UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 99-2496 (OK)**
	)	
PHILIP MORRIS INCORPORATED, et al.,	)	
	)	
	)	
Defendants.	)	

0 R D E R #230

TENTH CASE MANAGEMENT ORDER

On September 22, 1999, the United States filed this massive lawsuit against 11 Defendants--9 tobacco companies and 2 non-profit corporations providing research and public relations services to the industry. Of the original 11 Defendants, 9 remain. The Government's complaint accuses the entire industry of a far-ranging conspiracy to deceive the American public. That conspiracy, according to the Government, caused enormous adverse consequences to the physical health and longevity of Americans and imposed enormous health care costs on federal and local governments, on private insurers, and on members of the public. The industry vigorously denies these allegations. The Defendants deny that they concealed any information from the public which they had a duty to reveal. Moreover, Defendants argue that the Government was itself integrally involved in the conduct it now labels a "conspiracy."

The Defendants point to the Government's allowing the sale of cigarettes, reaping tax revenue from the sale of cigarettes, and regulating the warnings that appear on cigarette labels.

Because of the significance of the allegations, the enormity of the remedies being sought, and the need for the Government to be vindicated or the tobacco companies to be exonerated, the American public and the parties deserve to have this case tried expeditiously. To achieve that end, the Court, issued Order #37 on November 21, 2000, set a firm trial date for July 15, 2003, and has consistently emphasized to the parties the necessity of meeting that deadline.

From the inception of the litigation, the Court recognized that this goal--embodied in Rule 1 of the Federal Rules of Civil Procedure--could only be met by applying intensive case management and oversight. Consequently, there have been innumerable status conferences with counsel, frequent submissions from counsel as to the actual status of discovery, and issuance of more than 200 Orders.

Discovery began December 1, 2000. Shortly thereafter, in Order #41, a Special Master was appointed to develop a comprehensive case management plan, a procedure for resolving discovery disputes, and a procedure for resolving privilege disputes. On March 26, 2001, the Court issued Order #51, a 50-page document which spelled out in great detail the powers of the

Special Master, the procedures for resolution of discovery and privilege disputes, and the protocols f or fact discovery.

Discovery has been, if anything, even more massive than anticipated. A few facts will suffice. Plaintiff designated 27 expert witnesses, and the Defendants designated 44 expert witnesses. As of August 15, 2002, 199 fact witness depositions, and 44 expert witness depositions have already been taken by the parties; parties claim that 18 fact witness depositions and 36 expert witness depositions remain to be taken or concluded, although a number were scheduled to be concluded in the month of September.

As to documents, Plaintiff has produced approximately 980,000 pages, and Defendants have produced approximately 38.8 million pages. Plaintiff expects to produce another 60,000 pages within the next 90 days; those documents will emanate from the Executive Office of the President ("EOP") and will undoubtedly raise many privilege issues. In addition, the Federal Trade Commission ("FTC"), which is not a party, has claimed privilege f or approximately 8,000 documents it has produced; many of these claims will be challenged by Defendants. Defendants expect to produce approximately 67,000 pages within the next 90 days. In short, by the close of discovery, parties will have exchanged some 40 million pages of documents.

Litigation before the Special Master has been particularly heavy. He has, as of August 15, 2002, issued 76 Reports and Recommendations. Parties have taken forty complete or partial appeals. As of September 1, 2002, 28 motions remain pending on his docket, almost half presenting complex privilege issues which are particularly time-consuming because of the need to examine hundreds of individual pages of documents. The Special Master has estimated that resolution of these motions may take him and his staff of two legal associates between 18 to 20 months to complete.

In addition, the Special Master has alerted the Court to a significant number of discovery motions (in excess of 15), which parties anticipate may be filed in the near future.

Finally, in response to Order #210, issued August 22, 2002, the parties have filed the following good faith estimates about future non-discovery-related, pre-trial motions practice: for summary jud~rnent motions which raise purely legal, non-Daubert issues, the Government estimates filing 15-20 motions, and the Defendants estimate filing 19; for summary judgment motions which rest on disposition of Daubert issues, the Government estimates filing none, and the Defendants estimate filing 1; for Daubert motions, the Government estimates filing 15-20. and the Defendants estimate filing 25. In sum, the parties estimate filing a total of 75-85 summary judgment and Daubert motions; this number does not include other pre-trial in limine motions.

The Court has spelled out this background in order to give a full factual context for the conclusions it has reached and the steps it will take to restore some sense of proportion and structure to the further litigation of this case.

First, despite the best efforts of the Special Master and the Court, it is clear that the existing trial date of July 15, 2003, cannot be met. Several developments are responsible for this conclusion, amongst them the following: substantial privilege challenges are expected for both the FTC and EOP document productions; Defendants only recently produced close to 2 million documents, after having removed them from their privilege logs very, very late in discovery, which the Government must now examine and evaluate; resolution of pending motions before the Special Master will take substantial time, and there may well be subsequent appeals.

Second, it has become clear, given the natural inclination of lawyers to leave no discovery stone unturned, that the discovery phase of this case has become the main focus of counsel's efforts when it is the trial--with its ultimate resolution of disputed issues--that must take center stage. While that 18 understandable to some extent, the Court is very concerned that counsel are losing sight of the forest for the trees.

Third, it is this Court's responsibility to manage its caseload, and keep cases on track. Moreover, that responsibility

includes managing all its other pending cases as well -- many of which require prompt resolution of significant and difficult constitutional questions or questions involving the relationship between the executive and legislative branches. Case management responsibility is particularly vital in a case of this magnitude. Early on, Order #37 allocated slightly more than two-and-a-half years for all pre-trial work. Eased on the estimates provided by counsel and the Special Master, this case might well not be ready for trial for at least an additional three to four years--i.e., 2a06-2007--i.e., seven years after filing. That result is simply unacceptable.

It is unacceptable for two important reasons. First, the public interest demands that cases of such significance not drag on for years and years and that they come to closure in the time-honored fashion: a public trial where the positions of both sides can be tested in the glare of cross-examination and public scrutiny. Second, it is essential that our civil justice system demonstrate that it has the capacity to efficiently handle a case of this magnitude by narrowing issues, reining in over-zealous lawyers, and directing counsel to focus their efforts on the central issues of the case rather than peripheral minutiae.

Accordingly, the Court now adopts the following procedures, deadlines, and restrictions:

1. The trial date of July 15, 2003 is continued to **September 15, 2004.**

2. The following schedule will govern all pre-trial proceedings:

January 15, 2003--Preliminary Proposed Findings of Fact and Conclusions of Law;

April 1, 2003--Completion of Fact Discovery Except for FTC and EOP;

August 1, 2003--Completion of All Fact Discovery;

September 1, 2003--Completion of Expert Witness Discovery;

October 1, 2003--Summary Judgment Motions;

November 1, 2003--Summary Judgment Oppositions;

November 15, 2003--Summary Judgment Replies;

March 15. 2004--First Pre-Trial Conference;

April 15, 2004--In Limine Motions;

May 1, 2004--Second Pre-Trial Conference;

May 15, 2004--In Limine Oppositions;

June 1. 2004--In Limine Replies;

June 15, 2004--Final Proposed Findings of Fact and Conclusions of Law;

July 15, 2004--Final Pre-Trial Conference;

September 15, 2004--TRIAL.

3. As noted earlier, privilege challenges will be made to documents produced by the FTC and to be produced by the EOP. Those challenges need to be resolved as early as possible. Consequently, as to the documents produced by the FTC, for which a privilege log has already been supplied, the parties must meet and confer in good faith, in accordance with LCvR 7.1(m), with respect to challenging an assertion of privilege, within **15** days of the filing of the privilege log, **or no later** than October 15, 2002. As to documents which are yet to be produced by either the FTC or the EOP, the parties must also meet and confer in good faith, in accordance with LCvR 7.1Cm), with respect to challenging an assertion of privilege, within 15 days of the filing of the privilege log. In all other respects, the applicable provisions of Order #51 shall apply.

4. The Court has carefully examined the submissions of the parties regarding Daubert motions. Daubert v. Dow Pharm., Inc., 509 U.S. 579 (1993), clarified the standard for admitting expert scientific testimony in federal trials. It held that Fed. R. Evid. 702 displaced the "general acceptance " test first formulated in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923), and imposed an obligation upon trial judges to screen purportedly scientific evidence to ensure that only relevant and reliable evidence is admitted. In particular, Daubert instructed trial judges to perform the role of gatekeeper, keeping powerful, but misleading, evidence from the jury. 509 U.S. at 595.

In this case, there will be no jury and the Court will be the factfinder. Consequently, there is no need for Daubert motions or hearings. See Gibbs v. Gibbs, 210 F.3d 491, 500 (5~ Cir. 2000) ("Most of the safeguards provided for in Daubert are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury."); Ekotek Site PRP Committee v Self, 1 F. Supp. 2d 1282, 1296 n.5 (D. Utah 1998) (denying motions to exclude expert testimony under Daubert and Fed. R. Evid. 702 as unnecessary where the Court is acting as trier of fact). To the extent that the parties are raising challenges to the qualifications of the experts, the scientific reliability, replicability or validity of their methods, or the relevance of their testimony to the allegations of the lawsuit, all of these issues can be dealt with by cross-examination during trial. Consequently, no Daubert motions will be permitted.

5. The Court has also carefully examined the submissions of the parties regarding the subject matter of summary judgment motions they intend to file. It is perfectly clear that many of those motions are not, in fact1 appropriate for summary judgment and that they can only be decided after the Court has had an opportunity to hear all the facts of the case.

Consequently, counsel are going to have to exercise both professional judgment and restraint in deciding which issues truly merit summary judgment consideration. Each Defendant will be

limited to filing no more than 1 summary judgment motion, or 9 collectively for all Defendants; the Government will be limited to filing no more than **9** summary judgment motions. Motions and oppositions will be limited to **30** pages and replies will be limited to **15** pages.

Should the parties be able to clearly identify any additional issues that are truly appropriate for summary judgment treatment, and show extraordinary good cause for according them such treatment, they may file a motion limited to **3** pages, an opposition of **3** pages, and a reply of **1** page.

6. As noted earlier, the Government has designated 27 expert witnesses and the Defendants have designated 44 expert witnesses. After preliminary review of the Rule 26 reports, the Court concludes that there is overlap and duplication amongst many of these experts. Once again, counsel are going to have to narrow their focus to the core issues in this case and exercise professional judgment and restraint.

At this point, the Court does not have sufficient information to establish a numerical limit on expert witnesses. Given the overlap and duplication, however, a limit must ultimately be set. No later than **December 1, 2002**, counsel may file challenges to the number of expert witnesses on the basis of overlap and duplication. Such challenges will be limited to **7** pages and replies to **3** pages. After receiving the submissions of counsel, the Court will rule on

the number of experts who may be called. After these rulings, the Court will establish procedures for submission of question-and-answer narratives as direct testimony at trial.

7. Some concluding observations are in order. Although the trial date has been moved forward -- with great reluctance -- by a little over a year, the parties will continue to be under great pressure to complete all their tasks in that period of time. The parties need to recognize that some things will simply not get done. It may well be that some motions do not get decided by the Special Master. It may well be that some depositions do not get taken or concluded. In that sense, this case will be no different than any other, in that no lawyer ever thinks that they have completed every task that should be done prior to trial. Unorthodox accommodations may have to be made in order to meet our schedule: for example, it may be necessary to engage a second Special Master in the event that the backlog of essential motions becomes unmanageable. Above all, counsel on both sides are going to have to focus more closely on the essential elements of their claims and defenses and what trial evidence must be presented to prove them. It is hoped that early preparation, as required in paragraph 2 above, of Preliminary and Final Proposed Findings of Fact and Conclusions of Law will help parties achieve this end.

SO **ORDERED**, this 1st day of October, 2002.

Gladys Kessler

Gladys Kessler
United States District Court Judge