

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER #886**

On February 4, 2005, the Court of Appeals of our Circuit issued its 2-1 decision barring disgorgement as an available remedy in this case. United States v. Philip Morris USA Inc., et al., 2005 WL 267948 (D.C. Cir., February 4, 2005). Thereafter, on February 10, 2005, in Order #875, the Court asked the parties, after conferring with them informally, to address the Government's request to postpone presentation of its evidence on remedies, and the scope and meaning of the Court of Appeals' decision. Those issues have now been fully addressed by the parties in their memoranda and in an amicus curiae brief submitted by the Citizens' Commission to Protect the Truth in Support of Presentation of Plaintiff United States of America.<sup>1</sup> Upon consideration of these

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<sup>1</sup> Defendants have filed an Opposition to the filing of the brief.

submissions, as well as the extensive record in this case, the Court reaches the following conclusions.

**I. PRESENTATION OF EVIDENCE ON REMEDIES**

The Government argues in its Memorandum, that the February 4, 2005 ruling of the Court of Appeals "has fundamentally changed the law that has governed this case for the past four and half years" and "has dramatically changed any assessment of the overall remedy scheme necessary to prevent and restrain future wrongful conduct by the Defendants." See United States' Memorandum Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875, at 4, 13. Indeed, it is not an overstatement to say that the 2-1 Opinion of the Court of Appeals, written by Judge Sentelle, has struck a body blow to the Government's case.

In light of this development, the Government requests that it be allowed to evaluate its testimony and exhibits to conform with the newly announced remedy scheme which excludes disgorgement. As the Government points out in its Reply at p. 4, "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 the Defendants from future racketeering activity." This is a fair assessment of the work to be done by the Government if it is to satisfy the new legal standard announced in Judge Sentelle's 2-1 Opinion. In short, the

reordering of witnesses is necessary to avoid a manifest injustice to the United States.

Defendants strongly oppose postponement of the Government's evidence on non-disgorgement remedies. Defendants complain about logistical difficulties in scheduling their own witnesses and the possibility of having to call some of those witnesses twice -- both on liability and remedies issues. While the scheduling of the many witnesses involved in this case, almost all of whom are extraordinarily busy people, has been a real burden to both sides, all counsel have worked diligently and effectively to avoid any "down" time in the Court's trial schedule, and have accommodated each other to a substantial degree. There is no doubt that Defendants can continue to do so. Moreover, with the practical resources available to Defendants (i.e., first class air travel, limousines, and perhaps corporate planes), the Court has no doubt that the Defendants will be able to present their case in an orderly, efficient way that makes maximum use of all available trial time. Finally, in an effort to fully accommodate the concerns that Defendants have voiced, through informal e-mail, about this rearrangement of testimony, Defendants will be allowed to commence their testimony on Monday, March 7, 2005.<sup>2</sup>

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<sup>2</sup> It should be noted that Defendants clearly represented to the Court that they would be able to begin their direct case on Tuesday, March 1, 2005. In fact, we will begin their case on Monday, March 7, 2005. Thus, this witness reordering comes as no  
(continued...)

## II. SCOPE AND MEANING OF THE COURT OF APPEALS OPINION

\_\_\_\_\_The Court finds itself in the peculiar and extremely uncomfortable position of interpreting the scope of an appellate decision which, in the words of Judge Tatel's dissent, "ignores controlling Supreme Court precedent, disregards Congress's plain language, and creates a Circuit split -- all in deciding an issue not properly before [the appellate court]." United States v. Philip Morris USA Inc., et al., 2005 WL 267948, \*14 (D.C. Cir. February 4, 2005). As all parties know at this point, Judge Sentelle's 2-1 decision held that disgorgement is not available to the Government in a suit under 18 U.S.C. § 1964(a) because it does not prevent or restrain future violations of the statute.

The Government's Memorandum regarding the scope of the Court of Appeals' ruling and which, if any, non-disgorgement remedies are available reads as if Judge Sentelle had never written his Opinion. While the Court is aware that the Government is pursuing en banc reconsideration by the Court of Appeals, and that it may at some point seek certiorari from the Supreme Court, as of now, this Court is bound by the existing 2-1 Opinion written by Judge Sentelle. Virtually all of the arguments made by the United States in its Memorandum were arguments relied upon by this Court in its original opinion, United States v. Philip Morris USA Inc., 321 F. Supp.2d 72

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<sup>2</sup>(...continued)  
surprise to the Defendants.

(D.D.C. 2004), and by Judge Tatel in his dissent. The fact of the matter is that those arguments were rejected by Judge Sentelle in his 2-1 Opinion and are simply not the law to be followed at this time.

Judge Sentelle's Opinion, as this Court reads it, simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO. Rather, this Court's "jurisdiction is limited to forward-looking remedies that are aimed at future violations" of RICO. United States v. Philip Morris USA Inc., et al., 2005 WL 267948, \*7 (D.C. Cir., February 4, 2005). In fashioning its remedies testimony, the Government must be mindful of the plain, explicit language of Judge Sentelle's 2-1 Opinion.

It would be premature for the Court, at this point, to rule out as a matter of law the non-disgorgement remedies which the Government has identified on pp. 8-12 of its opening Memorandum. The Government is entitled to an opportunity to present evidence that will meet the new appellate standard announced by Judge Sentelle.

**WHEREFORE**, it is this 28th day of February, 2005, hereby

**ORDERED** that the Defendants shall commence their evidence on liability on Monday, March 7, 2005, the Government shall present its evidence on non-disgorgement remedies after completion of the

Defendants' evidence on liability, and the Defendants shall then present their evidence on non-disgorgement remedies.

/s/  
Gladys Kessler  
United States District Judge

**Copies via ECF to all  
counsel of record**