

STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS, § CIVIL NO.: 5:96-CV-0091
Plaintiff, §
§ JUDGE: DAVID FOLSOM
VS. §
§
THE AMERICAN TOBACCO § MAGISTRATE:
COMPANY, ET AL § JUDGE WENDELL C. RADFORD

THE STATE OF TEXAS' MOTION FOR A TEMPORARY RESTRAINING
ORDER ENJOINING DEFENDANTS FROM INTERFERING
WITH THIS COURT'S DISCOVERY ORDERS

Plaintiff, the State of Texas, respectfully moves this Court for a temporary restraining order enjoining certain Defendants from (1) interfering with the discovery orders of this Court and (2) from seeking to hold Brooke Group Ltd., Liggett Group, Inc., and Liggett & Myers, Inc. (collectively "Liggett"), their agents and attorneys, in contempt for submitting documents to this Court for in camera inspection. In support of this Motion, the State would show:

1. On March 20, 1997, Liggett entered into the Attorneys General Settlement Agreement ("Settlement Agreement") with 22 states – including Plaintiff, the State of Texas – that have filed lawsuits against the cigarette manufacturers to, inter alia, recoup the public health care costs caused by smoking-related disease. Central to these suits are allegations that the cigarette manufacturers have affirmatively misrepresented and hidden the true health dangers of smoking from the public and health regulators.
2. As part of the settlement agreement, Liggett agreed to turn over "all documents and information that are relevant to the subject matter of the Actions or which are likely to lead to admissible evidence in connection with the claims asserted in any of the Actions" Settlement Agreement, para. 4.3.2(2). Liggett further agreed to deposit in this Court, under seal for in camera inspection, all documents which any tobacco company claims may be privileged. *Id.*
3. Defendants R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated sought, and were granted, a temporary restraining order dated March 20, 1997, the effect of which has precluded Liggett from disclosing documents and information as required by the Attorneys General Settlement Agreement. See, Temporary Restraining Order (attached). On March 21, 1997, Defendants R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated sought, and were granted, a further order regarding the documents and information pertinent to the Settlement Agreement. This Order requires Liggett to retrieve all copies of all documents subject to the TRO and deposit them with the Superior Court of Forsyth County, North Carolina by Monday, March 24, 1997, at 5:00 p.m. See, March 21, 1997, Order (attached).
4. The actions of Defendants R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated seriously interfere and infringe on the jurisdiction of this Court, undermine this Court's previous Orders, and impair this Court's power to effectively manage and decide the above-captioned action. Accordingly, the State of Texas moves this Honorable Court for a temporary restraining order enjoining Defendants from interfering with the standing mandatory disclosure obligations of the Plan for the Eastern District of Texas as well as this Court's prior, outstanding orders.
5. The documents required to be disclosed pursuant to the Settlement Agreement are documents required to be produced by Liggett pursuant to Fed. R. Civ. P. 26(a)(1)(B), the Eastern District Plan, and this Court's repeated discovery orders. Rule 26(a)(1)(B) requires disclosure of documents "in the possession, custody or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings. The Eastern District Plan imposes similar requirements. Further, this Court has specifically

ordered all Defendants, including Liggett, to comply with the provisions of the Plan. Specifically, the Court ordered:

On or before December 15, 1996, Defendants shall produce copies of all documents, data compilations or tangible items that bear significantly on any claim or defense of the parties. Documents to be produced include documents produced by Defendants in current or past litigation or otherwise in their possession and/or control that bear significantly on any of the Plaintiff's claims.

Order Compelling Disclosure, Magistrate Judge Wendell C. Radford, United States District Court, November 13, 1996; see also, November 5, 1996, Case Management Order, para. 6, January 16, 1997, Order.

6. As provided in the Settlement Agreement, and as noted above, these are "documents . . . that are relevant to the subject matter of the Actions or which are likely to lead to admissible evidence in connection with the claims asserted in any of the Actions . . ." Settlement Agreement, para.

4.3.2(1)(emphasis added). Accordingly, these documents fall four-square within the universe of documents Liggett has specifically been ordered and is required to disclose to the State.

7. Defendants in this action, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated, by their actions and filings in the Superior Court of Forsyth County, North Carolina, have seriously infringed upon the jurisdiction of this Court, undermined this Court's discovery orders and impaired this Court's power to effectively manage and determine the issues in this case. Therefore, the relief requested by the State is entirely appropriate.

8. The State has shown, by the facts presented above, that it is entitled to a temporary restraining order.

In order to obtain a temporary restraining order, plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury in the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the defendant; and (4) that granting the preliminary injunction will not disserve the public interest.

Crump v. Gilmer Independent School District, 797 F. Supp. 552 (E.D. Tex. 1992). All factors weigh heavily in favor of granting the temporary restraining order. Plaintiff is rightfully entitled to disclosure of documents in Liggett's possession not only under this Court's discovery orders, but also by virtue of the Settlement Agreement. The action in Forsyth County Superior Court is merely an effort to interfere with this Court's jurisdiction and the State's entitlement to disclosure.

9. Further, unless Liggett immediately discloses the documents, the State will be irreparably injured in its preparation for its upcoming trial. Moreover, these documents concern a public health hazard which takes the lives of thousands of Texans every year, and addicts thousands more. There can be no more irreparable injury that this to the State of Texas. Without these documents, the State is deprived of information necessary to address this public health crisis.

10. Finally, there is absolutely no threatened harm to any Defendant by this Court's granting the relief requested. Procedures are in place to provide protection to any document to which Defendants claim any sort of privilege. Specifically, the procedures provide for the deposit under seal, for in camera inspection, those documents which any Defendant might claim a privilege. These procedures are in full accord with federal and state law.

11. This Court has obvious authority to enjoin Defendants from interfering with its outstanding discovery orders as they attempt to do in the North Carolina state action. And, although the State does not seek such relieve, this Court also has the unquestioned authority to enjoin the entire action pending before the North Carolina court insofar as it acts in derogation of this Court's authority over its own proceedings. An injunction of this type is authorized by the Anti-Injunction Act. The Act provides: A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

12. The Anti-Injunction statute authorizes this Court to issue a temporary restraining order upon the “in aid of” exception to the Act and under the provision which grants to federal courts the power to “protect or effectuate its judgments.”

Where a state court enjoins a course of conduct which is necessary to comply with a prior federal court order, the federal court has authority to effectuate its order by enjoining the state proceedings.

...

Where proceedings in a federal court have been ongoing for several years, as they have here, state proceedings which would frustrate the federal court’s effective disposition of the case have frequently been enjoined even where the state proceedings have not yet progressed to final judgment.

United States of America. v. District of Columbia, et al, 654 F. 2d 802, 809-810 (D.C. Cir. 1981), cert. Denied, 454 U.S. 1082 (1981)(upholding federal district court’s order enjoining enforcement of state court’s temporary restraining order); Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996)(Anti-Injunction Act does not bar courts with jurisdiction from “issuing injunctions to protect the integrity of their rulings, including pre-trial discovery orders”); Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295, 90 S. Ct. 1739, 1747 (1976)(holding that a state court may be prevented “from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the court’s flexibility and authority to decide that case”).

13. The Fifth Circuit Court of Appeals has also confirmed this Court’s right and power to issue the requested restraining order against Defendants. For example, in D.G. Bland Lumber Co. v. National Labor Relations Board, 177 F.2d 555 (5th Cir. 1949), the Fifth Circuit affirmed a federal district court’s order enjoining Bland Lumber Company from interfering with an individual’s provision of information pursuant to a subpoena. The Court held:

The appellant [Bland Lumber] was properly enjoined from taking any action that would render the court’s order ineffective or jeopardize the parties who were directed to comply with it. It was necessary to enjoin appellants from prosecuting the action in the state court in order to keep the Railway Company and F.P. Love from being subjected to punishment for contempt for obeying the order of the federal court. Section 2283 of Title 28 U.S.C.A. does not forbid a court of the United States to grant an injunction where necessary in aid of its jurisdiction or to protect or effectuate its judgments. It is clear to us that in this case it was necessary to enjoin action in the state court in order for the federal court to effectuate its judgment.

177 F.2d at 558-9 (bold added).

14. The authorities are clear that this Court has the right and the power to enjoin Defendants from seeking to interfere with this Court’s proper administration of the matters before it. Equally clear is the State’s entitlement to the requested relief. By this Motion, the State seeks absolutely the most narrow of rulings from this Court that still allows the Court to protect and preserve its jurisdiction. The State has not asked for the North Carolina court to be enjoined to any extent whatsoever, although this Court clearly has that power if necessary to protect its jurisdiction. 28 U.S.C. Sec. 2283. By seeking the narrowest of rulings from this Court, the State seeks to strike a balance and obtain a ruling “in aid” of this Court’s jurisdiction and to “protect its judgments” and orders.

WHEREFORE, premises considered, the State of Texas respectfully requests that this Court enter a temporary restraining order enjoining Defendants from (1) interfering with the discovery orders of this Court in derogation of this Court’s jurisdiction over the above-captioned proceedings and (2) seeking to hold Liggett, its agents and attorneys in contempt for submitting documents to this Court for in camera inspection.

Respectfully submitted:

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State Bar No.: 11078900

By: _____
Grant Kaiser, by permission of Walter
Umphrey, Attorney-in-Charge

VERIFICATION

Grant Kaiser, being first duly sworn, deposes and says:

That he is counsel for the State of Texas in the foregoing action; that he has read the foregoing Motion; that he knows the contents thereof; and the same is true of his own knowledge except for those matters and things set out on information and belief and as for those matters, he believes them to be true.

Dated: March 24, 1997.

Grant Kaiser

Sworn to and subscribed before me on March 24, 1997.

Notary Public

My commission expires: _____

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document has been sent by hand delivery on March 24, 1997, to the following:

Administrative Liaison Counsel for All Defendants:

Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, TX 75505-5517
903.792.8246
Fax

Respectfully submitted,

Grant Kaiser

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS, § CIVIL NO.: 5:96-CV-0091

Plaintiff, §

§

JUDGE: DAVID FOLSOM

VS. §

§

THE AMERICAN TOBACCO
COMPANY, ET AL

§

MAGISTRATE:

§

JUDGE WENDELL C. RADFORD

TEMPORARY RESTRAINING ORDER

The State of Texas' Motion for Temporary Restraining Order was heard today. After reviewing all pertinent pleadings, briefs and other filings and arguments of counsel, the Court determines that the State's Motion should be in all things granted. The Court therefore makes the following findings and orders:

The Court finds that this Motion for Temporary Restraining Order is "necessary in aid of its jurisdiction" and "to protect or effectuate its judgments" as provided in 28 U.S.C.A. Sec. 2283. If the Motion were not granted, this Court being deprived of its jurisdiction over the matters properly before it.

The Court finds that the Stipulation and Order of Confidentiality should be entered so as to preserve all rights and privileges, if any, pending review by this Court.

The Court finds that no bond shall be required since the State of Texas is hereby engaged in public interest litigation.

IT IS THEREFORE ORDERED, that all Defendants, including R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated (hereinafter "Defendants"), are hereby immediately enjoined from taking any action that is calculated to, or may cause, Brooke Group Ltd., Liggett Group, Inc., and Liggett & Myers, Inc. (hereinafter "Liggett"), from complying with the disclosure requirements of the Plan for the Eastern District of Texas and this Court's prior, outstanding disclosure orders. Specifically, Defendants are precluded from in any way seeking to prohibit or hinder Liggett from filing with this Court, under seal, any and all documents presently sought to be enjoined by Defendants' action in Forsyth County Superior Court, North Carolina, or any other action.

IT IS FURTHER ORDERED that Defendants are precluded from taking any action, including seeking to hold in contempt of any purported court order, Liggett, its agents and attorneys, for the purpose of preventing, limiting or discouraging submission by Liggett of any documents for in camera review by this Court for a determination of claimed privileges or protections.

IT IS FURTHER ORDERED that Liggett immediately file all documents contemplated and encompassed by the Attorneys General Settlement Agreement into this Court, under seal, for in camera inspection.

The hearing on the preliminary injunction is set for the _____ day of _____, 1997, at _____ o'clock __.m.

Dated: March 24, 1997, at _____ o'clock __.m.

DAVID FOLSOM
Federal District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS, § CIVIL NO.: 5:96-CV-0091

Plaintiff, §

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JUDGE: DAVID FOLSOM

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MAGISTRATE:

§

JUDGE WENDELL C. RADFORD

NOTICE OF LIGGETT'S JOINDER IN THE STATE
OF TEXAS' MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant, Liggett Group, Inc., and Brooke Group, Ltd., and Liggett & Myers, Inc. (collectively "Liggett") hereby gives notice that it joins in the State of Texas' Motion for a Temporary Restraining Order Enjoining Defendants from Interfering with this Court's Discovery Orders and from seeking to hold Liggett in contempt for submitting documents to this Court for in camera inspection.

Respectfully submitted,

Ellen B. Malow

Texas Bar No.: 12888280

Kasowitz, Benson, Torres & Friedman, L.L.P.

700 Louisiana Street, Suite 2200

Houston, Texas 77002

713.220.8800

713.222.0843

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document has been sent by hand delivery on March 24, 1997, to the following:

Administrative Liaison Counsel for All Defendants:

Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
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Respectfully submitted,

Ellen B. Malow

R.J. Reynolds Tobacco Co, Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., and Philip Morris, Inc.

Indeed, these very documents also fall within the scope of the State's Motion to Compel Liggett Group, Inc. and United States Tobacco Company to Produce a Copy of Non-privileged Documents and Motion for Sanctions" which this Court is presently scheduled to hear Thursday, March 27, 1997.

The Texas Supreme Court has passed rules to preclude, except on a very stringent showing, the sealing of documents in court files that implicate the "general public health or safety." Tex. R. Civ. P. 76a.

The "in aid of" exception encompasses cases where a district court has taken a controversy in hand and will exercise continuing jurisdiction, and state court intervention in the controversy would seriously impair the district court's power to decide the case. *Swann v. Charlotte-Mecklenburg Board of Education*, 501 F.2d 383 (4th Cir. 1974); 17 Wright, Miller & Cooper, Federal Practice and Procedure Sec. 4225 (1978).

The State of Texas Motion for Temporary
Restraining Order Page PAGE 9

Temporary Restraining Order