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STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

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TO: PUBLIC HEALTH GROUPS, LITIGATING DATE: 3/12/98
STATE ATTORNEYS, WASHINGTON
POLICY MAKERS

FROM: Luanne Nyberg
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DETERMINED TO BE AN
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INITIALS: LN DATE: 10/21/13 ~~CONFIDENTIAL~~ FACSIMILE

COMMENTS: As you know, the court reporter who owns rights to the daily unofficial transcripts does not permit us to provide unlimited access to the Minnesota trial transcripts. While we are able to provide *limited* access to the public health community, government officials and to other state tobacco litigants on a bulletin board, the transcripts may not be copied, redistributed or posted for general use, nor may anyone give the password to others.

Unfortunately, the someone has violated the access conditions and given the passwords or forwarded transcripts to unauthorized persons who have posted them for unlimited access. As a result, we are changing the password and access codes.

We are working hard to post as much as possible on our web site about the trial, *but if people continue to disregard the conditions of access we will no longer be able to post the transcripts for anyone.*

Following, you will find the new user name and password, but *under no circumstances should you give this information out to another party.* If you agree to the above conditions, you may access the Minnesota Tobacco trial transcripts at the following address:

www.ag.state.mn.us/press/transcripts.qry. A screen will come up showing various transcripts. When you click on one you want, a screen will appear that asks for a user name. The user name is visitor and the password is 56a12b.

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**STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT SECTION**

Hubert H. Humphrey III
Attorney General

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FROM: Luanne Nyberg

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DATE: March 23

NUMBER OF PAGES (including cover page) 6

Minnesota Tobacco Trial Order Sanctioning British American Tobacco for 'lack of compliance with and violation of the Court's January 5 Order: regarding the production of two witnesses for deposition.

Sanctions include:

- 1. Striking all privilege claims regarding documents associated with these two witnesses - document must be produced to plaintiffs "immediately"***
- 2. Jury may be instructed that these witnesses were not produced, that the destruction of three cases of files on smoking and health were destroyed, with no index, and that they can assume what these witnesses would have said would have been unfavorable to defendants.***
- 3. Defendants must pay all costs related to these matters.***
- 4. Yet more sanctions may be imposed at a later date.***

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

COURT FILE NO. C.-94-8565

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

**ORDER IMPOSING SANCTIONS
FOR FAILURE TO COMPLY WITH
ORDER OF JANUARY 5, 1998**

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
BRITISH-AMERICAN TOBACCO COMPANY LIMITED,
BAT (U.K. & EXPORT) LIMITED,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC.,
and THE TOBACCO INSTITUTE, INC.,

Defendants.

WHEREAS, after numerous attempts¹ to obtain the testimony of four witnesses requested by the Plaintiffs through cooperation with Defendants British-American Tobacco Company ("BATCo") and B.A.T. Industries, p.l.c. ("BAT Ind.") and through Letters of Request via the Hague Convention, this Court issued an Order:

1 See Exhibit 1 attached hereto and made a part hereof.

Finding that Dr. Ray Thornton and Mr. Alan Heard are under the control of
BATCO and BAT Ind.;

Ordering Mr. Heard and Dr. Thornton to appear for deposition before this Court
at the Ramsey County Courthouse beginning January 12, 1998; and

Ordering Defendants BATCo and BAT Ind. to take whatever steps necessary to
ensure the appearance of Mr. Heard and Dr. Thornton for deposition in St. Paul on January 12;
(See Order Requiring Former Employees of BATCo to Appear for Deposition, filed January 5,
1998 (CLAD # 1929) (herein "January 5 Order"));

WHEREAS, on January 9, 1998, BATCo moved for modification of the Court's January
5 Order to permit the deposition to take place in London instead of St. Paul on some unspecified
date "in the next few weeks" instead of January 12, 1998 (see BATCo's Notice of Motion and
Motion for Modification of the Court's Order of January 5, 1998, filed January 9, 1998 (CLAD #
1960));

WHEREAS, the witnesses did not appear as ordered; thus the Court now finds:

1. Defendants BATCO and BAT Ind. did not take whatever steps were
necessary to ensure the appearance of Mr. Heard and Dr. Thornton for deposition in St. Paul on
January 12, 1998.

2. Plaintiffs have been substantially prejudiced by their inability to obtain
testimony from either Dr. Thornton or Mr. Heard before trial.

Based on the record, submissions, and representations and arguments of counsel

IT IS HEREBY ORDERED as sanctions for Defendants' lack of compliance with and
violation of the Court's January 5 Order:

A. Any foundation objection is deemed waived for all documents offered by the
Plaintiffs which:

(1) on their face appear to be authored, signed by, copied to, or received by either Mr. Alan Heard or Dr. Ray Thornton, or

(2) were authored by a BATCo or BATUKE scientist or were received from BATCO contract research laboratories during the time Mr. Heard (10/1/79 -1/31/92) or Dr. Thornton (11/19/62 - 12/31/93) worked at BATCo; or

(3) were authored by BAT consultants P. Lee or Dr. F.J.C. Roe because Dr. Thornton and Mr. Heard worked with those paid consultants and solicited comments and opinions from them.

B. The Court deems true and admitted any statement made in any documents offered by the Plaintiffs which fit into any of the three categories listed in paragraph A. above and precludes BATCo, BATUKE, or BAT Ind. from offering testimony disputing those statements.

C. The Court strikes the privilege claims which BAT Ind. and BATCo/BATUKE have made as to all documents on their privilege logs which either reference Dr. Thornton or Mr. Heard or those which were authored by, received by, or copied to Dr. Thornton or Mr. Heard and orders that BAT Ind. and BATCo/BATUKE immediately produce those documents in their entirety to the Plaintiffs (such documents are listed on Exhibit A to Affidavit of Martha K. Wivell dated January 21, 1998).

D. The Court may instruct the jury as follows:

"You are instructed that the Court ordered Mr. Alan Heard and Dr. Ray Thornton to appear and give testimony in this case. Both men have consulting agreements with BATCo's lawyers. The Court found Mr. Heard and Dr. Thornton to be under the control of BATCo and

BAT Ind. The Court also ordered that BAT Ind. and BATCo 'take whatever steps required and necessary' to ensure their appearance. BATCo paid the corporate counsel for BAT Ind. to represent Mr. Heard and Dr. Thornton; and those counsel opposed the appearance by Mr. Heard and Dr. Thornton in this case. The witnesses did not appear as ordered by the Court. They did not give testimony in this case. Furthermore, three cases of files containing smoking and health documents belonging to D.G. (Geoff) Felton, BATCo's retired Research and Development Manager and Smoking and Health Advisor, were destroyed in approximately July 1985. No index was made of their contents. The person most knowledgeable about the destruction of Felton's files is Dr. Ray Thornton.

"You are instructed that if a party fails to call a person who possesses knowledge about the facts in issue and who is reasonably available to the party, and who is not equally available to the other side, then you may infer that the testimony of that witness is unfavorable to the party who could have called him but did not.² If a party destroys documents within that party's control and fails to provide a satisfactory explanation for doing so, you are permitted to infer that the evidence, if produced, would have been unfavorable to that party."³

2 See 3 Edward J. Devitt et al., Federal Jury Practice and Instructions (4th ed. 1987) § 72.15

3 See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436-37 (Minn. 1990); nnolly v. Nicolle Hotel, 104 N.W.2d 721, 728 (Minn. 1960); Glover v. BIC Corp., 6 F.3d 1318, 1329-30 (9th Cir. 1993); Kingston v. Isuzu Motors, Ltd., 910 F.Supp. 1473, 1494 (D. Mont. 1995); Rice v. U.S., 917 F.Supp. 17, 19 (D.D.C. 1996); also 3 Devitt et al., supra, § 72.16.

E. The Court prohibits any Defendant from mentioning the Cohort Analysis conducted as part of the preparation of the "Compendium of Epidemiology" compiled by Dr. Thornton and prohibiting the Compendium of Epidemiology from coming into evidence.

F. As mandated by the Minnesota Rules of Civil Procedure, sanctions are imposed for failure to obey an Order of the Court; Defendants BATCo and BAT Ind. are ordered to pay Plaintiffs the reasonable expenses, including attorneys' fees, incurred in trying to obtain the deposition testimony of Mr. Heard and Dr. Thornton, including but not limited to:

(1) — fees and costs incurred in hiring solicitors and barristers in the United Kingdom to obtain their testimony pursuant to the Hague Convention as well as any costs or taxing fees which might be awarded to Herbert Smith by the English Courts;

(2) fees and costs incurred in preparing for the depositions of Mr. Heard and Dr. Thornton and in preparing Plaintiffs' motions to compel and motion for sanctions. To assist the Court in determining the appropriate amount, Plaintiffs shall within thirty (30) days submit their affidavit of costs and expenses, including attorneys' fees, incurred because of Defendants' failure to obey the January 5 Order.

G. The Court will consider finding, at the close of evidence, personal jurisdiction over BAT Ind. not only under the basis asserted by Plaintiffs in response to the Summary Judgement Motion brought by BAT Ind. but also as a sanction for discovery misconduct and an additional appropriate sanction for violation of this Court's Order.

Dated this 21st day of March, 1998.

/s/ Kenneth J. Fitzpatrick
Kenneth J. Fitzpatrick
Judge of District Court

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STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

WWW.AG.STATE.MN.US

TO: PUBLIC HEALTH GROUPS, LITIGATING DATE: March 23, 1998
STATE ATTORNEYS, WASHINGTON
POLICY MAKERS

FROM: Luanne Nyberg
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INITIALS: LN DATE: 10/21/13

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AG:113736 v1

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

WWW.AG.STATE.MN.US

TO: People interested in Tobacco Control Policy
& Minnesota Trial

DATE: 2/17/98

FROM: Luanne Nyberg
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INITIALS: W DATE: 10/21/13 ~~CONFIDENTIAL~~ FACSIMILE

NUMBER OF PAGES (including cover page):

COMMENTS: As you may know, because of contractual issues with the unofficial court reporter, we had to stop offering unlimited access to the daily transcripts of the Minnesota tobacco litigation. We can, however, offer transcript access to the public health community, to government officials, and to other state tobacco litigants, UNDER THE FOLLOWING CONDITIONS:

- * The transcript is for your use only. Do not forward, copy, redistribute or post this transcript for general use, in any form.

- * Please do not give the password to other people.

- * Understand that this is an UNOFFICIAL transcript.

If you agree to the above conditions, you may access the Minnesota Tobacco trial transcripts at the following address:

<http://www.ag.state.mn.us/press/transcripts/qry>

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User name: guest

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

LAW ENFORCEMENT SECTION
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More Hot Quotes from Minnesota's Tobacco Trial

Quote Sheet #2

February 6- February 11

Tobacco Companies Manipulated Cigarette Design to Maintain Nicotine Addiction

"What the industry was concerned with, in the face of lowering tar, is the problem they would face if nicotine levels dropped...They didn't want to go out of business."

- *Stanford University Biochemical Engineering Professor Channing Robertson*

"We couldn't figure out why it was that Marlboro was taking off in sales."

- *David Bernick, attorney for Brown and Williamson*

"The secret of Marlboro is ammonia...Ammonia does many good things."

- *1989 Brown & Williamson document*

"They knew the importance of pH and its relationship to the freebase effect and other effects."

- *Stanford University Biochemical Engineering Professor Channing Robertson*

"This time period corresponds to the dramatic sales increase Philip Morris made from 1965 to 1974."

- *RJR document discussing the fact that Philip Morris began using an ammoniated form of tobacco in 1965 and steadily increased its use through 1974*

"Sweets or confectioneries containing nicotine carry the danger of over-dosage - nicotine is an acute poison."

- *BAT document "The Product in the Early 1980s," which discusses new products if cigarettes become "socially undesirable"*

"It does not follow that future alternative 'Product X' would sustain a profit level above most other product/ business activities unless, like tobacco, it was associated with dependence."

- *BAT document "The Product in the Early 1980s," which discusses new products if cigarettes become "socially undesirable"*

"[The company is looking for] a socially acceptable addictive product....the essential constituent is most likely to be nicotine or a direct substitute for it."

- *BAT "Key Areas - Product Innovation Over Next 10 Years for Long Term Development", 1979*

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One Tobacco Company CEO Admits what Other Industry Officials Deny

"I was espousing the party line, the industry line that everyone else was saying."

- *Brooke Group Ltd. (Liggett) Chairman and Chief Executive Bennett LeBow on why he previously denied that smoking is addictive or causes disease*

"Smoking is really addictive. It causes all these problems."

- *Brooke Group Ltd. (Liggett) Chairman and Chief Executive Bennett LeBow*

"If you are really and truly not going to sell to children, you are going to be out of business in 30 years."

- *Brooke Group Ltd. (Liggett) Chairman and Chief Executive Bennett LeBow*

"We had now seen all the documents. I was convinced that smoking was addictive, that smoking does cause all these problems. I didn't want to have to go to court and lie about it."

- *Brooke Group Ltd. (Liggett) Chairman and Chief Executive Bennett LeBow on information he obtained after he hired independent attorneys to work on state lawsuits*

"Total outrage...I would call it a firestorm, not a reaction. We released all of our documents, waived all of our privileges."

- *Brooke Group Ltd. (Liggett) Chairman and Chief Executive Bennett LeBow explaining the other cigarette makers reaction to his decision to part ways with the rest of the industry*

"We're certainly not real popular."

- *Liggett attorney James Stricker, noting that the other industry lawyers leave space between themselves and Liggett in the courtroom, stop talking when Liggett walks by, and have excluded Liggett from the industry 'war room' and conference calls*

Tobacco Institute Spokesman Claims That He Knows Little

"That's not something I would need to know in my general course of business."

- *Walker Merryman, vice president and chief spokesman for the Tobacco Institute, on why he did not know the reason Liggett ended it's membership in the Tobacco Institute*

"I don't believe they [tobacco CEO's] testified that nicotine is addictive."

- *Walker Merryman, vice president and chief spokesman for the Tobacco Institute, less than 2 weeks after the CEO's January 29th testimony before Congress. Newspapers reported that four of the five CEO's admitted nicotine is addictive*

"Health concerns are very important, but I don't know if I'd use the word paramount."

- *Walker Merryman, vice president and chief spokesman for the Tobacco Institute when asked in Court if the industry should make health issues a paramount priority in its research*

"All the information I've ever received from our member companies is that they don't market to youth."

- Walker Merryman, vice president and chief spokesman for the Tobacco Institute

"This is a fellow who was the spokesman for the industry for 21 years. He didn't even listen to the congressional hearings? He didn't even look at it? You've got to ask yourself, does that pass the smell test?"

- Michael Ciresi, Attorney for the State of Minnesota

The Tobacco Industry Actively Markets Tobacco to Teens

"Marlboro dominates in the 17 and younger age category, capturing over 50 percent of the market."

- 1979 Philip Morris memo

"They represent tomorrow's cigarette business...As this 14-24 age group matures, they will account for a key share of the total cigarette volume -- for at least the next 25 years."

- R.J.R. marketing plan presented to the company's board of directors in 1974

"[The report on Teenage Smokers (14-17)] indicates that RJR continues to gradually decline and between the spring and fall 1979 periods, RJR's total share declined from 21.3 to 19.9.

Hopefully, our various planned activities that will be implemented this fall will aid in some way in reducing or correcting these trends."

- RJR inter-office correspondence July 22, 1980

"Kool has shown little or no growth in share of users in the 26 [plus] age group. . . Growth is from 16-25-year-olds. At the present rate, a smoker in the 16-25 year age group will soon be three times as important to Kool as a prospect in any other broad age category."

- 1973 Brown and Williamson memo

"The amount spent on promotions and marketing of cigarettes vastly exceeded what was spent on any of these [Tobacco Institute youth] programs."

- Michael Ciresi, Attorney for the State of Minnesota, summarizing in court information showing that the three largest cigarette manufacturers spent \$40.6 million on youth prevention programs from 1983 to 1994 or less than 2 tenths of 1% of the \$26.9 billion spent on cigarette advertising, marketing and promotion during the same period

"Young blacks have found their thing. It's menthol in general and KOOL in particular."

- 1974 Philip Morris marketing plan

"Since Minnesota has seen fit to designate itself, as Surgeon General Koop stated, 'a model for the country' with regard to anti-smoking legislation, our only choice in this matter is a complete victory. Anything less could be used against us in other states....[E]very possible legislative, political, social and theoretical angle is being utilized in our efforts to get out of this session unscathed."

- 1985 Tobacco Institute memo on efforts to kill Minnesota legislation to reduce youth smoking

Compiled by the Minnesota Attorney General's Office

Tobacco Companies Know Cigarettes Cause Disease But They Say the Opposite Publicly

"I have no explanation other than smoking for causing lung cancer....No one has ever found an alternative explanation for these findings except that smoking is the cause of lung cancer."

- Dr. Jonathan Samet, cancer specialist from Johns Hopkins University

"In the US only Berkson is prepared to doubt the statistical evidence, and his reasoning are nowhere thought to be sound."

- 1958 BAT trip report on their visit to the U.S where they met with tobacco industry officials and discussed health concerns

"We don't believe it's ever been established that smoking is the cause of disease."

- Walker Merryman, vice president and chief spokesman for the Tobacco Institute, testifying at the Minnesota Trial

"We believe the Auerbach work proves beyond reasonable doubt that fresh whole cigarette smoke is carcinogenic to dog lungs and therefore it is highly likely that it is carcinogenic to human beings."

- American Tobacco (Now Brown and Williamson) "Privilege" document written by one of the company's top research officials in response to the American Cancer Society's release of the Auerbach Smoking Dogs Study in 1970

"The Cancer Society claimed that this result refutes the contention of the tobacco industry that there is no laboratory proof of a connection between cigarette smoking and lung cancer. The Tobacco Institute does not -- and the public should not-- accept these claims at face value."

- Tobacco Institute Ad run in response to American Cancer Society's release of the Auerbach Smoking Dogs study in 1970

"Instituting a biological program today will be argued to be an implied admission that the company believes it has not in the past been doing all it could and should have been doing to find the scientific facts respecting tobacco use and health.....[I]t opens for jury evaluation the question whether it acted reasonably in not instituting biological research long before now."

- 1965 "Privileged" document - memorandum by Janet Brown, a longtime attorney for American Tobacco. No in-house program was begun at the company

"With millions of Americans dead from lung cancer who were smokers, I have no reason to ask for proof from animals."

- Dr. Jonathan Samet, cancer specialist from Johns Hopkins University

"You can see how it's spread throughout the lung and destroyed the structure of the lung. In essence, it's eating up the lung.... You're going to see a very large white mass... That's the cancer."

- Dr. Jonathan Samet, cancer specialist from Johns Hopkins University showing the jury a lung sample taken from a smoker

Compiled by the Minnesota Attorney General's Office

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

TO:	Officials Concerned about Tobacco Policy	DATE:	March 10, 1998
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FROM:	Scott Strand and Luanne Nyberg Office of Attorney General Hubert H. Humphrey III St. Paul, MN 55101-2131	PHONE:	215-1533 (Voice) 297-4036 (Fax) 297-7206 (TTY)
--------------	--	---------------	--

On Saturday, March 7 the Honorable Kenneth Fitzpatrick ordered the tobacco industry to release to the Minnesota Tobacco Trial Team 39,000 documents the industry has previously shielded from public view behind claims of attorney client privilege.

On Sunday, the industry obtained a temporary stay of this order, to permit an emergency appeal to the Minnesota Court of Appeals. Both sides have already submitted briefs, and we hope for a very swift decision.

In his order, Judge Fitzpatrick ruled that defendants may not assert attorney-client privilege for any of the 39,000 so-called "privileged" documents in the categories below (hereafter "Released Documents"). (These are the same 39,000 documents recently subpoenaed by the House Commerce Committee. The industry has not yet responded to the Congressional subpoena.)

Category 1 "Other Litigation" (This includes all documents that any court, anywhere, has previously recommend for release.)

Category 3 "Science" (This includes all documents relating to or referencing scientific research or research reports on smoking and health.)

Category 4b ""Special Projects" (This includes all documents relating to or referencing research conducted as "Special Projects"; including CTR Special Projects, lawyers' Special Projects, or Special Accounts.)

Category 5 "Public Statements" (This includes all documents relating to or referencing positions taken or statements made by a defendant or by The industry regarding smoking and health.)

The judge also ruled that "Defendants have in numerous instances claimed privilege where none is due and blatantly abused the categorization process." **He ordered the Special Master to randomly examine documents from Category 7 ("Children" - documents relating to or referencing persons under age 18), Category 8 ("Advertisements" - documents relating to or referencing advertising, promotion, or marketing of cigarettes), and 12 ("Other" - documents for which privilege is claimed which do not fit into any of the previous categories) to determine whether some or all of these categories should be "de-privileged" as well.** Judge Fitzpatrick stated that "Abuse of privilege and violation of the rules of court are, themselves, sufficient grounds to order release of documents."

You can find both Judge Fitzpatrick's and the Special Master's order at <http://www.ag.state.mn.us/press/newssearch.qry?function=tobaccolitigationsearch>. Also, attached is an article from The L.A. Times with a detailed analysis of the Judge's decision.

Los Angeles Times

SUNDAY, MARCH 8, 1998

Tobacco Firms Ordered to Give Up Secret Files

■ **Courts:** Outline of some documents suggests they offer best evidence of extent to which the industry suppressed products' health hazards. Ruling is a major setback.

By HENRY WEINSTEIN, TIMES LEGAL AFFAIRS WRITER

In a devastating defeat for the tobacco industry, a Minnesota judge Saturday ordered the nation's major cigarette companies to turn over 39,000 confidential documents that they waged a long, bitter and expensive battle to keep secret. The judge ruled that the papers show evidence of crime or fraud.

An outline of some of the documents, described in a 140-page report by a special master in the case, indicates that the papers represent the clearest evidence to date of the lengths to which the industry went to suppress evidence about the health hazards of its products and how it manipulated nicotine to keep smokers addicted.

The master's report, unsealed Saturday, also represents the most comprehensive assessment yet by a judicial officer of the stark contradictions between the companies' public positions and what their internal documents show that they knew in private.

The report contains page after page of descriptions of material the industry tried to keep from the public on a host of topics for over four decades. Some of the most dramatic examples:

- The master said that R.J. Reynolds Tobacco Co. was trying to keep confidential a 1957 memo by company scientist Alan Rodgman titled: "Cigarette Smoking Termed Lethal Habit With Some Addiction Involved."

- A 1959 report by the British American Tobacco Co. expressed fears about "destroying the nicotine habit in a large number of consumers and preventing it ever being acquired by new smokers."

- A 1961 report by BATCO sci-

entist Sir Charles Ellis referred to smokers as "nicotine addicts." That was 27 years before the U.S. surgeon general issued a report characterizing smoking as "addictive."

- An undated Brown & Williamson Tobacco Corp. document described company research on the "starting [smoking] behavior of children as young as 5 years old."

- Documents from BATCO and Philip Morris about shipping material "off-shore" or to other countries to keep them secret.

Attorneys for the major cigarette companies maintained that Ramsey County District Judge Kenneth J. Fitzpatrick's ruling is legally and factually flawed and will be appealed as soon as possible. The attorneys said they do not intend to voluntarily comply with the order to turn over the documents by 8 a.m. Monday in St. Paul.

But Minnesota Atty. Gen. Hubert H. Humphrey III called the ruling "one of the most monumental public health decisions in American history. . . . The tobacco industry's 40-year game of hide-and-seek has ended."

Humphrey predicted that when members of Congress—currently considering a proposed \$388.5-billion national tobacco settlement—"see the pervasiveness of the fraud and conspiracy" revealed in the

Please see TOBACCO, A24

TOBACCO: Judge Orders Industry to Surrender Confidential Papers

Continued from A1
papers. "They will demand action to truly protect kids from addiction and disease without giving this outlaw industry the special immunity and protection it so desperately seeks."

Last month, Rep. Thomas J. Bliley (R-Va.) subpoenaed the 39,000 documents, shortly after Mark Gehan, the special master, had issued a brief report Feb. 10, saying that the state of Minnesota and its co-plaintiff, Blue Cross/Blue Shield of Minnesota, were entitled to 39,000 of 240,000 confidential documents they had been seeking.

But Gehan's full 140-page report to Fitzpatrick was not made public until Saturday. In making it public, Fitzpatrick stated that, with some limited exceptions, Gehan's report was "well-reasoned and supported by the law and by the evidence on the record."

As part of his ruling, Fitzpatrick denied the cigarette companies' request for a stay of the order pending appeal.

Among the other highlights, Gehan's report:

- Lists voluminous documents about a "gentleman's agreement" among the cigarette companies not to conduct in-house research about the health hazards of smoking.

- Contains references to scores of documents about company efforts to enhance the amount of nicotine in cigarettes, including a 1977 BATCO document describing discussions among its scientists about the possible use of the drug etorphine, noting that it "is 10,000 times as effective an analgesic as morphine and has addictive characteristics."

- Contains a description of admissions by one of the industry's own experts in the Minnesota case that "stopping smoking, all the research indicates, is quite as difficult as giving up alcohol or even heroin."



Associated Press

Ramsey County District Judge Kenneth J. Fitzpatrick ordered the tobacco industry to release thousands of pages of secret documents.

- Refers to previously secret internal documents in which ranking company scientists openly talk about the addictive qualities of their products, while they were denying this in public. In one BATCO document, S.J. Green, a top company scientist, states that "smoking is fairly irrational like other drug dependencies." In another, Green referred to "members of the nicotine dependent majority."

The industry has contended for years that there is no definitive proof that smoking is hazardous to health or is addictive, and although it has retreated somewhat from those positions, executives of two of the nation's largest cigarette companies only last week sparred over the definition of addiction with attorneys representing Minnesota in its \$1.7-billion lawsuit against the industry.

Gehan's report quoted documents from all the cigarette companies, as well as the Council for Tobacco Research, the industry's research arm, and the Tobacco Institute, its lobbying wing. After quoting numerous internal documents in which the companies acknowledge the health hazards of their products, Gehan cites examples of industry press releases denying dangers.

One of the most striking is a 1972 Tobacco Institute press release issued shortly after the release of a surgeon general's report that described cigarette smoking as the nation's top health problem.

"The 1972 report of the Surgeon General," the press release said, "insults the scientific community. . . . The number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public."

Along the same line, Gehan quotes several internal RJR documents to illustrate the disparity between the company's public and private positions.

For example, he quotes a 1959 paper by scientist Rodgman that concluded that there is a "distinct possibility" that substances in cigarette smoke could have a carcinogenic effect and a 1962 Rodgman paper stating, "The amount of

**Fitzpatrick lambasted
industry lawyers for
making spurious claims
of attorney-client
privilege in an attempt to
keep documents
confidential.**

evidence accumulated to indict cigarette smoke as a health hazard is overwhelming, [while] the evidence challenging the indictment is scant."

Then, Gehan quotes a 1983 RJR advertisement that said: "It has been stated so often that smoking causes cancer, it's no wonder most people believe this is an established fact. But, in fact, it is nothing of the kind. The truth is that almost three decades of research have failed to produce scientific proof for this claim. . . ."

The master's report is particularly stinging about the conduct of industry lawyers and the role they played in suppressing the hazards of cigarettes.

Gehan put special emphasis on a 1970 memo by David Hardy, a key industry lawyer, who warned Brown & Williamson's general counsel against the dangers of open discussion by company scientists of the health risks of smoking. Gehan said this document, one of many dealing with "the control or suppression of research, and the creation of privilege shields to conceal possession of dangerous information, is particularly disturbing because it was written by a member of the firm [Kansas City's Shook, Hardy & Bacon] which has for decades represented the tobacco industry."

There are also several references to memos by B&W in-house attorney J. Kendrick Wells about the need to shield scientific papers by routing them to lawyers. Minnesota has announced that it will call Wells as a witness in the case.

In his order, Fitzpatrick also lambasted industry lawyers for making spurious claims of attorney-client privilege in an attempt to keep documents confidential. He also said that the industry had mislabeled documents as part of that effort.

In particular, he cited a Brown & Williamson document that had been placed in category called "advertising," one of the categories where, the master said, the industry's papers were entitled to confidentiality.

In reality, the judge said, the document dealt with research conducted among 16-to-17-year-olds. The document said:

"The research examined the behaviour of youth toward starting, smoking and quitting and their attitudes to these activities. . . . The studies reported on youngsters' motivation for starting, their brand preferences, etc. as well as the starting behaviour of children as young as 5 years old."

Fitzpatrick said this document was an example of the companies' "blatant abuse" of a categorization process that he had set up to aid the special master in reviewing selected batches of documents on which the defendants had claimed privilege.

In addition to ordering the industry to turn over the documents Monday morning, Fitzpatrick dealt the companies another body blow. He directed the special master to reconsider an earlier decision that prevented attorneys for the state

Please see TOBACCO, A25

TOBACCO: Court Ruling Requires Industry to Give Up Documents

Continued from A24.

of Minnesota from obtaining thousands more cigarette company documents dealing with youth smoking and advertising.

In seeking to obtain the material, lawyers for the state, led by Michael Ciresi and Roberta Walburn, worked off so-called "privilege logs" that gave cryptic descriptions of the subject matter of internal industry papers, along with the author, recipient and date of a document.

In his report, Gehan rejected the companies' argument that the plaintiffs had "cherry-picked" a limited number of documents that were unrepresentative.

"I... note that defendants have not disputed the content of these documents," Gehan said in regard to a large group dealing with nicotine addiction and the use of ammonia to enhance nicotine delivery to smokers.

"It is also noteworthy that these documents were written primarily by senior scientists and research officials at defendant companies. Finally, defendants have failed to present evidence from their own internal files to support their allegation that plaintiffs' selection is unrepresentative of defendants' actual knowledge regarding addiction."

In fact, Gehan stressed that there was evidence that it was the defendants who had cherry-picked, selectively employing claims of privilege to shield certain information from discovery while producing certain other information. As a prime example, Gehan cites a 1996 RJR document introduced in this case on the issue of nicotine manipulation, which states that some of its earlier research on increasing the pH of nicotine was wrong.

"Reynolds... has produced this memo, since it provides a more favorable interpretation of previous (contemporaneous) internal memoranda," Gehan said, adding he did not find the document persuasive. "Numerous contemporaneous documents from the internal files of defendants are more persuasive evidence than isolated documents created by defendants for litigation purposes."

Many of the documents that the judge ordered disclosed are papers that passed between industry lawyers and their clients.

The Tobacco Files

Here are some excerpts from confidential documents that major cigarette companies were ordered to release:

■ A 1957 memo by an R.J. Reynolds Tobacco Co. scientist was titled: "Cigarette Smoking Termed Lethal Habit, With Some Addiction Involved."

■ One of the industry's experts says that "stopping smoking, all the research indicates, is quite as difficult as giving up alcohol or even heroin."

■ A 1961 report by a British American Tobacco Co. scientist referred to smokers as "nicotine addicts," 27 years before the U.S. surgeon general called smoking addictive.

■ Another of the company's scientists says that "smoking is fairly irrational like other drug dependencies," and he refers to "members of the nicotine dependent majority."

■ One document says: "The research examined the behaviour of youth toward starting smoking and quitting and their attitudes to these activities. . . . The studies reported on youngsters' motivation for starting, their brand preferences, etc. as well as the starting behaviour of children as young as 5 years old."

■ One scientist concludes in a 1959 paper that there is a "distinct possibility" that substances in cigarette smoke could have a carcinogenic effect.

■ A 1962 paper states: "The amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming, (while) the evidence challenging the indictment is scant."

■ One 1977 document describes discussions among a company's scientists about the possible use of the drug etorphine, noting that it "is 10,000 times as effective an analgesic as morphine and has addictive characteristics."

Traditionally, such material is protected under what is known as the attorney-client privilege, a long-standing legal doctrine designed to encourage candid communications between lawyers and the people they represent. However, the privilege can be breached if a judge decides that the papers show evidence of crime or fraud.

Both Gehan and Fitzpatrick have made prior rulings that there was evidence of crime or fraud in ordering the release of other material that the companies tried to keep secret in the case.

Several industry lawyers said Saturday that they would challenge the ruling.

Philip Morris attorney Michael York maintained that the judge's order was "wrong on numerous legal issues. We are deciding now among the companies on how best to mount the appeal."

David Bernick, a Chicago attorney who represents Brown & Williamson and its BATCO affiliate, called Fitzpatrick's ruling "a fundamentally flawed order in a fatally flawed trial."

Bernick, a law partner of White-

water independent counsel Kenneth W. Starr, asserted that Fitzpatrick "has ordered the production of literally thousands of privileged documents which have never even been reviewed by the court. . . . There is nowhere to be found the document-by-document review and findings that are the essence of the due process requirements that have been set by the U.S. Supreme Court for crime-fraud determinations."

Months ago, Fitzpatrick said it would take several years for a judge to review the hundreds of thousands of documents for which the industry claimed privilege. He said that would unacceptably delay the trial and thus be unfair to the plaintiffs. Fitzpatrick then instituted a procedure whereby the special master would review documents in categories and then make rulings on claims of privilege. He said that such a procedure could be used without violating the defendants' right to due process, citing prior instances where this had been done.

Times librarian William Holmes contributed to this story.

STATE OF MINNESOTA
Office of the Attorney General

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Minnesota Attorney General
National Contact List/Tobacco Litigation

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SUBJECT: Transcripts

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COMMENTS:

Unfortunately, due to circumstances beyond our control, we are no longer able to post on our website the unofficial daily transcripts of proceeding in the tobacco trial.

Because of continued unauthorized re-publication of the transcripts, the unofficial court reporter, who owns the rights to his work product, has withdrawn his verbal authorization for such use, and has retained counsel to help resolve this matter.

An official transcript will be prepared in the event of any appeal.

Our office believes in timely access to information needed to inform public debate, and that full public disclosure, sometimes called sunlight, is, indeed, the best disinfectant.

We regret that we are not able to continue to provide even limited access to these important proceedings.

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STATE OF MINNESOTA

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Minnesota's Tobacco Trial Presents "The Osdene Files"

Thomas S. Osdene began at Philip Morris in 1965 as Manager of Chemical Research and retired as Senior Vice President for Science and Technology in 1992.

He invoked the Fifth Amendment over 100 times during portions of his videotaped deposition played for the Minnesota jury.

Quote Sheet #3

From Deposition, Documents, and the Minnesota Trial on February 13 & 17, 1998

Q: "It would be your understanding that the sole basis for your being subject to a criminal inquiry would be your activities as an employee of Philip Morris; is that correct?"

A: "Yes"

Q: "Dr. Osdene, is it your belief that if you answer questions truthfully, your answers will confront you with a substantial hazard of self-incrimination?"

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

"It's certainly not what we wanted. Philip Morris asked Dr. Osdene to testify fully and truthfully." Peter Bleakley, Philip Morris Attorney, as quoted in the press.

"The Osdene testimony is a powerful reminder that these companies have much to hide." Attorney General Hubert H. Humphrey III, as quoted in the press.

Using Nicotine to Keep the Tobacco Industry in Business

Q: "First draft of annual report to Philip Morris board by VP for research and development considered too technical, fall '69... 'We have, then, as our first premise, that the primary motivation for smoking is to obtain nicotine.'... and that was the considered view of the research and development department of Philip Morris in 1969, was it not sir?" [Report prepared by Osdene's Department. Trial Exhibit 3681]

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

Q: "[T]he next paragraph... 'In the past, we at R&D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine and nicotine is the agent of a pleasurable body response'... And that was the view at Philip Morris research and development throughout the period of time that you were there; correct, sir?" [Report prepared by Osdene's Department. Trial Exhibit 3681]

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

Q: "[Y]ou state... 'This program includes both behavioral effects as well as chemical investigation. My reason for this high priority is that I believe the thing we sell most is nicotine'.... And in 1980, you

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believed the thing Philip Morris sold most was nicotine; correct?" [August 12, 1980 memo from T.S. Osdene regarding the evaluation of most R&D programs. Trial Exhibit 10,255]

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

Q: "I'd like to first draw your attention to... a memorandum dated March 18, 1980 from James R. Charles to Dr. R.B. Seligman... it indicates that a CC was sent to Dr. T.S. Osdene... And the very first line... states, 'Nicotine is a powerful pharmacological agent with multiple sites of action and may be the most important component of cigarette smoke'.... and that was consistently the internal philosophy of Philip Morris research and development department...?"

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

"Dr. Seligman brought up the grant by Dr. Abood in which one of the stated aims was to make a clinically acceptable antagonist to nicotine. This goal would have the potential of putting the tobacco manufacturers out of business." January 10, 1978 memo from Osdene regarding the issues discussed during a January 5, 1978 CTR meeting in New York City. Trial Exhibit 10227

Smoking and Health Issues

Q: "And one of the statements you made to Dr. Seligman [Vice President, Philip Morris] and the board of directors [sic] of Philip Morris was, under biological effects of smoking... 'In view of the clouds on the horizon, we must be more aware of the activities of additives, materials etc.', correct?" [August 12, 1980 memo from T.S. Osdene. Trial Exhibit 10,255]

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

"Please find attached the additives list that we discussed on November 19, 1980. Additives are those used domestically by Philip Morris USA as of August 6, 1980." 1980 memo from Dr. Charles to R.P. Heretick with a CC to Osdene. Trial Exhibit 2513

Q: "And in fact one of your responsibilities as Philip Morris director of research was an overall responsibility for knowledge of the additives being sold throughout the United States; correct?"

A: "On advice of counsel, I respectfully refuse to answer based on my Fifth Amendment privilege against self-incrimination because there is an ongoing parallel criminal investigation."

"This company is in trouble. The cigarette industry is in trouble. If we are to survive as a viable commercial enterprise we must act now to develop responses to smoking and health allegations from both the private and the government sectors." February 23, 1988 handwritten note from Dr. Charles to Osdene. Trial Exhibit 10521

"An admission by the industry that excessive cigarette smoking is bad for you is tantamount to an admission of guilt with regard to the lung cancer problem. This could open the door to legal suits in which the industry would have no defense." 1978 Osdene memo to Dr. R.B. Seligman, Vice President, Philip Morris. Trial Exhibit 3697

Q: "[You] have stated... 'Dr. Kreisher's work in the area of AHH from my point of view, starts out with the proposition that smoking causes lung cancer. The rest of work seems to justify this approach. I am very surprised about the extensive human clinical data which is now being sought and feel after four years of this project nobody has the slightest idea where it is going, where it is, or what it is trying... It is my strong feeling that with the progress that has been claimed, we are in the process of digging our own

grave... I am very much afraid that the direction of the work being taken by CTR [Editor's note: CTR is Council for Tobacco Research, an arm of the Tobacco Industry] is totally detrimental to our position and undermines the public posture we have taken to outsiders....And, in fact, the direction of CTR changed significantly in response to your concerns; correct?"

A: "Same response." [Editor's note: Part way through the deposition, it was agreed that Dr. Osdene could answer "Same response" instead of the longer "On Advice of Counsel, I respectfully refuse to answer...".]

"Let's face the facts:

1) Cigarette smoke is biologically active.

A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that. It's not a secret.

B. Cigarette smoke condensate applied to the backs of rats causes tumors.

C. Hydrogen cyanide is a potent inhibitor of cytochrome oxidase - a crucial enzyme in the energy metabolism of all cells.

D. Oxides of nitrogen are important in nitrosamine formation. Nitrosamines as a class are potent carcinogens.

E. Tobacco-specific nonvolatile nitrosamines are frequent in significant amounts in cigarette smoke.

F. Acrolein is a potent eye irritant and is very toxic to cells. Acrolein is in cigarette smoke.

G. Polonium 210 is present in cigarette smoke.

H. We know very little about the biological activity of sidestream smoke.

I. We do not know enough about the biological activity of additives which have been in use for a number of years." *February 23, 1988 handwritten note from Dr. Charles to Osdene. Trial*

Exhibit 10523

"While the bulk of gas phase is composed of nitrogen, oxygen, and carbon dioxide, there are present certain gases which are known to be or are suspected of being toxic....The single most toxic compound in gas phase (present in high concentration) is carbon monoxide." *1968 memo from Osdene. This information was never released to the public. Trial Exhibit 3695*

"Now we have a study of the effect of smoking in pregnancy which supports previous conclusions that smoking mothers produce smaller babies. The position of the medical people is that smaller babies suffer detrimental effects all through life." *1969 memo to Helmut Wakeham, Philip Morris V.P., that was also copied to Osdene. Philip Morris did not disclose this information and it was not required on warning labels until the 1980s. Trial Exhibit 3696*

Destruction of Documents and Hiding Research Abroad

"Since we have a major program at INBIFO, and since this is a locale where we might do some of the things which we are reluctant to do in this country, I recommend that we acquire INBIFO either in toto or to the extent of controlling interest." *1970 memo from Philip Morris Vice President, Helmut Wakeham, that recommended buying a research lab in Cologne, Germany. Philip Morris bought the lab in the early 1970's. When asked what Philip Morris did abroad that they were reluctant to do in the United States, Osdene took the Fifth Amendment. Trial Exhibit 2554*

"We have gone to great pains to eliminate any written contact with INBIFO... If this procedure is unacceptable to you, perhaps we should consider a 'dummy' mailing address in Koln [Cologne] for the receipt of samples." *March 1977 memo to Dr. Max Hansermann of Philip Morris Europe S.A.'s research department from Dr. R.B. Seligman, Philip Morris V.P. When asked why Philip Morris wanted to avoid direct contact with INBIFO, Osdene took the Fifth Amendment. Trial Exhibit 2688*

"1. Ship all documents to Cologne. 2. Keep in Cologne. 3. Okay to phone and telex (these will be destroyed)... 5. We will monitor in person every 2-3 months. 6. If important letters or documents have to be sent, please send to home - I will act on them and destroy." *Handwritten note by Thomas S. Osdene on how sensitive Philip Morris documents should be handled. Trial Exhibit 2501*

Q: "Did you ever receive letters or documents concerning research conducted on behalf of Philip Morris by IMBIFO [sic] [German research facility] at your home...[D]id you ever destroy any such documents, sir?"

A: "Same response."

"I have given Carolyn (Levy) approval to proceed with this study. If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this avenue with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine [sic], we will want to bury it." *November 1977 Philip Morris memo from William Dunn to Thomas S. Osdene. Trial Exhibit 3708*

"I consider myself well trained in the biological and chemical sciences and qualified to make the following comments which should be taken as constructive criticism with suggestions as to how to approach the solution to some of the problems. You may shred this document, have it typed as is, incorporate the suggestions in a position paper or use the document in any way you see fit." *Handwritten note from Dr. Charles to Osdene, February 23, 1982. When asked what he did with this document, Osdene took the 5th. Trial Exhibit 10523*

Marketing to Teens

"Smoking a cigarette for the beginner is a symbolic act... 'I am no longer my mother's child, I am tough, I am an adventurer, I'm not a square.'... As the force from the psychosocial symbolism subsides, the pharmacological effect takes over to sustain the habit." *1969 draft report to the Philip Morris board of directors prepared by Osdene's department. Trial Exhibit 3681*

"Most of these studies have been restricted to people age 18 and over, but my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15-17 year-olds. The teenage years are also important because those are the years during which most smokers begin to smoke, the years in which initial brand selections are made, and the period and the life-cycle in which conformity to peer group norms is greatest." *1975 memo from Myron Johnston to Dr. R.B. Seligman, Philip Morris VP, stating that several studies had attested to Marlboro's popularity among younger smokers. When asked if he encouraged staff to keep records on cigarette smoking among 15 to 17 year olds, Osdene took the Fifth Amendment. Trial Exhibit 2557*

Q: "And this document is entitled 'GENERAL COMMENTS ON SMOKING AND HEALTH.' The first line states, '... Of all the concerns, there is one - taxation - that alarms us the most. While marketing restrictions and public and passive smoking do depress volume, in our experience taxation depresses it much more severely. Our concern for taxation is, therefore, central to our thinking about smoking and health. It has historically been the areas to which we have devoted most resources and for the foreseeable future, I think things will stay that way almost everywhere.'... And the reason that Philip Morris was concern [sic] about taxation was because Philip Morris knew that as taxes went up cigarette consumption went down; correct?"

Mr. Webb: "Objection"

A: "Same response."

STATE OF MINNESOTA
Office of the Attorney General

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National Contact List/Tobacco Litigation

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The Minnesota Court of Appeals has denied the industry's petition for writs of prohibition and mandamus on the 39,000 privilege documents. The order is attached

The ruling itself is an unqualified victory for getting out the truth. However, the Court has delayed the effectiveness of its Order until noon on Thursday (3/19), permitting the defendants to seek a stay from the Minnesota Supreme Court.

Here is the address for the Appellate Court's decision which is now on our website:
<http://www.ag.state.mn.us/press/newssearch.qry?function=tobaccolitigationsearch>

The three-page decision states:

- (1) any challenge to the use of document categories is too late;
- (2) the industry failed to show that specific documents are CLEARLY not discoverable, or that they were afforded inadequate remedies, or that the District Court exceeded its legitimate powers;
- (3) the industry failed to: (a) provide a full record of proceedings before the Special Master, (b) identify the specific documents on which they made individualized argument below, or (c) show that such claims were raised below.

The Court is "mindful of . . . the numerous interlocutory petitions previously filed by these parties". Petitioners fail to establish that:

- (a) they were denied adequate opportunity to present their arguments;
- (b) the District Court misapplied the crime-fraud standard; or
- (c) the Special Master's findings of fact are inadequate.

"Petitioners are not entitled to relief".

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

**OFFICE OF
APPELLATE COURTS**

MAR 17 1998

FILED

The State of Minnesota,
By Hubert H. Humphrey, III,
Its Attorney General,
and
Blue Cross and Blue Shield
of Minnesota,

ORDER

#CX-98-414
#CX-98-431

Respondents,

vs.

Philip Morris, Inc., et al.,

Petitioners,

Liggett Group, Inc.,
Defendants.

Considered and decided by Tousseint, Chief Judge, Lansing, Judge, and
Crippen, Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

Petitioners seek prohibition and mandamus, for relief from orders compelling
discovery. Petitioners also seek oral argument on the petitions and a stay, in the
event that relief is denied. Respondents oppose the petitions and motion for stay
and seek attorney fees and costs incurred in defense of the petitions.

The focus of the petitions is the trial court's use of a process of categorical review to evaluate claims of privilege. This process was established by order of May 9, 1997, and we have previously denied extraordinary relief on a similar petition involving production of a different group of documents. To the extent that petitioners are challenging the use of categories rather than a line-by-line review of every document, the petitions are untimely. *See Ebenezer Soc'y v. Minnesota State Bd. of Health*, 301 Minn. 188, 193, 223 N.W.2d 385, 388 (1974) (petition for extraordinary relief to be filed within time permitted for appeal from an order).

To obtain a writ of prohibition, petitioners must establish that the documents ordered disclosed are *clearly* not discoverable. *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 377 (Minn. 1977). Prohibition is appropriate "only in extreme cases where the law affords no other adequate remedy." *Wasmund v. Nunamaker*, 277 Minn. 52, 54, 151 N.W.2d 577, 579 (1967). It is issued to prevent a trial court from acting when it is wholly without jurisdiction or from exceeding its legitimate powers. *Id.* at 55, 151 N.W.2d 579. Petitioners have not established that specific documents are *clearly* not discoverable, that the remedies afforded them are or were inadequate, or that the trial court exceeded its legitimate powers, and prohibition will not lie.

Petitioners did not (a) provide a complete record of the proceedings before the special master; (b) identify the documents on which they made individualized argument in support of their claims of privilege, either before the special master or the trial judge; or (c) establish that claims made in this court as to specific documents were raised and preserved in the trial court. We have carefully

reviewed the arguments of the petitioners and the appendices submitted to this court (which lack many of the documents to which petitioners refer in their arguments) and are mindful of the facts and circumstances of this case, as well as the numerous interlocutory petitions previously filed by these parties, the submissions made in connection with those petitions, and our previous rulings in this case. Petitioners have failed to establish (a) that their opportunity to present argument or evidence in support of claims of privilege was limited or abridged in any significant way; (b) the existence of errors of law in the application of the standards governing the crime-fraud exception; or (c) that the detailed findings of the special master are inadequate to support the trial court's order compelling disclosure. Petitioners are not entitled to relief.

IT IS HEREBY ORDERED:

1. The petitions in CX-98-414 and CX-98-431 are consolidated.
2. The petitions and motions of the parties are denied.
3. This order shall be effective at noon on Thursday, March 19, 1998, unless a stay is granted by the Minnesota Supreme Court.
4. Counsel shall retrieve their confidential appendices from the clerk of the appellate courts by noon on Thursday, March 19, 1998.

Dated: March 17, 1998

BY THE COURT

Edward J. Tonn
Chief Judge

CLL:blm

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

Court File No. C1-94-8565

The State of Minnesota,
By Hubert H. Humphrey, III,
Its Attorney General,

and

Blue Cross and Blue Shield of Minnesota,

Plaintiffs,

vs.

**ORDER WITH RESPECT TO
NON-LIGGETT DEFENDANTS'
OBJECTIONS TO THE
SPECIAL MASTER'S REPORT
DATED FEBRUARY 10, 1998**

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
B.A.T. Industries, p.l.c.,
British-American Tobacco Company Limited,
BAT (U.K. & Export) Limited,
Lorillard Tobacco Company,
The American Tobacco Company,
Liggett Group, Inc.,
The Council for Tobacco Research - U.S.A., Inc., and
The Tobacco Institute, Inc.

Defendants.

The above matter came on for hearing on February 16, 1998, before the Honorable Kenneth J. Fitzpatrick. Robert Weber, Esq., appeared and began arguments on behalf of R.J. Reynolds Tobacco Company specifically and on behalf of all Defendants generally with the exception of Liggett Group, Inc. (herein "Non-Liggett Defendants"). David Bernick, Esq.,

appeared and argued on behalf of Brown & Williamson Tobacco Company with respect to 108 inadvertently logged documents. Noel Clinard, Esq., appeared and argued on behalf of Philip Morris Incorporated with respect to 458 additional documents allegedly related to nicotine and addiction sought by Plaintiffs. Michael Corrigan, Esq., appeared and argued on behalf of B.A.T. Industries, p.l.c., with respect to a footnote on page nine of the Special Master's Report. Roberta Walburn, Esq., appeared and argued on behalf of Plaintiffs. Additional counsel were present at the hearing on behalf of their clients. Members of the public and the media also attended and observed the proceedings.

The Court makes the following **ORDER** based upon the record, arguments of counsel, and supplemental filings made by the parties.

WHEREAS, the Non-Liggett Defendants have raised certain objections to the Report of Special Master: Findings of Fact, Conclusions of Law, and Recommendations, filed February 10, 1998 (CLAD docket # 2224) ("Special Master's Report"), with respect to the documents for which the Non-Liggett Defendants claim privilege ("Non-Liggett Documents");

WHEREAS, this Court has carefully reviewed the Special Master's Report, the submissions of the parties, and the record with respect to the matters at issue;

WHEREAS, Category 1 contains the 457 documents listed in Appendix A,¹ not 365 as inadvertently stated in paragraph 317 of the Special Master's Report;

WHEREAS, the Court finds that the Non-Liggett Defendants had numerous, full, and fair opportunities to be heard with respect to the Non-Liggett Documents for which they asserted attorney-client privilege, work product privilege, and/or joint defense/common interest privilege as well as the procedure by which said documents were examined and evaluated;

WHEREAS, the Court finds that the Non-Liggett Defendants suffered no lack of due process;

WHEREAS, the Court finds the Report of the Special Master to be well-reasoned and supported by the law and by the evidence on the record;

THEREFORE, IT IS HEREBY ORDERED:

1. The Findings of Fact, Conclusions of Law, and Recommendations of the Report of the Special Master dated February 10, 1997 (CLAD docket # 2224) incorporated herein by reference, are hereby approved and adopted by this Court with the clarifications stated below. The Report as clarified shall constitute an Order of this Court in this action. Said document shall be released from seal, clarified as stated below, and made a part of the public record.

1. Pursuant to the Order Setting Forth Document Categories for Determination of Privilege Claims, Plaintiffs had the opportunity to designate documents for consideration in Category 1. *See* Order of May 22, 1997, at paragraph 1 (CLAD # 963). Plaintiffs designed 457 documents, which are identified in Plaintiffs' Memorandum of Law in Opposition to the Non-Liggett Defendants' Claims of Privilege, dated September 29, 1997 (CLAD # 1391-1393), and listed in their Appendix A thereto, which Appendix A is made a part hereof and incorporated herein by reference.

a. Paragraph 15 of the Special Master's Report shall be clarified by the addition of the following footnote: "B.A.T. Industries, p.l.c. ("BAT Ind."), British-American Tobacco Company Limited ("BATCo"), and B.A.T. (U.K. and Export) Limited ("BATUKE") have never themselves been members of the Tobacco Industry Research Committee ("TIRC") or the Council for Tobacco Research ("CTR") and did not themselves sign the "Frank Statement." Their subsidiary or sister corporation in the United States - Brown and Williamson Tobacco Company ("B&W") - did sign the Frank Statement and was a member of the TIRC, later CTR."

b. Paragraph 40 of the Special Master's Report shall be clarified by the addition of the following footnote: "Attorneys representing BAT Ind., BATCo, or BATUKE exclusively were not members of the Committee of Counsel. Attorneys representing their subsidiary or sister corporation in the United States - B&W - were active members."

c. Paragraph 295 of the Special Master's Report shall be clarified by replacing the words "in furtherance of the conduct or was closely related to it" with "in furtherance of the conduct and was closely related to it."

d. Paragraph 317 of the Special Master's Report shall be clarified by replacing the words "plaintiffs designated 365 privilege documents" with the words "plaintiffs designated 457 privilege documents."

2. **The Court makes the following additional Findings of Fact:**

a. Defense counsel could not make the unqualified representation that all documents were properly categorized.² The Court agrees with the Special Master's conclusion that "plaintiffs in this case must be permitted to inspect documents withheld on claims of privilege which relate [to] nicotine addiction and manipulation (even if such documents are privileged in the first instance.)" Special Master's Report paragraph 306 (emphasis added). Plaintiffs have listed documents which Non-Liggett Defendants have described in their privilege logs using the words "nicotine" or "addiction"³ which were not placed in Category 3. Accordingly, documents listed in Exhibit 1 shall be remanded to the Special Master for examination as set forth below.

b. Upon review of randomly selected documents, it has been determined that Defendants have in numerous instances claimed privilege where none is due and blatantly abused the categorization process. Examples include, but are not limited to, the following:

(1) Brown and Williamson Tobacco Corporation ("B&W") produced document 689453650-3860, placing it in "Category 8 - Advertisement." B&W described this document as attorney work product prepared by in-house counsel for a BAT Canadian affiliate with whom B&W maintains a common legal interest, identifying and evaluating the significance of certain company documents produced as exhibits in the course of litigation. The actual title of this document, however, is "Series B, ITL Documents: Apparent Difficulties and Relevant Facts,

2. Transcript, Trial Volume Number 20, February 16, 1998, pg. 3962, ln.10, to pg. 3964, ln.6.

3. See Exhibit 1 to the Affidavit of Tara D. Sutton dated February 14, 1998 (CLAD # 2262) (list of 458 of Defendants' privilege log entries containing the word "nicotine" or "addiction" or a variant thereof).

Volume II, Project 16 and Project Plus-Minus” and labeled “for internal use with the B.A.T. group of companies.” Under the heading “Apparently Problematic Research,” the author, Kwechansky Marketing Research, Inc., has noted: “The research was conducted among 16-17 year olds.” @ 689453653. “The research examined the behaviour of youth towards starting, smoking and quitting and their attitudes to these activities.” *Id.* “The studies reported on youngsters’ motivation for starting, their brand preferences, etc. as well as the starting behaviour of children as young as 5 years old.” @ 689453654. “The studies examined examination [sic] of young smokers’ attitudes towards ‘addiction,’ and contain multiple references to how very young smokers at first believe they cannot become addicted, only to later discover, to their regret, that they are.” *Id.* Certainly this document should have been placed in “Category 7 - Children,” a category specifically released via this Court’s December 16, 1997, Order.⁴

(2) American Tobacco Company (“American”) placed a document in “Category 7 - Children” which references a doctor “who had the recent AMA article criticizing the articles etc. associating cigarette smoking causally with heart and cardiovascular diseases.” ATMNPRIV0009796-98 The doctor preferred to be a consultant to a law firm and refused to take grants. “Instead of paying for expenses, . . . he should cover this [travel expenses] in his consultation charges. This is to be a Special Account #11 Item.” @ 9796 (emphasis in the original). Since the document expressly refers to a Special Account, it should have been categorized as Category 4b - a category which was released by the Court in its December 16, 1997, Order.

(3) A document produced from the files of B.A.T. Industries, p.l.c., was described as legal advice from external counsel re legal issues in US smoking and health litigation and placed in “Category 9 - Discovery.” While this is the correct category, the document itself states: “There appears to have been an effort, at different times, to disguise the fact that material was routinely sent to B&W or, at least, to attempt to make it attorney privileged.” In his note to Dr. Blackman, Morini suggests that “contentious” items from R&DC be transmitted “through me to Pepples thus maintaining the legal privilege - ‘attorney work product.’” BAT 503144927-45 at 503144942. Such evidence is highly relevant to claims of abuse of the work product privilege in this litigation.

(4) Numerous documents found via examination of documents placed in “Category 12 - Other” reveal that a more proper categorization would have

4. Order with Respect to Non-Liggett Defendants’ Objections to the Special Master’s Report Dated September 10, 1997, filed December 16, 1997 (CLAD # 1821) (herein “December 16, 1997, Order”).

been "Category 3 - Science" or "Category 4b - Special Projects," for which privilege cannot be claimed. For example, B&W 620619083-85 refers to grants and research and B&W 521035153 refers to "a new research period."

(5) B&W produced document 383003577 which they describe on their privilege log as "attorney work product prepared to identify subjects covered in a deposition conducted in connection with the case entitled Rogers et al. v. RJ Reynolds Tobacco Company et al." The document is nothing but a file folder tab labeled "III. INDEPENDENT STUDIES" which words, of course, were redacted on the copy provided for Plaintiffs.

(6) The Tobacco Institute, Inc. ("TI") claimed privilege for a deposition of Anne Duffin, *in camera*. Ms. Duffin is a former TI employee; and her deposition included topics such as whether the deponent was seeking legal advice from in-house and outside counsel for TI, a Special Master's determination regarding the deponent's contacts; the "White Paper," and attorneys acting in an editorial role when it came to reviewing documents concerning scientific and medical information. TIMN 8001-8036.

(7) The Council for Tobacco Research - U.S.A., Inc. ("CTR") classified document HK 0670077 as "Category 12 - Other" despite its subject - Franklyn Institute's proposal of January 23, 1978, regarding a scientific study on tobacco glycoprotein - which would more properly have been classified as "Category 3 - Science."

(8) Lorillard Tobacco Company ("Lorillard") placed document 87660429-0473A in "Category 12 - Other." This report entitled "Why Bio-Research" details Lorillard's collaborative association with "Bio-Research" and others with respect to scientific research and includes such matters as mouse skin painting tumor data, a copy of "Gelhorn-On the Cocarcinogenic Activity of Cigarette Tobacco Tar" (Cancer Research 1958) which is characterized as the first study undertaken by Bio-Research for Lorillard, Dr. Spears's discussions of numerous variables in experimental design to assess carcinogenic activity of smoke condensate subfractions, etc. Such a scientific report should have been classified as "Category 3 - Science" which was released.

3. Non- Liggett Defendants may claim no privilege for the following documents (hereafter "Released Documents") subject to the exceptions set forth in paragraph 7 of this Order:

a. All Non-Liggett Documents designated by Defendants and Plaintiffs as Category 1, i.e., the 458 documents listed in Exhibit 1.

b. All Non-Liggett Documents designated by Defendants as Category 3.

c. All Non-Liggett Documents designated by Defendants as Category 4b.

d. All Non-Liggett Documents designated by Defendants as Category 5.

4. The Released Documents shall be made available to Plaintiffs and deposited within the Minneapolis Depository (if they have not already been so deposited) within forty-eight (48) hours from the date and time of filing of this Order. Failure to do so without good cause shown shall be deemed cause for imposition of sanctions.

5. Non-Liggett Defendants' Motion for Stay of Document Production is **DENIED**.

6. The Special Master shall supplement his February 10, 1998, Report after examining randomly selected documents from Categories 7, 8, and 12. The Special Master shall specifically report abuses of the categorization process. Documents in those categories exhibiting violation of the Court's Orders, as well as those which constitute non-privileged information or those for which privilege has been lost, may be released by subsequent order of this Court.

7. With respect to the 108 documents which Defendant B&W claims were inadvertently produced, said documents shall remain in the Minneapolis Depository in the form produced. The Special Master shall examine each of the eighteen documents listed in the Affidavit of Todd Gale filed February 12, 1998 (CLAD # 2245) and determine whether any or all such documents, or any portions thereof, shall be released subject to appropriate legal objections at trial, e.g., objections for relevance or hearsay. In making such determination, the Special

Master shall consider the Orders of this Court, including but not limited to, Order Granting in Part and Denying in Part Plaintiffs' Motion in Limine for an Order Excluding Post-1994 Material, filed February 4, 1998 (CLAD # 2187).

8. With respect to the 458 documents listed in Exhibit 1 which Plaintiffs claim were miscategorized (i.e., those which contain references to nicotine or addiction and should have been categorized as Category 3), such documents shall be remanded to the Special Master for further examination of a random sample to determine whether same were miscategorized. Because Defendant R.J. Reynolds claims that, of these 458 documents, 68 documents were authored by Jones Day and constitute attorney opinion work product,⁵ the Special Master shall examine a randomly selected number of said 68 documents to determine whether same were miscategorized. If the Special Master finds that mischaracterization is more than a statistical anomaly, privilege shall be waived as to all the documents listed in Exhibit 1; the Court will not tolerate a pattern of abuse of the categorization process.

9. As mandated by the Rules of Civil Procedure, Non-Liggett Defendants and counsel for same are ordered to pay Plaintiffs the reasonable expenses incurred, including attorneys' fees, because of the Non-Liggett Defendants' improper claims of privilege and noncompliance with the Court's Orders. To assist the Court in determining the appropriate amount, Plaintiffs shall within thirty (30) days submit their affidavit of costs and expenses, including attorneys' fees, incurred with respect to this issue.

5. The Bates numbers of the 68 documents are listed in paragraph 4 of the Amended Affidavit of Jeffrey Jones, dated February 16, 1998 (CLAD # 2274).

9. This Order does not apply to any document from which a Non-Liggett Defendant has withdrawn its claim of privilege. The Court notes, however, that the substantial number of documents from which Defendants withdrew claims of privilege after the Special Master's initial review of Liggett documents suggests that claims of privilege were not always made in good faith.

10. The attached memorandum is incorporated herein by reference.

11. To the extent that this Court's Order with Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated September 10, 1997, and the Memorandum incorporated therein, filed December 16, 1997 (CLAD # 1821), are not inconsistent with this Order, they are hereby incorporated by reference.

Dated: March 7, 1998

BY THE COURT:

/s/ Kenneth J. Fitzpatrick

Kenneth J. Fitzpatrick
Judge of District Court

MEMORANDUM

BACKGROUND AND PROCEDURES

Non-Liggett Defendants⁶ in this action have objected to producing certain documents, claiming attorney-client privilege, work product privilege, and/or joint defense/common interest privilege with respect to more than 230,000 documents, comprising more than one million pages. Plaintiffs demanded production of the documents. Non-Liggett Defendants refused. After meeting and conferring in attempts to resolve the issue, the parties were unable to come to a mutually agreeable solution. The procedures for this Court's determination as to whether certain documents must be produced were described in this Court's December 16, 1997, Order and thus will not be repeated here, other than to note that (1) this Court found that Plaintiffs had established a *prima facie* case of crime/fraud on the part of Defendants; (2) the Minnesota Court of Appeals found that Non-Liggett Defendants' challenge to the categorical review process

6. Liggett entered into a Settlement Agreement with the State of Minnesota and agreed to waive its privilege with respect to certain of its documents. Non-Liggett Defendants claimed a joint defense/common interest privilege with respect to these documents. The Special Master's Findings of Fact, Conclusions of Law, and Recommendations dated September 10, 1997 (CLAD # 1321) were adopted and incorporated, with certain clarifications, into this Court's Order with Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated September 10, 1997, filed December 16, 1997 (CLAD # 1821) (herein "December 16, 1997, Order").

ordered by this Court to be untimely;⁷ and (3) reiterating that the categories into which documents were to be designated⁸ are:

- | | | |
|------|---|--|
| 1. | Other Litigation | (Documents reviewed in other litigation for which privilege was denied) |
| 2. | No Attorney Identified | (Documents that, on their face, do not indicate they were written or received by an attorney.) |
| 3. | Science | (Documents relating to or referencing scientific research or research reports on smoking and health.) |
| 4. | Attorney-Related Involvement in Smoking and Health: | |
| 4.A. | Communications of Counsel | (Documents relating to or referencing the Committee of Counsel, Scientific Liaison Committee, or Research Liaison Committee.) |
| 4.B. | Special Projects | (Documents relating to or referencing "Special Projects" including CTR Special Products, Lawyers' Special Projects, or Special Accounts.) |
| 4.C. | LS, Inc. | (Documents relating to or referencing LS, Inc., 3i, or LRD which were formed to index, store, and retrieve information relating to smoking and health for the tobacco industry.) |
| 5. | Public Statements | (Documents relating to or referencing positions taken or statements made by a defendant or by the industry regarding smoking and health.) |
| 6. | Additives | (Documents relating to or referencing ingredients, formulae, constituents, chemicals, or components added to tobacco or tobacco products.) |
| 7. | Children | (Documents relating to or referencing persons under age 18.) |
| 8. | Advertisements | (Documents relating to or referencing advertising, promotion, or marketing of cigarettes.) |
| 9. | Discovery | (Documents relating to or referencing requests for information, including document destruction and document transfer..) |

7. State of Minnesota and BCBSM v. Philip Morris Inc., et al., (Minnesota Appellate Court Case Number C5-97-2349) dated January 14, 1998. The Minnesota Supreme Court denied Non-Liggett Defendants' Petition for Review of the Decision of the Court of Appeals.

8. See Order Setting Forth Document Categories for Determination of Privilege Claims, filed May 22, 1997 (CLAD #963).

- | | | |
|-----|------------------------|---|
| 10. | Government Regulations | (Documents relating to or referencing regulatory activity by the government, including labeling.) |
| 11. | Patents/EPA | (Documents relating to or referencing the Environmental Protection Agency or patents.) |
| 12. | Other Documents | (Documents for which privilege is claimed which do not fit into any of the previous categories.) |

The issues of privilege and loss of privilege based on the crime-fraud exception were referred to the Special Master appointed in this matter (*see* May 9, 1997, Order at p. 13, para. 14). The privilege review process commenced with the Liggett Settlement Documents, hearings on which concluded in July, 1997. The parties were invited to submit suggestions and recommendations with respect to the privilege review process, and a number of procedural changes were ordered by the Special Master.⁹

With respect to the Non-Liggett Documents, the Special Master generated a random selection of the hundreds of thousands of documents, including a selection from each party's documents in each category. Presentations and arguments by the parties, in open court and *ex parte*, with respect to the randomly selected documents and any other documents which the parties chose to present took place before the Special Master on October 15, 16, 17, and 18,

9. *See, e.g.*, Fourth Order Establishing Procedures for the Review of Documents Subject to Privilege Claims, filed July 22, 1997 (CLAD # 1179); Order Relating to Completion of Verification and Correction of Non-Liggett Documents, filed August 6, 1997 (CLAD # 1230); Order Setting Conference for Discussion of Hearing Procedures on Privileged Non-Liggett Documents, filed August 13, 1997 (CLAD # 1267); Order Directing the Non-Liggett Defendants to File their Privileged Document Numbers by Privilege Classification, filed August 14, 1997 (CLAD #1271); Fifth Order Establishing Procedures for the Review of Documents Subject to Privilege Claims, filed September 12, 1997 (CLAD # 1327); Order of the Special Master in Clarification of Procedural Issues, filed September 24, 1997 (CLAD # 1379); Order re Procedures to be Used at the Hearings Beginning on October 15, 1997 (CLAD # 1489); etc.

1997. Upon conclusion of the hearings, the parties were ordered to submit their proposed findings of fact and conclusions of law for consideration by the Special Master.

After review of the record and each of the hundreds of randomly selected documents, the Special Master issued the Report of Special Master: Findings of Fact, Conclusions of Law, and Recommendations Regarding Non-Liggett Privilege Claims (CLAD # 2224, filed February 10, 1998) ("Special Master's Report"). In his extensive and well-supported report, the Special Master found that the Non-Liggett Defendants failed to rebut the Court's *prima facie* finding of crime-fraud and that privilege was lost with respect to certain categories of documents. He also found that some categories contained documents which were not, in the first instance, attorney-client privileged. The Special Master recommended release of all documents the Non-Liggett Defendants placed in categories 1, 3, 4b, and 5 - more than 30,000 documents. The Special Master sustained the Non-Liggett Defendants' privilege claims for documents in categories 2, 4a, 4c, 6, 7, 8, 9, 10, 11, and 12.

The Non-Liggett Defendants, however, raised numerous objections to the Special Master's Report. The Court offered them yet another opportunity to be heard - the opportunity to present the Court with their objections and rebuttal arguments at the hearing on February 16, 1997. After review of the record herein, the objections and argument of Defendants, oral and written, as well as Plaintiffs' submissions, this Court finds that the evidence of record unequivocally supports the findings of the Special Master; and the Court adopts each and every recommendation of the Special Master with the *de minimus* clarifications set forth in the Order. The claims of privilege for documents placed by the Non-Liggett Defendants in categories 1, 3, 4b, and 5 are denied and all documents in said categories shall be released.

**ABUSE OF PRIVILEGE AND VIOLATION OF THE RULES OF COURT ARE,
THEMSELVES, SUFFICIENT GROUNDS TO ORDER RELEASE OF DOCUMENTS**

The relevant portions of the Court's December 16 Order with respect to abuse of privilege and violation of the rules of court are adopted and incorporated herein.

The Court is very troubled by the fact that the Non-Liggett Defendants continue to violate the orders of this Court. For example, the Special Master ordered that a redacted copy of each selected document for which privilege was claimed was to be provided to the Plaintiffs prior to the Special Master hearings. The record reflects that in some instances Non-Liggett Defendants failed to provide redacted copies until their failure to do so was brought to the attention of the Special Master.

The Court's review indicates that Non-Liggett Defendants and each of them claimed privilege for documents which are clearly and inarguably not entitled to protections of privilege. Again, this Court finds, as it did with respect to the Liggett Settlement Documents, that many documents examined contained nothing of a privileged nature, establishing a pattern of abuse. Certain Defendants complain that the documents they chose from selected categories demonstrate attorney opinion work product; this may indeed be so. However, despite the fact that certain documents in a category may contain privileged material, abuse of the privilege claim with respect to even one document taints the category. Defendants had a myriad of opportunities to determine whether a claim of privilege could be properly made. Indeed, the Court expressly put counsel on notice that counsel personally or those under counsel's supervision were to have reviewed each document on the privilege log so that counsel could represent that privilege was properly claimed.. The intentional and repeated misuse of claims of privilege is intolerable in a

court of law, and an appropriate sanction for such abuse is release of all documents for which privilege is improperly claimed. If a spot-check of documents reveals a pattern of abuse, a document-by-document review (if it were even possible) would more probably than not reveal even more abuses.

A reviewer less cautious and conservative than our Special Master might have recommended that even one discovered abuse be sufficient to deny privilege for the entire set of documents. Plaintiffs, however, express their acquiescence with the recommendations of the Special Master even though many important and probative documents may remain cloaked in privilege. With trial underway, this Court will permit the light of discovery to permeate the categories of documents which the Special Master recommended be released and allow unchallenged categories to remain in cloaked in privilege for the present.

STANDARD OF REVIEW OF SPECIAL MASTER'S REPORT

The Court has examined the Special Master's findings of fact and found that his findings are not "clearly erroneous." *See* Minn. R. Civ. P. 53.05(2); 2 Herr & Haydock, Minnesota Practice § 53.14 (2d ed. 1985). Because the proper standard of review has been met, the Special Master's findings of fact are accepted and adopted by this Court.

NON-LIGGETT DEFENDANTS' DUE PROCESS RIGHTS

Non-Liggett Defendants complain that their Due Process rights were violated because the category-by-category review prevented them from adequately defending their privilege claims and presenting rebuttal evidence and allowed Plaintiffs to shirk their burden of showing that any document was "in furtherance of" and "closely related to" a crime or fraud. The Court rejects this argument and incorporates the relevant portions of its December 16, 1997, Order.

**APPLICATION OF CORRECT LEGAL STANDARDS
OF ATTORNEY-CLIENT PRIVILEGE,
WORK PRODUCT DOCTRINE, AND THE CRIME-FRAUD EXCEPTION**

The Non-Liggett Defendants claim that the Special Master has failed to apply the correct legal standards in making his report and recommendations. The Court rejects this argument and incorporates the relevant portions of its December 16, 1997, Order. The attorney-client and work product privileges in this case are ancient but not honored.

The Court finds that the standard for application of the crime-fraud exception has been correctly applied. The Levin court set forth the test which must be met to invoke the crime-fraud exception: "To invoke the crime-fraud exception to the attorney-client privilege, Levin must establish a prima facie showing that the communication was (1) made in furtherance of a crime or fraud and (2) was closely related to the fraud." Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. Ct. App. 1991), *petition for review denied* (Minn. July 24, 1991) . The Special Master expressly stated that the two prongs of his inquiry were whether he was "satisfied by a preponderance¹⁰ of the evidence offered by both plaintiffs and defendants that the defendants were engaged in criminal or fraudulent conduct[.] Included within "criminal or fraudulent conduct" are a failure to conduct appropriate research into the safety of their products and failure to warn their products' consumers if the research supported negative conclusions. Second, has it been demonstrated by a preponderance of the evidence that the involvement of defendants' attorneys was in furtherance of the conduct or was closely related to it?" Special Master's

10. The Court notes that the Special Master required - and found - sufficient evidence to meet a "preponderance of the evidence" standard, which is a stricter standard than the "prima facie showing" required by the Levin court to invoke the crime-fraud exception.

Report paragraph 295. These inquiries meet, indeed exceed, the requirements set forth in Levin and are those criteria expressly set forth by this Court in its Order of May 9, 1997 (citing Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992) (citing In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987) (citations omitted), order vacated on other grounds, 975 F.2d 81 (3rd Cir. 1992)). Moreover, the Court notes that, despite the use of the word “or” in paragraph 295 of the Special Master’s Report, the Special Master did, indeed, consider both whether the evidence showed that the involvement of Defendants’ attorneys was in furtherance of the conduct and was closely related to it. See, e.g., paragraphs 325, 327, 367, 393, 407, 414, and 418 of the Special Master’s Report. Accordingly, paragraph 295 of the Special Master’s Report shall be clarified by replacing the word “or” with the word “and.” Substantively, the Special Master’s Report is sound; there is no evidence that the Special Master erred in application of the standard.

CONCLUSION

Non-Liggett Defendants have been found to have committed numerous abuses of privilege and certain violations of Court Orders and the Rules of Court. Non-Liggett Defendants have been afforded notice and innumerable opportunities to be heard. No violations of their due process rights have occurred. The record supports the factual findings of the Special Master. Application of the law of privilege, and the crime-fraud exception were properly applied by the Special Master. The Findings of Fact and Conclusions of Law of the Special Master are adopted and made a part of this Order as clarified herein. Having been carefully considered by this Court, Non-Liggett Defendants’ remaining objections are dismissed. The documents designated as falling into categories 1, 3, 4b, and 5 shall be released as herein ordered.

STATE OF MINNESOTA



OFFICE OF THE ATTORNEY GENERAL
HUBERT H. HUMPHREY III

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St. Paul, MN 55155

TO:

Jerry Mande

FROM:

Eric Johnson

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Humphrey calls secret tobacco documents 'crown jewels' of

STEVE KARNOWSKI / Associated Press

ST. PAUL, Minn. (AP) -- Lawyers for the state proclaimed victory after a court official said they should be allowed to use 40,000 secret tobacco industry documents in a lawsuit against the cigarette makers.

Attorney General Hubert Humphrey III hailed Tuesday's recommendation by Mark Gehan, a court-appointed special master who reviewed samples of more than 240,000 confidential documents.

"These are the 'crown jewels' of the conspiracy -- the documents the industry fought tooth and nail to conceal from the American public," Humphrey said. "They will reveal what the industry knew and when they knew it."

Gehan's recommendation went to Ramsey County District Judge Kenneth Fitzpatrick, who will make the actual ruling. Tobacco attorneys have 10 days to appeal to the judge, and R.J. Reynolds lawyer Bob Weber said they would do so.

Even though Gehan said most of the documents should remain sheltered under the doctrine of attorney-client privilege, the state's lead attorney, Michael Ciresi, said it was still a big win.

"Whenever we get 100,000 (pages of) documents that have been hid from the public for 40 or 50 years I consider it a major victory," Ciresi said.

Humphrey and a tobacco litigation expert said the documents that will come out -- if Fitzpatrick agrees -- are potentially explosive.

"This is something the plaintiff attorneys have been salivating over for 10 years now," said Mark Gottlieb, an attorney for the Tobacco Products Liability Project at Northeastern University in Boston.

Bob Weber, an attorney for R.J. Reynolds, said it was improper for Gehan to make a recommendation based only on samples of the papers instead of reviewing each document individually.

"It was not based on a total reading of all of the documents," Weber said. "It's a profoundly flawed procedure."

The state and Blue Cross and Blue Shield of Minnesota are suing the tobacco companies for \$1.77 billion spent treating smoking-related

illness, plus punitive damages. They allege the industry concealed what it knew about

"If (they're) like the **documents** that we've seen, they bear upon this industry's knowledge, dating back decades, of the health risks of **smoking** and the fact that they simply did not get this information out to the public," Ciresi said.

Gehan divided the documents into a dozen categories and agreed with **tobacco** companies that attorney-client privilege applied in most of them, including those that dealt with children, advertising, **tobacco** additives and communication between attorneys in **tobacco** lawsuits.

But he said documents in three groups did not qualify for the privilege: those dealing with science, special projects by the Council for Tobacco Research, and public statements agreed upon by the industry.

On the witness stand Tuesday, Walker Merryman, a vice president and spokesman for The **Tobacco** Industry, took a pummeling from Ciresi, who brought up several internal company documents indicating that top industry officials believed as early as 1958 that **smoking** causes cancer.

But Merryman refused to back off the institute's contention that while there is a "statistical association" between **smoking** and cancer, it still has not been established that **smoking** actually causes cancer.

Merryman said he did not accept the positions of the American Medical Association, the World Health Organization, the National Institutes of Health and the Centers for Disease Control, which all say it has been proven that **smoking** causes cancer.

"Do you believe the world is flat?" Ciresi finally asked tauntingly, then withdrew the question after the defense objected.

Merryman was expected to conclude his testimony today.

Defendants include Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. British-American Tobacco Co. Ltd., Lorillard Tobacco Co. and The Tobacco Institute Inc. Liggett Group Inc. is a defendant of Blue Cross only.

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Published Wednesday,
February 11, 1998,
in the Pioneer Press.

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Tobacco documents subject to disclosure

Court officer deals industry major blow

DAVID SHAFFER and MOLLY GUTHREY STAFF WRITERS

The first damaging evidence from the tobacco industry's privileged legal papers landed in a St. Paul courtroom Tuesday -- just as a judicial officer said 40,000 similarly protected documents should be disclosed.

In a major defeat for cigarette makers, Special Master Mark Gehan recommended release of the largest collection of tobacco industry studies, memos and letters ever protected under the doctrine of lawyer-client confidentiality.

Those documents still haven't been released. But the importance of such files was dramatically underscored the same day when three formerly privileged documents, obtained under an earlier ruling, were introduced as evidence in the Minnesota tobacco trial.

One document, a secret 1965 memorandum by an American Tobacco Co. attorney, urged the firm not to open an in-house smoking-research lab because "it opens for jury evaluation the question whether it acted reasonably in not instituting biological research long before now."

Two other documents, also from American's files, tell the inside story on the industry's reaction to a widely publicized 1970 American Cancer Society research project that produced lung cancer in beagles taught to smoke.

In public, the Tobacco Institute downplayed the so-called Auerbach study, saying it proved nothing and that more scientific review was needed, according to a press report and ad introduced at the trial. American was a longtime member of the institute, an industry trade group.

But in a "privileged and confidential" document, a top research official for an American affiliate wrote "we believe the Auerbach work proves beyond reasonable doubt that fresh whole cigarette smoke is carcinogenic to dog lungs and therefore it is highly likely that it is carcinogenic to human beings."

Michael Ciresi, the trial attorney for the Minnesota attorney general and Blue Cross and Blue Shield, said the three privileged documents introduced Tuesday are the first to be used in the 3-week-old trial.

"These are the first of the privileged documents -- and they are dynamite," Ciresi said. "They show these defendants knew what their duty was under the law and suppressed the knowledge of smoking and

health."

Gehan's recommendation to release 40,000 other privileged documents may represent the largest number of privileged papers ever to face disclosure in any lawsuit -- not just in the tobacco industry, Ciresi added.

"These are the crown jewels of the conspiracy -- the documents the industry fought tooth and nail to conceal from the American public," Minnesota Attorney General Hubert Humphrey said in a statement.

Ramsey County District Judge Kenneth Fitzpatrick still must review Gehan's findings, and the tobacco industry is expected to challenge them. Only after the judge rules could the documents be released to plaintiffs at trial.

But Fitzpatrick previously has ruled that the tobacco industry engaged in a "conspiracy of silence" and suppressed research. The judge in December ordered disclosure of 834 lawyer-protected documents from Liggett Group and 1,114 such documents from American Tobacco Co., including the three disclosed in court Tuesday.

The 40,000 still-unreleased privileged documents cover several subjects that are key issues in the \$1.77 billion consumer fraud lawsuit against tobacco companies. The suit seeks to recover smoking-related medical costs and accuses the industry of decades of deceiving the public.

Gehan recommended revoking attorney-client privilege on documents pertaining to smoking-and-health studies and research directed by lawyers as well as memos and letters relating to the industry's public positions.

Also included in the documents are hundreds of memos and letters identified by Humphrey's lawyers from the industry's index of secret papers. Said Ciresi: "We can't wait to get our hands on those documents."

Gehan's full recommendations were sealed. But he issued a summary of his findings, and cited his earlier report that concluded industry lawyers engaged in crime or fraud to cover up research into the health effects of cigarettes. Gehan recommended preserving the industry's privilege on 10 document categories, including those about youth.

Robert Weber, an attorney for R.J. Reynolds Tobacco Co., said he objected to Gehan's procedure -- established by the judge -- of reviewing only samples from the full collection of 240,000 privileged documents.

"I think it's a profoundly flawed procedure -- to take away attorney-client privilege in any respect by ruling on documents that haven't been reviewed (individually) by a judicial officer," Weber said.

The first privileged document disclosed in court was a 56-page memorandum written by Janet Brown, a longtime attorney for American Tobacco, about the legal consequences of conducting in-house smoking research, instead of funding outside projects. Brown

was against such research -- and, indeed, no in-house program was begun at the company, now part of Brown & Williamson Tobacco Corp.

"Instituting a biological program today will be argued to be an implied admission that the company believes it has not in the past been doing all it could and should have been doing to find the scientific facts respecting tobacco use and health," Brown warned to Cyril Hesko, vice president and general counsel for American Tobacco.

All three documents were introduced during testimony by Walker Merryman, vice president and communications director of the Tobacco Institute, as Ciresi questioned him about whether the industry told the public everything it knew about smoking. Merryman resumes his testimony today.

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TOBACCO CONTINUED ON 6C ▶

Pioneer Press
2-11-58

TOBACCO

▼ CONTINUED FROM 1C

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PAT ROLO

Walker Merryman, vice president and communications director of the Tobacco Institute, testifies in the Minnesota tobacco trial in St. Paul on Tuesday.

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Pioneer Press
2-11-98

Special master supports release of more documents

Attorney-client privilege does not apply, he rules in report

By David Phelps and Melissa Levy
Star Tribune Staff Writers

Certain confidential tobacco industry documents on smoking and health are not protected by attorney-client privilege and should be turned over to the state of Minnesota for examination, a court officer ruled Tuesday.

Special Master Mark Gehan, in a public report, said the claim of attorney-client privilege was applied improperly by tobacco companies in a number of broad categories and thousands of documents should be released.

Gehan used language in Tuesday's report similar to that in a report last fall in which he determined that documents from cigarette maker Liggett Group contained evidence of "crime fraud." Gehan wrote in September that tobacco companies had abused claims of attorney-client privilege

to shield documents.

He determined that the state and Blue Cross and Blue Shield of Minnesota should be given access to scientific documents relating to smoking and health, special research projects directed by attorneys, and documents relating to public positions taken by the industry on health issues.

Gehan, who also filed a lengthy sealed report outlining the reasons for his determination, said Minnesota attorneys should be entitled to documents contained in about one-third of the 14 categories where the claim of attorney-client privilege had been invoked.

The state and Blue Cross are in the third week of a civil trial in Ramsey County District Court against nine tobacco companies and two industry trade groups.

Turn to TRIAL on B7



Star Tribune photo by David Browder:
Bennett LeBow, left, head of the Liggett Group, arrived at court with his attorney, James Stricker. He said Liggett settled early because it couldn't afford a major judgment.

Stephonia
2-11-98

SHOOTING from B1

Man said he shot teen because he 'hates blacks', police say

According to court documents and interviews, Figueroa drove by Stephon and gave him a dirty look. Stephon said he ignored Figueroa, but minutes later Figueroa returned and shot him, documents said. Stephon watched the driver pull the gun inside the truck, smile and drive away.

Stephon, a student leader and three-sport athlete at Olson Middle School in Minneapolis, ran a block before collapsing in a driveway in the 5300 block of Russell Av. N.

The bullet hit a rib, punctured a lung and lodged in his chest. He was hospitalized at North Memorial Medical Center in Robbinsdale for several days, but has recovered and returned to school Tuesday.

Figueroa told police that Stephon confronted him and that he believed Stephon had a weapon, so he drew his rifle and shot the teenager. Stephon didn't have a weapon, police said.

"Figueroa's reason for the shooting isn't really valid,"

McComb said. "He shot somebody in the back. There was no evidence of face-to-face confrontation. He was a random target."

Figueroa, who lives with his grandmother, told police he was smoking at a nearby park. Police were tipped to him several days after the shooting, and his pickup matched a description given by Stephon.

Figueroa was arrested about 11 p.m. Monday in White Bear Lake driving his black, rusty pickup. He is being held in the Hennepin County jail in lieu of \$375,000 bail.

"The detectives worked long and hard," McComb said. "We're very happy with the results."

Stephon's mother, Stephanie Arnold, said there is no easy way to explain to her son why somebody would shoot him. He has to move on and not let "this coward" ruin his life, she said.

"I told him to go out and continue to do all the things he dreamed about," she said.

Racial allegations

During the investigation, police said, they found evidence that on several occasions Figueroa professed hatred for blacks and Jews. He also confessed that he shot Stephon because he "hates blacks," court documents said. Figueroa's mental health status will have to be evaluated by the courts, McComb said.

Figueroa has suffered from depression and attention deficit disorder, and he has been found to be schizophrenic, said his older brother Elijah Figueroa. The shooting may seem racially motivated, his brother said, but it may have been the way he vented internal hatred and anger because of personal problems.

"People don't know Aaron," his brother said. "He's a great kid."

Elijah said his brother dabbled in the occult and had problems with drugs. When his grandmother would spend time away during winter, Aaron Figueroa spent time with friends who may have pushed him to become involved in a shooting, Elijah said.

Although Aaron's father is Mexican, relatives said he considers himself white.

"I don't remember him ever saying that he wanted to go out

and shoot a black person," he said. "We're half Mexican ourselves."

Elijah said he talked to Figueroa two days ago and would have turned him in had he known about the shooting. If Figueroa wanted to shoot somebody randomly, why would he have bought the gun with a check and then returned it to a gun shop with a bullet in the chamber, Elijah asked.

Seeking peace for family

Community leader Spike Moss met with Stephon and his mother Tuesday. Stephon told him he was relieved that Figueroa had been arrested because only Stephon could identify the shooter. He did identify Figueroa in a lineup Tuesday afternoon.

"We knew all along it was racial crime," Moss said. "We just wanted police to do their job and pursue this situation so the family could have peace."

Stephanie Arnold said that although she wished police would have taken the case more seriously from the start, she's glad that "they got Figueroa and that he's not going anywhere."

"The Lord kept my son alive for a reason," she said.



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**STATEMENT OF
HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
Re: Special Master Gehan's Report on
Crime-Fraud Documents**

Today's decision is a major victory in our three-year battle to expose the truth about the tobacco industry. The 40-year cover-up of fraud and conspiracy is coming to an end, and this outlaw industry is at the end of its rope.

Under this decision, the American public may see hundreds of thousands of pages of secret documents that have been shielded in the tobacco lawyers' vaults. These are the "crown jewels" of the conspiracy -- the documents the industry fought tooth and nail to conceal from the American public. They will reveal what the industry knew and when they knew it.

Only by exposing the full truth can we prevent this industry from marketing to kids and manipulating nicotine in the future. And I intend to make sure the American public and Congress see the pervasiveness of the fraud and conspiracy so we can finally reform this industry and bring it to justice.

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