

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
And	)	Civil Action No. 99-CV-2496 (GK)
	)	
TOBACCO-FREE KIDS ACTION FUND,	)	
<u>et al.</u> ,	)	Next Scheduled Court Appearance:
	)	None
v.	)	
	)	
PHILIP MORRIS USA INC. (f/k/a	)	ORAL ARGUMENT REQUESTED
PHILIP MORRIS INCORPORATED), <u>et</u>	)	
<u>al.</u> ,	)	
	)	
Defendants.	)	

**CERTAIN DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE  
FOR RELIEF UNDER RULES 52, 59, AND 60 WITH RESPECT TO  
THE COURT’S AUGUST 17, 2006 ORDER**

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Pursuant to Rules 52, 59, and 60 of the Federal Rules of Civil Procedure, certain defendants<sup>1</sup> request clarification, or in the alternative an amendment to, or relief from, the Court’s August 17, 2006 Final Judgment & Remedial Order (the “Order”) and Final Opinion (the “Opinion”).

Defendants seek clarification from the Court on two discrete issues arising from the Order. First, defendants seek clarification as to the meaning and application of the general injunctive provisions in paragraphs II.A.1. and II.A.3. of the Order. Second, defendants seek

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<sup>1</sup> The defendants joining this motion are Philip Morris USA, Altria, R.J. Reynolds, Brown & Williamson, Lorillard, and BATCo.

clarification that the Court does not intend that certain aspects of the Order -- *i.e.*, those provisions prohibiting the use of descriptors and those requiring corrective statements at retail point-of-sale -- apply to sales wholly outside the United States.<sup>2</sup>

**I. DEFENDANTS REQUEST CLARIFICATION REGARDING THE GENERAL INJUNCTIVE PROVISIONS IN SECTIONS II.A.1. AND II.A.3. OF THE ORDER**

**A. The Court Should Clarify The Scope Of The General Injunctions It Has Ordered**

Although a number of the provisions in the Court's Order detail specific actions that defendants are required to take to be in compliance with the Order, two provisions set forth broad and amorphous requirements that raise serious issues under the law. Specifically, the Order provides that defendants are (1) "enjoined from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States," Order § II.A.1., and (2) "enjoined from making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor . . . that misrepresents or suppresses information concerning cigarettes." Order § II.A.3. As defendants emphasized in support of their request for an emergency stay, to the

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<sup>2</sup> As the Court is aware, defendants contest numerous findings and conclusions contained in the Court's 1,653 page Opinion. Defendants' positions on those issues have been set forth in detail in defendants' post-trial submissions as well as numerous other submissions made throughout the course of this proceeding. Defendants will challenge those findings and conclusions on appeal and submit this motion without waiver of their position that the extensive findings and conclusions underlying this Court's Order are incorrect and that defendants should not be subject to any of the relief set forth in the Order. This motion focuses on several discrete issues where defendants believe that the Order is unclear and requires clarification, or in the alternative amendment or relief from the judgment.

extent that these provisions are intended to impose obligations above and beyond those imposed by the specific provisions in the Order, they create great uncertainty regarding the precise scope of the conduct the Court seeks to prohibit.<sup>3</sup>

Defendants seek clarification from the Court as to the precise conduct that is prohibited under these sections. Given the structure of the Order and the Court's comments during the August 18, 2006, conference call hearing, defendants interpret these general injunctive provisions as barring them from making affirmative statements to the public respecting the manufacture and sale of cigarettes within the United States:

- “misrepresenting the adverse health effects caused by smoking and exposure to environmental tobacco smoke”;
- “maintaining that neither smoking nor nicotine is addictive”;
- stating that light or low tar cigarettes are safer than other cigarettes;<sup>4</sup>
- denying that they manipulate nicotine; and
- denying that they market to youth.

Opinion at 1501-02; *see also id.* at 1604-05. Defendants also understand the Order to preclude them from entering into any agreement to limit or suppress research. Defendants' interpretation of the Order is that this list of specific obligations fully encompasses all of the injunctive relief

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<sup>3</sup> The Court's denial of defendants' request for the emergency stay, coupled with its statement that the Order does not require defendants to do anything yet, is consistent with defendants' view that the general provisions do not add to the specific obligations of the Order. But it does not definitively resolve the issue.

<sup>4</sup> Pursuant to the more specific injunctive relief ordered by the Court, however, the use of low tar cigarette descriptors is not prohibited until January 1, 2007. Opinion at 1632.

imposed by Sections II.A.1. & II.A.3. Defendants request that the Court indicate otherwise if defendants' interpretation of these provisions is incorrect.

As we detail in our motion for a stay pending appeal, even these obligations are vague and difficult to implement against the backdrop of the Court's 1,600-plus pages of factual findings. They would result in irreparable harm to defendants if required to be implemented immediately. *See* Certain Defs' Mem. of Points and Authorities in Supp. of Their Mot. to Stay the Final Judgment and Remedial Order Pending Appeal (Aug. 31, 2006). But the government apparently has taken a position that goes well beyond even this interpretation of the injunction. The government describes the injunction as a general requirement to obey the law. *See* United States Mem. in Opp. to Defs.' Emergency Mot. for Stay of Judgment (Aug. 23, 2006) at 2-3. The government's reading, if adopted by this Court, would exponentially increase both the ambiguity and the harm. It would impose additional, impossible-to-define burdens on defendants in violation of Rule 65 and longstanding Supreme Court and D.C. Circuit precedent, leave defendants nothing but their own best guess as a guide for determining what conduct is prohibited by the general provisions, and unfairly subject defendants to the threat of judicial contempt proceedings arising out of mere "uncertainty and confusion." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).<sup>5</sup>

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<sup>5</sup> In the event that a stay is not granted, defendants may bring any additional issues involving the implementation and interpretation of the Order to the Court's attention pursuant to the Court's continuing jurisdiction over its injunctive order.

**B. Absent Clarification From The Court, The General Injunctive Provisions Fail To Conform With Rule 65(d)**

Rule 65(d) mandates that “[e]very order granting an injunction and every restraining order . . . shall be specific in its terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.” Fed. R. Civ. P. 65(d). The Supreme Court has long held that the need for specificity is “no mere technical requirement[ ].” *Schmidt*, 414 U.S. 473 at 476. To the contrary, “[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.” *Id.*; *see also Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388-89 (1970) (specificity requirement imposed by Rule 65 “is essential in cases where private conduct is sought to be enjoined”). The need to ensure effective appellate review also demands that injunctions be specific: “In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.” *Schmidt*, 414 U.S. at 477. Thus, a federal court must “frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.” *Int’l Longshoremen’s Ass’n., Local 1291 v. Phila. Marine Trade Ass’n.*, 389 U.S. 64, 75-76 (1967).

Recognizing the importance of these goals, federal appellate courts, including the D.C. Circuit, have not hesitated to strike down provisions that fail to comport with Rule 65. *See, e.g., Gulf Oil Corp. v. Brock*, 778 F.2d 834, 843 (D.C. Cir. 1985) (injunction containing ambiguous phrase “similar in nature” violated specificity requirements of rule 65); *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 926-27 (D.C. Cir. 1982) (deeming an injunction violative of Fed. R. Civ. P. 65 because it was “susceptible to more than one interpretation” and

“failed to give adequate notice to the [enjoined party] of the nature of the prohibited activity”); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1318-19 (D.C. Cir. 1981) (striking injunction ordering the defendant “not to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person” because it was “so vague as to put the whole conduct of [the defendant’s] business at the peril of a summons for contempt”) (internal quotation marks and citations omitted).<sup>6</sup>

Defendants submit that their interpretation of the general injunctive provisions comes closer to adherence to these principles than does the government’s interpretation. *First*, the government’s interpretation of the provision against “committing any act of racketeering as defined in 18 U.S.C. § 1961(1)” would violate the above requirements. 18 U.S.C. § 1961(1) defines “racketeering activity” to mean any act indictable under any of more than sixty listed federal statutory provisions, including (to name a few) not only the mail and wire fraud statutes at issue in this case, but also statutes ranging from those governing extortionate credit transactions, to financial institution fraud, to immigration fraud, to obscenity laws, to false

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<sup>6</sup> See also *Corning Inc. v. PicVue Elec., Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (concluding that a preliminary injunction violated Rule 65 because it was “not possible to ascertain from the four corners of the order precisely what acts [were] forbidden”) (internal quotation marks and citations omitted); *United States v. Dinwiddie*, 76 F.3d 913, 928 n.12 (8th Cir. 1996) (concluding that “[w]ith its prohibition on activities that can be ‘remotely construed’ to violate FACE and its lack of a definition for legitimate personal activity, the [challenged] injunction violate[d] Rule 65(d) by calling on [the defendant] to guess at what kind of conduct is permissible”) (citations and internal quotation omitted); *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987) (vacating injunction that “too broadly require[d] [the defendant] to guess at what kind of conduct would be deemed [prohibited conduct]”); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978) (noting that Rule 65’s “command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order”).

statements in application and use of passports, to copyright infringement, to unauthorized trafficking in sound recordings, and to laws governing reporting of currency and foreign transactions. On top of these sixty-plus federal statutory provisions, “racketeering activity” can also include broad categories of criminal offenses chargeable under *state* law. 18 U.S.C. § 1961(1)(A). Accordingly, an order not to engage in “racketeering activity” not limited in the manner defendants propose would amount to nothing more than a vague directive to obey a panoply of state and federal criminal laws. It would thus fail to satisfy the requirements of Rule 65. *See, e.g., Cobell v. Norton*, 392 F.3d 461, 475 (D.C. Cir. 2004) (injunction invalid where it “amount[ed] to an order to obey the law”); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) (injunction preventing city from discriminating on the basis of race in its annexation decisions “would do no more than instruct the City to ‘obey the law,’” and thus “would not satisfy the specificity requirements of Rule 65(d)”); *Payne*, 565 F.2d at 898 (“‘obey the law’ injunctions cannot be sustained.”); *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748 (2d Cir. 1994) (striking down an injunction prohibiting the defendant from violating the Lanham Act and state trademark statutes because “requiring [the defendant] to guess -- on pain of contempt -- at what conduct the Lanham Act proscribes is too onerous a burden”).<sup>7</sup>

*Second*, the Court’s prohibition on “making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public

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<sup>7</sup> The Court’s limitation of the prohibition against “racketeering activity” to those acts “relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States” is not a meaningful limitation for defendants who are cigarette manufacturers, since this encompasses virtually everything that they do.

relations or marketing endeavor . . . that misrepresents or suppresses information concerning cigarettes” also could be interpreted so broadly as to be unlawful. Read as the government apparently reads it, this provision is indistinguishable from a provision that the D.C. Circuit has expressly deemed insufficiently precise under Rule 65. In *SEC v. Savoy Indus., Inc.*, the Court of Appeals struck a provision enjoining the defendant from “engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” 665 F.2d at 1318-19. The Court recognized that allowing such a provision to stand “could subject to the federal civil contempt power future acts by [the defendant] . . . unrelated to his lawbreaking in the past.” *Id.* at 1319. As the Court aptly noted, the provision was ““so vague as to put the whole conduct of [defendant’s] business at the peril of a summons for contempt.”” *Id.*; *see also United States v. Vitasafe Corp.*, 345 F.2d 864, 871 (3d Cir. 1965) (finding that an injunction prohibiting distribution of literature considered “otherwise false and misleading” violated Rule 65).

Indeed, given the specific remedies ordered, the government’s interpretation of the Order does not make sense. For example, notwithstanding that every cigarette package contains the health warnings required by Congress, the Opinion criticizes defendants for not stating on their cigarette packaging that they “agree” that smoking causes cancer and other diseases. Opinion at 331. Presumably, the Court chose to remedy this defect by requiring corrective statements to be published in the manner specified in the Order, including the use of onserts on *some* cigarette packages for six weeks per year for two years beginning in February 2007. Thus, it would seem unreasonable to conclude that it would be fraudulent for defendants to sell cigarettes that do *not* contain such statements before February 2007 (or after 2009), or during the 46 weeks per year when the onserts are not required. Indeed, the Court deems the precise content of those to-be-

developed corrective statements so important that, even if “slight variations” are necessary to accommodate the media or format utilized, “no such variations may be implemented without prior approval of the Court.” Order § II.B.5. Given these directives, defendants’ reading of the general injunctive provisions conforms to the words and context of the Court’s Order and Opinion.

## **II. DEFENDANTS REQUEST THAT THE COURT CLARIFY THE ORDER’S APPLICATION TO CERTAIN INTERNATIONAL ACTIVITIES**

The bulk of the provisions in the Order apply by their terms only to activities in the United States. *E.g.*, Order § II.A.1. (enjoining racketeering activity “relating in any way to the manufacturing, marketing ... or sale of cigarettes in the United States”); § II.A.3. (enjoining false, misleading or deceptive statements “disseminated to the United States public”); § II.B.7.a. (requiring corrective statements in inserts for “cigarettes shipped for retail distribution in the United States”); § II.B.7.c.-d. (requiring publication of corrective statements in various United States publications and broadcasts of such statements as advertisements on United States television networks). However, there are certain provisions that lack any specific limitation to the United States. These provisions, however, do not expressly state that they have international application either. Defendants point especially to two provisions -- Section II.A.4. and Section II.B.7.b.

*First*, defendants seek clarification that the prohibition against express or implied health messages or health descriptors in section II.A.4. of the Order (p. 3) applies only to statements made by defendants in the United States and to cigarettes sold by defendants at retail in the United States. This provision prohibits use of descriptors such as “low tar,” “light,” “ultra light,” “mild,” and “natural.” Some defendants (or their subsidiaries) manufacture cigarettes bearing

these or similar descriptors for sale in various foreign countries, where permitted under applicable law. For example, BATCo manufactures cigarettes for distribution and sale internationally.

Given (1) the fact that the numerous other provisions in the Court's Order are expressly limited to the United States, (2) the limited jurisdictional reach of the RICO statute, (3) the severe problems involving international comity that would result if this Court's injunction were read to supersede other countries' regulatory policies concerning cigarette descriptors, and (4) the lack of any factual findings in the opinion concerning the use of light cigarettes in foreign countries, it seems highly unlikely that the Court intended for its prohibition of these descriptors to extend to cigarettes sold at retail in foreign countries. Indeed, it would appear that section II.A.4. is simply a more specific application of the general prohibitions against false, misleading or deceptive statements in Section II.A.3. -- a provision that is limited by its terms to the United States. Moreover, banning the use of the low tar descriptors in foreign countries would be an unwarranted intrusion upon the right of these countries to regulate cigarette sales within their own borders. *See, e.g., McColloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (refusing to apply federal law to foreign activities where doing so would create "[t]he possibility of international discord"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.) (concluding that the Sherman Act did not reach agreements limiting the supply of product to foreign nations given "the international complications likely to arise from an effort in this country to treat such arguments as unlawful"); Restatement (Third) of Foreign Relations Law of the United States § 403(2)(g) (describing unreasonableness of regulating activity primarily of interest to foreign sovereign). And prohibiting BATCo from manufacturing such products for distribution and sale -- while leaving its international

competitors free to continue using such descriptors -- would place it at an unfair marketing disadvantage in overseas markets.

*Second*, defendants request clarification that the inclusion of corrective statements in Countertop Display, and Header Display, at retail point of sale (Section II.B.7.) is limited to retail locations in the United States. Although this provision contains no express U.S. limitation, like the descriptor provision, it is surrounded by other provisions that are so limited<sup>8</sup> and it would make no sense to impose an international obligation with respect to such countertop and header displays.

### **CONCLUSION**

For the reasons stated, defendants request the Court to clarify or amend its Order in the respects described above.

DATED: August 31, 2006

Respectfully submitted,

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<sup>8</sup> *E.g.*, Section II.B.7.a. (requiring onserts on “each pack of Defendants’ cigarettes shipped for retail distribution in the United States” during certain periods); Section II.B.7.c. (requiring publication in various United States newspapers).

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