

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	99-2496 (GK)
	:	
PHILIP MORRIS USA, Inc.,	:	
f/k/a Philip Morris, Inc.	:	
<u>et al.</u>	:	
Defendants.	:	

ORDER #523

This matter is now before the Court on the Motion for Summary Judgment filed by Defendant Liggett Group Inc. ("Motion"). Upon consideration of the Motion, the Opposition, the Reply, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, Defendant Liggett's Motion is **denied.**

April 7, 2004

_____/s/_____
Gladys Kessler
United States District Court Judge

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MEMORANDUM OPINION

This matter is now before the Court on the Motion for Summary Judgment filed by Defendant Liggett Group Inc. ("Motion"). Upon consideration of the Motion, the Government's Opposition, the Reply, and the entire record herein, and for the reasons stated below, the Motion is **denied**.

I. BACKGROUND

Plaintiff, the United States of America ("the Government") has brought this suit against the Defendants¹ pursuant to Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt

¹ Defendants are Philip Morris USA Inc. (f/k/a Philip Morris Incorporated), R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (individually and as successor by merger to the American Tobacco Company), Lorillard Tobacco Company, Altria Group Inc. (f/k/a Philip Morris Companies, Inc.), British American Tobacco (Investments), Ltd., The Council for Tobacco Research-U.S.A., Inc., the Tobacco Institute, Inc., and The Liggett Group, Inc.

Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq.² Defendants are manufacturers of cigarettes and other tobacco-related entities. The Government seeks injunctive relief and billions of dollars for what it alleges to be Defendants' unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of manufacturing safer and less addictive tobacco products. Amended Complaint ("Am. Compl.") at ¶ 3.

The Government seeks equitable relief under Section 1964(a) of RICO. In order to obtain the requested injunctive relief and disgorgement, the Government must demonstrate "a reasonable likelihood of future RICO violations." United States v. Philip Morris Inc., et al., 116 F. Supp.2d 131, 148 (D.D.C. 2000). Section 1964(a) is designed to prevent and restrain future conduct rather than to punish past conduct. See United States v. Carson, 52 F.3d 1173, 1182 (2d. Cir. 1995).

² The Complaint originally contained four claims under three statutes. On September 28, 2000, the Court dismissed Count One (pursuant to the Medical Care Recovery Act, 42 U.S.C. § 2651, et seq.) and Count Two (pursuant to the Medicare Secondary Payer provisions of the Social Security Act, 42 U.S.C. §§ 1395y(b)(2)(B)(ii) & (iii)). See United States v. Philip Morris, 116 F. Supp.2d 131 (D.D.C. 2000).

II. Analysis

In the present Motion, one of the Defendants, Liggett Group Inc. ("Liggett"), seeks summary judgment on the grounds that it affirmatively withdrew in the mid-1990s from any alleged conspiracy which might have existed. In light of this alleged withdrawal, Liggett asserts that the Government cannot meet its burden of demonstrating that Liggett poses a continuing threat of RICO violations in the future.

While the Government acknowledges that Liggett has been somewhat helpful and distinguishes Liggett's conduct from that of the other Defendants, the Government asserts that the evidence of withdrawal which Liggett claims is "undisputed" is in fact very much in dispute. According to the Government, Liggett has failed to "come clean" to authorities because it continues to assert that there never was a RICO conspiracy and that if there was, it never participated in it. See Govt's Opp'n at 20. In addition, the Government claims that Liggett's overall behavior falls far short of action to disavow or defeat the conspiracy, as required to establish withdrawal.

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255; see also Washington Post Co. v. United States Dep't of Health and Human Servs., 865 F.2d 320, 325 (D.C. Cir. 1989).

Additionally, "if the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." Greenberg v. FDA, 803 F.2d 1213, 1216 (D.C. Cir. 1986). At the summary judgment stage, "the court is not to make credibility determinations or weigh the evidence." Dunway v. Int'l Brotherhood of Teamsters, 310 F.3d 758, 761 (D.C. Cir. 2002).

B. There Are Material Facts in Dispute About Whether Liggett Withdrew from the Alleged Conspiracy

In order to be awarded the equitable relief it seeks under Section 1964(a), the Government must prove a reasonable likelihood of future RICO violations on the part of Defendants. Liggett claims that the Government cannot as a matter of law meet this burden because it withdrew from the alleged conspiracy in the mid-1990s and thus cannot pose a risk of future RICO violations.

To establish withdrawal, a co-conspirator must prove either

that: (1) it took affirmative action to disavow or defeat the purpose of the conspiracy which is communicated in a manner reasonably calculated to reach co-conspirators, or (2) it "made a clean breast to the authorities." See Hyde v. United States, 225 U.S. 347, 368-69 (1912); United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997). While both Liggett and the Government stipulate that Liggett "broke ranks" from the other Defendants in 1997, material facts remain in dispute regarding whether Liggett's actions constitute "affirmative actions to disavow or defeat the conspiracy " or "coming clean" to the authorities."³

Liggett advances several arguments to demonstrate that it took affirmative action to defeat the purpose of the conspiracy in the mid-1990s. Liggett was the first domestic tobacco company to admit that smoking causes cancer and is addictive and include product warnings beyond those required by law. See Motion at 4-5. Liggett asserts that it was the only company to disclose the ingredients of its cigarettes and to agree to submit to FDA jurisdiction. Id. at 4. In addition, Liggett argues that it provided assistance and cooperation to the States' Attorneys General in their prosecution of claims against other tobacco companies, Liggett's alleged co-conspirators. Id. In particular, Liggett relies on the fact that

³ The Government also disputes whether a finding of withdrawal would preclude liability in this action. However, because the Court leaves the determination of withdrawal to trial, it need not reach that issue at the present time.

its officials testified about the dangerous health effects of smoking. Id. Liggett asserts that its cooperation was a key element in achieving state settlements with the other tobacco companies and that it has been hailed as a "responsible tobacco company." Id. Because it "broke ranks" with the other Defendants in 1997, Liggett claims that it has become a pariah in the tobacco industry. Id. at 5. Based on this evidence, Liggett claims that it affirmatively abandoned any alleged conspiracy and, thus, cannot pose a continuing or future threat of RICO violations.

In response, the Government argues that Liggett's actions today continue to support and protect the RICO conspiracy, rather than defeat it. In particular, the Government alleges that Liggett (1) refuses to disclose all of the ingredients in its cigarettes to the public (See Govt's Opp'n at 23); (2) continues to engage in marketing tactics that appeal to youths (id.); (3) continues to deny that it manipulates the nicotine content in its cigarettes while still researching methods to deliver sufficient nicotine to enhance addiction (id. at 24); and (4) continues to deceptively market "light" and low tar cigarettes as safer or less hazardous (Id. at 26). Moreover, according to the Government, Liggett's economic entanglement with Philip Morris means that Liggett has a financial stake in the continuing vitality of the conspiracy. Id. at 26 (citing U.S. Supp. LG 7.1/56.1 St. at ¶86). As a result, the Government claims that Liggett has not taken

affirmative steps to completely disavow or defeat the conspiracy and therefore cannot be found to have withdrawn.

While Liggett does not specifically advance an argument that it made a "clean breast to the authorities," Liggett emphasizes the point that it "turned state's evidence in the mid-1990s and provided historic, widely-publicized testimony, evidence and admissions in support of governmental claims against its alleged co-conspirators at that time." Liggett's Reply at vi. In fact, Liggett argues that as a result of this cooperation with the States' Attorneys General, it no longer has any meaningful relationship with the other Defendants. Id. According to the Government, however, Liggett cannot be found to have withdrawn because it has failed to make the requisite disclosure to authorities to completely "come clean" about the alleged conspiracy.

The foregoing recitation of the parties' positions makes it eminently clear that there are genuine disputes about material facts and about the inferences and interpretations to be drawn from individual facts which may not be disputed. Summary judgment is, therefore, inappropriate. In short, a determination of whether the challenged acts constitute withdrawal on the part of Liggett is a fact-intensive inquiry that can only be resolved at trial.

