STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

Court File No. C1-94-8565

vs.

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
BRITISH-AMERICAN TOBACCO COMPANY LIMITED,
BAT (U.K. & EXPORT) LIMITED,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' CONSOLIDATED MOTION FOR PARTIAL SUMMARY JUDGMENT
ON CERTAIN DAMAGES ISSUES:

DISGORGEMENT OF PROFITS

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I. INTRODUCTION

Plaintiffs respectfully submit this memorandum in opposition to defendants' motion to dismiss plaintiffs' claims for disgorgement of profits. Defendants' motion was part of their Consolidated Motion for Partial Summary Judgment on Certain Damages Issues. Plaintiffs have chosen to respond to this motion separately pursuant to this Court's order of October 20, 1997.

At the appropriate time in this litigation, plaintiffs intend to seek the disgorgement of defendants' profits from their sales of cigarettes in Minnesota. See Amended Complaint ¶ 134(h). Plaintiffs intend to seek this relief as a remedy for their statutory and equitable claims, Counts 2 through 9. Disgorgement is not being sought as a remedy for the tort claim, Count 1.

The conduct at issue in this case -- a decades-long conspiracy which has resulted in (and continues to result in) disease and death in unprecedented magnitude -- presents a paradigm for the disgorgement of profits. Plaintiffs submit that, at the conclusion of trial, the inescapable judgment will be that this industry should not be permitted to retain the profits of its extraordinary wrongdoing. Thus, at best, defendants' motion is premature, because the law unquestionably authorizes the disgorgement of profits -- on appropriate facts -- pursuant to eight of the nine causes of action in this case.

Plaintiffs have pled two causes of action in equity, Count 8 ("Performance of Another's Duty to the Public") and Count 9 ("Unjust Enrichment"). Disgorgement of profits is a traditional equitable remedy. Clearly, disgorgement of profits is appropriate for these counts.

Equally clear is this Court's authority to disgorge profits pursuant to Minnesota Statutes section 8.31, which provides remedies for violations of the antitrust and consumer fraud statutory causes of action pled by plaintiffs. Subdivision 3a, for example, specifically grants authority for plaintiffs to "receive other equitable relief as determined by the court."

In view of this authority, defendants are in essence requesting that this Court amend the relevant statutes, ignore equitable principles, and foreclose remedial options for fear that the Court might abuse its discretion after trial. Nothing in the defendants' motion even resembles a sound basis for granting summary judgment.

II. RECITAL OF DISPUTED FACTS AND STATEMENT OF SUPPORTING DOCUMENTS OF RECORD

Plaintiffs rely upon the disputed facts set forth in Plaintiffs' Combined Recital of Disputed Facts ("Combined Recital"), which is incorporated herein. All documents submitted as exhibits to the Combined Recital support

plaintiffs' opposition.

III. PLAINTIFFS' STATUTORY CAUSES OF ACTION (COUNTS 2-7)

A. Minnesota Statutes Section 8.31 Confirms This Court's Equitable Authority to Disgorge Profits

The plaintiffs are authorized by Minnesota statute to seek disgorgement of profits as a remedy for violations of the antitrust and consumer protection laws at issue. See Minn. Stat. § 8.31, subds. 3, 3a (1996). Subdivision 3a of section 8.31 provides:

> In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

(Emphasis added). Thus, subdivision 3a empowers the Court to grant equitable relief for each of the plaintiffs' statutory claims.[1]

Without question, profits disgorgement is "equitable relief." See, e.g., Estate of Jones by Blume v. Kvamme, 430 N.W.2d 188, 196 (Minn. App. 1988) ("[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment." (quoting Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir.), cert. denied, 382 U.S. 879 (1965)), aff'd in part and reversed in part, 449 N.W.2d 428, 432-33 (Minn. 1989); FTC v. Gem Merchandising Corp., 87 F.3d 466, 469 (11th Cir. 1996) ("Among the equitable powers of a court is the power to grant restitution and disgorgement."); Curtis Mfg. Co. v. Plasti-Clip Corp., 933 F. Supp. 94, 104 (D.N.H. 1995) (interpreting statutory language in New Hampshire's Consumer Protection Act almost identical to section 8.31 to include disgorgement of profits); see also Oklahoma ex rel. Day v. Southwest Mineral Energy, Inc., 617 P.2d 1334, 1338 (Okla. 1980) ("[D]isgorgement, being an equitable remedy, may be tailored in each individual case, to reach the ends of justice and equity."); 1 George E. Palmer, The Law of Restitution § 2.12, at 158 (1978).

Indeed, once a court sits in equity jurisdiction, the full range of equitable relief is available. In the landmark case of Porter v. Warner Holding Co., 328 U.S. 395, 66 S. Ct. 1086 (1946), the United States Supreme Court confirmed equitable jurisdiction to disgorge rents collected from Minneapolis tenants in violation of federal price controls. Id. at 396. The statute provided for "a permanent or temporary injunction, restraining order, or other order," but did not mention restitution or profits disgorgement. Id. at 397. Nevertheless, the Supreme Court concluded that it was "readily apparent" that once a trial court's equitable jurisdiction was invoked, "a decree compelling one to disgorge

profits, rents or property acquired in violation" of the statute was proper. Id. at 398-99 (emphasis added). The Supreme Court stated:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." . . . . Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398 (emphasis added) (citations omitted); accord Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92, 80 S. Ct. 332, 335 (1960); SEC v. O'Hagan, 901 F. Supp. 1461, 1471-72 (D. Minn. 1995).

Minnesota adheres to this traditional rule. For example, in State by Spannaus v. Northwestern Bell Tel. Co., 304 N.W.2d 872 (Minn. 1981), the Minnesota Supreme Court upheld the Attorney General's authority to seek restitution of illegally charged rates, id. at 876-77, despite provision for only "a mandatory injunction or other appropriate writ to compel obedience to the law, order, or judgment" in the statute, Minn. Stat. § 237.27. This result conforms to the rule that "when a court of equity properly assumes jurisdiction of a cause for one purpose it acquires it for all and grants full relief." State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 106, 147 N.W. 953, 957 (1914); accord Anderson v. W.J. Dyer & Bro., 94 Minn. 30, 36, 101 N.W. 1061, 1063 (1904).[1]

Thus, courts in a variety of contexts have held that statutory authority for injunctive relief is sufficient to trigger the equitable power to deprive a violator of all ill-gotten gains. See Pierce v. Amaral, 938 F.2d 94, 95-96 (8th Cir. 1991) (upholding an order disgorging all sales proceeds in violation of the Interstate Land Sales Full Disclosure Act, which specifically provides for injunctive relief); Gem, 87 F.3d at 468-70 (profits disgorgement furthers the FTC's efforts "to enforce consumer protection laws").

In addition, the statutes at issue in this case must be construed broadly in light of their purposes -- to

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[1] See also State v. Red Owl Stores, Inc., 253 Minn. 236, 249-50, 92 N.W.2d 103, 112-13 (1958) (even when the Legislature did not provide for injunctive relief, the Attorney General was authorized and had a duty to seek injunction against regulatory violations by sellers of drugs and medicines); Peterson v. Johnson Nut Co., 209 Minn. 470, 478, 297 N.W. 178, 182 (1941) ("Equity having assumed jurisdiction and granted an injunction will, as an incident, give full relief and compel an accounting of the profits wrongfully obtained."). In arguing that disgorgement is inconsistent with the "specific law governing the subject," Defs.' Mem., p. 13; see also id. at 10, defendants place puzzling reliance on Westgor v. Grimm, 381 N.W.2d 877, 881 (Minn. App. 1986). There, the court held that the "'dissenting shareholder buyout' provisions" of Minn. Stat. § 302A.471 governed whether the trial court could "force a buyout of dissenting shareholders." Id. A specific statute denied that particular relief.

protect the public and ensure vigorous enforcement of the law by public and private plaintiffs alike. See State of Minnesota v. Philip Morris Inc., 551 N.W.2d 490, 495-97 (Minn. 1996); State by Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 892 (Minn. App. 1992), aff'd, 500 N.W.2d 788 (Minn. 1993); Yost v. Millhouse, 373 N.W.2d 826, 832 (Minn. App. 1985). Profits disgorgement fulfills these purposes by preventing unjust enrichment and deterring wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); CFTC v. British Am. Commodity Options Corp., 788 F.2d 92, 94 (2d Cir. 1986) (BACO), cert. denied sub nom. Forma v. CFTC, 479 U.S. 853 (1986). As the Supreme Court of California stated:

> We do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct.

Fletcher v. Security Pac. Nat'l Bank, 591 P.2d 51, 57 (Cal. 1979) (analyzing remedies for unfair trade practices).[2]

Whether a public or private attorney general seeks relief, disgorgement may be the only way to prevent unjust enrichment and remove incentives to violate the law. See California v. Thomas Shelton Powers, M.D., Inc., 2 Cal. App. 4th 330, 341, 3 Cal. Rptr. 2d 34, 41 (Cal. Ct. App. 1992) ("[I]llicit profits may be disgorged to some entity or party in a position to use it to correct, as much as possible, the harm wrought by the unfair practice."); California v. Parkmerced Co., 198 Cal. App. 3d 683, 692-93, 244 Cal. Rptr. 22, 26-27 (Cal. Ct. App. 1988) (illegally retained but unclaimed tenant fees could be directed to a residents organization that was not even a party to the action), review denied (Cal. May 19, 1988).[3]

In this case, the plaintiffs intend to prove a pervasive and unexcused pattern of statutory violations such that all profits from Minnesota cigarette sales must be disgorged. See Alpine Air, 490 N.W.2d at 896 ("Alpine's fraud infected every single sale of its air purifiers."); BACO, 788 F.2d at 93 (upholding complete disgorgement based on "systematic and pervasive fraud"); Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222 (8th Cir.) (to deter

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[2] Defendants contend that no Minnesota court has ever awarded disgorgement under any of the causes of action pled in this case. Defendants fail to note, however, that a leading Minnesota case involving antitrust and consumer protection violations granted a broader disgorgement remedy than that sought by plaintiffs in this case: restitution of all revenues, not just disgorgement of profits. Alpine Air, 490 N.W.2d at 890-91, 896 (upholding "complete restitution" as "equitable relief" within the sound discretion of the trial court).

[3] Defendants do not seriously argue that the government is limited to "but for" damages in profits disgorgement actions, see Defs.' Mem., p. 15, nor could they, e.g., BACO, 788 F.2d at 93-94; O'Hagan, 901 F. Supp. at 1471-72. And section 8.31, subdivision 3a does not distinguish between the relief available to public and private attorneys general. Compare ABC Int'l Traders, Inc. v. Matsushita Elec. Corp., 931 P.2d 290, 302-04 (Cal. 1997) (discussing the availability of restitution/disgorgement of profits without reference to the public or private status of the plaintiff, and stressing deterrence and

wrongdoing, "equity requires that Fruehauf relinquish all of its profits"), ~~cert. denied~~, 429 U.S. 861 (1976). This Court must retain the power to ensure that the defendants do not walk away with a net gain.

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unjust enrichment policies).

B. Disgorgement Is a Proper Remedy in Antitrust Cases

Section 8.31, on its face, expressly includes the antitrust laws at issue in this case. See Amended Complaint ¶¶ 90, 96; Minn. Stat. § 8.31, subds. 1, 3, 3a. Accordingly, for all of the arguments set forth above, disgorgement of profits -- being an equitable remedy -- is available for antitrust violations.

Indeed, a "premise" and "teaching" of federal antitrust cases is that adequate relief should "deprive the defendants of any of the benefits of the illegal conduct" and "reach the root of the evil." United States v. Grinnell Corp., 384 U.S. 563, 577-78, 86 S. Ct. 1698, 1707 (1966) (emphasis added) (discussing trial court power to order divestiture). Restoration of the status quo ante is not the limit of antitrust remedies; rather, the Court may grant relief to "eliminate the effects" of illegal conduct and "assure the public freedom from its continuance." Ford Motor Co. v. United States, 405 U.S. 562, 573 n.8, 92 S. Ct. 1142, 1149 n.8 (1972) (citations and internal quotation marks omitted). A trial court "is clothed with 'large discretion' to fit the decree to the special needs of the individual case." Id. at 573, 92 S. Ct. at 1149 (citation omitted) (emphasis added).

This Court retains the authority to craft an antitrust remedy that fulfills these purposes. The relief must fit this case, in light of all the facts. Cf. United States v. American Airlines, Inc., 743 F.2d 1114, 1122 n.14 (5th Cir. 1984) ("We reject appellees' argument that because the courts previously have not been faced with a factual situation similar to the case at bar, that the conduct cannot violate the antitrust laws.").

Disgorgement certainly promotes deterrence, and it also serves the distinct interest of depriving wrongdoers of ill-gotten gains. See BACO, 788 F.2d at 94; O'Hagan, 901 F. Supp. at 1468-70; cf. National Merchandising Corp. v. Leyden, 348 N.E.2d 771, 776 (Mass. 1976) ("Nor should such a defendant be heard to say that the unjust enrichment remedy [of profits disgorgement] is unfairly 'punitive' because the plaintiff may recover more than his exact loss, when use of a tort measure might allow the defendant to retain some part of his ill gotten gains.").

The defendants' speculation about "double recovery," Defs.' Mem., p. 12, is also misplaced. Double recovery cases concern more than one damages recovery. E.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348, 91 S. Ct. 795, 811 (1971) (antitrust plaintiffs cannot recover the same "item of damage" from two coconspirators). "Disgorgement and damages are completely different remedies." Defs.' Mem., p. 9; see Thomas Shelton Powers, 2 Cal. App. 4th at 341 n.8, 3 Cal. Rptr. 2d at 41 n.8. When distinct interests are served by two forms of relief, both remedies may be awarded; in such circumstances there is no "double recovery." Pedro v. Pedro, 489 N.W.2d 798, 803 (Minn. App. 1992) (upholding the trial court's discretion to award both damages for lost wages and

improper gains for breach of fiduciary duty), review denied (Minn. Oct. 20, 1992).[2]

IV. PLAINTIFFS' EQUITABLE CAUSES OF ACTION (COUNTS 8-9)

Disgorgement of profits is simply one application of the unjust enrichment principle. See, e.g., Nelson v. Tripp, 264 Minn. 216, 220, 118 N.W.2d 805, 808 (1962) (describing an unjust enrichment claim as an equitable remedy to compel one "to disgorge"); Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 734 F. Supp. 1071, 1075 (S.D.N.Y. 1990) ("[D]isgorgement is a mechanism by which the equitable remedy of restitution is effectuated."). As one court stated:

> The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to "disgorge" his gains. Disgorgement is designed to deprive the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of the fraud.

Warren v. Century Bancorporation, Inc., 741 P.2d 846, 852 (Okla. 1987) (footnote omitted) (disgorging "gross profits" for conscious wrongdoing in diverting business).

In some cases, defendants may gain more by their wrongdoing than the plaintiffs lose. But courts retain the power to disgorge benefits flowing from the wrong. See Estate of Jones, 449 N.W.2d at 430, 432 (disgorging profits from a stock sale to a third party 11 years after the fraud); Restatement of Restitution § 1 cmt. e (1937) (enrichment may be unjust even when the plaintiff "has not suffered a corresponding loss or, in some cases, any loss"). This power is especially acute in cases of intentional wrongdoing. See 1 Palmer, supra, § 2.12, at 158, 164-65 ("In equity it has been traditional to hold a wrongdoer accountable for profits realized through the wrongful act.").

When the claim asserted is unjust enrichment, disgorging profits may be reserved for "extraordinary" circumstances and "serious wrongdoer[s]." 1 Dan B. Dobbs, Law of Remedies § 4.1(4), at 567 (2d ed. 1993). Such is the case in the present action. The Court should retain its inherent authority to disgorge profits, and allow the plaintiffs to prove their case.

V. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motion to dismiss the claims for disgorgement of profits.

Dated this 4th day of November, 1997.

RESPECTFULLY SUBMITTED,

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1. The antitrust counts and three of the consumer protection counts pled in this case a cifically referenced in section 8.31, subdivision 1. The fourth consumer protection statute ue -- the Minnesota Deceptive Trade Practices Act ("DTPA") --is also encompassed within sect 1, subdivision 1, although not specifically listed, since the citation of statutes in subdivisio "not exclusive[]," and since the DTPA is a "law of this state respecting unfair, discriminato other unlawful practices in business, commerce, or trade." See also Pls.' Mem. in Opp. to Def ion for Partial Summ. J. on the Grounds that Damages Are Not Available Under the Minn. DTPA (fi temporaneously with this memorandum). Moreover, even absent section 8.31, equitable rel cluding disgorgement) is authorized for violations of the DTPA pursuant to Minnesota Statu tion 325D.45, subdivision 1 (an injunction against violations of the DTPA may be granted "under nciples of equity and on terms that the court considers reasonable").

2. Moreover, the Court is vested with ample discretion to ensure -- after liability ablished -- that the remedy is fair and appropriate. See Alpine Air, 490 N.W.2d at 896. itional discretionary authority in the antitrust statutes only confirms the Court's power to ctical justice. Cf. Minn. Stat. § 325D.57 ("In any subsequent action arising from the s duct, the court may take any steps necessary to avoid duplicative recovery against a defendan oted in part in Defs.' Mem., p. 12)).