10 & n.8) simply ignore this Court's prior ruling that medical monitoring funds are equitable in nature, a decision in which the Court rejected the identical argument Defendants re-introduce here. See United States v. Philip Morris, 273 F. Supp. 2d 3, 11 (D.D.C. 2002).

deceptively and to market their products in ways known to appeal to adolescents. Requiring Defendants to fund effective smoking cessation programs and prevention and education programs will prevent and restrain Defendants from continuing the practices that they have used in furtherance of their fraudulent scheme. Ultimately, after considering all of the evidence, the Court will decide what equitable remedies are appropriate to address Defendants' massive scheme to defraud.

Additionally, unlike the Court of Appeals' view of disgorgement – which is measured by gains ill-gotten **in the past** – the remedies identified by the United States are all forward-looking remedies designed to address the ongoing and future effects of that unlawful conduct. And that sort of remedy falls squarely within the scope of permissible equitable that relief courts are traditionally empowered to order, and that Congress authorized the district courts to order in Section 1964(a).⁴

Defendants' discussion of the antitrust cases cited by the United States ignores the principle of law for which they were cited: that courts fashioning remedies under the “prevent and restrain” language of the antitrust laws, which is identical to Section 1964(a)'s language, may order relief aimed at curing the ongoing ill effects of a defendant's wrongdoing.⁵ In United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950), the Supreme Court stated: “The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or

⁴ See, e.g., Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”).

⁵ Contrary to Defendants' urging (Defs. Mem. at 5), the Court of Appeals' decision that disgorgement is not an available remedy under Section 1964(a) does not render irrelevant all judicial interpretation of the scope of equitable relief available under the same “prevent and restrain” language of the antitrust statute upon which Section 1964 was patterned.

affirmative actions normally exceeds that of any reviewing court.” 340 U.S. at 89 (citing cases).⁶

2. Defendants’ opposition to the United States’ request that the trial proceed with Defendants’ case-in-chief on liability issues should be rejected. Defendants inappropriately minimize the impact of the Court of Appeals’ decision on the presentation of remedies evidence, and at the same time exaggerate the impact that a staggering of liability and remedies presentations will have on them.

The Court previously recognized the impact that the Court of Appeals’ decision would have on the presentation of evidence in Order #871, when it noted that the decision “could justify reconsideration” of its denial of the United States’ request to stagger liability and remedies witnesses during trial. The United States has explained that the elimination of disgorgement as an available remedy necessitates a wholesale recalculation of what combination of equitable relief is necessary to best prevent and restrain Defendants from future racketeering activity. This fundamental change to the remedies landscape does not lend itself to simple or minor alterations to proposed remedies testimony and supporting exhibits, as Defendants contend.

Defendants’ assertion that their selection of witnesses and presentation of testimony will be hindered by an alteration in the trial schedule that allows the United States’ remedies witnesses to testify after Defendants’ case-in-chief on liability is a hollow one. Defendants have not identified a single defense witness who blends separable liability and remedies issues – that is, not a single witness who must testify in the liability phase for whom testimony is at all

⁶ Defendants’ assertion that the antitrust statutes preclude remedies “plainly designed to ameliorate injuries suffered because of prior unlawful actions” is wrong. In Wilk v. American Med. Ass’n, 895 F.2d 352, 371 (7th Cir. 1990), the Seventh Circuit approved the district court’s requirement that the defendant undertake affirmative actions was a reasonable method of ensuring the efficacy of the remedy and of “eliminating the consequences” of the AMA’s unlawful activity. The district court had found such affirmative steps, which included informing its members that it is ethical to associate with chiropractors, warranted to address the “lingering effects” of the unlawful activity, such as the fact that “the injury to chiropractors’ reputations which resulted from the boycott has not been repaired.” Wilk v. American Med. Ass’n, 671 F. Supp. 1465, 1507-08 (N.D. Ill. 1987). See also U.S. Mem. at 2-7.

dependent on what the United States presents from its remedies witnesses. The description of the 36 live witnesses identified by Defendants – both expert and fact witnesses – shows that the only witnesses whose testimony would be materially affected by the United States’ remedies witnesses are the two witnesses who would respond to the disgorgement testimony of Drs. Gruber and Fisher. As the Court is aware, however, Drs. Gruber and Fisher will not offer testimony on disgorgement as long as the February 4 appellate decision constitutes the law of this case. As a result, Defendants cannot claim any prejudice or inefficiency from the alteration sought by the United States.

Defendants’ complaint that they will be forced “to guess at how many trial hours they should reserve for a separate remedies phase,” see Defs. Mem. at 15, is equally unpersuasive. The United States has put on its own liability case and planned the use of its time without knowing how many of the 110 live witnesses identified by Defendants would actually testify at trial, or how broad that testimony would be. There is no reason why Defendants should be unable to similarly present their case-in-chief on liability issues when there are still witnesses to be called on remedies issues. The need to plan their trial presentation does not amount to a “burden,” as Defendants contend. Id.

The United States’ proposed adjustment will allow testimony to proceed efficiently and without interruption.⁷ Most importantly, it will prevent the prejudice and manifest injustice that would result if the United States were not given the opportunity to meet the mid-trial change in the law that resulted from the Court of Appeals’ decision.

⁷ On multiple occasions, Defendants have assured the Court that they expected to start their case on March 1, 2005. See, e.g., Trial Tr. 10,693 (Jan. 24, 2005) (Mr. Redgrave: “I wanted to alert the court to one point that was not made as clear as it should have been in our papers . . . [W]e have been planning to start our case in chief on or around March 1st of this year.”).

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