

**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 POINTS AND
AUTHORITIES IN SUPPORT OF THEIR MOTION TO STAY
THE FINAL JUDGMENT AND REMEDIAL ORDER PENDING APPEAL**

INTRODUCTION

Moving Defendants¹ submit this joint memorandum in support of their request for a stay pending appeal of the Court’s August 17, 2006 Order (“Order”).² That Order imposes expansive and unprecedented remedies on defendants based on the Court’s conclusion that defendants violated RICO. The relief ordered includes, among other things, prohibiting the use of descriptors such as “light” and “low-tar” and requiring each defendant to make corrective

¹ The Moving Defendants are Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Holdings, Inc., Lorillard Tobacco Co., and British American Tobacco (Investments) Ltd.

² Pursuant to LCvR 7(m), the parties have met and conferred but have been unable to narrow or resolve their dispute. The government opposes this motion.

communications by way of advertisements in major newspapers and magazines and onserts placed directly on product packages.

The immediate implementation of these remedies would fundamentally alter the business landscape for these defendants, causing them immediate and lasting injury. The required logistical efforts alone will require expenditures of hundreds of millions of dollars. For example, the Order requires defendants, among other things, to re-tool printing equipment; remove and replace signage in hundreds of thousands of retail stores; change advertising on hundreds of brands of cigarettes; and produce and distribute onserts on millions of packs of cigarettes. Even more lasting than these production and logistical changes will be the impact the Order will have on defendants' ability to compete in this consumer goods industry. The Order imposes sweeping restrictions on defendants, but not, of course, on other manufacturers. These other manufacturers, who are not defendants in this litigation, will gain a significant competitive advantage.

Additionally, the Court's corrective communications remedy mandates that defendants make declarations about themselves to the public that they believe to be untrue. Once forced to make these public statements, defendants will be effectively unable to take them back, even if their anticipated appeal is successful.

In short, the Court's Order will substantially interfere with defendants' businesses and market standing -- and the impact will be permanent. To impose such irremediable burdens on defendants before they have had the opportunity to obtain meaningful appellate review is inconsistent with fundamental principles of fairness and due process. Defendants therefore request that this Court stay its judgment pending the completion of the appellate process.

The standard for granting a stay under Rule 62(c) of the Federal Rules of Civil Procedure is well-settled and easily satisfied here. A stay is warranted when an appeal will raise legal questions that are “sufficiently serious, substantial, and difficult, to make [the appeal] ‘a fair ground for litigation and more deliberative investigation,’” and when the balance of equities, including injury to the defendant and the public interest, favors a stay during the pendency of the appeal. *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584-85 (D.D.C. 1995) (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)), *rev’d on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996).

The Court need not decide it was wrong or mistaken, only that the issues raised are legitimate and significant. There can be little dispute of that. This case presents legal and factual issues of such importance and complexity that they easily comprise “a fair ground for litigation and thus more deliberate investigation.” *Reich*, 897 F. Supp. at 584-85; *see also Wash. Metro Area Transit Comm’n*, 559 F.2d at 845 (even where a party is “less likely than not to prevail on the merits,” a “difficult [case]” may warrant a stay pending appeal).

This Court’s holdings are subject to substantial challenge on appeal. The issues to be raised are numerous, but include: (1) whether the Court applied the correct standard for specific intent; (2) whether the Court properly outlawed brand descriptors in the face of FTC and numerous court holdings permitting such descriptors; (3) whether the government satisfied the legal requirement of establishing that defendants are likely to commit future RICO violations; and (4) whether the Court’s imposition of certain remedies without a hearing violated defendants’ constitutional protections pursuant to *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

Moreover, absent a stay, compliance with this Court's judgment would require defendants to change their business operations with irreparable consequences. Defendants should not be required to sustain such injury before this Court's judgment is subject to any judicial review. This principle is particularly apt here, where the Court's Order, read as the government apparently interprets it, would result in pervasive regulation of defendants and piecemeal regulation of the tobacco industry.

Finally, the equities compel a stay. In considering whether or not to grant a stay, the Court should take into account, among other factors, the companies' existing obligations under the Master Settlement Agreement ("MSA"), the companies' current disclosures about the health risks of smoking (including addiction) on websites and onsets, the pervasive awareness by the public concerning the health risks of smoking, the impact on third parties, and the government's own failure ever to seek expedition of the proceedings (and, in fact, its own request for a stay of the remedies phase of the trial pending a ruling on its *certiorari* petition before the Supreme Court). In light of these and other factors, there can be no legitimate argument that any public interest emergency requires immediate implementation of the Court's remedies in advance of an appeal -- especially when the remedies would impose massive and irreparable harm on defendants.

ARGUMENT

Rule 62(c) permits this Court "in its discretion [to] suspend . . . an injunction during the pendency of [an] appeal." Fed. R. Civ. P. 62(c). The rule reflects the principle that, to be meaningful, an appeal must be capable of affording the appellant full and complete relief. *See Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). That cannot occur if enforcement of the judgment during the appeal results in harm to the defendant that cannot be undone if the appeal is successful. Thus, in determining whether

stays under Rule 62(c) should be granted, courts balance: (1) the likelihood that the party seeking the stay will succeed on the merits; (2) the threat of irreparable injury in the absence of a stay; (3) the prospect that other interested parties might be harmed if the court issues a stay; and (4) the public interest. *See Wash. Metro. Area Transit Comm'n*, 559 F.2d at 842-44.

These factors should not be applied rigidly, and no single factor is determinative. Instead, courts are required to balance the equities to determine whether preservation of the *status quo* pending appeal is warranted. *Id.* at 844. As the magnitude of the potential harm associated with the denial of a stay increases, the need to demonstrate probability that the appeal will succeed decreases. *See, e.g., Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843.

In this case, a stay that preserves the *status quo* during appeal is the only way to protect defendants' right of redress on appeal. Unless a stay is granted now, the irreparable consequences flowing from the implementation of this Court's judgment would not be subject to redress on appeal, effectively depriving defendants of meaningful judicial review.

I. Defendants Will Suffer Irreparable Harm Absent A Stay

In deciding whether to enter a stay pending appeal, the Court must consider the extent to which irreparable harm will occur absent a stay. *See Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843. The Court's Order requires dramatic changes to defendants' businesses that inevitably will impact their standing in the cigarette market. Defendants will be required to expend significant amounts of money implementing these changes with no possibility of recovery should the judgment be reversed on appeal. Finally, the Court's corrective communications remedy and general injunctions threaten to violate defendants' First Amendment and due process rights.

A. The Court's Order Imposes Dramatic And Irreversible Changes To Defendants' Businesses

The Court's ban on descriptors such as "light" and "low-tar" will result in enormous changes to the way defendants conduct their businesses and will significantly hamper defendants' ability to compete with non-defendant manufacturers not subject to the Court's Order. For many years now, the now-prohibited terms have described cigarettes that compete in a well-established market segment.³ Within this segment, all participating companies utilize similar terms to identify brands and attract consumers.⁴ Although descriptors are just one factor that some consumers take into account when choosing brands, if defendants were required to remove brand descriptors that distinguish those cigarettes that fall within this market segment, many of their customers would be hampered in their ability to compare and identify brands.⁵ For example, many smokers who prefer the taste of certain brands of cigarettes identify their preferred taste by the name "light." Without the "light" descriptor, these consumers would have a difficult time differentiating the cigarettes they prefer from other cigarettes at the point of purchase and, thus, would likely switch to "low-tar" and "light" brands promoted by cigarette manufacturers that are not subject to this Court's Order.⁶

Currently, there are approximately 200 brands of cigarettes in this market segment that use prohibited descriptors and are sold by companies not subject to this Order.⁷ The cost to defendants of the loss of sales in the United States to other cigarette manufacturers is estimated

³ See Declaration of David R. Beran (August 31, 2006) ("Beran Decl.") (Exhibit A) ¶¶ 8, 17.

⁴ See Beran Decl. ¶ 17.

⁵ See, e.g., Beran Decl. ¶¶ 17, 18; Declaration of Randy B. Spell (August 31, 2006) ("Spell Decl.") (Exhibit B) ¶ 7; Declaration of J. Brice O'Brien (September 1, 2006) ("O'Brien Decl.") (Exhibit C) ¶¶ 7, 9.

⁶ See, e.g., Beran Decl. ¶ 18; Spell Decl. ¶ 7; O'Brien Decl. ¶ 10.

⁷ Beran Decl. ¶ 17.

to be \$155 million per percentage of market share lost per year.⁸ This competitive injury would continue even if an appellate court reverses, because market share, once lost, cannot easily be regained.⁹

This loss of market share itself justifies a stay. *See, e.g., Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (“In a competitive industry where consumers are brand-loyal, we believe that loss of market share is a potential harm which cannot be redressed by a legal or an equitable remedy following a trial.”) (internal citation and quotation marks omitted); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1175 (6th Cir. 1995) (affirming grant of injunction where manufacturer’s false claims were causing irreparable injury to a competitor in the form of lost sales and market share); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.”); *Medtronic, Inc. v. Catalyst Research Corp.*, 664 F.2d 660, 663 (8th Cir. 1981) (affirming grant of preliminary injunction because, without injunction, movant “would suffer irreparable harm through loss of market share in the highly competitive pacemaker industry”). Consistent with these authorities, the Court should preserve the *status quo* while defendants’ appeal is pending.

⁸ Beran Decl. ¶ 19; O’Brien Decl. ¶ 11.

⁹ *See, e.g.*, Beran Decl. ¶ 19; Affidavit of Murray Gilliland Charles Anderson in Support of Defendants’ Motion to Stay the Final Judgment and Remedial Order Pending Appeal (August 30, 2006) (“Anderson Aff.”) (Exhibit D) ¶ 5; Spell Decl. ¶ 7; O’Brien Decl. ¶¶ 11,13.

B. The Court's Requirements Impose
Significant Monetary Harm On Defendants

The Court's broad prohibition on the use of descriptors and other aspects of defendants' marketing of low-tar cigarettes will impose costs on defendants that will run into the hundreds of millions of dollars.¹⁰ Scores of brands of cigarettes will need alternate packaging and alternative marketing and promotion campaigns. For example, although PM USA has not yet completely catalogued all of the steps it would need to take to eliminate these descriptors, PM USA knows that it would have to take at least the following steps to ensure that as of January 2007 it does not manufacture any products using the forbidden descriptors:

- Redesign packs, cartons, cases, and all other packaging used on all the brands that use the prohibited descriptors;
- Redesign all advertising on such brands, including advertising that is currently in use;
- Remove existing printing cylinders, which are used to print brand names and imagery on packs and cartons, from the vendors' printing machines, and engrave and install redesigned printing cylinders at its printing vendors; and
- Arrange for employees or contractors to visit over 200,000 retail stores with which PM USA has merchandising contracts to remove PM USA point of sale signage that carries a forbidden descriptor.¹¹

This process will need to begin almost immediately in order to come even close to meeting the Court's deadline.¹²

But even then, it will be difficult and costly to comply. PM USA's preliminary analysis and investigation creates concern that it may be unable to comply with the Court's deadlines. As explained in the Declaration of David Beran, the steps required to make these changes are so

¹⁰ See, e.g., Beran Decl. ¶ 16; Declaration of Tom Moring (August 31, 2006) ("Moring Decl.") (Exhibit E) ¶ 12; O'Brien Decl. ¶ 30.

¹¹ Beran Decl. ¶ 9.

¹² See also Moring Decl. ¶¶ 3-12; Spell Decl. ¶ 5.

significant and time-consuming that PM USA may be required to seek modification of the Court's injunction. For example, just creating an interim package design that comports with the Court's Order will require PM USA's printing vendors to make numerous modifications to its printing equipment -- a process that normally takes months to complete.¹³ Although PM USA will make every effort to expedite that process, its vendors are constrained by the limits on their engraving abilities and their production resources.¹⁴ Other defendants face similar hurdles.¹⁵

When the Court has entered a remedy with which defendants simply cannot comply, the correct result is to enter a stay. *Ruiz v. Estelle*, 650 F.2d 555, 573 (5th Cir. 1981) (staying an injunction requiring "structural and administrative changes" to prisons in part because the state contended that it was impossible to comply within the time set by the district court); *see also Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1208 (Fed. Cir. 1987) (Nies, J., concurring) ("Having found impossibility of compliance with its order, the board should not have dismissed but, rather, should have granted a stay for a reasonable period.").

The Court's corrective statements campaign will also require defendants to spend significant amounts of money publishing corrective statements in newspaper advertisements in a vast number of papers, in prime-time television commercials, and in inserts on all cigarette packages over a period of two years. Order at 4-9. This remedy is expected to cost defendants millions of dollars for newspaper advertisements and television commercials.¹⁶ Taking just one

¹³ Beran Decl. ¶¶ 13-14.

¹⁴ Beran Decl. ¶ 15.

¹⁵ *See* Spell Decl. ¶¶ 9-10; O'Brien Decl. ¶ 8.

¹⁶ *See, e.g.*, Beran Decl. ¶¶ 29, 30; Anderson Aff. ¶ 8; Spell Decl. ¶¶ 9-10; O'Brien Decl. ¶ 29.

defendant, the package insert program this Court envisions is more expansive than any program previously implemented by PM USA and would be extremely costly.¹⁷

The Court's requirement that countertop displays and headers containing the corrective statements be included in all retail stores with whom defendants have "Retail Merchandising Programs" creates still more costs, which are spelled out in detail in the attached declarations.¹⁸

There would be no way for defendants to recoup these significant costs if these remedies are reversed on appeal because the money is not going to the plaintiff, but towards expenditures that will be forever lost. This constitutes irreparable injury. *See, e.g., Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers) (finding irreparable harm where "[t]he State will bear the administrative costs of changing its system to comply with the District Court's order" and "it is unlikely that the State would be able to recover these costs").¹⁹ A stay of these remedies is therefore necessary to prevent significant, irreparable monetary loss to defendants.

The Court's document disclosure requirements will lead to further monetary loss that could not be recovered on appeal. For example, § III.C., ¶10.c. of the Order provides that the Internet document websites of each defendant must be searchable by 28 specific bibliographic

¹⁷ Beran Decl. ¶¶ 25-28. *See also* Moring Decl. ¶¶ 13-15; O'Brien Decl. ¶ 29.

¹⁸ Beran Decl. ¶¶ 34-37; Spell Decl. ¶¶ 2-5; O'Brien Decl. ¶¶ 19-28.

¹⁹ *See also Heckler v. Turner*, 468 U.S. 1305, 1307-08 (1984) (Rehnquist, J., in chambers) (finding irreparable harm where, if a party were to prevail on appeal, it would be "unlikely . . . to recover funds improperly paid out"); *Mori v. Int'l Bhd. of Boilermakers, Local Lodge No. 6*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (finding irreparable harm where "[t]he funds held in escrow . . . would be very difficult to recover should applicants' stay not be granted"); *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (granting injunction to stay enforcement of state tax statute and finding irreparable harm in payment of an allegedly unconstitutional tax where state law afforded no restitution remedy should statute be adjudged invalid); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss . . . does qualify as irreparable harm."); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985) ("The absence of an available remedy by which the movant can later recover monetary damages, however, may also be sufficient to show irreparable injury.").

fields. Some defendants have used virtually all of these fields or similar fields in their document collections. However, in some cases where similar fields are used, there is no automated way to isolate the specific information called for by the 28 bibliographic fields.²⁰ For example, instead of utilizing a “Person Attending” or “Organization Attending” field, defendants may have used a “Mentioned Name” or “Names Mentioned” field, which references all persons or organizations mentioned in the document including persons or organizations mentioned as attending a meeting.²¹ Because there is no automated way to isolate the persons or organizations who actually attended the meeting from persons or organizations that are simply mentioned, a substantial portion of the documents would need to be reviewed.²² As a result, manual review of millions of pages of documents would need to be undertaken to populate some of the specific bibliographic fields required by the Court’s Order. Such review will require significant amounts of time and millions of dollars that cannot be recovered on appeal.²³ Further, as detailed in the attached affidavits, defendants will incur other significant costs that also cannot be recouped in order to comply with § III.C. of the Order.²⁴

Additionally, the Order requires defendants to place on the Internet, and into the Minnesota Depository, documents that they maintain are privileged before they have an opportunity to have this privilege determination decided by the D.C. Circuit. *See* Order § II.C,

²⁰ *See, e.g.*, Declaration of R. Michael Leonard (August 31, 2006) (“Leonard Decl.”) (Exhibit F) ¶¶ 3-5, 8, 11, 15 (discussing Reynolds, B&W, and American Tobacco Company document collections).

²¹ *See, e.g.*, Leonard Decl. ¶¶ 5(a), 8(a), 11(a).

²² *See* Leonard Decl. ¶¶ 5, 8, 11, 15.

²³ *Id.* ¶¶ 6, 9, 12, 15. It is impossible for certain defendants to populate their collections with some of the required bibliographic fields. *See, e.g.*, Leonard Decl. ¶¶ 7, 10, 14 (discussing Reynolds, B&W, and American Tobacco Company document collections and the “Physical Attachments” Field); Declaration of Denise J. Talbert (August 31, 2006) (“Talbert Decl.”) (Exhibit G) ¶ 5 (discussing Lorillard document collection and the “Physical Attachments” field).

²⁴ *See* Talbert Decl. ¶¶ 4-6; Anderson Aff. ¶¶ 10-12; Leonard Decl. ¶¶ 13, 16.

¶14. This unquestionably subjects defendants to irreparable harm and warrants a stay. *See United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (“[T]he general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough” to support a finding of irreparable injury.).

C. The Court’s General Injunctions And Corrective Communications Will Violate Defendants’ Constitutional Protections And Create Other Irreparable Consequences

As described above, the Order requires defendants to make certain “Corrective Communications.” It also appears, in its general provisions, to enjoin defendants from making any affirmative statements to the public (1) denying that they market to youth; (2) denying that they manipulate nicotine in their products to maximize addiction; and (3) questioning whether second-hand smoke causes disease. These remedies will inevitably force defendants to make statements with which they disagree.

The Supreme Court has held that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Even if the Order is confined to enjoining only commercial speech -- about which the Order is unclear -- the law is no different. As the Tenth Circuit recently held, “the injury incurred through the deprivation of commercial speech rights cannot be quantified solely in terms of transaction costs and lost profits” and is therefore irreparable. *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005) (granting preliminary injunction against enforcement of city ordinance establishing burdensome licensing procedure to engage in door-to-door solicitation); *see also, e.g., Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956 (5th Cir. 1981) (holding that potential infringement of First Amendment speech rights was

irreparable injury and granting stay pending appeal of district court's order upholding constitutionality of city ordinance that proscribed advertisement of "drug paraphernalia").

Moreover, the Order, read broadly, substantially interferes with fundamental freedoms protected by both the First and Fifth Amendments. For example, the Court supported its finding that defendants violated RICO in part by detailing statements they made to regulatory authorities, because of their litigation positions, and during other acts that involve defendants' legitimate exercise of their First Amendment and due process rights. *See, e.g.*, Opinion at 1525. But defendants have an absolute right to participate in these activities *See, e.g.*, U.S. Const. Amend. I (recognizing the right to petition the government for redress of grievances); *Clark v. Arizona*, 126 S. Ct. 2709, 2731 (2006) (recognizing a defendant's due process right to put on evidence in defense); *Gillard v. Norris*, 857 F.2d 1095, 1101 (6th Cir. 1988) (First Amendment petition clause guarantees the right to petition agencies).

In addition to the constitutional harm, there will be real-world consequences of forcing defendants to make statements to the public with which they disagree before an appeal is decided. While the Court has not yet defined the corrective remedies, the Court's general injunctions give cause for concern about what defendants will and will not be able to say to the public. The Court enjoined defendants from denying that they market to youth. If asked publicly about whether they target youth smokers, must the defendants answer "yes"? The Court criticizes the defendants for denying that they manipulate nicotine to maximize the addictiveness of their cigarettes. If asked whether they manipulate nicotine levels, must they publicly state that they do so? Even if they vehemently disagree, and no appellate court has had a chance to evaluate this Court's conclusions?

Defendants anticipate that the public statements imposed by the Court will be contrary to many of defendants' positions about their products and their business practices. Yet the statements will be attributed to defendants by the press, the public, and even by litigants, long after any appeal is decided. The consequences, once realized, will be impossible to reverse. In these circumstances, the Court should not require these communications until the appeal is resolved.

II. The Appeal Of This Case On Its Merits Presents Substantial Issues Justifying A Stay

Where an appeal will raise issues that are “sufficiently serious, substantial, and difficult, to make them ‘a fair ground for litigation and . . . more deliberative investigation,’” courts have held that stays should be granted. *Chamber of Commerce*, 897 F. Supp. at 585 (quoting *Wash. Metro. Area Transit Comm’n*, 559 F.2d at 844); *see also* *Population Inst.*, 797 F.2d at 1079 (finding that “appellant has raised a serious legal question” on at least one issue and granting stay pending appeal). In this case, the Court addressed numerous novel and complex legal issues and took positions for which contrary authority exists. Whether or not the judgment is ultimately upheld, there can be little dispute that the case presents a fair ground for an appeal. *See Wash. Metro. Area. Transit Comm’n*, 559 F.2d at 845 (finding that, even where a party “is less likely than not to prevail on the merits,” the fact that the case is “difficult,” “in light of the balance of equities . . . , suffices to sustain the stay”); *see also* *Nat’l Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980) (“[E]ven if the district court had correctly concluded that plaintiffs would not be likely to prevail on the merits . . . , plaintiffs needed only to present a ‘serious legal question’ for preliminary relief to be granted under the other circumstances of their case.”).

A. Specific Intent

This Court ruled that the specific intent requirement of the mail and wire fraud statutes did not require that any single employee of any defendant actually harbored the specific intent to commit mail or wire fraud. *See* Opinion at 1578-84. As the Court itself recognized, this holding is in tension with the decisions of numerous other courts. *See, e.g., Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 265 F.3d 353, 366-67 (5th Cir. 2004); *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 886 n.2 (6th Cir. 1990); *Lind v. Jones, Lang LaSalle Am., Inc.*, 135 F. Supp. 2d 616, 622 n.6 (E.D. Pa. 2001); *First Equity Corp. v. Standards & Poor's Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988).

In fact, the D.C. Circuit has indicated that specific intent must be proven by showing that specific employees had specific intent. In one case, it rejected the plaintiff's proofs because:

[t]here was no showing that either Air France or Dynair employees were subjectively aware of the serious risks attending packaging the carpets inadequately in violation of regulations or leaving the carpets outside. Saba did show that Air France's packers in Linz failed to pack the carpets according to Air France's regulations. But he offered no evidence that the packers knew that the cargo was likely to be left outside in inclement weather and that the packaging provided would not adequately protect it Without any such evidence, the inference that Air France or Dynair intended (or recklessly disregarded the high risk of) bad consequences is entirely unwarranted, and willful misconduct, as a matter of law, is not established.

Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 (D.C. Cir. 1996).

Saba and the line of authority cited above supports defendants' argument that specific individual intent is required. Defendants respectfully submit that this Court's conclusion that corporate intent can be inferred from the circumstances of this case creates a fair and important issue for appeal; if defendants are right in their interpretation of the law, the government's RICO case fails in its entirety.

B. Low-Tar Cigarettes

The Court's Order prohibits the use of descriptors such as "light" and "low-tar," Order at 3, and the Court found that by using these descriptors defendants violated RICO, Opinion at 1514-18. But a number of recent decisions have found that the use of such terms is specifically authorized by the FTC as part of a comprehensive regulatory framework, created pursuant to the Federal Trade Commission Act and the Federal Cigarette Labeling and Advertising Act, and designed to "prevent deception." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 862 (8th Cir. 2005) (emphasis added) (*certiorari* pending); *see also Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010 (E.D. Mich. Oct. 25, 2005); *Sullivan v. Philip Morris USA Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005); *Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 75 (D.P.R. 2004), *aff'd*, 405 F.3d 36 (1st Cir. 2005); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005). One court has called the correctness of these decisions "a matter of public record." *Price*, 848 N.E.2d at 34.

For example, the Eighth Circuit recently noted that, since the FTC adopted the FTC Method for measuring tar and nicotine yields, the agency has, among other things:

- "[M]ade it clear that it has not found any other testing method adequate and will consider advertising to be 'deceptive' if it deviates from the [FTC Method]";
- Compelled an industry agreement to disclose FTC Method tar and nicotine yields in all advertising;
- Enforced compliance with the agreement;
- Specified and conducted testing procedures under the FTC Method;
- Controlled "the specific manner in which the industry agreed to disclose the tar and nicotine ratings in advertising";
- Inspected industry testing labs;

- Approved use of the terms “low,” “lower,” “reduced,” or “like qualifying terms” to describe cigarettes having FTC Method tar yields of 15 milligrams or less; and
- Reevaluated and refused to alter its policies.

Watson, 420 F.3d at 859-62; *see also Schwab v. Philip Morris USA, Inc.*, No. 04-cv-1945, 2005 WL 2401633 (E.D.N.Y. Sept. 26, 2005) (rejecting request for an injunction prohibiting use of the descriptor “light”).

The Court’s determination that RICO prohibits descriptors conflicts with these decisions and the FTC’s policies. *See Watson*, 420 F.3d at 862 (finding a conflict between claims challenging the use of descriptors and the FTC’s regulations because “[t]he very combination [plaintiffs] challenge as deceptive is the same combination the FTC requires to *not* be deceptive”) (emphasis in original). Defendants therefore have a substantial argument under well-established principles of law that RICO, as a general statute, should not apply to descriptors that are governed by a specific, statutorily-authorized regulatory scheme. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”); *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1228 (D.C. Cir. 1991) (specific statutory measures established in the Service Contract Act, as opposed to RICO, controlled and defined the relief available to plaintiffs); *Bridges v. Blue Cross & Blue Shield Ass’n*, 935 F. Supp. 37, 41 (D.D.C. 1996) (finding that “[t]he [Federal Employees Health Benefits Act] leaves no room for a remedy under RICO; the broad enforcement and oversight powers of the [Office of Personnel Management] established in the statute indicate that the exclusive remedy for an action cognizable under the FEHBA lies under the FEHBA, not under another federal statute”).

C. Likelihood Of Future Violations

As this Court correctly recognized, the government must establish a likelihood of future violations before it can obtain any relief under RICO. *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000). But the evidence for continuing violations was, we submit, subject to legitimate dispute.

Defendants have a substantial argument that their current business environment ensures that they will not resurrect any alleged enterprise. The MSA, along with destroying the structure of the alleged enterprise, prohibits much of the conduct that this Court criticized in its Findings of Fact. *See, e.g.*, MSA § III(r) (JD-045158) (prohibiting “material misrepresentation of fact regarding the health consequences of using any Tobacco Product”). In light of the MSA the likelihood of future RICO violations is extremely low, if it even exists at all.

The Court in part concluded that the *possibility* of resurrecting an enterprise, coupled with the fact that defendants undertook certain acts not long ago, justified a finding that defendants were likely to engage in RICO violations in the future. But a *possibility* should not be a sufficient basis to hold defendants liable, particularly when they currently make public statements and take other actions that are very different than their past conduct -- and particularly when the MSA and related injunctions in place in *every state* already bars the resurrection of the sort of enterprise activity that the Court found to violate RICO. *See* MSA § III(o) (barring “restitut[ion]” of “CTR or its function in any form”); § III(p) (establishing strict guidelines for and oversight of any new tobacco-related trade associations); § III(q) (enjoining agreements to “limit or suppress research” or to “limit[] . . . distribution of information about health hazards” of the use of tobacco products); *compare also* Opinion at 1534 (noting that “these organizations *can be* resurrected, recreated, or reincarnated”) (emphasis added) *with SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992) (noting that there “must be ‘some cognizable danger of recurrent

violation, something more than the mere possibility which serves to keep the case alive”)
(quoting *United States v. W.T. Grant. Co.*, 345 U.S. 629, 633 (1953)).²⁵

D. Violations of *United States v. Microsoft*

Defendants have a substantial argument that many of the remedies imposed are proscribed by *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), because they were not afforded an evidentiary hearing to dispute the factual basis underlying the government’s proposed remedies. *Id.* at 101.

In *Microsoft*, the D.C. Circuit reversed a lower court’s order splitting Microsoft into two separate companies. The court stated, “[i]t is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings.” *Id.* The failure to hold such a hearing prior to issuing an injunction, the court found, “would be contrary to the spirit which imbues our judicial tribunals prohibiting decision without hearing.” *Id.* (internal quotation marks and citation omitted). Here, as the trial progressed, the government did not even submit a proposed remedies order. When defendants objected, the Court required the government to provide one, but it did so only after the trial was completed. Because the Order imposes remedies not previously sought, the defendants had no opportunity to challenge the feasibility, practicality, and possibility of complying, as well as the factual assumptions underlying them.

The consequences are real -- the Court’s injunction contains many directives that are vague and ambiguous and therefore difficult to follow and implement. For example:

²⁵ The possibility is even further remote that B&W Holdings, Inc. or BATCo would engage in RICO violations. Neither manufactures cigarettes in the United States, sells cigarettes in the United States, or markets or advertises cigarettes in the United States. Moreover, it is undisputed that BATCo’s future conduct will occur only overseas, and there is no proof that this conduct will result in direct and substantial effects on the American public, or that similar effects ever occurred in the past.

- The Court has ordered that defendants make certain “corrective statements,” Order ¶ 5, to be disseminated, in part, through countertop and header displays at retail point of sale outlets. *Id.* ¶ 7(b). The vast majority of independent businesses do not utilize countertop displays.²⁶ Yet the Order may be read to require retailers to either use such displays or forego carrying defendants’ products. No evidence was presented or taken about the impact of these displays on retailers.
- The Court’s timetables for complying may not be realistic or even possible. Evidence about possibility of compliance could have been presented at a hearing, but one was not held. As defendants continue to make attempts to comply they may have to seek this Court’s guidance and even modifications of the injunction to comply.

III. The General Injunctions Should Be Clarified So That They Do Not Impose Additional Vague And Overly Broad Ambiguous Obligations On Defendants

The Order provides that defendants are “permanently 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. It also states that defendants are “permanently 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 is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes.” Order § II.A.3.

Defendants have filed a motion seeking clarification of these provisions. As we explain in that motion, given the structure of the Order and the comments made by the Court on the August 18, 2006 conference call hearing, the Order appears to bar defendants from making public affirmative statements 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”;

²⁶ See Spell Decl. ¶ 3.

- “maintaining that neither smoking nor nicotine is addictive”;
- denying that they manipulate nicotine;
- denying that they market to youth; and
- stating that “light” or “low-tar” cigarettes are safer than other cigarettes.

Opinion at 1501-02; *see also id.* at 1604-05. The Order also appears to preclude defendants from entering into any agreements to limit or suppress research. These obligations would, of course, be in addition to the specific injunctive relief outlined in other provisions of the Order. As described above, these requirements in and of themselves create harm that would be irreversible if implemented prior to appeal. They will force defendants to make statements that they believe to be false and, at the same time, greatly limit their public communications about their products -- including communications to their consumers.

Even as interpreted by defendants, this sort of broad injunction runs afoul of the principle that injunctions must be specific and ascertainable. *See* Fed. R. Civ. P. 65(d). Nonetheless, the government reads the general injunctive provisions in a way 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 the Court and applied immediately, would leave defendants unable to discern what they are and are not permitted to do to comply with the Order, potentially infringing upon their lawful business activities and even the exercise of constitutional rights guaranteed by the Due Process Clause and the First Amendment. Such draconian requirements should not be imposed before judicial review.

Such a reading, if adopted by this Court, would create a clear likelihood of reversal on appeal. Numerous courts addressing the question have reversed broad injunctions to “obey the law” under Rule 65 of the Federal Rules of Civil Procedure. Rule 65 expressly mandates that “[e]very order granting an injunction . . . shall be specific in terms; 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 emphasized that “the specificity provisions of Rule 65(d) are no mere technical requirements.” *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). 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.*²⁷ And courts have repeatedly held that injunctions that

²⁷ See also *Int’l Longshoremen’s Ass’n., Local 1291 v. Phila. Marine Trade Ass’n.*, 389 U.S. 64, 75-76 (1967) (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”); *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388-89 (1970) (specificity requirement outlined in Rule 65 “is essential in cases where private conduct is sought to be enjoined”); *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 Rule 65 because it was “susceptible to more than one interpretation” and “failed to give adequate notice to the [enjoined party] 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); *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 marks omitted); *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”); *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

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amount to nothing more than an instruction to “obey the law” do not satisfy the specificity 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); *Payne*, 565 F.2d at 898. Thus, if these general injunctions impose independent requirements, they will almost certainly be reversed upon appeal.

If the Court intends changes so vast, it must permit the defendants a meaningful appeal. To be meaningful, an appeal must be capable of affording the appellant full and complete relief. If, while the appeal is pending, the defendant is subjected to injury that cannot be rectified in the event that it prevails, its due process rights are seriously infringed. In *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev’d on other grounds*, 481 U.S. 1 (1987), the Second Circuit affirmed a preliminary injunction that precluded the plaintiff from executing on an \$11 billion state court judgment that, under state law, could be stayed only by posting a bond in the full amount of the judgment. The defendant could not obtain such a bond without filing for bankruptcy. The court recognized that the application of such a burdensome security requirement effectively “render[s] [the] right to appeal . . . an exercise in futility” and a “meaningless ritual . . . robbed of any effectiveness.” *Id.* at 1145, 1154; *see also In re Am. President Lines, Inc.*, 779 F.2d 714, 718 (D.C. Cir. 1985) (reversing a district court for setting an excessive supersedeas bond).

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65’s “command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order”); *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).

The analysis in *Texaco* fully applies here. If the government's interpretation of the Court's Order were accepted, the Order would require the defendants to change their designs, marketing, promotions, website, and public statements. Fundamental fairness and due process require this Court to stay the judgment so that it may be subject to appellate review before it results in crippling, irreparable harm to defendants' businesses.

**IV. A Stay Pending Appeal Will Harm
Neither The Government Nor The Public Interest**

We anticipate that the government will argue that it is essential to the public health that the Order go into effect without delay to prevent future RICO violations. But the government cannot show that a stay will increase the likelihood that defendants will violate RICO during the limited time period while the appeal is pending. Because the public is overwhelmingly aware of the health risks of smoking and because defendants are already subject to the broad prohibitions against wrongful conduct outlined by the MSA, there is no need for immediate enforcement of the remedies Order. The government implicitly recognized that the need for careful consideration of the legal issues in this case outweighed any interest in expedited action when it asked this Court to refrain from issuing any judgment on remedies until the Supreme Court resolved its *certiorari* petition.

In fact, the Order will likely have significant negative effects on the public. Many of the remedial provisions will necessarily raise cigarette prices for consumers. Moreover, numerous provisions will have the effect of shifting market share from defendants to competitors who are neither bound by the MSA nor by this Court's rulings. That shift of market share to firms not bound by the MSA would be against the public interest and militates *against* immediate implementation of the Order.

Furthermore, absent a stay, the Order will result in irreparable harm to other innocent persons such as defendants' suppliers, distributors, other creditors, employees, and farmers. Defendants bring their products to market by way of numerous third parties (such as tobacco farmers, paper manufacturers, *etc.*). For many of these companies, receivables due from defendants constitute a large percentage of their working capital. The eradication of the defendants' light and low-tar cigarette market share would inevitably affect these innocent third parties as these defendants' market share reduces. Moreover, as delineated in the affidavit of Lyle Beckwith, Senior Vice President for Government Relations of the National Association of Convenience Stores ("NACS"), the Court's requirement of Countertop displays in retail stores will impose a significant financial burden on retailers throughout the country.²⁸

In any event, in light of these circumstances, any alleged harm is not sufficiently "immediate or concrete" to outweigh the definite irreparable harm to defendants from implementation of the remedies prior to resolution of the appeal. *Chamber of Commerce*, 897 F. Supp. at 585 ("While economy and efficiency may well be served by implementation of the Executive Order, there is no way to quantify how immediate or concrete those benefits [would] be.").²⁹

Thus, a stay of the Order, so that important questions of law can be addressed on appeal before an industry is forever changed, is not likely to cause harm to anyone.

²⁸ Affidavit of Lyle Beckwith (August 30, 2006) (Exhibit H) ¶¶ 7-13; *see also* Affidavit Of Scott Hartman (August 30, 2006) (Exhibit I) ¶¶ 6-9.

²⁹ In the case of B&W Holdings, Inc. and BATCo, there will certainly not be any harm to the American public if a stay is granted. BATCo will only engage in non-United States conduct -- and none of this non-United States conduct was ever shown to have resulted in adverse effects on the American public. Moreover, B&W Holdings, Inc. will not market, advertise, sell, or manufacture any cigarettes in the United States in the future.

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that the Court stay enforcement of this Court's Order #1015--Final Judgment and Remedial Order and Final Opinion dated August 17, 2006 pending resolution of defendants' appeal.

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