IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Civil Action No. 99-2496 (GK)**
v.	)	
PHILIP MORRIS USA INC., *et al.*,	)	**Next Scheduled Court Date: None**
Defendants.	)	

CERTAIN DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO MODIFY ORDER #1015 TO REMOVE THE MINNESOTA DEPOSITORY REQUIREMENTS

Defendants Altria Group Inc., Philip Morris USA Inc., R.J. Reynolds Tobacco Company (individually and as successor to Brown & Williamson Tobacco Corporation), and Lorillard Tobacco Company respectfully request that the Court remove from Order #1015 the requirement that Defendants produce documents to and fund the Minnesota Depository (the "Depository").

As set forth below, while the Minnesota Depository costs approximately $1,000,000 annually to maintain, it is rarely used. Moreover, in light of technological advancements, the Depository no longer serves the original purposes for which it was created and is now a mere redundancy. Accordingly, because there is no credible reason for continuing to maintain the Depository and because all other requirements that the Depository be maintained have expired, there is no impediment to the Court granting the relief requested herein.

When the Court issued Order #1015, certain documents in the Depository were not posted on Defendants' document websites. Non-standard media (such as video and audio tapes or over-sized documents) were not posted because the Master Settlement Agreement did not

require it—in recognition of the fact that it was technologically infeasible to post such documents in 1998. Other documents were not posted due to simple human error. As the Court recognized at the time, the Depository thus served the public as a unique source for access to non-standard tobacco company documents and as a means to confirm that all Defendant documents produced in litigation were posted to Defendants' document websites. Since then, however, technological advances have enabled Defendants to post non-standard media to their public document websites. Also, since Order #1015's issuance, Defendants have conducted exhaustive reviews of records located at the Depository to identify any documents produced to the Depository but inadvertently not posted on Defendants' document websites. Defendants have taken steps to address all discrepancies. Additionally, Defendants have agreed to the Government's recent request to post to their websites a downloadable list of all documents produced in litigation within seven days of such production, which will provide a simple way for the public to confirm on a continuing basis that Defendants are meeting their document-posting obligations under Order #1015. The Depository, therefore, no longer represents a unique source for tobacco document access or serves as a check on the posting of such documents to Defendants' document websites.

As a result of these advances, efforts, and agreements, the Depository no longer serves the function for which it was created and is, at most, a mere redundancy. In light of this—and compounded by the fact that the Depository is rarely used—Defendants respectfully request that the Court remove the Minnesota Depository requirement from Order #1015.[1]

[1] Although this Court ordered that this motion be filed pursuant to Federal Rule of Civil Procedure 60(b), because the final judgment entered by the Court in 2006 was vacated by the D.C. Circuit, this Court's modification of Order #1015 is therefore subject to Federal Rule of Civil Procedure 54(b). Even assuming final judgment has been entered (which it has not), relief is warranted under Rule 60(b)(5) because applying the Depository obligations prospectively is no longer equitable for the reasons set forth below.

BACKGROUND

A. Order #1015 Requirements

Order #1015 requires Defendants to place "all industry documents" disclosed in this and future tobacco litigation in (1) a physical document depository in Minnesota and (2) on document websites. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 928, 941-44 (D.D.C. 2006). Defendants have long maintained the Depository and document websites pursuant to a settlement with the State of Minnesota and the Master Settlement Agreement; these obligations, however, expired in 2008 (Depository) and in 2010 (websites). *See* Consent Judgment at § VII(A), *Minnesota v. Philip Morris Inc.*, No. C1-94-8565 (Minn. D. Ct. 1998) (JD-093326); Master Settlement Agreement at § IV(c) & (e) (JD-045158). Order #1015 created new requirements lasting until September 1, 2021, in order to "allow the public to monitor what Defendants are doing internally and to assess the accuracy of future information they may make available about their activities and their products." 449 F. Supp. 2d at 928; *see also id.* at 929, 941; Order # 1021 (amending Order #1015 to extend the depository and website requirements until 2021).

B. The Minnesota Depository Is Rarely Used

At the February 24, 2011, Status Conference, this Court asked the parties to address how often the Depository is actually used. The information provided by Judge Guthmann and Depository administrator Cindi Smart makes clear that the depository is rarely used.[2] According to that information, the following represents the number of visitors from 2008 through 2010, excluding visits by Defendants, vendors, and contractors related to Depository administration:

- 2008—18 visits, five telephone requests, and 52 email requests;

[2] On Monday, March 21, 2011, Judge Guthmann and Ms. Smart provided redacted data showing usage of the Depository from December 2007 through March 15, 2011. The information included both a summary table and redacted user statistics. The data provided by Judge Guthmann and Ms. Smart is attached as Exhibit 1.

- 2009—25 visits, four telephone requests, and 87 email requests;
- 2010—seven visits, three telephone requests, and 78 email requests.

Yet even these numbers overstate the Depository's use. When *repeat* visits, telephone requests, and email requests from the same individual are excluded, the numbers are even smaller:

- 2008—12 visitors; one telephone requestor; and four email requestors. And of the 12 visitors in 2008, all visited on only three days, with two visitors on January 28, as well as five visitors on each of March 17 and October 8.
- 2009—18 visitors, 12 of whom visited on the same day, November 18, and another five of whom visited on October 14; two telephone requestors; and zero email requestors.
- 2010—two visitors; three telephone requestors; and one email requestor.

During 2008, a member of the public visited the Depository on just eight days; in 2009, on just nine days; and in 2010, on just six days.

This data only confirms what the parties have already acknowledged concerning the extent of the Depository's use. *See* Dec. 20, 2010 Status Conference Transcript at 17 (Statement of Ann M. Ravel for United States) (acknowledging the Depository "is not used extensively"); *id.* at 39 (Statement of Howard M. Crystal for Intervenors) (stating only that "the depository is still visited," without specifying how much); *id.* at 38 (Statement of the Court) ("[E]veryone seems to agree that its use is relatively small."). By contrast, and as explained below, Defendants' document websites are used extensively and are far more accessible to the general public.

C. The Public Uses Defendants' Websites, Not the Minnesota Depository

The Depository's negligible use reflects the fact that the Defendants' public websites are a far superior method for accessing Defendants' documents than the remote Depository. Comparative usage figures for the Depository and websites bear this out. For example, the Depository received an average of 17 visits, 72 emails, and four telephone calls from the public each *year* between 2008 and 2010. During this same period, Defendant PM USA's website alone received an average of 27,819 visits (i.e., "hits") each *month* from more than 4,100 unique visitors. (Declaration of Michael E. Klein ("Klein Decl.") ¶ 7 (noting that, even assuming some number of PM USA employee and counsel visits, "a significant majority of the average monthly visits to www.pmdocs.com and a significant majority of unique visits to www.pmdocs.com are made by the general public"), attached as Exhibit 2; *see also* Declaration of R. Michael Leonard ("Leonard Decl.") ¶ 5 (for RJRT's document website, average document image requests—entailing either viewing or downloading a document image—averaged 7,180 per *week* thus far in 2011), attached as Exhibit 3; Declaration of Denise J. Talbert ("Talbert Decl." ¶ 7 (in 2010 there were "almost 79,000" requests to view a document's image on the Lorillard website), attached as Exhibit 4).

This website usage data reflects a point of agreement among the parties throughout this litigation—that comprehensive document websites would best achieve Order #1015's goal of public access to tobacco company documents. For example, in its post-trial briefing in this case, the Government urged that "[d]ocument websites have several significant desirable features that document depositories do not." Post-Trial Brief of the United States of America at 242, *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (No. 99-CV-02496 (GK)) (hereinafter "*Government Post-Trial Brief*"). This Court adopted that statement, verbatim, in its Opinion. *See Philip Morris*, 449 F. Supp. 2d at 931. Chief among these desirable features, the

Government and Court explained, is that document websites "increase[] the availability of the documents to the general public," because "relatively few members of the public are able to travel to Minnesota." *Id.* (internal quotation marks omitted); *Government Post-Trial Brief* at 242 (same). Notwithstanding the superiority of the websites, this Court concluded that the Depository was also necessary because there remained many "non-digitized archival materials" in the Depository, typically referred to as non-standard media. *Id.*

D. Technological Advances Now Permit Posting of Non-Standard Media to Websites

Since Order #1015's entry, Defendants have developed the ability to provide public access to video tapes, audio tapes, and over-sized documents through their websites. Defendant RJRT has digitized and posted to its website all non-standard media. (Leonard Decl. ¶ 8). Defendants Philip Morris USA and Altria Group Inc. have digitized the vast majority of their non-standard media and are in the process of digitizing the remainder and posting all of those materials to Philip Morris USA's public website; this process should be completed by May 31, 2011. (Klein Decl. ¶ 4). Defendant Lorillard is undertaking a similar effort, which it expects to be completed within the next 60-90 days. (Talbert Decl. ¶ 4). Once the non-standard media postings are complete, the relative superiority of the Defendants' websites to the Depository in providing public access to tobacco documents will be further enhanced. Also, once the non-standard media postings are complete, there will no longer be a "non-standard media" need to maintain the Depository.

E. Reconciliation of Discrepancies Between the Depository's 4B Indices and Defendants' Website Postings Is Nearly Complete

Since August 2010, Defendants have been working with the California Attorney General's Office ("CAAG") to reconcile discrepancies between documents posted on their websites and those listed in the 4B indices housed at the Depository. (The 4B indices are indices

of publicly available documents produced by Defendants to the Depository.) As it turns out, a significant number of the documents identified by the CAAG as listed on the 4B indices but not available on the Defendants' public websites were either (i) actually available on the websites, or (ii) not required to be posted due to the documents' privilege and/or confidentiality designations. (Klein Decl. ¶ 6 (citing December 22, 2010, letter sent to CAAG citing figures regarding privileged/confidential documents not required to be posted and documents actually available on website); Leonard Decl. ¶¶ 13-15; Talbert Decl. ¶ 5). However, each Defendant was able to identify some number of non-privileged, non-confidential documents in boxes at the Depository that were in fact never posted to their respective websites due to human error. (*See* Klein Decl. ¶ 6 (citing February 7, 2011, letter notifying CAAG that transposition, transcription, and other human error resulted in failure to post some historical documents)); Leonard Decl. ¶ 14; Talbert Decl. ¶ 5). The various Defendants have effectively resolved these discrepancies.[3] Once all Defendants complete this reconciliation process, all publicly available documents at the Depository will be publicly available on Defendants' document websites. Accordingly, there will be no basis to maintain the Depository as a unique source for historical tobacco company documents.

F. The Cost and Administration of the Minnesota Depository

At the February 24, 2011, Status Conference, this Court asked the parties to explain who pays for the Depository, who administers it, and what it costs. As explained above, this Court's Order requires that the Depository be maintained "at [Defendants'] expense." (Order # 1015 ¶ 11). By agreement of the parties and the Minnesota District Court, Second Judicial District, in St. Paul, Minnesota, which exercises jurisdiction over the Minnesota Depository, it is

[3] Each Defendant is in a slightly different position, as explained in their respective Declarations. (*See* Klein Decl. ¶ 6; Leonard Decl. ¶¶ 14-16; Talbert Decl. ¶ 5).

administered by Smart Legal Assistance. (Klein Decl. ¶ 8; Leonard Decl. ¶ 3; Talbert Decl. ¶ 8). Defendants together pay approximately $1,000,000 per year to maintain the Depository. (Klein Decl. ¶ 8; Leonard Decl. ¶ 4; Talbert Decl. ¶ 8). The current lease on the Depository facilities extends until March 31, 2012. (Leonard Decl. ¶ 4).

ARGUMENT

Because Defendants' document websites will soon contain every document available to the public in the Depository, the Depository is, at this point, a mere redundancy. It nevertheless represents a significant cost and burden to Defendants, who are responsible for maintaining it.[4] Given that the Depository no longer serves the public purposes for which it was originally created and is *rarely* used, it should be discontinued. Accordingly, Defendants request that the Court remove the Depository requirement from Order #1015.

1. Under Rule 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Here, although Order #1015 was final when entered, the D.C. Circuit's partial vacatur of certain remedies in Order #1015 deprived this Order of finality by leaving these remedial issues to be resolved on remand. *See Jalapeno Prop. Mgmt., LLC v. Dukas,* 265 F.3d 506, 509-13 (6th Cir. 2001) (reversing trial court decision holding that "Rule 54(b) has no application after a claim has been heard on appeal" where there has been a partial vacatur of a final judgment and a remand for further proceedings). In this Circuit, a court may revise a non-final order "as justice requires." *Isse v. Am. Univ.*, 544 F. Supp. 2d 25, 29 (D.D.C. 2008).

[4] Maintenance of the Depository also carries with it a significant environmental burden. For example, to comply with the ever-growing Depository, parties are required to print to paper and then ship in cardboard boxes thousands upon thousands of documents that otherwise would exist only in electronic form.

While Defendants believe that this motion is properly brought under Rule 54(b), even if Order #1015 constituted a final judgment, relief would be appropriate under Rule 60(b). Rule 60(b)(5) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). This Rule embodies the "long-established, broad, and flexible [principle]," *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983) (Friendly, J.), that a "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need," *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (holding that Rule 60(b)(5) embodies a "flexible" standard). The Supreme Court has long held that "it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo*, 502 U.S. at 384); *see also Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961).

2. Since entry of Order #1015, it has become apparent that the Depository is unnecessary.

First, as explained above, it is now apparent that the Depository is rarely used because it is inconveniently located and, more importantly, Defendants' public websites are a far superior method for searching and obtaining Defendants' documents. Indeed, in 2008, a member of the public visited the Depository on just eight days; in 2009, on just nine days; and in 2010, on just six days. There is simply no need to maintain the Depository when virtually nobody actually visits it. To the contrary, these few visitors, as well as the comparably small number of

individuals who make telephone and email requests of the Depository, could access the same information far more easily from Defendants' websites.

Second, at the time of judgment in this case, certain non-standard media documents archived in the Depository were not required to be posted and, in any event, could not easily be placed on Defendants' websites because they were video tapes and audio tapes. *See Government Post-Trial Brief* at 242 ("Collections of tobacco documents placed on the internet following the litigation of the 1990s, *unlike the majority of non-digitized archival materials*, are generally searchable through the web." (emphasis added)); *Philip Morris USA Inc.*, 449 F. Supp. 2d at 931 (same). Since then, Defendant RJRT has mounted a determined effort to convert all such materials to digital format and posted them on its public website. (Leonard Decl. ¶ 8). In addition, Defendants Philip Morris USA and Altria Group Inc. have digitized the vast majority of their non-standard media and are in the process of digitizing the remainder and posting all of those materials to Philip Morris USA's public website. (Klein Decl. ¶ 4). Defendant Lorillard is engaged in this same undertaking, which it expects to complete within the next 60-90 days . (Talbert Decl. ¶ 4). As a result, the relative superiority of Defendants' document websites will be further enhanced relative to the remote, anachronistic Depository. Defendants, moreover, have in place the technology and processes to ensure that all new documents, including non-standard media, are promptly placed on their websites in accordance with Order #1015. (Klein Decl. ¶¶ 4-6; Leonard Decl. ¶¶ 8, 16; Talbert Decl. ¶ 4).

3. In light of these developments, it is no longer equitable to enforce the Depository requirement. Order #1015, as it currently stands, requires Defendants to maintain two now-redundant repositories of documents—websites and the Depository. It is, moreover, undisputed that the more efficient and useful mechanism is the document websites, not the Depository.

Nevertheless, each year, Defendants spend approximately $1,000,000 dollars maintaining the Minnesota Depository. (Klein Decl. ¶ 8; Leonard Decl. ¶ 4; Talbert Decl. ¶ 8). These costs are unnecessary, since every document that Order #1015 makes available to the public can be found on the websites. *See Horne v. Flores*, 129 S.Ct. 2579, 2595 (2009) ("If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper."). And it is well-settled that equity disfavors redundancy. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972) ("[T]he fact is that one injunction is as effective as 100, and concomitantly, that 100 injunctions are no more effective than one."); *Nat'l Farmers' Org. v. Assoc. Milk Producers*, 850 F.2d 1286, 1309 (8th Cir. 1989) ("[T]here is nothing to be gained by entering an injunction that substantially duplicates the relief already available.").

4. The Government and Intervenors have identified only one independent function for the Depository: to check its contents against the websites. *See* Dec. 20, 2010 Status Conference Transcript at 16 (Statement of Ann M. Ravel for the United States) ("Our belief is that … a number of public health investigators utilize [the Minnesota Depository] to test the information and to augment the information that is presently contained on the websites of the tobacco companies, and that there are inconsistencies."); *id.* at 39 (Statement of Howard M. Crystal for Intervenors) ("There is an incredibly important purpose served by the hard copy depository in terms of dealing with discrepancies."). As discussed above, any past discrepancies between the Depository and the websites will soon be fully remediated.

Moreover, there is no basis for requiring maintenance of the Depository as a check against the website on a going-forward basis. All of the documents that the CAAG identified as missing from the website involved documents produced in applicable litigation years ago. (Klein Decl. ¶ 6; Leonard Decl. ¶ 12; Talbert Decl. ¶ 5). In contrast, all documents produced in recent

years have consistently been loaded onto Defendants' websites and sent to the Depository. (Klein Decl. ¶ 6; Leonard Decl. ¶ 8; Talbert Decl. ¶ 6). The Depository, therefore, on a going forward basis, will not serve as a way to "check" the accuracy of the websites. (Klein Decl. ¶¶ 5-6; Leonard Decl. ¶ 17). In addition, in the future, Defendants have agreed to the Government's request to provide electronic lists or spreadsheets listing all documents being produced in applicable litigation promptly after making such production. (Klein Decl. ¶ 5; Leonard Decl. ¶ 17; Talbert Decl. ¶ 6). Those lists or spreadsheets can be utilized by the Government as a "check" that Defendants are posting to their websites all documents produced in litigation, thus eliminating any need to utilize the very expensive and antiquated Depository to provide such a "check." (Klein Decl. ¶ 5; Leonard Decl. ¶ 17; Talbert Decl. ¶ 6).

5. In light of the changed factual circumstances described above, removing the Depository requirement from Order #1015 is appropriate. Doing so will eliminate the current redundancy of Defendants' two parallel disclosure requirements without going any further "than equity requires." *Rufo*, 502 U.S. at 391. Defendants will be relieved of the costs and burden of maintaining the outdated and superfluous Depository, while the Government and Intervenors (and thus the public) will continue to receive access to all of the documents to which they are entitled—yet in a more comprehensive and convenient format. Consequently, the Court can be sure the central purpose of Order #1015 "remains in force." *See Western Electric*, 46 F.3d at 1207.[5]

6. Finally, at the February 24, 2011 Status Conference, the Court asked the parties to address what court should have jurisdiction over the Depository in the event that this Court denied the relief that Defendants seek. In that event, Defendants believe that such jurisdiction

[5] For the same reasons, if the Court were to conclude that Rule 60(b) is the proper basis for resolving this issue, then Rule 60(b)(6) would also entitle Defendants to relief. That subsection allows a court to "relieve a party" from "a final judgment [or] order" for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Given the clearly inequitable nature of the onerous and now unnecessary Minnesota Depository requirement, if Rule 60 governs and subsection (5) does not entitle Defendants to relief, then subsection (6) surely does.

should rest with the Minnesota District Court, Second Judicial District, in St. Paul, Minnesota—the court that currently exercises jurisdiction over it.

CONCLUSION

The Minnesota Depository has run its course. Accordingly, Defendants respectfully request that the Court grant Defendants' motion and remove the Minnesota Depository requirement from Order #1015.

Dated: March 24, 2011

Respectfully submitted,

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