

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
--------------------------	---------------	------	-------------

001. memo	Bob Nash to Bruce Reed, re Tobacco Policy Position [non-selection] (1 page)	11/21/1997	b(6)
-----------	--	------------	------

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Thomas Freedman
OA/Box Number: 17554

FOLDER TITLE:

Tomacco - Documents

2015-0274-S

wr10808

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Documents From Cigarette Makers Show They Tested Methods to Enhance Nicotine

By BARRY MEIER

Two months after a top executive of the Philip Morris Companies testified in 1994 before Congress that the cigarette maker did not "manipulate or independently control" nicotine in its products, company scientists reported on human experiments that indicated that they could produce "enhanced" nicotine effects on a smoker's nervous system; an internal company document shows.

The June 1994 research report also found that altering the nicotine's chemical form likely "increased the rapidity" at which nicotine, the addictive substance in cigarettes, entered a smoker's bloodstream, the document shows. The document does not indicate whether the research

Tobacco companies hope the records will smooth passage of a national settlement.

was used in commercial products.

All the major tobacco producers, including Philip Morris, have repeatedly denied that they manipulate or control nicotine levels or design their cigarettes to deliver specific levels of the chemical. Michael York, a lawyer for Philip Morris, said yesterday that the company would decline to comment on the 1994 study and other company documents related to nicotine chemistry and delivery prior to presentation of its case in a lawsuit in Minnesota, where it is a defendant.

"We are very comfortable with the evidence," Mr. York said. "I think the evidence will show that the company acted prudently, properly and lawfully."

Still, thousands of internal memorandums released on Friday by the companies provide a portrait of an industry obsessed with nicotine, its physiological and pharmacological effects and the myriad ways in which it might be controlled and altered while being delivered to the smoker.

Over the last three decades, the tobacco industry poured millions of dollars and thousands of research hours into exploring how to "manipulate," "control" and "augment" nicotine, the documents show. The methods explored included treating nicotine with ammonia; adding other chemicals; new filter and cigarette

paper designs; and direct addition of nicotine, according to the documents.

The documents were initially collected by lawyers for Minnesota for use in the state's lawsuit against the nation's four largest cigarette companies: Philip Morris, the R. J. Reynolds Tobacco Company, a subsidiary of the R. J. R. Nabisco Holding Corporation, the Lorillard Tobacco Company, a subsidiary of the Loews Corporation, and Brown & Williamson Tobacco, a subsidiary of B. A. T. Industries.

The cigarette makers had initially resisted disclosing the records. But last month, after the Minnesota case began, they agreed to publicly disclose some of the records from the case in an apparent bid to improve prospects for Congressional passage of the \$368.5 billion tobacco settlement proposal reached in June between the industry and 40 state attorneys general.

The documents posted by the companies on Friday on the Internet (www.tobaccosolution.com) represent the first installment of those records. The companies are continuing to fight disclosure of 39,000 other documents involving evidence of possible fraud or other crimes by cigarette company officials and their lawyers. Those records were recently subpoenaed by the House Commerce Committee.

The question of whether cigarette makers deliberately manipulated nicotine is a major thrust of the Justice Department's criminal investigation into possible fraud by tobacco producers, including whether producers lied or made false statements to Federal regulators about the substance. Justice Department officials have obtained many of the documents collected by Minnesota, said one lawyer who is familiar with the matter.

In the 1994 Philip Morris study, subjects were given cigarettes containing an additive that varied the tobacco's pH, the measure of its acidity or alkalinity. The study, which is titled "The Effects of Cigarette Smoke pH on Nicotine Delivery and Subjective Evaluations," found that as the alkalinity of the tobacco increased, nicotine entered the bloodstream more rapidly. The study also found that cigarettes containing more alkaline substances produced "enhanced, electrophysiological and subjective responses" in smokers tested.

The 1994 Philip Morris study, as well as many earlier industry studies, found that while the use of chemicals like ammonia or other alkaline compounds did not affect overall nic-

otine delivery they did produce a chemical reaction that converted nicotine from its bound, or less physiologically active, form, to its free form. The higher proportions of free nicotine produced greater physiological satisfaction, "kick" or "impact" on a smoker, various documents show.

Philip Morris began to use ammonia in its cigarette manufacturing process in the mid-1960's, according to other documents, and other cigarette makers soon began to suspect that the compound was critical to the success of its Marlboro brand. R. J. Reynolds documents show that the company, whose researchers believed that higher pH increased the "kick" of nicotine, marketed an ammonia-containing version of its Winston brand in 1980 that was a chemical clone of Philip Morris's Marlboro and duplicated its levels of smoke pH and free nicotine.

An R. J. Reynolds spokeswoman said the company did not design cigarettes for nicotine levels, and Philip Morris has repeatedly stated that it

used ammonia solely as a flavoring agent and tobacco binder.

Mr. York, the Philip Morris lawyer, said that the additive used in the 1994 study, calcium hydroxide, is related to compounds that are formed when ammonia, a component of the cigarette manufacturing process, breaks down during smoking. He declined to discuss why the company had conducted the research.

The 1994 study, however, was part of a long line of experiments run by Philip Morris that examined the relationship between the alkalinity of smoke, nicotine delivery and smoker response as measured through such devices as electroencephalograph. Other research documents also looked at the issue of "optimal" nicotine delivery.

One 1990 Philip Morris research memorandum, for example, states, "We have shown that there are optimal nicotine deliveries for producing the most favorable physiological and behavioral responses." It also goes on: "Our laboratory has demonstrat-

Many memos show an industry obsessed with nicotine and with how to alter it.

ed that all forms of nicotine are not behaviorally or physiologically equal. This observation is important for evaluating research cigarettes, where the addition of nicotine is necessary."

Mr. York also declined to comment on the 1990 document pending presentation of its scientists in the Minnesota lawsuit, in which the state is seeking to recover Medicaid money spent treating smoking-related illnesses. The company's chairman, Geoffrey Bible, is expected to testify in that lawsuit on Monday in St. Paul.

In addition, in a statement issued on Tuesday, Philip Morris said

Since the allegations of nicotine manipulation first arose in 1994, Philip Morris has carefully described its position and knowledge regarding the relationship between ammonia, smoke, pH and nicotine delivery. Philip Morris is unaware of any scientific study that answers conclusively the question of whether the pH of cigarette smoke or the amount of ammonia in smoke affects the rate at which nicotine is absorbed in the bloodstream.

The documents, which span four decades, show that most major producers devoted vast resources to determining whether they could use various techniques to alter nicotine delivery or availability, even while tar and nicotine levels as measured by Government tests were falling.

For example, a 1976 Lorillard memorandum stated that it "imperative that Lorillard develop a flavorful cigarette delivering tar while at the same time delivering a level of nicotine higher than could be obtained normally by conventional cigarette construction."

Maine Limits Fishing For Island's Lobster

By The New York Times

MONHEGAN ISLAND, Me., Feb. 28 — For the first time in Maine history, the lobster grounds surrounding an island have been declared off limits to all who are not islanders.

Gov. Angus King signed into law on Friday a measure allowing lobster fishing only by the fishermen who set traps around the island last winter — all islanders. The law was sought by island fishermen who said they feared that residents from the nearby town of Friendship might overfish the waters surrounding the island, 12 miles off the Maine coast.

The bill was passed by 29 to 1 in the State Senate on Wednesday and by 132 to 14 by the House on Thursday.

Islanders agreed to give up their rights to fish outside the specified bounds around the island. The new law also sets up a study group to look into ways of conserving the lobster fishery.

Commodities: —
Tuesday through Saturday,
in Business Day
The New York Times

Did they do it? Do we care?

William Livingston Monica
Lorillard's lawyer appeared
first on *60 Minutes* tonight.
His back to the one-on-one
interview with Gerald Rivera.



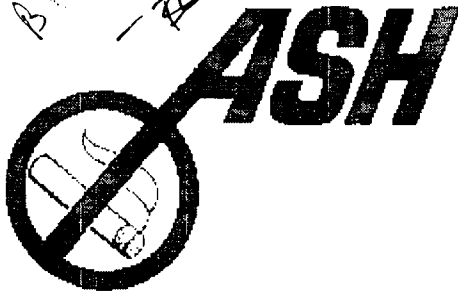
**DIVERA
LIVE**

**Special Edition
Tonight, 9pm ET/PT**



CNBC

**Everything For Everybody Concerned About Smoking
and Protecting the Rights of Nonsmokers**



Action on Smoking and Health
A National Legal-Action Antismoking Organization
Entirely Supported by Tax-Deductible Contributions

<http://ash.org>

PROMISED DOCUMENT DISCLOSURE CONSIDERED A PLOY [01/30-5]

Just as the Minnesota medicaid trial begins and the first of former secret tobacco industry documents are released as part of that lawsuit, the tobacco industry offers to release millions of those document which are already expected to be unveiled as the trial progresses. Under the circumstances, it is not surprising that the offer is seen as a public relations ploy.

According to the New York Times," Hubert Humphrey 3d, the Attorney General of Minnesota, suggested that Mr. Bible's offer, which was made in consultation with top industry officials, was little more than a public-relations ploy because the documents at issue are already being released as part of the Minnesota lawsuit, which began last week. Mr. Humphrey said that the industry is still seeking to block disclosure of tens of thousands of other documents that the companies claim are protected by the attorney-client privilege."

"The fact is that the industry had given up nothing," Mr. Humphrey said in a statement. "They have only agreed to release the documents that we have already started to expose at trial."

[click here to return to ASH's Home Web Page: http://ash.org](http://ash.org)

[click here for more information about Action on Smoking and Health \(ASH\)](#)

[click here to learn the many benefits of joining ASH on-line, over the Internet](#)

Presented as a public service by Action on Smoking and Health (ASH), 2013 H Street, N.W., Wash., DC 20006, USA, (202) 659-4310. ASH is a 30-year-old national legal-action antismoking organization which is entirely supported by tax-deductible contributions.

2204 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-0529
(202) 225-3976

DISTRICT OFFICE:
8436 WEST 3D STREET
SUITE 600
LOS ANGELES, CA 90048-4183
(213) 651-1040

RANKING MEMBER
COMMITTEE ON GOVERNMENT
REFORM AND OVERSIGHT

MEMBER
COMMITTEE ON COMMERCE
DEMOCRATIC STEERING COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515-0529

HENRY A. WAXMAN
29TH DISTRICT, CALIFORNIA

*Public
down*

January 14, 1998

The Honorable Tom Bliley
Chairman, Committee on Commerce
2125 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Bliley:

With the cooperation of the plaintiffs and their attorneys in the Mangini litigation in California, I have obtained over a thousand of pages of previously secret documents from the R.J. Reynolds Tobacco Co. These documents address one of the most important public health questions facing our nation: Have the U.S. tobacco companies deliberately marketed tobacco products to our children? These documents show that at least one major company, RJR, has in fact sought to market its tobacco products to children for decades. *dp final?*

In recent years, there has been considerable disclosure of documents from Philip Morris and Brown & Williamson. These documents have primarily addressed tobacco industry manipulation of nicotine and suppression of health information. There has been little disclosure of documents from RJR and little disclosure of documents discussing tobacco industry efforts to market to children. The Mangini documents thus have special significance: they are the first detailed window into RJR and the first detailed revelations of a tobacco company's efforts to exploit children.

I am transmitting with this letter over 80 documents from RJR, along with a legal analysis of the documents prepared by the lawyers for the Mangini plaintiffs. The vast majority of the documents have never been previously been disclosed to the public.¹ This letter summarizes some of the most important new documents and conveys my thoughts about their legal and policy significance.

¹Of the 81 documents being transmitted with this letter, it appears that fewer than 10 have been previously disclosed to the public.

RJR's Public Statements on Youth Smoking

Senior RJR executives have testified before the Commerce Committee that RJR does not market cigarettes to children. On April 14, 1994, the chairman and chief executive officer of R.J. Reynolds Tobacco Co., James W. Johnston, testified that "we do not market to children and will not." He also testified that "[w]e do not survey anyone under the age of 18." More than a decade earlier, on March 12, 1982, the then chairman and chief executive officer of R.J. Reynolds Tobacco Co., Edward A. Horrigan, testified that "our advertising is not designed to attract new smokers of any age and is not having that effect."

In 1995, a few internal RJR documents began to surface that suggested that RJR has in fact targeted children. News reports disclosed that an RJR researcher named Claude Teague had written a 1973 memorandum that stated that "if our Company is to survive and prosper, over the long-term we must get our share of the youth market." RJR, however, continued to deny that these documents reflected corporate policy. In their 1996 submission to the Food and Drug Administration, RJR stated that the Teague memorandum was not evidence of RJR corporate policy because Teague "was never an officer of RJRT," "never had responsibility for marketing," and was expressing only "his personal thought processes -- not institutional positions of RJRT." RJR reiterated to FDA what the company had told our Committee: that they "never 'targeted' underage individuals."

Summary of the Mangini Documents

The Mangini documents portray a vastly different picture of RJR's activities than conveyed in the company's testimony to this Committee and its comments to FDA. They show (1) that RJR has extensively surveyed teenage smoking behavior, (2) that RJR has designed and implemented marketing programs to increase its share of the youth market, and (3) that RJR executives at the most senior levels of the company -- including its board of directors -- had detailed knowledge of these activities.

The legal analysis prepared by the lawyers for the Mangini plaintiffs summarize each of the RJR documents being transmitted to you. Rather than repeat this detailed analysis, this letter will highlight a few of the many significant new documents obtained through the Mangini litigation.

1. Presentation from C.A. Tucker, Vice President of Marketing, to the Board of Directors of RJR Industries (Sept. 30, 1974) (Mangini exhibit 1)

This document contains an extensive discussion of the importance of the youth market and RJR's intentional efforts to increase its share of this underage market. Because the document is a presentation from RJR's most senior marketing executive to the board of directors of RJR

Industries, the parent corporation, it reveals that RJR's efforts to market to children were not the "personal thought processes" of rogue employees -- but rather deliberate corporate policy endorsed by the company's top officials.

Specifically, the 1974 board presentation:

- o States that "this young adult market, the 14-24 age group, ... represent[s] 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." (p. 1)
- o Describes how "[b]oth Philip Morris and Brown & Williamson ... have shown unusual strength among these younger smokers," which "suggests continued growth for Philip Morris and B&W as their smokers mature," while "[o]ur two major brands, Winston and Salem, show comparative weakness ... among these younger smokers," which "suggests slow market share erosion for us in the years to come unless the situation is corrected." The document specifically reports that "Winston is at 14% in the 14-24 age group versus Marlboro at 33%. Salem is at 9% versus Kool at 17%." (p. 2)
- o Reaches the conclusion that "our strategy becomes clear for our established brands: 1. Direct advertising appeal to the younger smokers." (p. 3)

The board presentation also describes steps that RJR has already taken to market its product to "young adults," which are defined on the first page of the document as "the 14-24 age group." For example, the document states:

- o "For Salem, significant improvements have been made in the advertising, designed for more young adult appeal under its greenery/refreshment theme. These include: More true-to-life young adult situations. More dominant male visuals. A greater spirit of fun." (pp. 3-4)
- o "We have also increased our media efforts toward young adults for our brands. These include: Increased advertising insertions in traditional young adult magazines like Sports Illustrated, Playboy and Ms. Have added new young adult special interest magazines like Road and Track and Motorcycling. Expanded outdoor with selective locations for maximum young adult exposure -- e.g., posters in Greenwich Village and in areas with large college student populations." (p. 6)
- o "For Camel Filter, we ... will have pinpointed efforts against young adults through

its sponsorship of sports car racing and motorcycling.” (p. 7)

- o “Our special merchandising division is in its second year with its successful wholesale operation of premiums at beaches. ... We anticipate selling over a million items in 1975 -- a million ‘walking billboards’ for our brands.” (p. 10)

2. Memorandum from G.H. Long, Executive Vice President of Marketing, to E.A. Horrigan, Chairman of R.J. Reynolds Tobacco Co. (July 22, 1980) (Mangini exhibit 26)

This document confirms the essential point made in the 1974 board presentation -- namely, that increasing the company’s share of the underage market has been an important objective of RJR’s most senior management. The person who prepared the 1980 memorandum was RJR’s vice president of marketing, G.H. Long, who subsequently became the company’s chief executive officer. The recipient of the memorandum was the then chairman of R.J. Reynolds Tobacco Co., Edward A. Horrigan. The title of the memorandum is “Report on Teenage Smokers (14-17).”

Like the 1974 board presentation, the document describes how RJR was losing the youth market to Philip Morris. The memorandum states:

Last January, a report was issued ... that indicated that Philip Morris had a total share of 59 among 14-17 year old smokers, and specifically, Marlboro had a 52 share. This latest report indicates that Philip Morris’ corporate share has increased by about 4 points. ... Importantly, the report further 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.”

And like the 1974 board presentation, the memorandum demonstrates that RJR was taking steps to increase the number of teenagers smoking its brands. G.H. Long, the company’s senior marketing executive, expresses the view that “[h]opefully, our various planned activities that will be implemented this fall will aid in some way in reducing or correcting these trends.”

3. “Smokers Screening Profile (14-17), Conducted for R.J. Reynolds Tobacco Co. by National Family Opinion, Inc. (April 1976) (Mangini exhibit 14)

The Mangini documents demonstrate that RJR has been secretly conducting extensive surveys of the smoking habits of teenagers for decades. The “Smokers Screening Profile (14-17)” from April 1976 is a representative example of these surveys. In this survey, the contractor hired by RJR, National Family Opinion, analyzed the smoking habits of over 11,000 teenagers aged 14-17.

The survey collected comprehensive data on the smoking habits and demographics of these teenagers, including data on their brand of cigarette; cigarette consumption; cigarette

purchasing habits; age; sex; religion; household income; education and occupation of parents; and residence. This raw data was then compiled into hundreds of pages of detailed tables on youth smoking habits. One typical table (Table 20) shows (1) the percentage of Newport and Kool smokers who were male or female teenagers; (2) the subbrands these teenagers smoked (such as Newport Soft or Newport King Box); (3) whether these teen smokers were light, average, or heavy smokers; (4) whether Newport and Kool were smoked more heavily by young teenagers (ages 14-15) or older teenagers (ages 16-17); (5) the occupation, education level, and income level of the parents of the teen smokers; (6) the religion of the teen smokers; and (7) the city size and census region of the teen smokers.

The existence of detailed youth smoking surveys like the "Smokers Screening Profile (14-17)" underscores the importance of the youth market to RJR. It also raises serious questions about the veracity of RJR's 1994 testimony to our Committee and RJR's 1996 submission to FDA. For example, in the company's FDA comments, RJR stated:

As a matter of corporate policy, Reynolds conducts its brand market research only among those aged 21 or older -- and then only if they smoke. Reynolds has taken this conservative approach since 1992. Prior to 1992, at all relevant times, Reynolds' policy was to conduct brand market research on all lawful smokers aged 18 and older.

4. Memorandum on "Teenage Smokers (14-17) and New Adult Smokers and Quitters" (Feb. 1, 1980) (Mangini exhibit 17)

This 1980 document is representative of the types of documents prepared by RJR to summarize the youth smoking data collected for RJR by National Family Opinion. The document states that "[m]any adult smokers have already formed consistent smoking patterns by the time they enter the market at age 18" (p. 1). It then explains that "[t]o improve our ability to forecast future trends, this report examines the demographics and smoking behavior of 14-17 year old smokers" (p. 1). Like many other RJR documents, this document again finds that "RJR's share of teenager smokers has declined" while "[t]he share of teenagers ... who smoke[] P. Morris brands has increased" (p. 4).

5. Documents Relating Specifically to Camel Cigarettes

Many of the Mangini documents describe RJR's plans for marketing Camel cigarettes to underage smokers, including the development of the "Joe Camel" campaign. These documents include the following:

- o A 1973 RJR marketing document states that "[i]n view of the need to reverse the preference for Marlboros among younger smokers, ... [a] comic strip type copy might get a much higher readership among younger people than any other type of

copy. It would certainly seem worth testing a heavy dose of this type of copy in a test market to get a research reading on percentage of readership and copy recall.” (Mangini exhibit 8, p. 5)

- o A 1975 memorandum to C.A. Tucker, the vice president for marketing, states that “[t]o ensure increased and longer-term growth for Camel Filter, the brand must increase its share penetration among the 14-24 age group which have a new set of more liberal values and which represent tomorrow’s cigarette business.” (Mangini exhibit 13)
- o A 1990 document on “Camel Brand Promotion Opportunities” states that “[t]arget smokers are approaching adulthood. ... Their key interests include girls, cars, music, sports and dancing.” (Mangini exhibit 69)

In public statements, RJR has continually emphasized that peer pressure -- not advertising -- causes children to smoke. In the company’s 1982 testimony to the Committee, Edward Horrigan testified that “[p]eer pressure and not our advertising provides the impetus for smoking among young people.” Twelve years later, James Johnston made the same point, testifying that “the driving force in an underage person starting to smoke is peer pressure.” What the Mangini documents show, however, is that RJR deliberately tried to capitalize on peer pressures to increase teen smoking of Camel cigarettes. For example, a 1986 memorandum on the new Joe Camel advertising campaign states:

Camel advertising will be directed toward using peer acceptance/influence to provide the motivation for target smokers to select Camel. Specifically, advertising will be developed with the objective of convincing target smokers that by selecting Camel as their usual brand they will project an image that will enhance their acceptance among their peers. (Mangini exhibit 58, p. 1)

6. Documents Relating to “Young Adult Smokers”

The Mangini documents contain numerous references to targeting “young adult smokers.” RJR has publicly asserted that these “young adult smokers” are smokers 18 years old and older. As the Mangini lawyers demonstrate in their comprehensive analysis, however, the term “young adult smokers” became a company code-word for teen smokers. For example, one 1987 document discussing “Project LF,” the code-name for Camel Wides, states “Project LF is a wider circumference non-menthol cigarette targeted at younger adult male smoker (primarily 13-24 year old male Marlboro smokers)” (Mangini exhibit 41).

The Legal and Policy Significance of the Mangini Documents

The Mangini documents have obvious legal significance. In the recent criminal information against DNA Plant Technology, Justice Department lawyers stated that they had found evidence that a tobacco company "knowingly concealed" material information from FDA. The Mangini documents raise similar issues. They reveal corporate activities that appear to conflict directly with the testimony of RJR executives before this Committee and the company's comments to FDA. Whether the executives committed perjury or otherwise made illegal false statements to this Committee or FDA is a matter that the Justice Department should thoroughly investigate.

The Mangini documents also have major policy significance. The documents reveal that tobacco companies have an enormous financial stake in attracting teen smokers. As the 1974 board presentation recognized, "the 14-24 age group ... represent[s] tomorrow's cigarette business." Congress's efforts to restrict youth smoking will be doomed to failure unless we grasp this point and create a legal framework that removes the companies' incentives to exploit our children.

It will not be enough for Congress to pass laws that restrict tobacco advertising and marketing. As they have in the past, the companies will find ways to circumvent these laws. Indeed, one of the Mangini documents, an RJR report prepared in the early 1990s entitled "Operating in a Restricted Environment," presents "sales/marketing recommendations" for minimizing the impact of advertising bans. It recommends that RJR "[p]lace even greater priority on direct marketing," "more thoroughly develop" the "retail environment," and preserve the gains from its Camel campaign by "transfer[ing] Old Joe's irreverent, fun loving personality to other creative properties which do not rely on models or cartoon depictions." Indeed, the analysis sees benefits for RJR in advertising restrictions, stating "[w]hile we would stand to lose minor brand styles, with five of the top ten brands currently, RJR could benefit from this type of industry profile change on a relative basis" (Mangini exhibit 61, pp. 1, 4, 5, 9).

The lesson in the Mangini documents is that Congress must enact a new approach. We must set targets for reducing youth smoking rates and hold the tobacco companies individually accountable for achieving these reductions. RJR needs to know that if it does not reduce the number of children smoking its products, it will face additional restrictions, such as significant price increases, that will place the company at a competitive disadvantage. Only this kind of approach will fundamentally change the tobacco company's economic incentives.

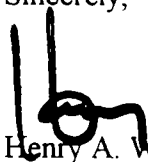
The Mangini documents thus underscore one of the central policy recommendations of the Koop-Kessler Committee and, more recently, the Institute of Medicine: the need for company-specific performance standards for reducing youth smoking. As the IOM recognized earlier this month in its most recent tobacco report, "[i]ncentives to reduce youth tobacco use will be most

The Honorable Tom Bliley
January 14, 1998
Page 8

powerful if penalties for failure to achieve goals fall hardest on those firms making brands attractive to underage users."

Mr. Chairman, I know you sincerely want to reduce the incidence of youth tobacco use in the United States. The documents that I am transmitting to you today emphasize the importance of this goal and provide insights on how we can best achieve it. I value your leadership on this issue and look forward to working with you to achieve our common goal this year.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Waxman', with a stylized flourish at the end.

Henry A. Waxman
Member of Congress

cc: Members of the Committee on Commerce

market
side

Food answer on
mids



① influence any pass



Legislation

Waxman: Absolutely

Proel

McLaren: Pious response

Dickens / Sen & Hill

① Rather have a fight

② Low

cat of business
wicks to culture

Spain GNP

Smuggling as
Cap

immunity

States ~~was~~ us feels

political fight

option

for info - document

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
445 Minnesota St., #1400
St. Paul, MN 55101-2131

PHONE: (612) 215-1533
FAX: (612) 297-4036
TTY: (612) 297-7206

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>

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.

User name: guest

Password: 31n35r

FOR TRANSMISSION PROBLEMS, PLEASE CALL FAX OPERATOR: Deanne at (612) 297-3578
OR RECEPTIONIST AT: (612) 298-7575

The information contained in this Fax message is attorney-client or work product **PRIVILEGED** and/or **CONFIDENTIAL INFORMATION**. It is intended only for the use of the individual or entity named below. If the reader of this Fax is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. Furthermore, you should (a) refrain from examining the materials, (b) immediately notify the sending person of the mistake, and (c) abide by the sending person's instructions regarding the return of the document(s).

AG:113738 v1



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

LAW ENFORCEMENT SECTION
SUITE 1400
445 MINNESOTA STREET
ST. PAUL, MN 55101-2131
TELEPHONE: (612) 296-7575

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*

Facsimile: (612) 297-4348 • TTY: (612) 297-7206 • Toll Free Lines: (800) 657-3787 (Voice), (800) 366-4812 (TTY)

An Equal Opportunity Employer Who Values Diversity

♻️ Printed on 50% recycled paper (15% post consumer content)



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

Compiled by the Minnesota Attorney General's Office

"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

to 5-110
documents

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

Hubert H. Humphrey III
Attorney General

TRANSMISSION BY FACSIMILE

Suite 1400 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Tele No.: (612) 296-7575

DATE: February 13, 1998

TO: Officials Concerned about Federal Tobacco Policy

FROM: Luanne Nyberg

TELEPHONE NO.: (612) 215-1533

FAX NO.: (612) 297-4036

COMMENTS:

The motion the tobacco companies filed with the Minnesota Court to make good on their promise to come clean with the truth falls far short of doing that - they have excluded the millions of documents in the Depository in England, the key indices that provide a road map to the documents in Minnesota, and the "Privilege" documents already awarded to us or recommended to be turned over by the Special Master.

Attached is a letter from Attorney General Humphrey to Representative Bliley encouraging Congress to demand full disclosure of tobacco industry documents before it considers any liability protection for this industry and explaining the limitations of the industry's offer.

The Minnesota judge has already released two batches of inappropriately privileged documents to the Minnesota trial team. One of them is attached. The St. Paul Pioneer Press said about them:

"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....."

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."

FOR TRANSMISSION PROBLEMS, PLEASE CALL Brenda at 296-1799.



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1002
TELEPHONE: (612) 296-6196

February 13, 1998

Representative Thomas J. Bliley, Jr.
Chair, House Committee on Commerce
2409 Rayburn House Office Building
Washington, DC 20515

VIA FACSIMILE 202-225-0011

Re: Tobacco Industry Documents

Dear Representative Bliley:

As you will recall, nearly two weeks ago, the tobacco industry chief executive officers tried to convince the House Commerce Committee that they were coming clean with the truth by offering to make certain documents from the Minnesota litigation available to the public. Last Thursday, Philip Morris's attorney made the same commitment to Chairman Hyde's Judiciary Committee, and, each time, we have challenged them to turn that talk into meaningful action.

On Sunday, February 8, the tobacco companies did file a motion with Ramsey County District Court Judge Kenneth Fitzpatrick, requesting that the non-privileged, non-trade secret documents in the Minnesota document depository be made open to the public. While the industry's flip-flop is a victory in our efforts to expose the truth about this industry's fraud and deception, it comes only after we have started exposing those documents at trial. Far from a well-intended effort to change their corporate conduct, the change in position was a public relations ploy to deceive congress and the American public into believing that big tobacco was "coming clean with the truth". I write to ensure that you and your colleagues understand the limited nature of the industry's action and the three critical steps to be accomplished if we are to uncover the **whole** truth for the American public.

First, they must agree to release the millions of pages of documents in the Guildford, England document depository. Given this industry's past efforts to move damaging information overseas, and the need to get to the truth about the entire tobacco industry, that information is critical.

Second, to make this latest release of information genuinely useful to Congress and to the American public, the tobacco companies must also agree to release all of their database indices, including both the 4A and 4B indices, the briefs, pleadings, recitals, and other material that has previously been filed under seal. These are the materials that put these documents in context, and, provide the only road map to understand what is and is not important in this mountain of

Facsimile: (612) 297-4193 • TDD: (612) 297-7206 • Toll Free Line: (800) 657-3787 (TDD or voice)

An Equal Opportunity Employer Who Values Diversity

Printed on 50% recycled paper (15% post consumer content)



Representative Thomas J. Bliley, Jr.
February 13, 1998
Page 2

paper. We have responded to the industry's motion by filing a letter of our own, requesting simply that the protective order be lifted and that everything that has been disclosed or submitted under the confidentiality order, except category 2 formula documents, now be made available to the public. I believe Congress should insist on no less.

Third, the tobacco industry has **not** agreed to release the rest of the so-called "privilege log" documents, or, for that matter, the "privilege logs" themselves, the summaries the court has ordered the industry to prepare for each document to which it asserts a privilege. These documents include the most sensitive materials on the industry's internal scientific research, on marketing to kids, on nicotine and nicotine manipulation, and on the industry's own plans to hide damaging information. On Tuesday, February 9, the special master in our lawsuit issued his report, under seal, recommending that all "privilege log" documents in categories 1 (other litigation), 3 (science), 4b (special projects), and 5 (public statements) be turned over to the plaintiffs. That set of recommendations will now be reviewed by the court, but, as with the Liggett "privilege log" documents before, we believe Congress should insist for itself, through its subpoena power if necessary, on full disclosure of those documents (including **immediate** production of February 9th's special master report) before it considers any liability protection for this industry.

I want to thank you again for your public commitment to get the truth out to the American people about the tobacco industry's conduct, and I look forward to continuing to work with you.

Best regards,

HUBERT H. HUMPHREY III
Attorney General

tabacco - document

Hot Quotes from Minnesota's Tobacco Trial

Quote Sheet #1 January 28-February 5

"I was overwhelmed about the amount of information there was that the rest of us didn't know....The documents I reviewed had 'secret' stamped all over them."

- *Dr. Richard Hurt, Director of the Mayo Clinic's Nicotine Dependence Center*

"If the defendants take the position that their private research is not relevant to their public positions, then you will find me instructing them to the contrary."

- *The Honorable Kenneth Fitzpatrick, Judge of Ramsey County District Court*

Tobacco Companies Know Tobacco is a Drug

"The defendants know that nicotine is a drug. They know the lowest threshold for it to be pharmacologically active, above which they had to operate to be successful. They knew if they removed nicotine, they'd have no business."

- *Stanford University Biochemical Engineering Professor Channing Robertson*

"BAT should learn to look at itself as a drug company rather than as a tobacco company."

- *April 1980 memo by a team of BAT scientists*

"Do we really want to tout cigarette smoke as a drug? It is, of course."

- *February 1969 memo from a Philip Morris researcher*

"If the use of such drugs [as marijuana] was legalized, one avenue for exploitation would be the augmentation of cigarettes with near subliminal levels of the drug."

- *March 1976 British-American Tobacco Co. report entitled "The Product in the Early 1980s"*

"[C]lassification of tobacco as a drug should be avoided at all costs."

- *1974 British American Tobacco memo*

Tobacco Companies Understand that Nicotine is Addictive

"The tendency is to blame the smoker. But the smoker isn't the problem. The drug is the problem."

- *Dr. Richard Hurt, Director of the Mayo Clinic's Nicotine Dependence Center*

"We are searching explicitly for a socially acceptable addictive product...The essential constituent is most likely to be nicotine or a direct substitute for it."

- *August 1979 memo by BAT on the search for a potential replacement for cigarettes*

"Nicotine is the addicting agent in cigarettes."

- 1982 B&W Tobacco Company document on getting smokers to switch brands

"Taken together, the evidence suggests that self-administration of nicotine may be the primary motivation for smoking."

-1984 BAT document describing nicotine's addictive qualities in scientific detail

"Very few customers are aware of the effects of nicotine, i.e. its addictive nature and that nicotine is a poison."

-1978 B&W document

Tobacco Companies Recognize the Power of Nicotine

"They said in their internal documents that without nicotine, there would be no cigarette industry"

- Stanford University Biochemical Engineering Professor Channing Robertson

"We now possess a knowledge of the effects of nicotine far more extensive than exists in published scientific literature."

-1962 Private and Confidential BAT memo

"Nicotine is by far the most characteristic single constituent in tobacco, and the known physiological effects are positively correlated with smoker response."

-1963 British American Tobacco document

"We are in a nicotine rather than a tobacco industry."

- British American Tobacco Co. senior executive, as quoted in the minutes from a 1971 meeting of executives.

"The cigarette should not be construed as a product but a package. The product is nicotine. Think of a puff of smoke as the vehicle for nicotine."

- William L. Dunn Jr., Philip Morris researcher, after taking part in a 1972 Caribbean meeting held by the Council for Tobacco Research

"The cigarette was viewed as an engineered device for the specific purpose of delivering nicotine into the human body."

- Stanford University Biochemical Engineering Professor Channing Robertson

Tobacco Companies Manipulate Nicotine

"I had not even dreamed there was this much work done over the years, especially with regard to pH (acidity/alkalinity) and nicotine manipulation."

- Dr. Richard Hurt, Director of the Mayo Clinic's Nicotine Dependence Center

"Irrespective of the ethics involved, we should develop alternative designs (that do not invite obvious criticism) which will allow the smoker to obtain significant enhanced deliveries [of nicotine] should he so wish."

- 1984 BATCo memo

"It may well be to remind you, however, that we have a research program in progress to obtain, by genetic means, any level of nicotine."

- 1963 memo by B&W researcher, R.B. Griffith

"The secret of Marlboro is ammonia."

- Scientist in 1989 Brown & Williamson Tobacco report

"RJR introduced ammoniated sheet (processed tobacco) material in the Camel filter product in 1974. Better market performance was indicated in subsequent years."

- undated R.J. Reynolds report

"[A]ny desired additional nicotine 'kick' could be easily obtained through pH regulation."

- 1973 R.J. Reynolds memo titled "Cigarette concept to assure RJR a larger segment of the youth market"

Liggett Group Inc. document indicates they were researching the effects of adjusting pH levels with the, "eventual goal of lowering the total amount of nicotine while increasing the effect of the nicotine."

- 1972 Liggett Document

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

- Stanford University Biochemical Engineering Professor Channing Robertson

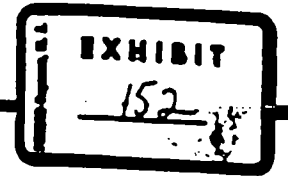
Tobacco Companies Know Nicotine Addiction Creates Profits

"Effective control of nicotine in our products should equate to a significant product performance and cost advantage."

- May 1991 R.J. Reynolds report

Quoting Oscar Wilde, 'A cigarette is the perfect type of pleasure. It is exquisite, and it leaves one unsatisfied,' BAT employee Colin Greig goes on to say, "Let us provide the exquisiteness, and hope that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to the bank."

- undated BAT marketing strategies document



January 23, 1975

RJR

~~SECRET~~Mr. C. A. Tucker:No. 204 By Q711/2

Our attached recommendation to expand nationally the successfully tested "Meet the Turk" ad campaign and new Marlboro-type blend is another step to meet our marketing objective: To increase our young adult franchise. To ensure increased and longer-term growth for CAMEL FILTER, the brand must increase its share penetration among the 14-24 age group which have a new set of more liberal values and which represent tomorrow's cigarette business.

Presently, almost two-thirds of the CAMEL FILTER business is among smokers over 35 years of age, more than twice that for Marlboro. While "Meet the Turk" is designed to shift the brand's age profile to the younger age group, this won't come over night. Patience, persistence, and consistency will be needed. There may even be temporarily a softness in CAMEL FILTER's growth rate as some of the older, more conservative CAMEL FILTER smokers are turned off by the campaign and younger, more liberal smokers begin to come into the brand's franchise. Test market results suggest, though, that this risk is small.

The current media spending level will be maintained since test market shipments indicate no significant short-term volume gains from increased spending. Other competitive brands, such as VANTAGE, Newport, and Virginia Slims with sharply directed advertising have demonstrated significant growth rates attainable with CAMEL FILTER's media spending level. We would prefer, as we did for VANTAGE, to demonstrate an increased growth rate with this campaign/blend and then give consideration to asking for extra monies.

J. F. Hind
J. F. Hind

JFH:jh

Attachment

SC577 5557

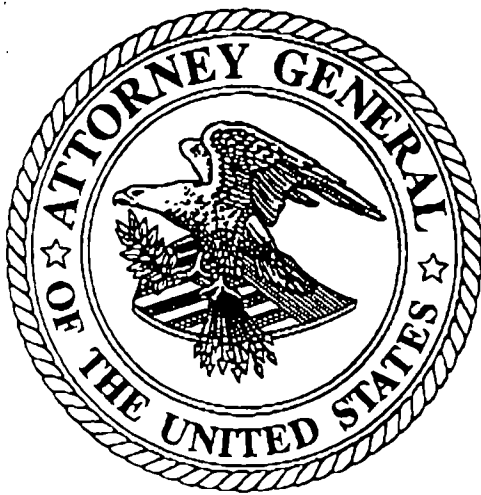
HJM 063440

REI TJ -

These are the
numbers that look
new to AS.
Tom
MAY

While some of the never-released numbers are listed below, we are still following up to obtain a complete list of new numbers. Some of the numbers contained in the attached accomplishment document which have never been publicly released:

1. Welfare-to-Work Hiring in Government Agencies, updated as of November 22, 1997.
New total: 2229
2. Youth Crime Gun Interdiction Numbers, updated since the Administration's last release in July 1997. **New number: 93,477 crime guns have been traced by ATF between July 1996 and November 1997.**
3. Number of Federal Firearms Licensees. **As of December 10, 1997, the total number of federal firearms licensees (FFLs) is 106,997, down from 279,839 in April 1994, and the total number of FFL dealers is 88,590 down from 252,799.**
4. The amount of debt that has been collected under the tax refund offset program. **The Tax Refund Offset program has collected \$1.2 billion in delinquent child support debt this year.**
5. Kennedy-Kassebaum numbers. Note: The Department of Labor emphasized that these numbers are projections not actual figures.
 - ▶ Each year about 3.6 million workers with prior coverage begin new jobs and enroll in plans that impose pre-existing exclusion periods. Of these about 106,000 workers or their dependents have pre-existing conditions, which, absent HIPAA, would be excluded from coverage during the applicable exclusion periods. Under HIPAA. These exclusion periods must be reduced or waived entirely for the majority of these workers who have at least 12 months of prior coverage. Source: Census Bureau Survey of Income Participation; National Health Interview Survey DataBase.
 - ▶ Because of HIPAA's staggered effective dates, which are tied to the beginning of plans' fiscal years and to the expiration of collective bargaining agreements, the number of workers helped by the HIPAA will not reach this level (106,000) until the year 2000. HIPAA applied to only a minority of 1997 job changes. By year end 1997, about 188,000 workers with prior coverage took new jobs and enrolled in HIPAA-covered plans with pre-existing condition exclusion provisions; 6,000 of these workers or their dependents suffered from pre-existing conditions. Source: Census Bureau Survey of Income Participation; National Health Interview Survey DataBase.



OFFICE OF THE ATTORNEY GENERAL

for 5000 documents
- ELL

TO

FAX Number 456 - 7431

Name: MARY SMITH

Telephone Number: _____

Organization: _____

Building, Room Number, etc. _____

Number of Pages Transmitted (including cover sheet)

19

FROM

FAX Number: _____

Name: TOM PERRELLI

Telephone Number: 514 - 2267

Date: 2/24/98

Building, Room Number, etc. MAIN JUSTICE - ROOM

COMMENTS

(NOTE: If the receiver did not receive the correct number of pages, please call the transmitter and request retransmission)

ANALYSIS OF ISSUES RELATED TO PRIVILEGED TOBACCO COMPANY DOCUMENTS

This memorandum analyzes Appendix VIII to the Global Tobacco Settlement ("GTS") and the legislation that it contemplates which deal with access to assertedly privileged tobacco industry documents concerning smoking and health-related issues. The alternative proposed methods of handling privilege claims by the tobacco industry, including changes in the standards presently applied under common law, all raise significant constitutional and policy concerns. These concerns counsel against significant abrogations of attorney-client privileges, such as those proposed in Senator Conrad's Healthy Kids Act bill.

I. Background

On or before February 23, 1998, the tobacco manufacturers are expected to announce that they will post on the Internet the Minnesota select documents, some 32,000, which the Minnesota Court found were not protected by the attorney-client privilege. Minnesota's Attorney General, Skip Humphrey, urged the manufacturers to release all of the documents, including some 1,000,000 pages for which attorney-client privilege has been claimed. This posting is in response to the manufacturers' assurances to Congressman Bliley that they would expeditiously disclose all of the documents necessary for an evaluation of their conduct in connection with the GTS. In addition, the GTS contemplates that the manufacturers would, "upon finalizing a resolution of these litigations with the Attorneys General without waiting for Congress to embody these requirement(s) in the proposed legislation * * * [c]ommence a good-faith, de novo, document-by-document review of all documents previously withheld from production on grounds of privilege."

There thus appears to be agreement that there is a need for the tobacco companies to produce documents generally. There also appears to be consensus on the following: (1) the tobacco industry kept important and incriminating documents from the public, litigants and the government by abusing their attorney-client and attorney work product privileges; (2) a national depository of the tobacco documents available to the public, litigants, and others should be established; (3) Congress, the Executive and the public need to see the essential tobacco documents before evaluating the comprehensive legislative solution; (4) the production and review of those documents must occur quickly; (5) a mechanism is needed to review tobacco company documents to ensure that privilege has not been improperly asserted; and (6) violence should not be done to the attorney-client relationship by unduly eroding attorney-client privileges.

II. The Privileges

Information or documents may be required to be produced through a court-issued subpoena or court order, and Congress, pursuant to its legislative function, may compel the production of information or documents through a legislative subpoena. Both a court order (or

subpoena) and a legislative subpoena for the production of information or documents can be opposed by the party to whom it is directed on the ground that a legal privilege protects against compulsory disclosure.

Under current law, in a federal question case in federal court, where federal law neither provides for, nor precludes the assertion of, a privilege against the disclosure of certain documents or information, Federal Rule of Evidence 501 generally determines whether a privilege exists. Rule 501 provides that, "[e]xcept as otherwise required by [federal law] . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In diversity cases in federal court, the state law of privilege generally governs.

The attorney-client privilege is one of the privileges recognized under current federal law that tobacco companies have often asserted to prevent the disclosure of information or documents. Under current federal law, the attorney-client privilege protects communications made in confidence by a client to an attorney relating to matters as to which the client is seeking legal advice. See 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). This privilege is intended to encourage full disclosure by a client to an attorney, thereby promoting adequate representation, and to serve the "broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It contains, however, an important exception for a communication that "was made to enable anyone to commit a crime or fraud." United States v. Zolin, 491 U.S. 554, 566 (1989) (quoting 21 C. Wright and K. Gordon, Federal Practice and Procedure: Evidence § 5055, p.276 (1977) (footnote omitted)).¹

III. Legislative Modification or Revocation of Privilege

A) Congressional Authority

Absent a federal constitutional limitation, Congress is free to alter the scope of existing privileges or to abolish them altogether. It is also free to define the scope of future privileges. In addition to the constitutional concerns that the proposed legislative modification of the attorney-client privilege would raise, such modification would also raise serious policy concerns. Any attempt to abrogate (or dramatically curtail) the tobacco manufacturers' rights to confidentiality under the attorney-client privilege must also be evaluated in light of its adverse impact on the recognized benefits of such privileges in other areas.

¹ A related privilege that tobacco companies have relied upon is the work product privilege. Broadly speaking, work product privilege is designed to protect the mental impressions and analysis of lawyers in the litigation process. See Federal Rule Civil Procedure 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).

B) Constitutional Concerns

The proposed legislative modification to the attorney-client privilege that you have asked us to review raises novel constitutional questions. There is little precedent to guide the analysis of these questions, and the Department is continuing to review them. The discussion that follows is necessarily preliminary and is intended simply to identify potential areas of constitutional concern.

The proposed legislation does not merely purport to clarify the future scope of the existing attorney-client privilege that would be recognized under federal law. It instead appears to permit the federal government to compel the production of information and documents that would have been protected against such production by the attorney-client privilege at the time that the information or documents were provided to an attorney. Individuals who made statements (or provided documents) to their lawyers, on the correct assumption that then-prevailing federal attorney-client privilege precluded the compelled disclosure of such communications at that time, would suddenly find themselves unable to rely upon that privilege to resist a future court order or subpoena compelling the production of that same information.

We are unaware of any case law that has addressed the constitutionality of a comparable retrospective restriction of the attorney-client privilege, nor are we aware from our research to this point of any prior occasion on which a legislature has attempted to retrospectively restrict the scope of that privilege. We are concerned, however, from our preliminary research into this novel question that the retrospective application of such a legislative modification of the attorney-client privilege, which has been so deeply rooted in the common law and on which persons may have reasonably relied in making their communications, would raise significant constitutional concerns.

As the Supreme Court has observed of retrospective legislation generally, "[t]he Due Process Clause * * * protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994). Although the Supreme Court declared 13 years ago that retroactive legislation will meet the test of due process if it is "supported by a legitimate legislative purpose furthered by rational means," Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984), it has more recently admonished that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf, 511 U.S. at 265 (footnote omitted). It has also expressed concern that Congress' "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Id., at 266. That description could fit the tobacco companies. While concerns about retroactivity usually focus on statutes affecting substantive rights, the Supreme Court has warned against the suggestion "that concerns about retroactivity have no application to procedural rules." Id., at 275 n. 29.

The future effect of the proposed legislative modification of the attorney-client privilege also may give rise to constitutional concerns. While there are many cases that state that the attorney-client privilege is not rooted in the constitution, and thus, implicitly, that Congress may prospectively alter its scope, such statements invariably appear in cases in which litigants have sought to extend the core of the attorney-client privilege on the ground that the constitution compels its extension. Here, by contrast, the contemplated exception for health and safety would appear to be unprecedented in its breadth. Indeed, the contemplated exception would arguably make the vast majority of future communications between tobacco companies and their lawyers subject to disclosure, as a large number of such communications could be encompassed by the "health and safety" standard. The exception therefore appears to raise the vexing questions of (1) whether there is a core of the attorney-client privilege, in both civil and criminal litigation, that is constitutionally mandated (whether pursuant to the Due Process Clause, the First Amendment, or the right to privacy) and (2) assuming that there is such a constitutionally mandatory core of the privilege, whether a health and safety exception could be a permissible grounds for limiting the privilege's application.²

C) Policy Concerns

Aside from constitutional concerns, we believe as a policy matter that abrogating privileges after the fact is unsound. Even if Congress constitutionally could take such action, the chilling effect on candid communications in the attorney-client and other privileged communication contexts, *e.g.* psychotherapist/patient, would be enormous. No one could be assured that what they believed was a confidential communication at the time could not be changed by Congress (or a state legislature) at a later point in time. We do not believe it would be sound to embark on a path of this kind, even if provisions could be crafted that would pass constitutional muster.

Senator Conrad's Healthy Kids Act bill would, however, embark on a path of privilege abrogation. Section 578(a)(1) appears to require the tobacco companies to produce to the Secretary of Health and Human Services all documents relating to the health effects of tobacco on humans, the sale or marketing of tobacco products, and research, including privileged documents. Although the Secretary must review the documents and generally cannot disclose those that are validly privileged, even validly privileged documents can be disclosed if "such information is necessary to promote the public health." This type of abrogation raises all the problems identified above, and goes well beyond simply ensuring that attorney-client privileges

² Finally, the proposed legislation may also raise constitutional concerns regarding the effect that it might have in application on the procedural protections that criminal defendants enjoy under the Fifth and Sixth Amendments. These constitutional concerns may in turn mean that the disclosures that the legislation would effect could impair the ability of prosecutors to bring cases against tobacco company officials. We are continuing to review these issues.

were not misused by the tobacco companies to prevent disclosure of non-privileged materials.³

Accordingly, we believe for policy reasons that no effort should be made retroactively to abrogate privileges. We believe the Conrad bill's proposal should not be adopted. We believe that a proposal along the lines of Appendix VIII of the GTS would be most appropriate. Such a plan would (1) provide a central, public tobacco document depository, (2) establish a process for raising and resolving the tobacco companies' privilege claims with respect to documents which would be placed in this depository, and (3) streamline judicial evaluation of such privilege claims and limit the tobacco companies' ability to invoke improperly the attorney-client privilege to shield disclosable documents.

IV. Plan for Resolving Privilege Issues

We continue to believe the following plan, which we proposed last September, is the best method for dealing with privilege issues:

- ▶ Create a central "Article II" Board, consisting of several members with expertise in tobacco and health, appointed by the Secretary of Health and Human Services, for a designated term;
- ▶ Require the tobacco companies to submit to the Board all documents in their custody or control that relate in any way to: (1) any health effects caused by or associated with the use of tobacco products; (2) the use of nicotine in tobacco products; or (3) the sale or marketing of tobacco products to children. These submissions must be made within 90 days of the creation of the Board. Thereafter, the tobacco companies will be under a continuing obligation to submit to the Board any newly-created documents that fall under any of the above three categories.
- ▶ Require the tobacco companies to include with their submission to the Board a separate submission of any material which they claim to be subject to the attorney-client, attorney work product, or trade-secret privileges. Those submissions of allegedly privileged material must be segregated, if feasible, into the following initial categories: attorney-client communications; opinion work product; ordinary or "fact" work product; trade-secret privilege. Where appropriate, the Board will consider whether these documents must be further divided into subcategories, such as those ordered by the court in Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct., 2d Dist., filed May 22, 1997), including, for example:

-all documents as to which a previous claim of privilege was denied.

³The Conrad bill also proposes disclosure of documents containing trade secrets. Such disclosure raises additional issues, including that the possibility that the United States would be required to compensate tobacco companies for their trade secrets. Those issues are discussed more fully in our separate memo on trade secrets.

-all documents that on their face show no evidence that they were written or received by an attorney.

-all scientific research or reports on smoking and health or information relating to smoking and health, and memoranda regarding the same.

► Require that, along with any submission of allegedly privileged documents, the tobacco companies provide a detailed privilege log which includes, for each document as to which a privilege is claimed: (a) a description of the document, including date, author, addressee, purpose of the document, and general subject matter, (b) an explanation as to why the document, or a portion of it, is privileged, and (c) a statement as to whether any previous claim of privilege was denied. This privilege log must be signed and sworn by a person with knowledge of the contents, pursuant to 28 U.S.C. 1746.

► Direct the Board to make available to the public, as soon as possible, all documents as to which the tobacco companies do not claim a privilege.

► Authorize the Board to review any privilege claims asserted by a tobacco company, and, applying federal privilege law, make a determination as to whether the material is subject to the claimed privilege. In conducting this review, the burden shall be on the tobacco company to prove that the document in question is subject to a recognized privilege, and that the privilege applies. Unless the Board determines that the document is not subject to a recognized privilege, it shall review the document in camera before deciding whether the privilege applies. The Board will notify the manufacturer in writing of its final determination, and will include in that notification a brief explanation of the basis for that determination.

► Authorize the tobacco companies to obtain judicial review of any final board determination in the District of Columbia Circuit. Under the APA, the Board's findings of fact would be reversed by the court only if clearly erroneous, and its legal conclusions would be reviewed de novo by the court. The tobacco company shall have the burden of proving that the document in question is subject to a recognized privilege, and that the privilege applies. Unless the court determines that the document is not subject to a recognized privilege, it shall review the document in camera before deciding whether the privilege applies. Judicial review must be sought within 60 days of the date of the Board's final determination.

► Authorize the Board to disclose an assertedly privileged documents to the public if, after a tobacco company has obtained judicial review and has pursued all appeal rights, the final judgment is that a document is not privileged. The tobacco company will be estopped from claiming that the document is privileged in any other proceeding. If a company fails to seek timely judicial review of a final determination by the Board that a document is not privileged, the Board will disclose the document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding.

► Prohibit the Board from disclosing to the public any document it determines is

privileged, and require the Board to return it to the submitting tobacco company. Current or future litigants who seek to challenge a company's assertion of that privilege in any legal proceeding will not be bound by the Board's final determination.

- Create civil penalties for any person who violates the requirements of this plan, in an amount not to exceed \$10,000 for each such violation, and not to exceed \$1,000,000 for all such violations adjudicated in the same proceeding. Civil penalties will be assessed by the Board, in an order made on the record after the opportunity for a hearing. A party against whom the Board assesses a civil penalty under this paragraph may seek judicial review of that penalty in federal district court.

- Nothing in this plan precludes the disclosure of relevant information, including information that is privileged or a trade secret, to other federal agencies, as permitted or required by any other provision of federal law.

This plan would avoid the constitutional concerns presented by the proposed legislation; no privilege is abrogated, and the tobacco companies are afforded a process to resolve all privilege claims in an orderly administrative fashion. The tobacco companies must, however, substantiate their privilege claims with a detailed privilege log and a sworn statement, and the plan mandates in camera review of all privileged documents. The plan would not intrude upon legitimate attorney-client relationships nor implicate the Fifth or Sixth Amendments. Finally, the plan would not work retroactive injustice by disturbing settled expectations. Instead, it would simply allow expeditious scrutiny of the companies' privilege claims under existing standards of law.

**POTENTIAL FEDERAL LIABILITY FOR TAKINGS
ARISING OUT OF THE DISCLOSURE OF TOBACCO
COMPANY DOCUMENTS CONTAINING TRADE SECRETS**

You have asked us to review draft legislative language pertaining to the disclosure of documents held by manufacturers of tobacco products. The provision at issue would require tobacco companies to submit a wide range of documents, including documents pertaining to health effects, nicotine levels, marketing, and research on safer tobacco products, to the Secretary of Health and Human Services for review and, in many instances, public disclosure. The Secretary generally would withhold from disclosure information that was "entitled to protection as a trade secret or under the attorney-client privilege." However, even information that was found to qualify for one of these protections still could be disclosed if the Secretary "determine[d] that the disclosure of such information [was] necessary to promote the public health."

This proposal raises two sets of constitutional concerns. First, disclosure of tobacco company trade secrets raises a risk of liability under the Just Compensation Clause of the Fifth Amendment. Second, abrogation of the attorney-client privilege could raise separate constitutional concerns. This memorandum addresses the just compensation issues.

I. Potential Takings Claims Based on Disclosures of Trade Secrets under the General Document Disclosure Scheme

According to the Supreme Court, property interests qualifying for protection under the Takings Clause are not created by the Constitution. Instead, they "are created and their dimensions . . . defined by existing rules and understandings that stem from an independent source such as state law." Ruckleshaus v. Monsanto, 467 U.S. 986, 1001 (1984) (internal quotations omitted); accord, e.g., Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1030 (1992). Trade secrets, according to Ruckleshaus, are among the "intangible property rights created by state law [that] are deserving of the protection of the Taking Clause." 467 U.S. at 1003. Accordingly, if the Secretary disclosed information that would have been protected from disclosure under otherwise applicable state trade secret law, tobacco companies could claim a federal infringement of their property rights within the scope of the Just Compensation Clause.

Public disclosure of tobacco company documents under the provision described above could give rise to takings claims against the United States under two circumstances.¹ First, the

¹ We note at the outset that the takings issues do not implicate the constitutionality of the proposed document disclosure provision. Successful takings claims by tobacco

Secretary's definition of a trade secret could be less protective than otherwise applicable state-law standards. The disclosure provision at issue here does not specify how the Secretary would determine which information is "entitled to protection as a trade secret." If the Secretary applied a uniform federal standard that was arguably less protective than some state-law standards, tobacco companies might claim that federal disclosure resulted in takings of their property.² A second class of potential takings claims could arise when the Secretary abrogated the federally recognized trade secret privilege -- however that privilege might be defined -- based on a finding that disclosure was "necessary to promote the public health." Tobacco companies might claim that any invocation of this authority must result, by definition, in the infringement of trade secret rights.³

companies would increase the cost of the proposed legislation to the United States. However, unless Congress unambiguously withdrew the Tucker Act remedy, there would be no taking without just compensation and, therefore, no basis for a judgment invalidating the document disclosure provision as violative of the Just Compensation Clause of the Fifth Amendment. See, e.g., Preseault v. United States, 494 U.S. 1, 12-17 (1988).

² Our takings analysis focuses on the proposed treatment of trade secrets, disregarding potential abrogations of attorney-client and work product privileges. Courts have described them as judge-made doctrines for the protection of the adjudicative process. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege is to "promote broader public interests in the observance of law and administration of justice"); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (similar account of the work product privilege). Although litigants have occasionally claimed property rights based on the work product privilege, see In re Berry, 521 F.2d 179, 183-84 (10th Cir. 1975) (rejecting contention that lawyer who had been forced to testify was deprived of property without due process); United States v. IBM, 62 F.R.D. 530, 534 n.5 (S.D.N.Y. 1974) (reciting law firm's assertion that the work product privilege defines a property right sufficient to support intervention), we are not aware of any decisions upholding such a claim.

³ Massachusetts and Minnesota recently enacted disclosure laws for tobacco companies doing business within those states. See Mass. Gen. L. ch. 94, § 307B (1996); 1997 Minn. Laws c. 227, § 5 (to be codified at Minn. Stat. § 461.17). Tobacco companies have sued to block implementation of these laws, arguing federal preemption under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, et seq. (1994), and a series of federal constitutional claims, including claims that disclosure would result in uncompensated takings. In the Massachusetts litigation, the tobacco companies' claim of federal preemption has been rejected. See Philip Morris Inc. v. Harshbarger, 122

A. Establishing a Uniform Federal Standard for Identifying Tobacco Company Information That Qualifies as a Trade Secret

Congress has instructed federal agencies, in a number of contexts, to withhold from disclosure undefined "trade secrets." In implementing such instructions, federal agencies have used uniform federal standards of what constitutes a trade secret, rather than attempting to identify and apply relevant state-law standards. See, e.g., 5 U.S.C. § 552(b)(4) (1994) (FOIA exemption authorizing agencies to withhold trade secrets);⁴ 18 U.S.C. § 1905 (criminal prohibition on unauthorized disclosure of trade secrets by federal employees). If, following this approach, the Secretary adopted a uniform federal standard of what constitutes a tobacco company trade secret -- and if that uniform standard were less protective than at least some otherwise applicable state-law standards -- tobacco companies could claim that disclosure under the provision at issue here must be treated as a compensable infringement of state-law property rights.

To establish that disclosure of information through application of a uniform federal standard for identifying tobacco company trade secrets resulted in a taking, a tobacco company

F.2d 58 (1st Cir. 1997) (rejecting companies' preemption argument on interlocutory appeal). However, the companies reportedly obtained a preliminary injunction against implementation of the Massachusetts statute on grounds that disclosure could effect a taking without just compensation. See V. 11, No. 16 Mealey's Litig. Rep.: Tobacco 15 (Dec. 18, 1997) (describing unpublished December 10, 1997, preliminary injunction entered by Judge O'Toole (D. Mass)). The Minnesota statute has also been challenged on similar grounds, although the district court apparently has not yet issued a ruling in that case. See Minnesota Sued by R.J. Reynolds Over New Tobacco Disclosure Legislation, V. 11, No. 4 Mealey's Litig. Rep.: Tobacco 15 (June 19, 1997) (describing tobacco companies' May 30, 1997, complaint in R.J. Reynolds Tobacco Co. v. Hubert H. Humphrey III, (D. Minn.)).

⁴ Companies that are required to submit information to federal regulators have occasionally argued that FOIA disclosure has taken or threatened to take their property by destroying the value of trade secrets. See, e.g., FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 972 n.12 (D.C. Cir. 1980) (rejecting as premature takings challenge to anticipated FOIA releases of information submitted to the Federal Trade Commission); Burnside-Ott Aviation Training Center, Inc. v. United States, 617 F. Supp. 279, 282 (S.D. Fla. 1985) (rejecting claim that FOIA disclosure effected a taking on grounds that released information contained no trade secrets). However, we are unaware of any decision upholding such a claim.

would have to make a two-part showing. The company would have to establish first that disclosure overrode otherwise state-law protections and second that the resulting infringement on its property rights rose to the level of a taking.

Tobacco companies may find it difficult to establish that decisions by the Secretary to disclose tobacco company documents had the effect of overriding state-law trade secret protections. It may be difficult for a company to establish that any particular body of state trade secret law would have been more protective than the federal trade secret standard. Moreover, because tobacco companies currently face numerous suits in different fora, they may be vulnerable to arguments that their documents were potentially subject to disclosure, even in the absence of the federal disclosure scheme, under more than one state-law trade secret regime and that the least protective body of potentially applicable state law ought to define the companies' property rights. In spite of these difficulties, it seems probable, given the value of the trade secrets at issue, that some companies would assert takings claims based on federally compelled disclosures.

Once a tobacco company established that the Secretary had ordered disclosure of a state-law trade secret, the company would still bear the burden of establishing that the federal devaluation of its property rights rose to the level of a taking for which the Fifth Amendment requires compensation. In Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984), Monsanto sued the Environmental Protection Agency (EPA) for the Agency's use and disclosure of health, safety, and environmental data that the company had submitted in order to register its products for sale within the United States as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Court found that Monsanto was entitled to compensation for EPA's use and disclosure of information that the company had submitted between 1972 to 1978, when FIFRA contained an explicit assurance that data registration data would be kept confidential. Id. at 1011. On the other hand, the Court rejected Monsanto's claim to compensation for EPA's use and disclosure of data that the company had submitted before 1972 and after 1978, periods during which FIFRA contained no such assurance.

The Court began its analysis in Ruckleshaus by recounting that regulatory taking claims call for an "ad hoc, factual inquiry" -- that no "set formula" can determine whether "justice and fairness" require compensation in a particular case. Id. at 1005, citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1977). The Court recited the three factors, which it first articulated in Penn Central, that it has frequently used to structure the ad hoc regulatory takings inquiry: "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." Id. (internal quotations omitted); accord, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-

43 (1993). While Ruckleshaus focused primarily on the third factor, the Court's observations respecting all three factors are relevant to this assessment of the tobacco companies' potential claims.

The Court rejected EPA's argument that the nature of the federal undertaking in FIFRA, creation of a comprehensive regulatory scheme for the registration of hazardous chemicals, allowed EPA to use and disclose registration data without compensating registrants for the infringement of any state-law rights to (or federal assurances of) confidentiality. In defending the uncompensated disclosure of data submitted during the 1972 through 1978 period, EPA argued that Congress, in amending FIFRA in 1978 to provide uniform use and disclosure rules for all registrant data, had effectively pre-empted contrary state trade secret law (as well as repudiating earlier federal assurances of confidential treatment) in the interest of establishing a comprehensive registration scheme. Id. at 1012. The Court ruled that the uncompensated use and disclosure of state-law trade secrets could not be justified on these grounds, stating that if Congress could "'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." Id. at 1012.

The Court also rejected EPA's argument that the loss to Monsanto, assessed in relation to the total value of its registration data, was too small to support a taking claim. The relevant property interest, as Ruckleshaus analyzed the issue, was not the data that Monsanto had submitted to EPA, which retained substantial value to the company despite its disclosure, but the "competitive advantage over others that Monsanto enjoy[ed] by virtue of its exclusive access to the data." 467 U.S. at 1012. Disclosure, by "destroy[ing] that competitive edge," was viewed as having eliminated essentially all of the value of the relevant property. Id. Ruckleshaus's narrow conception of the property right affected by compulsory trade secret disclosure appears to foreclose any argument by the United States, in defending against tobacco company claims for alleged takings of trade secrets, that the companies did not lose a high enough proportion of the initial value of their property to require the payment of compensation.

The third Penn Central factor, whether the disputed government action interfered with the property owner's reasonable investment-backed expectations, provided EPA with a partial defense to Monsanto's claim. The Court determined that an explicit statutory assurance of confidentiality, contained in FIFRA from 1972 to 1978, "formed the basis for a reasonable investment backed expectation" that its registration data would not be disclosed. Id. at 1011. However, with respect to data that Monsanto had submitted before 1972 and after 1978, periods when FIFRA contained no such assurance, the Court found that Monsanto had no reasonable expectation of confidentiality. These data, the Court found, were freely submitted to the government,

with no assurance of confidentiality, in return for the registration needed to sell the relevant pesticides within the United States. See id. at 1007.

The Court specifically rejected Monsanto's argument that FIFRA's imposition of a data-disclosure requirement, as a precondition to the registration of pesticides for sale within the United States, represented an unconstitutional condition on access to a valuable government benefit:

[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the economic benefit of registration can hardly be called a taking.

467 U.S. at 1007; see Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584-85 (1985). Accord Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission, 555 F.2d 82, 95 (3d Cir. 1977) ("voluntary submission of information by an applicant seeking the economic advantage of a license can hardly be a taking"); New Jersey Chamber of Commerce v. Hughey, 600 F. Supp. 606, 627-28 (D. N.J.) (similar analysis of public disclosure under state right-to-know legislation), aff'd in relevant part, 774 F.2d 587, 598 (3d Cir. 1985). Although Congress could not unilaterally redefine Monsanto's state-law rights to the confidentiality of its registration data, Congress could make Monsanto's assent to EPA use and disclosure of those data the price of a critical federal benefit -- legally required registration to sell pesticides within the domestic market. See 467 U.S. at 1007.⁵

In subsequent decisions, the Court has declined to extend Ruckleshaus' seemingly permissive approach to the conditioning of government benefits on property rights concessions. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court ruled that California could not, without compensation, require

⁵ FIFRA, as amended in 1978, did not allow pesticide registrants to avoid mandatory licensing of their data by cancelling their registration and exiting the American market. The use provision applied to "all data submitted after December 31, 1969, by an applicant or registrant." 7 U.S.C. § 136a(c)(D)(ii) (1982) (emphasis supplied). The public disclosure provision applied to "[a]ll information," with enumerated exceptions that are irrelevant here, "concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide." Id. § 136h(d)(1) (1982) (emphasis supplied). These provisions support the Court's focus on "the expectations of the submitter at the time the data were submitted." Ruckleshaus, 467 U.S. at 1013 n.17.

beachfront property owners, as a condition of a building permit, to cede a public easement across their beachfront. Id. at 831-42; accord Dolan v. City of Tigard, 512 U.S. 374, 389-95 (1994). Justice Scalia, writing for the Nollan majority, distinguished Ruckleshaus, finding that EPA's establishment of a condition on the receipt of a "valuable government benefit" -- pesticide registration -- could not be equated to California's imposition of a burden on an essential property right -- the "right to build on one's own property." 483 U.S. at 834 n.2.

Nollan and Dolan announced and elaborated a regulatory exaction doctrine, which limits governments' ability to require landowners, without compensation, to open their property to the public in order to obtain desired land-use permits. These decisions, taken together, hold that permit conditions of this nature may be validly imposed only if (1) denial of the permit would be a valid exercise of the police power and not a taking; and (2) the permitting authority can demonstrate a "'reasonable relationship' between the required dedication and the impact of the proposed development." Dolan, 512 U.S. at 386-90; see Nollan, 483 U.S. at 836. While the Court has not applied this doctrine outside the context of land use permitting, application of some type of reasonable relationship test to so-called "regulatory exactions" would not be a surprising development.⁶ Indeed, without some such limit, the power to regulate -- through imposition of a registration requirement, for example -- would carry with it the power to extract all manner of uncompensated property rights concessions outside the real property sphere.

Ruckleshaus suggests that Congress could make consent to trade secret disclosure a condition on receipt of a valuable federal benefit -- continued authorization to market tobacco products within the United States. Following the enactment of federal legislation making these terms clear, any tobacco company that continued to sell its products within the United States would be treated as having accepted the federal disclosure regime.⁷ A tobacco company that objected to disclosure as a

⁶ The lower courts have thus far declined to extend the Nollan and Dolan regulatory exaction doctrine to other contexts. See Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1996) (Nollan and Dolan "limited to the context of development exactions where there is a physical taking or its equivalent"); Harris v. City of Wichita, 862 F. Supp. 287, 293 (D. Kan. 1994) (Nollan and Dolan inapplicable where land use regulation does not require landowner to cede physical control over part of the property), aff'd, 74 F.3d 1249 (10th Cir. 1996) (table citing mem. op.).

⁷ The United States might also argue that tobacco companies accepted specific risks of compelled disclosure under federal law in place at the time when these trade secrets were created. However, it does not appear that any existing federal disclosure

01-24-95 11:11:33 FAX 4010

precondition to lawful sale, like a pesticide company that objected to data use and disclosure as a precondition to registration after 1978 (see 467 U.S. at 1007 n.11), could eschew the domestic market and elect to sell only overseas.⁸

B. Authorizing the Secretary to Disclose Information that Qualifies as a Trade Secret Based on a Finding that Disclosure is "Necessary to Promote the Public Health"

The draft disclosure provision could also lead to takings claims arising out of the Secretary's disclosure, on public health grounds, of information that meets the bill's trade secret definition.⁹ In this circumstance, the document disclosure

regime poses a serious threat of disclosure for most of the information that would be affected by the document disclosure provision at issue here. Tobacco company trade secrets are subject, at least in theory, to compelled disclosure in the discovery supervised by federal courts. However, the federal rules permit trade secret owners to apply for protective orders to block disclosure (see Fed. R. Civ. P. 26(c)(7)), and courts commonly grant such protection (see, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340, 363 & n.24 (1979) (although there is no absolute privilege against discovery of trade secrets, trial courts balance the values served by protection and disclosure by "enter[ing] a protective order restricting disclosure to counsel") (collecting cases)). Current federal law also requires tobacco companies to submit ingredient data to the Food and Drug Administration (FDA). See 15 U.S.C. § 1335a (1994). However, this information is submitted in a manner that prevents the FDA from determining which companies and products use particular ingredients (id.), and the FDA is generally required to treat these ingredients submissions "as trade secret and confidential information" (id. § 1335a(2)(A)).

⁸ Congress's assurance that tobacco companies' prior submissions of ingredients information to the FDA would be preserved from disclosure (see supra note 7) would not be affected by this bargain. This distinguishes the proposed tobacco document disclosure provision from the 1978 amendments to FIFRA. Those provisions, in their retrospective application, were specifically intended to abrogate the assurances of confidentiality that governed prior data submissions (see supra note 5).

⁹ Where applicable state law fails to provide explicit protection for information that the Secretary seeks to disclose on public health grounds, the conflict between compulsory disclosure and trade secrets may be narrower than the drafters of the disclosure provision expected. The Supreme Court has rejected, for example, claims that ingredient-disclosure requirements deprived manufacturing companies of property without due process. See Corn Products, Ref. Co. v. Eddy, 249 U.S. 427,

provision contemplates that trade secret classification would give way to the Secretary's judgment that disclosure was justified on public health grounds. To analyze the risk of takings liability for the exercise of this authority, it is necessary, again, to look to Ruckleshaus. We have already discussed one relevant line of defense that Ruckleshaus suggests: consent to the Secretary's authority to override trade secret protection (however defined) on public health grounds could be characterized as an additional condition on eligibility for a valuable government benefit -- continued authorization to market tobacco products within the United States. A tobacco company that objected to disclosure as a precondition to lawful sale under a new regulatory regime (again, like the pesticide companies discussed in Ruckleshaus) would be free to abandon the American market and sell only overseas.

Ruckleshaus also suggests a second, supplemental line of defense against takings claims arising out of the Secretary's abrogation of trade secret protections on public health grounds. Ruckleshaus upheld EPA's authority to use and disclose pesticide data submitted prior to 1972, even though neither FIFRA nor (according to the district court, at least), agency policy had provided for such use and disclosure. See Ruckleshaus, 467 U.S. at 1010-11 & n.14. The Court reasoned that pesticide companies, operating in an industry that had long been "the focus of great public concern and significant government regulation," necessarily accepted a substantial risk that the federal government "upon focusing on the issue, would find disclosure to be in the public interest." Id. at 1008-9. A similar rationale might apply to the disclosure of tobacco company trade secrets for public health purposes. Tobacco companies may argue that Congress cannot insist upon uncompensated disclosure of trade secrets as the price of continued access to the American market because the companies invested in the creation of trade secrets based on an expectation of continued domestic exploitation of this valuable property. But any tobacco company that invested in the creation of valuable trade secrets should have understood that the tobacco industry, like the pesticide industry, has long been "the focus of great public concern and significant government regulation" and that the federal government, "upon

431-32 (1919), (the "right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of the police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth"); National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937) (reaffirming Corn Products in decision upholding a state law requiring ingredients labelling on fertilizer bags). In this circumstance, background principles of fair disclosure, analogous to background nuisance principles in the real property context (see Lucas, 505 U.S. at 1029), may defeat takings claims arising out of federally mandated disclosure of certain reasonable ingredients information.

02-24-93 11:54 FAX 0010

focusing on the issue" would find that the public interest required disclosure of information relevant to the health effects of tobacco products. Id.; see also Concrete Pipe, 508 U.S. at 645 ("[t]hose who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

C. Potential Modifications of the Draft Disclosure Provision to Reduce the Risk of Federal Liability for Takings of Tobacco Company Trade Secrets

One approach to reducing the takings risk associated with establishment of the proposed tobacco document disclosure scheme focuses on achieving a close correspondence between the FIFRA data disclosure provisions at issue in Ruckleshaus and the tobacco document disclosure provisions in the legislation contemplated by the proposed resolution. Ruckleshaus, as we have seen, upheld the uncompensated use and disclosure of state-law trade secrets owned by a pesticide manufacturers where the pesticide manufacturer submitted those trade secrets to EPA without any assurance of confidentiality. Subsequently, in Nollan and Dolan the Court held that governments can be required to pay compensation when they use regulatory power to exact property rights concessions. While Nollan and Dolan involve exactions of easements across real property, their analysis suggests that Ruckleshaus may be insufficient to sustain particularly aggressive deployments of regulatory power to secure property rights concessions in other contexts as well. Accordingly, the odds of mounting a successful takings defense based on Ruckleshaus should improve as disparities narrow between the bargain that Congress offers the tobacco companies under the document disclosure provisions of the contemplated tobacco legislation and the bargain that Congress offered pesticide companies in FIFRA (in its pre-1972 and post-1978 forms).

Congress, following the FIFRA model, could ban sales of unregistered tobacco products and make formal consent to a federal document disclosure scheme a condition of registration. The practical effect of a product registration requirement might differ little from the effect of a bare requirement that tobacco companies submit to the new document disclosure regime. However, registration would give the companies clear and unequivocal notice of the terms of the market-access bargain. The proposed tobacco disclosure provision could also be made to conform more closely to the Ruckleshaus data disclosure requirements if tobacco companies were permitted to make independent choices concerning trade secrets pertaining to separate products. Under a product registration system, a tobacco company could decide that trade secrets peculiar to a particular product were more valuable than the ability to market that product in the United States. Compare Ruckleshaus, 467 U.S. 1007 n.11 (noting that "Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign markets"). Tobacco

legislation that permitted this choice, in addition to achieving a better fit with Ruckleshaus, would also fare better under the "reasonable relationship" test that Nollan and Dolan have established for exactions of easements.¹⁰

A second general approach to reducing the United States' potential exposure for disclosure of tobacco company trade secrets would involve broadening the scope of the federal trade secret privilege. For example, the disclosure provision of the tobacco bill could define trade secrets in a manner that conformed to the most protective state standards. Similarly, the Secretary's authority to disclose information despite its trade secret status could be defined narrowly. The bill might specify, for instance, that only research on health effects or improving the safety of tobacco products could qualify for disclosure. Any reduction in takings risk under this heading, of course, would come at the price of a reduction disclosure.

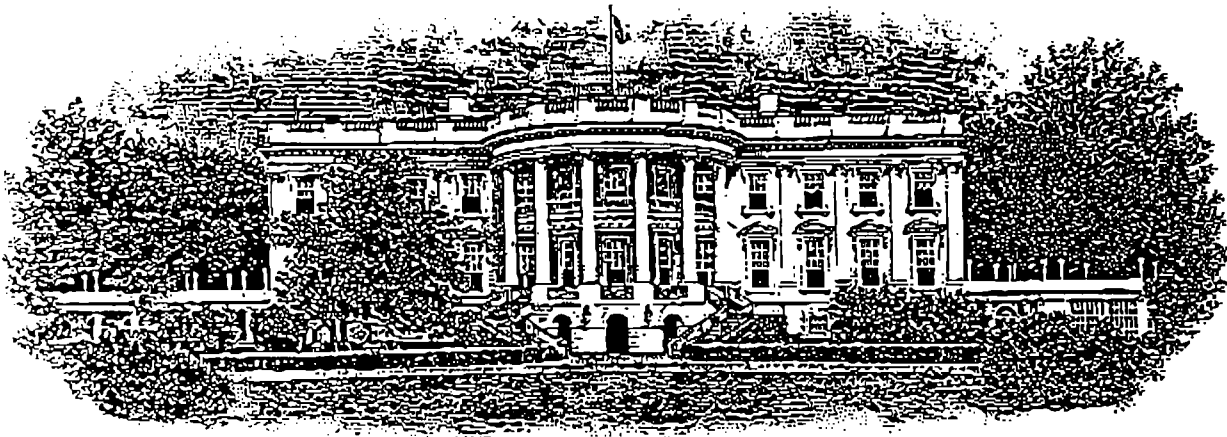
A third and final approach to reducing the United States' exposure to tobacco company takings claims would only address potential claims by settling tobacco companies. The document disclosure provision that we have seen appears to call for a uniform document disclosure regime applicable to settling and non-settling tobacco companies alike. The entire tobacco industry would be offered the same basic Ruckleshaus-inspired bargain: continued access to the American market in exchange for a partial waiver of trade secret rights. Under some of the legislative proposals that we have seen, however, tobacco companies that consented to advertising restrictions would obtain additional benefits under the statute, most notably immunity from punitive damages and multi-plaintiff lawsuits. If these additional benefits for settling parties were conditioned on a waiver of state-law trade secret protections, the United States would obtain a second line of defense against takings claims by those settling defendants.

¹⁰ Adapted to the current setting, the critical question posed by Nollan and Dolan would be whether the federally required dedication of tobacco company property -- that is, disclosure of certain state-law trade secrets -- is reasonably related to the federal government's legitimate interest in controlling the social costs of tobacco. The relationship here is self-evident. Fuller disclosure of tobacco company documents can be expected to improve the efficacy of numerous government and private efforts to address tobacco-related health problems. Indeed, a strong argument could be made that the required relationship would exist even if access to the American market for sales of a single tobacco product were conditioned on tobacco companies' acceptance of the federal document disclosure regime for all company documents. Nonetheless, existence of the reasonable relationship required by Nollan and Dolan would be far clearer if documents pertaining to products that a company has chosen to sell only overseas were not subject to the federal disclosure system.

folky Co
DOC mnts
sw

The White House

DOMESTIC POLICY COUNCIL



FAX COVER SHEET

To: Judge Mary

Phone: _____ Fax No: 514-

From: Laura Emmett

Phone: _____

Comments: 6 pages HHS paper
for 3:00 documents mtg

HHS Paper

DOCUMENT DISCLOSURE MECHANISMS

Conrad Bill Provisions

The Conrad bill requires tobacco manufacturers to release to the Secretary of Health and Human Services, within 3 months of enactment of the bill, all documents in their possession:

- (1) Relating, referring, or pertaining to—
 - (A) any health effects in humans or animals, including addiction, caused by the use of tobacco products, or components of tobacco products,
 - (B) the engineering, manipulation, or control of nicotine in tobacco products,
 - (C) the sale or marketing of tobacco products,
 - (D) any research involving safer tobacco products, or
 - (E) such other matters as the Secretary may prescribe; or
- (2) Produced or ordered to be produced in any judicial or administrative proceeding, including documents produced or ordered to be produced for *in camera* inspection.

The Secretary is then required to review the documents to determine if a trade secret protection or attorney-client privilege applies, and begin releasing documents that do not contain such information within 6 months. The bill also contains a provision that allows release of documents otherwise subject to trade secret protection or the attorney-client privilege if "the Secretary determines that the disclosure of such information is necessary to promote the public health."

Recommendations

1. Release of Documents to FDA

Because of the potential for the appearance of conflicts of interest, FDA should not be involved in the determination of whether a document is appropriately claimed to be subject to the attorney-client privilege. FDA's regulatory role, however, warrants separate provisions to ensure FDA access to documents.

The documents in category (1) of the Conrad bill should be submitted to FDA. Any documents containing trade secret information would be subject to all existing FDA protections. Companies would be obligated to make trade secret and confidential commercial information designations pursuant to 21 C.F.R. § 20.61 of FDA's Freedom of Information Act (FOIA) regulations. Consistent with the concept of providing a central mechanism for public access to tobacco documents, private parties seeking these documents would not be able to request these documents from FDA through FOIA. All such requests would go to the office discussed in item 2.

For documents within these categories that are withheld based on claims of attorney-client privilege, the companies should be required to provide sufficiently detailed privilege logs so that FDA can evaluate whether it should pursue release of the document. Attorneys involved in the Minnesota litigation have advised FDA that the logs produced in that litigation, pursuant to the requirements of the Federal Rules of Civil Procedure, were inadequate. FDA (and/or the office discussed in item 2) should have authority to issue requirements for the content of privilege logs.

Failure to submit documents to FDA, or to include documents in a privilege log, should be a prohibited act under section 301 of the Federal Food, Drug, and Cosmetics Act (FDCA), 21 U.S.C. § 331, and be subject to criminal prosecution and/or civil money penalties under the FDCA. In addition, the improper designation of a document as attorney-client privileged should be subject to civil penalties under the FDCA. There should be no intent requirement for the imposition of civil penalties (i.e., the government need not establish that the company intended to improperly or falsely designate the document as privileged).

2. Public Release of Documents/Mechanism to Review Claims of Privilege

An office to manage the document provisions should be established. This office should not be in FDA. Because of possible due process concerns, the legislation should contain provisions that make clear that this office will not share documents for which attorney-client privilege is claimed with other government agencies, including the Department of Justice, unless the claim of privilege is denied and judicial remedies have been exhausted.

The office would operate in a manner similar to a FOIA board. Companies would be required to submit to the reviewing body all documents listed in the Conrad bill.

The legislation should contain the framework of the office's procedures—

- Companies should be required to specify which documents are privileged, provide the reasons for the assertion of privilege, and provide sufficiently detailed privilege logs suitable for public release. Similar logs should be required for documents that are claimed to contain trade secret information.
- Federal government agencies would be authorized to request that the office evaluate specific claims of privilege. These requests would receive priority consideration by the office (i.e., the office would make decisions on these claims before proceeding to evaluate other documents).
- The reviewing office should have the flexibility to set up procedures with respect to documents for which attorney-client privilege is claimed that do not involve *in camera* review of all documents. For example, the court in the Minnesota litigation required the documents to be categorized. The court advised the parties that the categories could include the type of privilege claims (e.g., opinion work product, fact work product, attorney-client, or joint defense), the subject matter of the document, the maker of the document, and the recipient, if any, of the document. The parties met to discuss appropriate categories, and presented their positions to the court. The court eventually ordered that the documents be designated into one of several categories.¹ The court reviewed randomly selected documents in

¹ The categories were as follows: 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; 4A. Communications of Counsel (documents relating to or referencing the Committee of Counsel, Scientific Liaison Committee, or Research Liaison Committee); 4B Special Projects (documents relating to or referencing "Special Projects" including CTR Special Products, Lawyers' Special Projects, or Special Accounts); 4C. 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); 10. Government Regulations (documents relating to or

each category, and decided based on that review whether the claim of privilege for the entire category should be sustained (the court, however, reviewed all of the documents in certain categories). These procedures allowed the court to balance the need for efficiency and timeliness with due process concerns.

- If the claim of privilege or trade secret protection is upheld (or the office finds that the document would be exempt from disclosure under FOIA exemption 6, personal privacy), a private party or federal agency could challenge that determination in federal district court in the District of Columbia. The company would have to defend the determination; the office would not be responsible for its defense. The standard of review applicable to parallel FOIA matters, *de novo* review, would apply.
- If the claim of attorney-client privilege or trade secret protection is denied, the office would provide notice to company. The company would have 5 working days to object. If office decides to disclose the document after reviewing any company objections, the office would then provide notice to company that document or information will be released within 5 working days unless the U.S. District Court for the District of Columbia orders the office to not release it. The office (and/or DOJ) would defend the office's position in federal court. The APA standard of review for "reverse FOIA" cases would apply (under that standard, 5 U.S.C. § 706(2)(A), the district court sets aside agency determinations that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
- Companies would be required to pay costs and attorneys fees if the claim of attorney-client privilege or trade secret protection is denied by the courts. Penalties would be available if a court determines that the assertion of attorney-client privilege or the trade secret claim lacked reasonable basis.

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).

3.. *Issues Related to the Standard for Release of Information Subject to Attorney-Client Privilege or Trade Secret Protection*

FDA anticipates that many of the documents that the industry will claim to be attorney-client privileged will have information useful to agency regulatory efforts. Mechanisms should be included in legislation to resolve these issues. Some of these documents will be found to be not legitimately privileged, and released. Others could be considered privileged under existing law. With respect to these documents, one possibility is to adopt a standard that authorizes release to FDA and/or other interested regulatory agencies unless the company shows that release of a privileged document could subject them to criminal action or that the document contains core legal advice, such as litigation strategy.

Also, categories of tobacco industry information exist which seem unlikely to involve core areas of attorney-client privilege, such as original research and possibly documents related to marketing issues. The settlement proposed that the companies be required to release to FDA original laboratory research. Consideration should be given to requiring the companies to submit to FDA all original research, and possibly also marketing-related documents and any analyses related to scientific research. Further, the court in the Minnesota litigation denied claims of attorney-client privilege for all documents in the categories relating to or referencing children and relating to or referring scientific research or research reports on smoking and health. At minimum, strong presumptions against the assertion of attorney-client privilege may be appropriate with respect to these categories.

Finally, with respect to trade secret information, consideration should be given to whether legislation should authorize public release if the office (or another body) determines that such release would be in the public interest. The Conrad bill, for example, includes such a provision for ingredient information. The National Transportation Safety Board (NTSB) has this authority. Section 1114 of Title 49, United States Code, allows the NTSB to publicly disclose information related to a trade secret "to protect the health and safety." The NTSB is required to provide notice to interested persons and an opportunity for comment if the resulting delay "would not be detrimental to health and safety." 49 U.S.C. § 1114(b)(1)(D).

Cigarette Maker Manipulated Nicotine; Its Records Suggest

By BARRY MEIER

Continued From Page A1

Tobacco industry documents, including some released in recent weeks, strongly suggest that one of the nation's largest cigarette producers, the R. J. Reynolds Tobacco Company, altered nicotine delivery to smokers, apparently believing that doing so would increase the "kick" of its popular Winston brand and make it more competitive.

All cigarette manufacturers, including R. J. Reynolds, have denied that they manipulate levels of nicotine, the substance in cigarettes that addicts smokers. And some of the techniques used by R. J. Reynolds, like the addition of ammonia compounds, have also been employed by producers like the Philip Morris Companies.

But the latest R. J. Reynolds records, when added to previously disclosed documents, offer the most vivid case study yet of how one producer apparently decided in the 1970's to enhance nicotine delivery in an effort to make a brand more competitive. The documents show that R. J. Reynolds researchers noticed that Philip Morris had a higher level of free nicotine in its popular Marlboro brand. Soon after, the R. J. Reynolds researchers set out with the apparent intention of matching that quality in the company's Winston product.

The question of whether cigarette makers deliberately manipulated nicotine is a central focus of the Justice Department's criminal investigation into possible fraud by tobacco producers. Of particular interest to Justice Department officials is whether producers used various techniques to alter nicotine availability even while nicotine levels as measured by Government cigarette tests were falling, said two people questioned by investigators.

On Friday, a spokeswoman for R. J. Reynolds, a subsidiary of RJR Nabisco Holdings Corporation, said that nicotine levels were not a "design characteristic" in developing cigarettes. "In fact, our research through the years has focused on

reducing total 'tar' and nicotine yield," the spokeswoman said.

The company has also said that its scientists had mistakenly associated free nicotine levels with higher cigarette sales, and that there was no evidence to indicate that the nicotine availability of any of the company's brands had been purposely increased to improve sales.

Nicotine exists in two forms. One is its "bound" form that scientists believe is slowly absorbed by a smoker. In its other, or free, form, nicotine is more pharmacologically active and is more quickly absorbed, researchers believe.

Government tests measure total nicotine, but not the proportions of the bound and free forms. That ratio is controlled by the acidity or alkalinity of cigarette smoke, as measured by its pH, said James Pankow, a researcher at the Oregon Graduate Institute in Portland. When compounds containing ammonia, an alkaline substance, are added to tobacco, pH rises and the ammonia acts to chemically convert the bound nicotine into its free form, Mr. Pankow said.

In 1995, The Wall Street Journal disclosed a 1991 document from the Brown & Williamson Tobacco Company that said that the cigarette maker and others like Philip Morris and R. J. Reynolds used ammonia compounds. The free nicotine liberated by the additives is "associated with increases in impact and satisfaction reported by smokers," said the document from Brown & Williamson, a subsidiary of B.A.T. In-

Papers suggest a link between sales and kick.

dustries P.L.C.

Brown & Williamson officials have said that the use of ammonia does not increase "the amount of nicotine absorbed by the smoker." Peggy Roberts, a spokeswoman for Philip Morris, said on Friday that the company used ammonia solely as a flavoring and binding agent and did not believe that ammonia increased the potency of nicotine, the amount of nicotine absorbed by a smoker or how quickly nicotine reaches a smoker's bloodstream.

Ms. Roberts said Philip Morris had looked into whether ammonia affected how fast nicotine was absorbed into a smoker's respiratory system. She declined to elaborate.

About 25 years ago, however, R. J. Reynolds officials believed that raising the pH and increasing the amount of free nicotine in tobacco smoke could increase the level of nicotine kick perceived by a smoker. A 1976 company document said, "As the pH increases, the nicotine changes its chemical form so that it is more rapidly absorbed by the body and more quickly gives a 'kick' to the smoker."

The company, which was then anxiously watching the growing popularity of its competitor's Marlboro brand, soon launched a major program to add ammonia compounds to its Winston products, the documents show.

In fact, the documents show that R. J. Reynolds officials seized on a decision by Philip Morris, which in the mid-1960's began to use ammonia in its production process. By 1973, Marlboro sales were steadily rising, and officials of R. J. Reynolds, which was then losing its grip as the nation's leading cigarette maker, believed that the addition of ammonia was a key to the success of Marlboro, as well as a Brown & Williamson product, Kool. They suspected that the use of ammonia yielded more free nicotine and increased the cigarette's punch, internal company documents show.

A 1973 company memo noted, for example, that while Winston had a smoke pH of 5.8 to 6.0, the comparable figure for Marlboro was 6.8 to 7.3. "Thus, Marlboro and Kool smokes contain more 'free' nicotine than our comparable blends, hence would be expected to show more instantaneous nicotine 'kick' than our brand," the document said.

The memo, written by Claude E. Teague Jr., a top company scientist, then recommended that R. J. Reynolds develop, among other things, a cigarette similar to Marlboro.

"Because brands of the new type continue to show vigorous growth in sales; because a high proportion of beginning smokers are learning to like Marlboro, the leading brand of the new type; and because we have no current brand in this newly identified, major segment of the market; it has become appropriate for us to consider moving our present brands in the direction of the new type of cigarette," his 1973 memo said.

In 1996, when the memo by Mr. Teague was disclosed, R. J. Reynolds issued a public statement saying that company scientists were simply investigating a hypothesis related to smoke pH and free nicotine.

"The bottom line is that if 'smoke pH' had been so critical, R. J. Reynolds simply would have mimicked the 'smoke pH' of Marlboro," and would not have continued to lose market share, the company said.

Sales of Marlboro did continue to outstrip those of Winston, propelling Philip Morris to the top of the cigarette industry. But documents released in recent weeks as part of the State of Minnesota's lawsuit against the tobacco industry show that officials of R. J. Reynolds commercially produced an ammonia-containing version of Winston in the early 1980's that was a chemical clone of Marlboro, right down to its level of smoke pH and free nicotine.

The R. J. Reynolds documents said that the company began using ammonia in its cigarettes, starting with its filtered Camel brand in 1974 and then expanding into other brands, including one Winston version in 1979. An undated R. J. Reynolds document from the period noted that smokers assembled by the company liked the taste of the ammoniated cigarettes, adding that the product produced a "stronger physiological impact with less harshness."

The fruit of R. J. Reynolds's efforts apparently came in 1980 when the company introduced a reformulation of its Winston line referred to in company documents as Winston "B." A memo written that year by Alan Rodgman, then the company's director of basic research, said the Winston "B" had caught up with Marlboro in such key areas as smoke pH and free nicotine.

While the smoke pH for Winston according to Mr. Teague's memo ranged between 5.8 and 6.0 in 1973, it had risen in 1980 to 6.4 in the Winston "B," the document written by Mr. Rodgman said.

"The Winston B closely matches the Marlboro in the smoke properties indicated," Mr. Rodgman wrote. The document included graphs showing "how closely matched (except for 'free' nicotine) the Winston and Marlboro were in 1970, the disparities between the Winston and Marlboro prior to the introduction of the Winston B, how these disparities gradually increased between 1971 and 1978, and how they narrowed to essentially a no-difference status in 1980 with the Winston B."

Lawyers for the State of Minnesota introduced the R. J. Reynolds documents at issue to bolster their claim that the company had sought to manipulate nicotine delivery.

Peggy Carter, a spokeswoman for R. J. Reynolds, said that comparing smoke pH statistics in the 1973 memo by Mr. Teague to the 1980 memo by Mr. Rodgman was "not a valid exercise" because the pH measurement technologies used were not the same.

Ms. Carter also provided a copy of an internal company report on the question of smoke pH produced by R. J. Reynolds in 1996, two years after the matter became an issue in lawsuits and regulatory proceedings. The document, which was prepared

for company officials testifying in lawsuits, reviewed the company's past work on smoke pH and said that R. J. Reynolds researchers were mistaken in their belief in the early 1970's that high smoke pH was a driving force behind increased sales of cigarettes like Marlboro.

The report concluded that the smoke pH of Winston had not varied markedly over time and that "there is no evidence from the historical data reviewed that the smoke pH of RJR brands was purposely increased to enhance sales."

researchers suspected that a major competitor, Philip Morris, had done so for its Marlboro brand.

1980: CATCHING UP

A memo from Alan Rodgman, director of basic research, says a new version of Winston has smoke similar to Marlboro's.

Table titled "AVERAGE DATA FOR 1980: WINSTON vs. MARLBORO" comparing smoke properties of Winston and Marlboro cigarettes. The table includes columns for No. of Cigarettes, Tar (mg), Nic (mg), CO (ml), Smoke pH, and Free Nic (mg). It shows data for Winston (B) and Marlboro, with a note indicating that Winston B closely matches Marlboro in smoke properties.

No. of Cigarettes	Tar (mg)	Nic (mg)	CO (ml)	Smoke pH	Free Nic (mg)
Winston (B)	11.9	1.05	15.3	6.4	1.4
Marlboro	11.9	1.05	15.3	6.4	1.4

Note: The Winston B closely matches the Marlboro in the smoke properties indicated. However, this does not necessarily mean that smoking character for the brand is the same.

In 1994, the use of ammonia by all major tobacco companies became the subject of regulatory proceedings and lawsuits. In 1996, after an internal review, R. J. Reynolds said its scientists had incorrectly concluded in the 70's that smoke pH was a factor in cigarette sales. The company added that the pH of Winston's smoke had not changed markedly over time and that there was no evidence that pH levels had been purposely increased to enhance sales.

Inside RJR: Exploring Smoke pH and Nicotine

Internal R. J. Reynolds documents suggest that in the 1970's, the company began adding ammonia to its Winston cigarettes after

1973: THE IMPORTANCE OF ALKALINITY

A memo from Claude E. Teague Jr., a top R. J. Reynolds researcher, notes that Marlboro's smoke has a higher pH — more alkalinity — than Winston's, making the nicotine easier for the body to absorb.

It is assumed that a cigarette is a system for delivery of nicotine to the smoker in a relatively useful form. At "normal" smoke pH, at or below 6.0, the nicotine is chemically combined with acids and is relatively slowly absorbed by the smoker. As the pH increases, the nicotine is more readily absorbed. In increasing proportion of the total smoke, the nicotine is in a free form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine "kick". Chart VIII shows how proportion of "free" nicotine increases as pH goes higher.

Marlboro and Winston cigarettes have about the same amount of total smoke nicotine as do our comparable brands (Camel, Kool, and 100). However, Marlboro smoke is typically at pH 6.4-6.6, as compared with Winston smoke at pH 6.0 and Camel smoke at pH 6.0-6.2. Thus, Marlboro and Winston cigarettes have more "free" nicotine than our comparable brands. This would be expected in the case of cigarettes with higher pH. It is noted that the pH of Winston's smoke is higher than that of Camel's, and that the pH of Winston's smoke is higher than that of Kool's.

1976: A QUICKER KICK

Another memo outlines characteristics of smoke, including pH.

The pH also relates to the amount of the nicotine impact. As the pH increases, the nicotine changes its chemical form so that it is more readily absorbed by the body. Marlboro's smoke has a "kick" to the smoker. However, if the pH becomes too high, the smoke cannot be inhaled as is the case with other smoke.

The New York Times

MONDAY, FEBRUARY 23, 1998

2/2

Philip Morris Memos Detail Teen Habits

By John Schwartz
Washington Post Staff Writer

Philip Morris, the nation's largest tobacco company, monitored the smoking habits of people as young as 12 because "today's teenager is tomorrow's potential regular customer," according to internal documents released yesterday.

Rep. Henry A. Waxman (D-Calif.) presented the four memos in a House Commerce Committee hearing on pending tobacco legislation, which could protect companies from some lawsuits in exchange for paying billions of dollars to reduce youth smoking.

The memos were cited Monday in opening statements of the lawsuit against the tobacco industry brought by the state of Minnesota and Blue Cross

and Blue Shield of Minnesota to recover the costs of treating sick smokers. But the full memos were not made available then. Two of the documents were previously reported in the Richmond Times-Dispatch.

The documents echo a large number of internal R.J. Reynolds Tobacco Co. papers that Waxman made public several weeks ago that showed company officials recommended marketing efforts directed at teenagers dating back to the 1970s. Philip Morris's share of the underage market has long dwarfed R.J.R.'s despite the smaller company's advances with young smokers after it introduced the "Joe Camel" campaign.

Tobacco companies have long denied they target underage smokers.

Highlights of the documents:

- A March 1981 memo to Robert B.

Seligman, the company's vice president for research and development, described the habits of smokers 12 to 18 years old and warned that the smoking rates were on the decline since 1976-77, which meant the company would "no longer be able to rely on a rapidly increasing pool of teenagers from which to replace smokers lost through normal attrition." The decline in smoking among teenagers, wrote Myron Johnston of Philip Morris, was especially troubling. "Because we have our highest share index among the youngest smokers, we will suffer more than the other companies."

- A memo dated February, 1983 noted an "encouraging upward trend" in youth smoking rates, citing figures from the graduating class of 1982.

- A May 1975 memo from Johnston to

Seligman attributed the Marlboro brand's "phenomenal growth" to "our high market penetration among younger smokers," described as "15-19-year-olds." Johnston wrote that publicly available studies were generally limited to teenagers 18 and older but "my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15-17-year-olds."

- In a March 17, 1988, memo, Johnston discusses teenage spending. High school seniors from 1976 and 1979 had smoked roughly the same amount before the age of 16, he said, but the class of 1979 group, which had experienced a sharp hike in gasoline prices, smoked substantially less than 1976 seniors.

Michael York, an attorney who speaks for Philip Morris, said the documents were never used for marketing purposes. "What's conspicuously absent is 'We've got to do something about this by putting appeals to young people in these ads,'" York said.

California State Assembly Votes To Repeal Ban on Smoking in Bars

Associated Press

SACRAMENTO, Jan. 29—Less than a month after smoking was outlawed in thousands of California bars and casinos, the Assembly late Wednesday narrowly approved lifting the ban.

The measure to repeal California's first-in-the-nation law to ban smoking in most taverns was approved 42 to 24 and sent to the Senate. The bill requires Senate approval and the governor's signature to take effect.

The bill proposes suspending the smoking ban for two years—or until national ventilation standards to reduce smoke to safe levels are set.

It would allow smoking in about 35,000 bars, casinos and clubs where the practice was banned on Jan. 1.

Critics say many Californians kept right on puffing, despite the ban intended to improve the health of customers and employees.

Assemblyman Edward Vincent said his bill would protect jobs and give people the freedom to smoke and drink without suffering criminal penalties.

A floor vote in the Senate was expected for weeks—if the bill survives several committees and what promises to be a bitter political fight between tobacco, health and tavern lobbies.

Three years ago, California banned smoking in indoor workplaces, including the non-bar areas of restaurants. Taverns and casinos were initially exempt on the assumption that the federal government would set ventilation standards.

The Washington Post

FRIDAY, JANUARY 30, 1998

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bob Nash to Bruce Reed, re Tobacco Policy Position [non-selection] (1 page)	11/21/1997	b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Thomas Freedman
OA/Box Number: 17554

FOLDER TITLE:

Tomacco - Documents

2015-0274-S
wr10808

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

FAX COVER

COMMITTEE ON GOVERNMENT REFORM
AND OVERSIGHT

DEMOCRATIC STAFF OFFICE

HON. HENRY A. WAXMAN

RANKING MINORITY MEMBER

B350A RAYBURN HOUSE BUILDING

PHONE (202) 225-5051

FAX (202) 225-4784 or 8185

DATE: 12/18

TO: Tom Freedman FAX # _____

FROM: Phil Barnett

SUBJECT: Dingell Memo on Tobacco Documents

NO. OF PAGES 10
(EXCLUDING COVER SHEET)

COMMENT:

IF THERE IS A PROBLEM WITH THIS
TRANSMITTAL, PLEASE CALL OFFICE A.S.A.P.

ONE HUNDRED FIFTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
 MICHAEL G. OXLEY, OHIO
 MICHAEL BILIRAKIS, FLORIDA
 DAN SCHAEFER, COLORADO
 JOE BARTON, TEXAS
 J. DENNIS WASTERT, ILLINOIS
 FRED UFTON, MICHIGAN
 CLIFF STEARNS, FLORIDA
 BILL PAXON, NEW YORK
 PAUL E. GILLMOY, OHIO
 SCOTT L. KLUG, WISCONSIN
 JAMES C. GREENWOOD, PENNSYLVANIA
 MICHAEL D. CRAPO, IDAHO
 CHRISTOPHER COX, CALIFORNIA
 NATHAN DEAL, GEORGIA
 STEVE LARGENT, OKLAHOMA
 RICHARD BURR, NORTH CAROLINA
 BRIAN P. BILBRAY, CALIFORNIA
 ED WHITFIELD, KENTUCKY
 GREG GANSKE, IOWA
 CHARLIE NORWOOD, GEORGIA
 RICK WHITE, WASHINGTON
 TOM COBURN, OKLAHOMA
 RICK LAZIO, NEW YORK
 BARBARA CUBIN, WYOMING
 JAMES E. ROGAN, CALIFORNIA
 JOHN SHIMKUS, ILLINOIS

JOHN D. DINGELL, MICHIGAN
 HENRY A. WAXMAN, CALIFORNIA
 EDWARD J. MARKEY, MASSACHUSETTS
 RALPH M. HALL, TEXAS
 RICK BOUCHER, VIRGINIA
 THOMAS J. MANTON, NEW YORK
 EDOLPHUS TOWNS, NEW YORK
 FRANK PALLONE, JR., NEW JERSEY
 SHERRAD BROWN, OHIO
 BART GORDON, TENNESSEE
 ELIZABETH FURSE, OREGON
 PETER DEUTSCH, FLORIDA
 BOBBY L. RUSH, ILLINOIS
 ANNA G. CSHOD, CALIFORNIA
 RON KLICK, PENNSYLVANIA
 BART STUPAK, MICHIGAN
 ELIOT L. ENGEL, NEW YORK
 THOMAS C. SAWYER, OHIO
 ALBERT R. WYNN, MARYLAND
 GENE GREEN, TEXAS
 KAREN MCCARTHY, MISSOURI
 TED STRICKLAND, OHIO
 DIANA DEGETTE, COLORADO

JAMES E. DEROCRIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
 Room 2125, Rayburn House Office Building
 Washington, DC 20515-6115

December 18, 1997

MEMORANDUM

TO: Democratic Members, Committee on Commerce

FROM: Hon. John D. Dingell, Ranking Member

SUBJECT: Tobacco Documents

Today Chairman Bliley released tobacco documents subpoenaed by the Committee earlier this month. I supported both the subpoena and the release of the documents. The Chairman intends to place all of the documents on the Internet through the Committee's homepage. This memorandum presents background information and a preliminary assessment of the documents.

Summary and Introduction

On December 5, 1997, Chairman Bliley issued subpoenas to four tobacco companies for certain documents. Specifically, the subpoena requests:

"All documents in categories 1, 3, 4b, 5 and 7 of Judge Kenneth J. Fitzpatrick's May 22, 1997 Order in State of Minnesota, et al. v. Philip Morris, Inc., et al., No. C1-94-8563 (2nd Judicial Dist., MN) (attached), as to which Special Master Mark W. Gehan recommended in his September 10, 1997 Summary of Recommendation to Judge Fitzpatrick (attached) that claims of privilege be denied."

Those categories (for which various privileges had been previously claimed) are:

1. All documents for which any previous claim of privilege or protection has been denied (even in interim, non-final, or vacated orders) and all documents specifically designated by plaintiffs by Bates numbers.
3. All scientific research or research reports on smoking and health or information relating to smoking and health, and memos regarding the same, written by an employee or outside consultant researcher or research entity of any Defendant or corporate affiliate of any Defendant.
- 4.b. All documents relating to Special Projects (including CTR Special Projects and Lawyers' Special Projects) or any Special Account (Including Special Account No. 4).

- 2 -

5. All documents relating to public statements or positions taken by any Defendant or combination of Defendants relating to smoking and health.

7. All documents relating to persons under age 18 (or children, adolescents or young adults).

Prior to today's public release of the documents, the staff had a limited time to review the documents. The documents lacked an index, and had no apparent ordering. The topics discussed in the documents and their context are not always clear. The documents also cover a limited time frame. For example, no documents in the 1990's are included.

Some qualifications about the information contained in this memo are in order. The review of thousands of pages of documents was conducted under tight time constraints, and the minority did not have possession of its own copy of the documents until today. For those reasons, some spellings, names, and quotations taken from the documents may not be exact because they are based on staff notes. These matters can be checked by referring to the documents themselves. **(Numbers in parenthesis refer to the numbering of the documents, which begin with the letter LG.)**

As the public, particularly those who have followed the issues of tobacco legislation, litigation, and regulation, reviews these documents, their usefulness will become clear. The documents certainly raise more questions than they answer, and many of the documents may be rich in significance to those with more experience in the field. Most importantly, these documents represent a relatively small percentage of privileged documents held by various courts, including the "Minnesota select" documents, many of which may have far more significance than this assortment.

The Chairman's decision to make these documents available to the public is proper. The Special Master's prior determination that claims of privilege should be denied was justified. More recently, on December 16, 1997, the Minnesota judge reviewing the documents concluded that the tobacco industry engaged in "a conspiracy of silence and suppression of scientific research," and that the companies "committed numerous abuses of privilege." Most of the documents relate to a program of funding research, directed by the legal departments of the tobacco firms and outside lawyers. They are highly relevant to the complaints of the various states in litigation. To the extent that these documents give weight to claims that the industry engaged in a conspiracy to commit scientific fraud, it may complicate attempts to address questions of immunity in legislation.

The documents provide a starting point in the determination of whether or how industry research efforts were used in a manipulative fashion. They already reveal far more than was known about the extent of the role attorneys played in determining research priorities. Further investigation will be required to understand the full nature of the lawyer-directed research.

The massive funding of "helpful" researchers will certainly astound many. Beyond the hiring of expert witnesses, lawyers appeared to fund the entire livelihood of dozens of researchers. Perhaps it can be explained by the comment of one of the general counsels that "Lawyers cannot testify. We need people who can." (2000743)

A memo from Lorillard General Counsel Arthur Stevens opines about a Witness Development Plan with "percentages or quotas" of witnesses to be sought for testimony relating to specific diseases. (2001008)

In short, the documents present a glimpse of the mountainous costs that the tobacco industry paid in its search for scientific backing for its views, in a scientific community that believes the exact opposite. Consider the proposed funding of a doctor to study the beneficial effects of reducing stress through smoking. A letter from William Shinn of the law firm Shook, Hardy & Bacon to attorney Alexander Holtzman on May 19, 1967, suggests that the doctor could be helpful on television and Congressional hearings in the creation of an image of smoking "as 'right' for many people -- as a 'natural' act for man -- as a scientifically approved 'diversion' to avoid disease causing stress." Shinn continues, "He would not give an opinion on smoking as a cause of any disease because he does not consider himself qualified. [His private opinion is that smoking does cause some cancers to develop, may cause heart disease in some people, and does cause bronchitis -- he says these views are shared by all the doctors he knows but that these same doctors are willing to concede a beneficial diverting affect (sic) to smoking.] (2002520)

The remainder of this memorandum is intended to give you a general sense of the nature of the documents, based upon the staff review. This is far from an exhaustive review of the material, but rather a sampling of the information in the documents.

Special Projects

One important feature of the lawsuits brought by various State Attorneys General has been the allegation of fraud on the part of the tobacco industry in portraying their support of research into health and tobacco as intended to elicit independent scientific research, with no strings attached. The documents support a conclusion that research was in fact directed for the purposes of supporting tobacco lawyers in their litigation. The Council for Tobacco Research (CTR) was supposed to be independent, and governed by a scientific advisory board, but it appears that tobacco lawyers played a large role in determining the thrust of the research. Research which could not get the approval of CTR, but would be important to litigation, was funded as a "special project."

The preponderance of the documents received by the Committee relate to so-called Special Projects. They are referred to in various ways, as a Special Project of the CTR, a Special Project, a lawyers' special project, or Special Account #4 project. The common link was that the project would be recommended for funding by one of the company's outside firms -- most often Shook, Hardy, and Bacon -- in a letter to the General Counsels of the major tobacco firms. The

- 4 -

general counsels presumably approved the projects, often at a meeting known as the Committee of Counsel, based upon little more than a one or two page description of the research project. Under these Special Projects, doctors would be funded for thousands to hundreds of thousands of dollars to perform research. It appears that in general, the companies would pay the outside counsel periodically (initially similar amounts, but later based upon market share) and the outside counsel would forward the money to the doctor.

Special Projects were described in memos in the following ways. In a letter from Lorillard General Counsel Arthur Stevens to outside counsel Timothy Finnegan on February 22, 1980, Stevens questioned the need for certain special projects. He stated that he knew what the "mandate" was for the counsel: "I am mindful of the continuing mandate with which your office, Shook, Hardy and others have been charged by your respective clients on behalf of the industry: that is, to find witnesses and researchers – and, if necessary in order to determine the feasibility of developing a relationship with them, engage them as consultants, or as researchers on initially modest projects." (2006048, at 2006049)

Another memorandum from Liggett General Counsel Greer dated April 10, 1975, defines Special Projects as "scientific research projects of a quality sufficient to bear the imprimatur of the Scientific Director of CTR, approved by management, and which have the potential of arming our counsel and the industry with research helpful in court, in Congress, or elsewhere in adversary situations." (2000525, at 2000526)

In notes of a meeting of the Committee of Counsel on September 10, 1981, outside counsel Ed Jacob defined Special Projects as follows: "Purposes – 1) Develop witness – stimulate the interest of doctors; 2) develop information re: gaps in knowledge." (2000743)

This appeared to trouble Stevens, who wanted a re-evaluation, stating he was "concerned with the degree to which we make advocacy primary and science becomes secondary." He questioned why the same doctors kept coming up over and over and whether the research was worthwhile. In response, counsel Edward Jacob, stated, "If you have a doctor, you have to keep him busy or he will lose interest. Sterling has been enormously helpful. Berkson receives a small check and he has been helpful." (*Ibid.*)

Jacob continued, explaining the genesis of Special Projects: "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR Special Project. If he did not like it, then it became a lawyers' special project." (*Ibid.*)

An apparently attractive feature of Special Projects directed by lawyers was the argument that such research could be protected from discovery, as attorney work product. At the same meeting, Jacob noted, "With Spielberg, we were afraid of discovery for FTC, and with Aviado, we wanted to protect it under the lawyers. We did not want it out in the open." (*Ibid.*)

- 5 -

Not every company was interested in all of the Special Projects. As discussed above, the General Counsel of Lorillard expressed concern, and apparently, so did Liggett in notes of a January 10, 1983, meeting: "CTR Special Project: Things that Lgt [Liggett(?)] has never been involved in. These are 'scientific' or 'pseudo-scientific' projects that CTR has been unwilling to perform. Decker questions need for any of this." (2000788)

One unsigned document (2015011) appears to be a list of research projects of interest to the lawyers. They generally can be described as research that finds alternative factors in cancer and other diseases other than smoking, or research that attempts to refute studies linking smoking to cancer. A lengthy review of research projects follows, with CTR-financed research intermingled with special projects. All appeared to be part of an overall research strategy.

That strategy appears to be well-summarized in an interesting memo questioning the direction of the industry funding of research of nearly everything but the linkage of cancer and smoking. The Brown and Williamson memo on January 19, 1968, paraphrases the defense of the status quo research plan made by Janet Brown, an industry attorney:

"Research the disease not tobacco issues.

"1) Maintain that existing evidence of tobacco-health relationship is inadequate to justify research more close to tobacco;

"2) Study of disease keeps constantly alive argument that until basic knowledge of the disease advances, inappropriate to devote major effort to tobacco." (2023842)

Despite the claim that tobacco-sponsored research would be independent, and reviewed by an independent Scientific Advisory Board (SAB), as stated above, many projects were sponsored as Special Projects precisely because the SAB rejected them. For example, in the minutes of one meeting of the Committee of Counsels, lawyer David Hardy reported, "Hockett proposed to have project referred to SAB, and if SAB turns it down to carry it out under CTR special project. Severi's good will has real value." (2000139, at 2000141)

Far from using science as the sole criteria for research, a large percentage of letters going to the counsels requesting funds for Special Projects refers to prior acts of helpfulness by the researcher in testimony, statements, or the like.

Finally, in a memo to Ed Jacob of December, 1979, it appeared that an administrator understood the different roles of the CTR and attorneys. The CTR was responsible for broad administrative matters, while lawyers "establish broad goals and priorities." (2024368)

Nonscientific Factors Contributing to Funding of Special Projects

Many documents appear to suggest that factors other than scientific merit were considered in the funding of special projects. Letters from attorneys in Shook, Hardy and other firms to the

counsels to tobacco companies seeking approval for research funding often mentioned these other factors: (1) the doctors had conducted and would continue to conduct research with conclusions consistent with industry views; (2) the doctors were in the past or would likely be willing in the future to defend the industry before Congress, litigation, or in other settings where the industry was under attack; or (3) they held influential positions that would attract favorable attention.

For example, an August 20, 1971, letter regarding the funding of a Dr. Louis A. Soloff for more than a \$100,000, William Shinn of the law firm of Shook, Hardy, & Bacon noted, "We are needless to say, impressed by Dr. Soloff. He has presented a statement to Congress, appeared on the Security Analysts' program in New York and proved himself to be an excellent courtroom witness." His funding was recommended by the firm. (2002491)

Another letter from the same firm dated June 13, 1972, illustrates the same point but for a different researcher, a Dr. Thomas F. Mancuso: "Dr. Mancuso is willing to speak up. For example, his remarks at the AAAS meeting in Philadelphia on December 28, 1971 (attached), he criticized some of the participants at the meeting (Hammond and Selikoff) for focusing too much attention on smoking and ignoring the 'tremendous number of variables in the microchemical environment which have not been undertaken and which have not been considered.' " David Hardy from the firm recommended that Dr. Mancuso be funded. (2002575)

Other documents appear to indicate that many of the researchers the industry funded were both prominent and in positions to exert significant influence in the scientific community. Documents detail the apparent industry funding of Dr. Eleanor Macdonald, the Director of Epidemiology for the prestigious M.D. Anderson Hospital in Houston, Texas. Dr. Macdonald not only testified on several occasions before Congress, but also apparently assisted the industry in related litigation. In an October 12, 1972, letter from the law firm of Shook, Hardy & Bacon, Mr. William Shinn recommended \$46,730 in funding for Dr. Macdonald's work, noting that she "has been most helpful on several occasions in helping to develop statistics for litigation." (2002584)

Dr. Macdonald apparently remained helpful both as an industry consultant and as a scientist who could help the industry find new sources for industry research. In an April 1980 memo from the law firm of Shook, Hardy & Bacon, one lawyer notes, "Professor Eleanor Macdonald has requested a renewal of her CTR Special Project for one year... Industry support has enabled Professor Macdonald to have [had] a productive year... Professor Macdonald has been of assistance to us during the year. In addition to consulting on lung cancer epidemiology and other scientific issues, she has suggested names of researchers who might be candidates for industry funding. The amount requested is \$123,121." Dr. Macdonald's funding was recommended by the firm. (2002725)

Another example of a researcher apparently funded because of views favorable to the industry, concerns Dr. David Hickey. Lawyers from the same firm wrote in 1971, "It is perhaps unnecessary to add that Hickey is convinced that smoking has been given far too much consideration and air pollution far too little." (2002677) In 1968, lawyer David Hardy said of

Hickey, "In essence, Dr. Hickey is willing to prepare a statement for Congress provided he is able to complete the analysis of certain data which he has acquired. By applying methods of multivariate analysis, he is able to demonstrate that the concentration of certain air pollutants (most of which have not been identified in cigarette smoke) 'predicts' with considerable accuracy mortality rates of such diseases as lung cancer." (2002651)

Significance of Special Projects Documents

The Special Projects documents raise a variety of issues. At a minimum, they provide a small glimpse into the control of supposed independent research by tobacco lawyers. At the other extreme they could reflect a fraud or conspiracy to manipulate scientific research on the health effects of smoking, through the influence of money and the illegal use of attorney privilege. It is, if nothing else, startling to see hundreds of thousands of dollars in research subject to the review not of heads of university departments or hospitals, or organizations such as the National Institutes of Health, but rather only by tobacco attorneys.

The documents raise many questions that need to be answered:

- 1) How many researchers were paid through these Special Projects account, and how much was spent? The documents show dozens of projects funded each year for hundreds of thousands of dollars, but there is no single accounting. The recipients included a broad variety of institutions and hospitals.
- 2) What disclosures were made concerning these arrangements? Did researchers inform their institutions of the nature of their financial support? Was their support by tobacco industry lawyers made known in other fora, such as professional conferences or trials?
- 3) Is it appropriate for tobacco lawyers, not independent scientists, to direct millions of dollars of basic research at universities and hospitals?
- 4) If Special Projects recipients disclosed that they received money from the industry, did they improperly portray the funds as coming from the CTR, even when tobacco attorneys were making the decisions, not an independent Scientific Advisory Board?
- 5) Did the attorneys operate the program through the various general counsels in order to cloak the research under privilege? A memorandum on May 23, 1964, discusses a possible survey on consumer attitudes on smoking to be conducted not for the company, but for the lawyers, so if the results were unfavorable, the lawyers would receive the copies and there would be nothing to subpoena. (2006320)
- 6) Were any studies killed, because the results of the research were heading the wrong way, or did the lawyers seek to quash the public release of studies? One memo from Shook,

- 8 -

Hardy lawyer William Shinn to general counsels on January 11, 1968, refers to an action taken by a Special Projects recipient: "In spite of our instructions to the contrary, Sterling has submitted these papers 'informally' to the Public Health Service." (2006165)

7) Were Special Accounts at outside law firms used to conceal industry involvement in scientific research?

8) What oversight did universities and hospitals exert over the nature of research conducted at their institutions and the source of funding? In no case is there any record of an institution questioning the role of tobacco industry lawyers funding research projects at the institution.

Context of the Special Projects issues – The Huber Case

The documents alone cannot completely answer many of the above questions. Some of these have been raised in papers, but not mentioned in the documents. For example, in the fall of 1997, the Dallas Morning News and the Baltimore Sun ran several articles about one recipient of Special Project funding, Dr. Gary Huber, who received funding for various work at Harvard University, the University of Kentucky, and the University of Texas Health Clinic. Dr. Huber's name appears in a limited number of the documents we received, and the Harvard Project appears in a number of other documents.

The stories about Dr. Huber relate to his current role as a whistle-blower. The articles state that Dr. Huber received \$1.68 million during his work in Texas, an amount far greater than appears to be disclosed in the documents. According to an article in the Dallas Morning News of November 15, 1997, the "money was routed through an outside account bearing a Greek code name to keep it off hospital books and make it difficult for an outsider to find." The article states that the three institutions that Dr. Huber worked for received more than \$7.5 million over 25 years from tobacco lawyers, which also appears more than documented in the subpoenaed materials.

The Health Center was apparently aware that Dr. Huber was funded by industry lawyers, and agreed to their terms. According to the article, under a 1988 agreement between Dr. Huber and the Health Center, hospital officials agreed they could never review any work he did for the lawyers. In a 1994 memo, Dr. Huber warned that his continued funding hinged on avoiding public disclosure, and said the lawyers had insisted on keeping the payments off the Center's books. At that point his funds were funneled through an account named Alethia. Health Center officials let the arrangement go on because "it was either do it that way or not do it," said an associate executive director at the center.

In the articles, Dr. Huber claimed that the Harvard Project was close to establishing a link between cancer and emphysema when funding was canceled. The subpoenaed documents indicate an interest by lawyers to terminate the program, but there appeared no real mention of reasons. (See for example 2008417 discussing how tobacco lawyers considered dealing with him.) Industry lawyers in the article deny the accusation.

Most interesting in the articles is Dr. Huber's assertion of harassment by tobacco lawyers since his cooperation with plaintiffs. In the Baltimore Sun article of November 17, 1997, he says that a lawyer at Jones, Day, Reavis & Pogue threatened to bring "the full weight and power of Jones, Day and its client" – R.J. Reynolds – down on him. He says an attorney with Shook, Hardy & Bacon advised him there would be nothing wrong with removing from his tobacco files documents he no longer needed. The tobacco lawyers deny the accusations.

This matter is raised to point out that important follow-up investigations will be needed to determine the full meaning of the subpoenaed documents, to answer questions involving the knowledge of the institutions of the research sponsors, how the research was used, and whether research was suppressed.

Other Matters

Other documents provided to the Committee present other points of strong interest. A number of documents, for example, deal with industry responses to Safer Cigarette studies. (See for example, 2022168-9)

Other documents relate to advertising strategies. What exactly was the purpose of the proposed use of youth heroes on "Smoking being an adult custom"? (2022162) A number of lawyers were wary of that one. Other documents detail how the Tobacco Institute scripted "debates" on smoking and were wary that there be any notation of sponsorship of various doctors. (2017256)

What is the significance of the detailed computer-automated data base of health related research undertaken by the industry in mid-1960's? Or the existence of a form of clipping service of health related research from 1954-56? One May 28, 1958, memo from F.P. Haas to the general counsels discusses the development of a central file, noting that the TIRC (predecessor of the CTR) had assembled much material on health, but that it was important that future literature be collected and analyzed "under the wing" of counsel. (2017032) Is this an effort to shield unfavorable research under a claim of privilege?

Others may find legislative memos of interest. For example, at a meeting of Committee of Counsels on March 31, 1983, there was a lengthy discussion of how to answer a question concerning the hypothetical repeal of the warning label. Counsels have used the warning as a defense in lawsuits to show that smokers had adequate warning. (See 2006239) Not wanting to admit they liked the defense, they decided they would answer the question that the industry has

- 10 -

always opposed warning legislation "based upon the assumption shared by all that it wouldn't be repealed." (2000824)

A number of the documents touch upon strategies for dealing with requests for ingredients. It is acknowledged in one memo of September 15, 1977 by lawyer William Shinn that many companies dropped numerous ingredients right before they were required to provide a list to HHS, because of possible public relations problems. (2008121)

The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists.

Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TI 120602.

1. In 1979, the Tobacco Institute circulated a report entitled "Smoking and Health 1964-1979: The Continuing Controversy." This report, which followed the 1979 Surgeon General's Report, stated that:

The American public would be better served if high government health officials and private interest groups which encourage them abandoned the myth of waging war against diseases and their alleged causes.... Indeed, many scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous. Unfounded because evidence on many critical points is conflicting. Dangerous because it diverts attention from other suspected hazards.

Plaintiffs' Tab 47, Plaintiffs' Ex. 29(1), TIMN 0084430. (Internally, however, the tobacco industry acknowledged that the 1979 Surgeon General's report was "no doubt...an impressive document" and that "[t]he way in which the information was presented was on the whole sound, scientific and emotive." Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), at 2, BAT 100214029 at 030.)

1. In 1983, an RJR advertisement 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...in our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy.

Plaintiffs' Ex. 16(1), RJR 504638051.

1. On February 2, 1984, the chairman of the board of RJR made the following comments as part of a panel discussion on the Nightline television program:

It is not known whether cigarettes cause cancer. RJR 502371216.

Despite all the research to date, there has been no causal link established [between smoking and emphysema]. RJR 502371217.

...as a matter of fact, there are studies that while we are accused of being associated with heart disease, there have been studies conducted over ten years that would say, again, that science is still puzzled over these forces. RJR 502371217.

Plaintiffs' Tab 50, Plaintiffs' Ex. 17(1), RJR 502371216.

1. These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking also were published in Minnesota. For example, the St. Paul Pioneer Press published the following articles:
2. On October 13, 1954, the Pioneer Press quoted Timothy Hartness, chairman of TIRC, as stating that "no clinical evidence has yet established tobacco to be the cause of human cancer." Plaintiffs' Ex. 395.
3. On November 24, 1954, the Pioneer Press quoted E. A. Darr, president of RJR, as stating that "there still isn't a single shred of substantial evidence to link cigarette smoking and lung cancer directly." Id.
4. On April 19, 1963, the Pioneer Press quoted the director of the CTR scientific advisory board, C.C. Little, as stating:

It is at present scientifically unwise and indeed may be harmful to attribute a simple definitive causative role to any one of them or to attempt to assign them relative degrees of importance.

Id.

1. On February 7, 1965, the Pioneer Press quoted a tobacco industry spokesman saying that the link between smoking and disease is still unproved despite the Surgeon General's report. Id.
2. On August 17, 1968, the Pioneer Press quoted the Tobacco Institute as attacking a Surgeon General's task force for a "shockingly intemperate defamation of an industry which has led the way in medical research to seek answers in the cigarette controversy." Id.
3. On January 4, 1971, the Pioneer press quoted Joseph Cullman III, the CEO of Philip Morris, as reiterating the industry position that cigarettes "have not been proved to be unsafe" to human health. Id.
4. On January 11, 1979, the Pioneer Press quoted the Tobacco Institute as stating that the "preoccupation with smoking may be both unfounded and dangerous. . . because evidence on many critical points is conflicting. . . (and it) diverts attention from other suspected hazards." Id.

Sommers Cipollone Tr. 8597; *In Camera* and *Ex Parte* Affidavit of. Edwin J. Jacob ¶ 65. The results of CTR-funded contract research have appeared in a large number of publications in scientific journals. See In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶ 70.

2. The research contracts entered into by CTR were approved by the SAB. See Affidavit of Lisanti ¶ 33 (2/14/97); Sommers Rogers Dep. Tr. 56-57.
 3. 99. There is no evidence to indicate that contract research funded by CTR interfered with or compromised the integrity of the CTR grant-in-aid program.
 4. Contract research is a standard and common vehicle within the scientific community for funding research, and there is nothing misleading or improper about CTR engaging in contract research. See Affidavit of Hamm ¶¶ 11,12; Sommers Cipollone Tr. 8594-95; *In Camera* and *Ex Parte* Affidavit of. Edwin J. Jacob ¶ 65.
 5. By funding the CTR SAB grant-in-aid and contracts programs under the guidance of the SAB, the tobacco companies that were members of CTR have acted consistently with the statement in the 1954 Frank Statement that it would provide significant "aid and assistance" to research into smoking and health.
 6. 102. From about 1966 until 1990, CTR administered CTR Special Projects. The Defendants claim no privilege to the research itself nor to communications between the researchers and counsel. The researchers were free to publish their results and had the responsibility for publishing their results if they chose to do so. In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶95.
 7. The researchers who received funding under CTR Special Projects were informed that any publication of their research results should bear an acknowledgment that it was a "Special Project of the Counsel for Tobacco Research." There was no evidence introduced at the hearing in this matter which indicated that this acknowledgment had the effect of distinguishing Special Projects research from SAB Grant research.
 8. Special Projects were scientific research projects selected for funding by the tobacco companies' litigation counsel to support the defendant's position in the litigation, legislative and regulatory contexts. See Haines Special Master Report at 8-10; See In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶¶90-93. CTR provided funding for those projects out of a separate budget. Gertenbach Decl. ¶ 8; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 98; Affidavit of Glenn ¶¶ 32-36; Affidavit of Holtzman ¶¶ 6,9; See CTR Financial Statements, 1964-1990 attached to Affidavit of Craig Proctor.
 9. Proposals for CTR Special Projects were not reviewed or evaluated by the SAB. *In Camera* and *Ex Parte* Affidavit of. Edwin J. Jacob ¶ 98. They were, however, reviewed by the Scientific Director of CTR, and a determination by the Scientific Director that a proposed CTR Special Project had scientific merit was required before it could receive funding as a CTR Special Project. See In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶ 100; Gertenbach Decl. ¶ 7; Affidavit of Glenn ¶31.
 10. The researchers who received CTR Special Projects funding were affiliated with a variety of research institutions, including Harvard Medical School, the University of Pennsylvania School of Medicine, the University of California at San Francisco and Case Western Reserve University. See Affidavit of Glenn ¶ 33. Many of these researchers also received funding for their research from other services, including the National Institutes of Health and the National Cancer Institute. See Affidavit of Rubin ¶ 10 (4/25/96); Affidavit of Glenn ¶ 33 & Ex. G.
107. The recipients of CTR Special Projects funding were free to publish the results of their research. See Affidavit of Glenn ¶ 34; Glenn Cong. Test. at 362-63; Affidavit of Rothschild ¶ 5; Affidavit of Schrauzer ¶¶ 4-6; Affidavit of Furst ¶ 7; Bick Decl. ¶ 9; Affidavit of Guttstein ¶ 6; Jensen Decl. ¶ 4; Holtzman Decl. ¶10. There is no evidence in the record that any CTR Special Project recipient was restricted in his or her research or publication in any way, except to the extent that the original funding decision, or funding continuation decision was made by the attorneys for defendants.

1. The evidence in the record before the Court included affidavits from several CTR Special Project researchers, who have stated as follows:

When I was awarded my CTR Special Project, I understood from the beginning that I would be free to conduct my research and publish my results without any interference. In the course of my work, no one interfered with my research or sought to influence me with respect to my work or my publications. I published over a dozen articles based on my CTR Special Project research. Gutstein Aff. ¶¶ 6, 7.

I was completely free to publish the results of my Special Projects, and the decision not to publish was entirely my own. Furst Aff. ¶ 7 (4/29/96).

From the outset, I knew that I had complete freedom to conduct my research as I saw fit, and to publish my results whenever and wherever I deemed appropriate. No one associated with CTR, the tobacco companies, or lawyers for those organizations ever attempted to influence my research or my publications. Jenson Decl. ¶ 4 (5/6/96).

I had complete freedom to conduct and report on my CTR Special Project research as I saw fit. No one from CTR, the tobacco companies or the lawyers representing the companies, ever attempted to affect my research in any way. Also, the decision not to publish was my own. Bick Aff. ¶ 9 (4/8/96).

evidence in the case in chief.

(2) Category 2 - No Attorney Identified.

There were a total of 122 documents within Category 2. The following documents were individually read:

2017135-2017141

2018297-2018354

2007802-2007807

2023384-2023386

2024343-2024344

2024349-2024363

None of the sampled documents within Category 2 relate to involvement by attorneys in the selection or direction of research to be done, or in the involvement by attorneys in responding to an obligation to inform the public regarding the safety of the defendant's products. The documents within this category which were reviewed, although they do not identify an attorney as the author or recipient, are primarily legal in nature, and it is a reasonable inference that they constitute legal advice or legal work product.

For the foregoing reasons, I conclude that the claim to privilege to the documents in Category 2 should be sustained.

(3) Category 3 - Science.

There were 187 documents within Category 3 of the Liggett documents. The following documents were individually reviewed:

2005756-2005756

2005757-2005757

2005771-2005772

2005788-2005788

2022191-2022191

2022193-2022193

0308468-0308468

2006311-2006312

2023519-2023528

Of the documents randomly selected for review from Category 3, six were transmittal letters from the research bureau of the Liggett company to the General Counsel's office within that company. The communications transmit scientific information not included with the cover letter.

The seventh document, 0308468, could not be located within the Liggett documents.

Document 2006311 through 2006312 is a communication from Hill and Knowlton, a public relations firm, to the General Counsel Group for the defendant tobacco companies, including Frederick Haas, General Counsel for Liggett. The document, dated August 21, 1964, discusses the preparation of a pamphlet which would summarize medical and scientific evidence, which pamphlet would be aimed at opinion leaders, the business community and the general public.

The final document, 2023519 through 2023528 is a memorandum to file from "FKD" dated April 28, 1967, representing the author's summary of an April 27, 1967 meeting with the "literature committee" on the subject of the 3i computer project.

The sample of documents reviewed from Category 3, and by extension, the entirety of Category 3, is not subject to the attorney-client privilege. They do not demonstrate a process of a client seeking advice or an attorney providing advice. On the contrary, the letters from the Research Bureau of Liggett transmitting research or scientific information to Liggett's general counsel, reflect the involvement of the Liggett attorneys in the monitoring of that company's research function.

I conclude that the attorney-client privilege claim for the Category 3 documents should not be sustained on the basis that the documents were not privileged at the outset, and on the basis of the crime-fraud exception.

It is recognized that substantial portions of the documents within Category 3 are not relevant to the questions of research, knowledge and response. Because of the necessity of dealing with these documents by category, it is recommended that each document be individually considered for relevancy and be subjected to possible redaction prior to its being received as evidence in the case in chief.

(4) Category 4a - Communications of Counsel (Attorney-Client).

The following sample of documents was reviewed from Category 4a:

2004135-2004144

2005872-2005879

2008877-2008877

2009297-2009299

2019215-2019215

2000025-2000025

2000569-2000573

2001140-2001146

2004850-2004851

2005309-2005317

2005508-2005508

2005511-2005513

2006089-2006093

2006336-2006337

2008875-2008876

2008960-2008965

2009381-2009382

2009753-2009763

2009880-2009888

2010866-2010869

2010998-2010998

2010999-2011001

2011964-2011968

2012481-2012483

2015164-2015167

2015289-2015294

2015295-2015295

2015328-2015336

2015344-2015350

2017206-2017208

2017574-2017581

2017613-2017620

2017992-2017996

2019085-2019086

2019509-2019511

2021763-2021768

2022154-2022154

2022725-2022728

2023066-2023066

2023076-2023079

2024143-2024144

2024421-2024425

The sample of the documents within Category 4a consisted of 42 documents. Many of the documents consisted of hand-written notes of meetings of the Committee of Counsel. The documents also included communications between counsel on pending legal issues. On the basis of the sample reviewed, I conclude that the documents represent communications among lawyers as part of a joint defense in response to existing litigation, regulatory action, etc. I do not conclude that this sample of documents represents additional evidence supporting an inference of crime-fraud. The claim of privilege with respect to the documents in 4a should be sustained.

(5) Category 4b - Special Projects.

The following documents from Category 4b were examined:

2000634-2000634

2000476-2000482

2000483-2000483

2000488-2000488

2000578-2000579

2000751-2000752

2000849-2000849

2000850-2000860

2001036-2001044

2001122-2001128

2002495-2002495

2002502-2002503

2002568-2002570

2002642-2002642

2002643-2002643

2002683-2002683

2002734-2002735

2002743-2002744

2010694-2010694

2010957-2010960

2011407-2011408

2011969-2011975

2015251-2015256

2018841-2018842

2021550-2021550

2022016-2022016

2023844-2023848

The great majority of these documents are transmittal letters or reports recommending the funding of research as a special project.

Because of my determination that the crime-fraud exception applies with respect to the attorneys' direction of research, I conclude that the documents in Category 4b, if they are attorney-client privileged at all, are subject to the crime-fraud

exception.

It is recognized that substantial portions of the documents within Category 4b are not relevant to the questions of research, knowledge and response. Because of the necessity of dealing with these documents by category, it is recommended that each document be individually considered for relevancy and be subjected to possible redaction prior to its being received as evidence in the case in chief.

(6) Category 4c - LS, Inc.

The documents reviewed in this category are:

2023450-2023450

2005757-2005757

2005758-2005758

2005807-2005809

2020797-2020800

2020877-2020883

2022198-2022198

2001008-2001009

2004363-2004365

2011159-2011160

2011167-2011167

2011197-2011200

2011500-2011500

2017191-2017191

2018918-2018921

2019203-2019206

2020707-2020747

2024224-2024232

The 3i project essentially represents the industry-wide consolidation indexing, storage and retrieval of information relating to smoking and health.

The sample of documents examined from Category 4c, in summary, represents communications to and/or from lawyers on the subject of fact work product.

The sample does not disclose communications regarding the selection, direction or funding of research, nor does the sample reflect attorney involvement in a defendant's decision to advise the public on safety issues. The privilege claim should be sustained.

(7) Category 5 - Public Statements.

Documents within this category which were examined are:

2000124-2000127

2006112-2006113

2008841-2008844

2017997-2018001

The documents within the sample do not, on their face, disclose that they are attorney-client privileged. Document 2000124 is apparently a draft of a letter by Liggett declining to join the Tobacco Industry Research Committee, now known as CRT. Assuming this document was generated by Liggett, one could also conclude that it is not subject to the joint defense privilege.

Document 2006112 is a letter from General Counsel of Brown & Williamson to the General Counsel Group dated November 23, 1977. The letter recommends a public relations response to a statement made by a Dr. Borne.

Document 2008841 is an unidentifiable (by author or date) document disagreeing with the use of the word "addiction" in association with cigarette smoking.

Document 2017997 is, essentially, a scientific argument to the effect that carbon monoxide and cigarette smoke are not responsible for the development of cardiovascular disease.

I conclude that the sample of the documents within Category 5 are not attorney-client privileged. They do not represent communications made or received as part of the process of seeking or providing legal advice. I conclude, therefore, that the claim of privilege with respect to the documents in Category 5 should not be sustained.

(8) Category 6 - Additives.

The following sample of documents within Category 6 was examined:

2005671-2005674

2019470-2019470

2000580-2000580

2000690-2000691

2002855-2002868

2003587-2003595

2005351-2005382

2010961-2010962

2015212-2015213

2015235-2015240

2017211-2017212

2017612-2017612

2019085-2018086

2022168-2022169

2022384-2022389

The documents examined reflect communications to and/or from attorneys on the subject of additives in cigarettes. The documents collectively reflect the involvement by attorneys in responses to regulatory initiatives which relate to cigarette components. For example, 2005352 is a draft of a response to an FDA recommendation that cigarette filters be classified as Class 2 Devices.

Document 2017211-2017212 is correspondence to the Committee of Counsel from the law firm of Covington & Burling on the subject of congressional hearings on Chemosol.

The documents within the sample considered represent a response by attorneys to federal initiatives relating to additives in cigarettes. I conclude that the claim of attorney-client privilege for the documents in Category 6 should be sustained.

(9) Category 7 - Children.

The documents reviewed from Category 7 are:

2016954-2016986

2024088-2024105

2024046-2024059

Document 2016954-2016986 is an unsigned and undated paper, apparently commenting on proposed state legislation which would, if adopted, regulate many aspects of the cigarette business, including sales to minors, advertising, etc.

Document 2024088-2024105 was written by an attorney at Covington & Burling and sent to an attorney within Liggett's General Counsel office. The document simply transmits without comment proposed California legislation.

Document 2024046-2024059 is correspondence from an attorney at Covington & Burling to an attorney at Liggett's General Counsel office transmitting amendments to state legislation.

Based upon the sample of Category 7 reviewed, I do not see any indication that the communications were subject to the attorney-client privilege, and I conclude that the privilege claim with respect to Category 7 documents should not be sustained.

(10) Category 8 - Advertisements.

The documents within Category 8 are:

2004007-2004012

2004068-2004069

2004131-2004133

2004156-2004159

2004733-2004733

2004891-2004891

2006366-2006366

2012545-2012554

2017284-2017284

2023015-2023018

2023320-2023320

2000763-2000766

2005385-2005389

2005644-2005645

2006305-2006305

2006308-2006309

2006313-2006313

2007539-2007540

2007597-2007597

2008142-2008150

2010772-2010773

2010803-2010806

2011843-2011850

2012240-2012240

2012263-2012263

2012276-2012279

2012315-2012326

2012416-2012427

2015164-2015167

2015296-2015299

2016949-2016953

2017443-2017443

2017482-2017487

2017853-2017877

2019186-2019188

2019569-2019573

2020518-2020526

2021329-2021335

2021763-2021768

2022023-2022025

2022319-2022320

2022489-2022497

2022691-2022692

2022971-2022971

2023075-2023079

2023080-2023093

2023289-2023303

The documents within Category 8 relate almost exclusively to the industry's response to initiatives by the Federal Trade Commission to create an advertising code and to require disclosures and/or warnings within that advertising. The documents represent the response of the industry lawyers to that FTC initiative.

I conclude that the sample of documents within Category 8 fairly falls within the attorney-client and joint defense privileges. The attorneys for the industry were responding to regulatory initiatives which affected the entire industry.

(11) Category 9 - Discovery

The documents sampled within Category 9 are:

2000025-2000025

2000062-2000063

2017289-2017294

Document 2000025 was not found within the Liggett documents. Document 2000062-2000063 is a memorandum from Joseph Greer, attorney at Liggett, to an executive at the company, describing the status of a response to a discovery request by the Federal Trade Commission. Document 2017289 through 2017294 is a typed memorandum representing the minutes of the Committee of Counsel dated March 14, 1969. Among other subjects considered within the minutes is a response to a request from the FTC for data.

I conclude that the two documents sampled represent attorneys' consideration of appropriate responses to discovery requests, or requests for information from regulatory agencies. I conclude that the documents are subject to the attorney-client and joint defense privileges.

(12) Category 10 - Government Regulations.

The documents sampled within Category 10 are:

0310737-0310745

2004042-2004051

2004088-2004088

2004156-2004159

2004480-2004481

Tobacco Special Master 9/10

<http://www.house.gov/commerce/TobaccoDocs/master.htm>

2005613-2005614
2006720-2006779
2008306-2008307
2009300-2009303
2010936-2010938
2012106-2012106
2012524-2012524
2022043-2022044
2019289-2019354
2023559-2023559
2000062-2000063
2000562-2000566
2000780-2000783
2001255-2001257
2002373-2002383
2004495-2004510
2005583-2005612
2005629-2005629
2006273-2006273
2006295-2006295
2006305-2006305
2006365-2006365
2007541-2007546
2007552-2007557
2008190-2008197
2008230-2008232
2009096-2009097
2009291-2009296

Tobacco Special Master 9/10

<http://www.house.gov/commerce/TobaccoDocs/master.htm>

2009628-2009628

2010102-2010109

2010110-2010121

2010803-2010806

2010823-2010823

2011132-2011141

2011589-2011589

2011619-2011623

2011708-2011708

2011996-2012003

2012122-2012138

2012313-2012313

2012336-2012346

2012734-2012760

2015135-2015136

2015158-2015160

2015221-2015225

2016561-2016562

2017142-2017169

2017219-2017224

2017234-2017245

2017512-2017529

2017654-2017736

2017893-2017893

2018754-2018761

2019157-2019157

2021444-2021479

2021729-2021733

2021850-2021850

2022538-2022542

2022816-2022816

2022817-2022818

2023470-2023470

2024349-2024363

2024364-2024364

2024577-2024580

The sample of documents from Category 10 represents responses by the attorneys for the industry to regulatory activity by the government. Many of the documents are minutes of the committee of counsel in which responses to the regulatory efforts are considered. Other documents reflect attorneys' involvement in "position papers." e.g. 2001255-2001257.

In the aggregate, the documents reflect attorney involvement in responding to regulatory activity. I conclude that they are attorney-client and joint defense privileged.

(13) Category 11 - Patents/EPA.

The documents within Category 11 which were sampled are:

2000892-2000908

2018769-2018770

2005580-2005582

2005583-2005612

The sample documents are minutes or documents relating to the Committee of Counsel and relate at least marginally to the Environmental Protection Agency. There is nothing within them which reflects attorney direction of research. I conclude that they are attorney-client and joint defense privileged.

(14) Category 12 - Other Documents.

Category 12 documents reviewed are:

2000095-2000099

2022027-2022027

2000101-2000101

2010148-2010148

The sample of Category 12 documents reviewed consisted of four documents. Each of the documents reviewed was a communication to and/or from an attorney. The documents reviewed are unremarkable, and they pertain to matters of attorney-client communications. I conclude that they are attorney-client and joint defense privileged.

Dated: September 10, 1997 /s/ _____

Mark W. Gehan

Special Master

Tobacco Special Master 9/10

<http://www.house.gov/commerce/TobaccoDocs/master.htm>

AG:105603 v1

Tobacco Special Master 9/10

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, **REPORT OF SPECIAL MASTER:****FINDINGS OF FACT, CONCLUSIONS****vs. OF LAW AND RECOMMENDATIONS**

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.

Hearings on the above-named matter took place on July 16, 1997 through July 18, 1997, before Special Master Mark W. Gehan. Roberta Walburn, Esq., appeared and argued on behalf of Plaintiffs. Noel Clinard, Esq., William Allinder, Esq., David Bernick, Esq., William Plesec, Esq., Thomas Reynolds, Esq., James Goold, Esq. and Leslie Wharton, Esq., appeared and argued on behalf of all Defendants with the exception of Liggett Group, Inc. The following also were present at one or all of the hearing dates and identified themselves as appearing on behalf of the party or parties set forth opposite their names:

Name Party

Gary Wilson State of Minnesota and Blue Cross and Blue Shield of Minnesota

Tara Sutton State of Minnesota and Blue Cross and Blue Shield of Minnesota

Tobacco Special Master 9/10

David Klatasake State of Minnesota

Anne McBride Walker Philip Morris Incorporated

Peter Sipkins Philip Morris Incorporated

Paul Dieseth Philip Morris Incorporated

Cheryl Grissom Ragsdale Philip Morris Incorporated

Jonathan Redgrave R.J. Reynolds Tobacco Company

Ram Padmanabhan Brown & Williamson Tobacco Corporation

Michael Lieber Brown & Williamson Tobacco Corporation

Gerald Svoboda B.A.T. Industries, p.l.c.

Jeffrey Nelson Lorillard Tobacco Company

Craig Proctor Lorillard Tobacco Company

Denise Talbert Lorillard Tobacco Company

David Martin Lorillard Tobacco Company

Connie Iversen Lorillard Tobacco Company

Philip Cohen The American Tobacco Company

Kirk Kolbo The Council for Tobacco Research - U.S.A., Inc.

R. Lawrence Purdy The Council for Tobacco Research - U.S.A., Inc.

Hal Shillingstad The Tobacco Institute, Inc.

Members of the public and media also attended and observed the proceedings.

I. THE JOINT DEFENSE/COMMON INTEREST PRIVILEGE

1. Product liability litigation involving more than one of the major cigarette manufacturers began in March, 1954 when the smoking and health lawsuit, Lowe v. R.J. Reynolds, et al., was filed. (See Affidavit of Lawrence E. Savell, ¶ 8, June 20, 1996.) The defendants have engaged in a joint defense effort and shared information in furtherance of common legal interests since at least 1954. (See Affidavits of James W. Dobbins, ¶ 15, June 20, 1996; Denise F. Keane, ¶ 6, June 20, 1996; Ronald F. Bianchi, ¶ 15, April 7, 1997; Arthur J. Stevens, ¶ 14, April 7, 1997; Lawrence E. Savell, ¶ 14, June 20, 1996; Susan B. Saunders, ¶ 10, June 19, 1996; William Adams, ¶ 9, June 19, 1996; and Declaration of Alexander Holtzman, ¶ 4, May 15, 1996.) The defendants' coordinated defense efforts have included meetings among counsel, exchanging materials prepared in anticipation of litigation, and identifying and consulting with potential expert witnesses. Id. In June, 1954, the first smoking and health lawsuit with Liggett & Myers, Inc. ("Liggett") as a co-defendant, Deutsch v. R.J. Reynolds, et al., was filed. (See Affidavit of James W. Dobbins, ¶ 7, June 20, 1996.) In 1964, the first smoking and health lawsuit involving the Council for Tobacco Research - U.S.A., Inc. ("CTR") and the Tobacco Institute, Inc. ("TI") as co-defendants, Fine v. Philip Morris Inc., et al., was filed. (See Affidavit of Lawrence E. Savell, ¶ 13, June 20, 1996.) Since 1954, smoking and health litigation has been pending continuously against one or more of the major cigarette manufacturers, CTR and TI. (Id. at ¶ 9; Affidavits of James W. Dobbins, ¶ 8, June 20, 1996; Ronald F. Bianchi, ¶ 8, April 7, 1997; and Arthur J. Stevens, ¶ 8, April 30, 1996.) Such litigation has raised recurring factual and legal issues common to the defendants, including allegations of injury from smoking and the use of false statements in cigarette advertising, among others. (See Declaration of Alexander Holtzman, ¶ 5, April, 1997 and Declaration of Philip H. Cohen, Exhibits A, B and M, May 23, 1997.)
2. In the 1950's, regulatory activities (apart from continuing antitrust scrutiny) affecting the cigarette industry as a whole began to accelerate. Such activities have continued unabated from the 1950's to the present and have occurred on a federal, state, local and international level. These activities have involved a wide variety of federal regulatory

- agencies including the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") among others. (See, e.g., Defendants' Exhibit 37.) The activities have covered a wide range of issues, including cigarette advertising; placement and use of health warning notices on cigarette packages and in cigarette advertising; placement and use of tar and nicotine yields on cigarette packages and in cigarette advertising; restriction and prohibition of broadcast cigarette advertising; testing of cigarettes for tar, nicotine and carbon monoxide yields; excise taxes; reporting of ingredients used in cigarette manufacturing; restriction and prohibition of smoking aboard commercial aircraft, interstate buses and interstate trains; and, smoking in public places, among others. (See e.g., LG 2005566 - 2005579; LG 2024333 - 2024342; LG 2022879 - 2022898; LG 2010729 - 2010734.)
3. A review of the documents at issue and exhibits submitted by defendants establishes that federal regulatory activities since the 1950's involving the cigarette industry have included disputes between federal regulatory agencies (predominantly the FTC) and the major cigarette manufacturers. These disputes have involved a variety of issues such as cigarette advertising content and placement, broadcast cigarette advertising, the authority of the FTC to issue orders to file special reports and the authority of the FTC to promulgate regulations. (See e.g., LG 2005390 - 2005438; LG 2023211 - 2023237; LG 2023925 - 2023950.)
 4. Legislative activities on the federal level affecting the cigarette industry began in at least 1957 with the "Blatnik hearings", which addressed the disclosure of tar and nicotine yields in cigarette advertising. Since 1965, the defendants have monitored proposed legislation raising issues of common interest to the industry and have attended and testified at hearings regarding a wide variety of proposed and existing legislation. (See, e.g., Defendants' Exhibit 38.)
 5. Liggett's own declarations demonstrate that Liggett fully participated in and understood the terms of this joint defense effort. Liggett's Vice President and General Counsel, James W. Dobbins, testified, "Liggett and other cigarette manufacturers, TI [Tobacco Institute], and CTR have participated in a joint defense effort to defend against pending and anticipated smoking and health product liability actions," which "has included, among other things, meetings among in-house and outside counsel representing Liggett, other cigarette manufacturers, TI and CTR; exchanging materials prepared in anticipation of litigation; and identifying and preparing expert witnesses." (See Affidavit of James W. Dobbins, ¶ 15, June 20, 1996.)
 6. The joint defense/common interest privilege does not require a written agreement. As long as parties are "allied in a common legal cause," shared communications and work product are protected by the privilege. In re Regents of the University of California, 101 F.3d 1386, 1389, 1390-91 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 1484 (1997). The common interest/joint defense privilege also covers legal advice and strategy relating to regulatory or legislative proceedings. See In Re Sealed Case, Nos. 96-3085, 96-3086, 107 F.3d 46 (D.C. Cir. 1997). When, as in this case, joint defense efforts have been undertaken by the parties and their respective counsel, work product exchanged between counsel and confidential communications related to that common interest are protected from disclosure by the privilege. E.g., United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989), on remand, 738 F. Supp. 654 (E.D. N.Y. 1980), aff'd, 924 F.2d 443 (2d Cir. 1991), cert. denied, 502 U.S. 810 (1991).
 7. The joint defense privilege cannot be waived without the consent of all parties to the defense. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990), cert. denied, 500 U.S. 905 (1991); United States v. Bicoastal Corp., 819 F.Supp. 156 (N.D. N.Y. 1993). Consequently, no individual defendant, including Liggett, can unilaterally waive the joint defense privilege. No defendant, excluding Liggett, has waived the joint defense or common interest privilege.

II. PLAINTIFFS' ASSERTION OF THE CRIME-FRAUD EXCEPTIONII.

By an Order dated May 9, 1997, Judge Fitzpatrick of the Ramsey County Minnesota District Court concluded that plaintiffs had established a prima facie case of crime fraud in this case, sufficient to permit an in camera inspection of documents and to create the need for additional proceedings to permit the defendants an opportunity to rebut plaintiffs' evidence. The hearings which occurred on July 16, 17 and 18, 1997, provided the Defendants the opportunity to offer such evidence, as they saw fit, to respond to plaintiffs' prima facie showing. During these hearings, substantial evidence and argument was offered on an in camera basis, i.e., plaintiffs were excluded from the proceedings.

A. PLAINTIFFS' EVIDENCE DIRECTED AT A PRIMA FACIE DEMONSTRATION OF CRIME/FRAUD

1. Plaintiffs have produced evidence that the defendants have acted in concert for their mutual benefit and defense, at least since 1954, when each of the defendants with the exception of Liggett (the "defendants" or the "non-settling defendants"), published a document under the name Tobacco Industry Research Committee, now the defendant The Counsel for Tobacco Research - U.S.A., Inc. ("CTR"). This document, entitled "A Frank Statement to Cigarette Smokers" ("Frank Statement"), challenged the "theory that cigarette smoking is in some way linked with lung cancer in human beings." Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1) (CTR MN 11309817).
2. In the "Frank Statement," the non-settling defendants made the following statements, among others:

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

We are pledging aid and assistance to the research effort into all phases of tobacco use and health.

The "Frank Statement" also made three specific promises:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.
2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national reputation. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

1. In December 1970, the Tobacco Institute ran a statement declaring that "[f]rom the beginning, the tobacco industry has believed that the American people deserve objective scientific answers." Plaintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMN 0081352. The statement also represented that "in the interest of absolute objectivity, the tobacco industry has supported totally independent research with completely non-restricted funding" and that "the findings are not secret." Id.
2. In 1971, the Tobacco Institute in a press release stated, in reference to finding the "keys" which might unlock the door blocking the State between statistical evidence and causation:

Any organization in a position to apply resources in the search for those keys - and which fails to do so - will continue to be guilty of cruel neglect of those whom it pretends to serve.

Plaintiffs' Tab 4, Plaintiffs' Ex. 6(1), LG 0069275 at 0069279.

1. In a 1972 Wall Street Journal article, James Bowling, a Vice President of Defendant Philip Morris, Inc., ("PM") was quoted as saying:

If our product is harmful. . . we'll stop making it. We now know enough that we can take anything out of our product, but we don't know what ingredients to take out.

Plaintiffs' Tab 5, Plaintiffs' Ex. 7(1), RJR 500324162 at 500342163.

1. In 1982, the Tobacco Institute published a pamphlet in which it wrote:

Since the first questions were raised about smoking as a possible health factor, the tobacco industry has believed that the American people deserve objective, scientific answers. The industry has committed itself to this task.

Plaintiffs' Tab 49, Plaintiffs' Ex. 8(1), B&W 670500617.

1. In 1990, a public relations employee of Defendant R.J. Reynolds Tobacco Company ("RJR") wrote a letter to a person by the name of Rook in Minnesota, apparently in response to a letter from Rook. The public relations employee asserted in that letter that ". . . scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking." The letter went on:

Our company intends, therefore, to continue to support [research] in a continuing search for answers.

Plaintiffs' Ex. 9(1), RJR 507703861-03862.

1. One way in which the industry publicly stated that it would fulfill this promise to conduct and disclose objective research was through the auspices of the CTR (originally named the Tobacco Industry Research Council, or TIRC). Internal documents, however, imply that top officials from the tobacco industry privately acknowledged that, contrary to the public representations, CTR was meant to serve primarily a public relations function and that CTR scientific research was of little value in addressing issues relating to the causal link between smoking and health. For example:
2. In May 1958, a BAT scientist (and others from the British tobacco industry) visited representatives of the U.S. industry and found that:

Liggett & Meyers stayed out of T.I.R.C. originally because they doubted the sincerity of T.I.R.C.'s motives and believed that

the organization was too unwieldy to work efficiently. They remain convinced that their misgivings were justified. In their opinion T.I.R.C. has done little if anything constructive, the constantly reiterated "not proven" statements in the face of mounting contrary evidence has thoroughly discredited T.I.R.C., and the S.A.B. of T.I.R.C. is supporting almost without exception projects that are not related directly to smoking and lung cancer.

Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 5, BAT 105408490 at 8494.

1. In another trip report written in 1964 by British scientists, it was stated:

[B]oth L&M and Lorillard scientists told us quite bluntly that they considered TRC [the British trade group] research was on the correct basis and CTR largely without value.

Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 17, PM 1003119099 at 9115.

1. In 1967, W.W. Bates, Jr., Liggett's director of research, wrote to the president of the Tobacco Institute that the smoking and health problem "is basically a scientific one." Plaintiffs' Tab 12, Plaintiffs' Ex. 12(3), LG 0208295. Bates stated, however, that "So far...the major efforts of the industry have been other than scientific." *Id.* Bates further stated that:

The CTR and AMA programs suffer from almost the same fault. Most of their projects have only a peripheral connection to tobacco use.

Id. at LG 0209296.

1. In 1970, Helmut Wakeham, head of research and development of Philip Morris, wrote a memorandum to the president of Philip Morris, Joseph Cullman. In this memorandum, Wakeham discussed the raison d'être of CTR. Wakeham wrote:

It has been stated that CTR is a program to find out 'the truth about smoking and health.' What is truth to one is false to another. CTR and the Industry have publicly and frequently denied what others find as 'truth.' Let's face it. We are interested in evidence which we believe denies the allegations that cigarette smoking causes disease.

Plaintiffs' Tab 14, Plaintiffs' Ex. 14(3) (PM 2022200161, 2022200162).

1. A 1970 document discloses that another top Philip Morris scientist also questioned the worth of CTR research:

Osdene's view (Philip Morris' view?) was that C.T.R. did apparently no useful work and cost a vast amount of money.

Plaintiffs' Tab 13, Plaintiffs' Ex. 13(3), p. 2, BAT 110316203 at 204. (Thomas Osdene was a senior research and development scientist at Philip Morris.)

1. After a 1973 trip to the U.S., scientists from England wrote that:

It is difficult to avoid the sad conclusion that C.T.R. has become a backwater of little significance in the world of smoking and health.

Plaintiffs' Tab 15, Plaintiffs' Ex. 15(3), p. 28, BAT 100226995 at 7022.

1. Alexander Spears, research director at Lorillard Tobacco Company ("Lorillard"), explained to Curtis H. Judge, the chief executive officer, in a 1974 memorandum:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for purposes such as public relations, political relations, position for litigation, etc....In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.

Plaintiffs' Tab 16, Plaintiffs' Ex. 34(1), p. 3, Lor 01421596 at 598.

1. A memorandum written in November 1978 from Philip Morris executive Robert Seligman contained the following historical account showing that CTR was not set up to conduct objective research:

...Bill Shinn [attorney at Shook, Hardy] described the history, particularly in relation to the CTR. CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry "shield" in 1954....CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses.

Getting away from the historical story, Bill Shinn mentioned that the "public relations" value of CTR must be considered and continued.... A very interesting point, made by Bill Shinn, is the opposition's, "the case is closed with regard to smoking and disease."...It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed....There is a 'CTR' basket that must be maintained for PR purposes.

1. One handwritten note, believed to be written by Addison Yeaman, the chairman of CTR, summed up the fact that CTR was created to protect the industry, not the public health. These notes, entitled "CTR Meeting," state:

CTR is best and cheapest insurance the tobacco industry can buy, and without it the industry would have to invent CTR or would be dead.

Plaintiffs' Tab 17, Plaintiffs' Ex. 16(3), Lor 03539541.

1. There also is evidence that for years the industry acted in concert to suppress or eliminate internal research on smoking and health, notwithstanding the industry's public representations to conduct research into "all phases of tobacco use and health" and report all facts to the public. Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1), CTR MN 11309817. For example:
2. In 1968, Philip Morris director of research Wakeham described a "gentlemen's agreement" under which the companies had agreed to refrain from conducting in-house biological experiments on tobacco smoke. Wakeham stated:

We have reason to believe that in spite of gentlemen's agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities.

Plaintiffs' Tab 18, Plaintiffs' Ex. G(2), p. 4, PM 1001607055 at 058.

1. A 1970 memo by D.G. Felton, a BAT senior scientist, also referenced this "tacit agreement" not to conduct in-house biological research. Plaintiffs' Tab 19, Plaintiffs' Ex. 24(3), p. 2, BAT 110315968 at 969. This memo further described how this "tacit agreement" led one company -- Philip Morris -- to direct another company -- RJR -- to shut down its in-house biological work. After learning that RJR was conducting biological studies, Philip Morris president Cullman lodged a complaint with RJR president Galloway. The result was a "sudden reorganization at Reynolds, resulting in the closure of the biological section." *Id.*, pp. 2-3. This later became known as the "mouse house" incident.
2. An April 1980 letter from Robert Seligman, a top executive in research and development at Philip Morris, to Alexander Spears, a senior scientist at Lorillard, listed potential areas of scientific research for the industry. Seligman included a list of "subjects which I feel should be avoided." Plaintiffs' Tab 20, Plaintiffs' Ex. 20(3), p. 1, Lor 01347175. The list entitled "Subjects To Be Avoided" included:

1. Developing new tests for carcinogenicity.
2. Attempt to relate human disease to smoking.

Id., p. 3 (emphasis added).

1. Plaintiffs have presented substantial evidence showing involvement in scientific research and other scientific matters by attorneys for the tobacco industry, and that industry attorneys were a driving force behind the direction of and the suppression of scientific research. For example:
2. In 1978, Sheldon Sommers, M.D., who was then Chairman of the CTR Scientific Advisory Board, complained to William Gardner, who was then the Scientific Director for CTR, that he [Sommers] was unable to understand the legal counsel he was being given. The import of Sommers' letter was that the CTR lawyers were controlling tobacco research by CTR based upon legal considerations. Plaintiffs' Tab 27, Plaintiffs' Ex. 33(1), CTR SF 0800031. Sommers also stated:

I think CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short.

Id.

1. A hand-written memorandum dated April 21, 1978, produced from the files of defendant Lorillard, complains that:

We have again abdicated the scientific research directional management of the Industry to the "Lawyers" with virtually no involvement on the part of the scientific or business management side of the business.

Plaintiffs' Tab 28, Plaintiffs' Ex. 25(3), LOR 01346204.

1. A 1976 internal memo by a tobacco scientist at BAT, S.J. Green, also discusses the extent to which "legal considerations" dominated scientific research:

The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. . . By repudiation of a causal role for cigarette smoking in general they [the companies] hope to avoid liability in particular cases. This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research etc.

Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), BAT 109938433.

1. A 1964 trip report by English scientists described how a powerful committee of U.S. lawyers was dominant in the smoking and health arena:

This Committee is extremely powerful; it determines the high policy of the industry on all smoking and health matters - research and public relations matters, for example, as well as legal matters - and it reports directly to the presidents.

...

The lawyers are thus the most powerful group in the smoking and health situation.

Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 7, PM 1003119099 at 105, 106. This Committee, later known as the Committee of Counsel, also was involved in "clearing papers (e.g. Dr. Little's annual report)." Id. Dr. Little was the first director of CTR; thus, a powerful committee of lawyers was involved in "clearing" CTR's annual reports on scientific research.

34. It appears that one method by which attorneys may have controlled research is through maneuvers intended to "create" privileges. In November, 1979, the corporate counsel for B&W, Kendrick Wells, wrote a memorandum to Ernest Pepples, B&W's vice president of law. Plaintiffs' Ex. 43(1), PM 2048322229. In this memorandum, Wells outlined a plan to wrap scientific information in attorney-client privilege. Mr. Wells' proposal specifically provided that ". . . in the operational context BAT would send documents without attempting to distinguish which were and which were not litigation documents." PM 2048322230.

1. Defendants also presented evidence at the three days of hearings showing that scientific research is directed into different classifications, with some scientific research being withheld on the basis of privilege. Defendants' Exhibit 41 depicts how "Industry Counsel" directed three categories of research: "Special Account Recipients (Confidential Consultants)," "Special Account Recipients" and "Special Projects Recipients."
2. The defendants and their representatives have, in fact, been aware that cigarette smoking is probably hazardous to the health of the smoker. A statistical association between smoking and illness has been conceded by the defendants, but there has been a long standing scientific and public relations dispute as to whether one can infer "causation" from such an association.
3. For example, in April and May of 1958, three British scientists (including at least one from BAT, D.G. Felton) visited top officials and scientists in the U.S. tobacco industry, including those at TIRC, Liggett, Philip Morris and the American Tobacco Company. Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 1, BAT 105408490. One object of the visit was to find out "the extent in which it is accepted that cigarette smoke 'causes' lung cancer." Id., p. 2. The British scientists reported widespread acceptance of causation:

With one exception (H.S.N. Greene) [not formally affiliated with any tobacco company] the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is prepared now to doubt the statistical evidence and his reasoning is nowhere thought to be sound.

Id., p. 2. The authors concluded that there was no serious dispute that the statistical associations constituted a "cause and

effect" phenomenon:

Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, scientific opinion in the U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship.

Id., p. 8.

1. In 1959, an RJR scientist, Alan Rodgman, concluded that there is a "distinct possibility" that substances in cigarette smoke could have a carcinogenic effect. Plaintiffs' Ex. 21(1), RJR 500945942.
2. In 1962, Rodgman wrote:

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

Plaintiffs' Tab 32, Plaintiffs' Ex. 22(1), p. 4, RJR 504822847 at 504822850.

1. In 1964, Philip Morris scientist Wakeham examined the first Surgeon General's Report -- which found that smoking was causally related to lung cancer in men -- and found that "little basis for disputing the findings at this time has appeared." Plaintiffs' Tab 33, Plaintiffs' Ex. 24(1), p. 1, PM 1000335612. Wakeham commented on "[t]he professional approach" of the Surgeon General's committee. Id., p. 2.
2. In 1967, G.F. Todd of the Tobacco Research Council [the British counterpart to TIRC/CTR] wrote a letter to Mr. Addison Yeaman, the vice president and general counsel of Brown & Williamson Tobacco Corporation. In his letter, Todd observed:

The only real difficulties that we encountered arose out of the unavoidable paradox at the centre of our operations - namely that, on the one hand the manufacturers control TRC's operations and do not accept that smoking has been proved to cause lung cancer while, on the other hand, TRC's research program is based on the working hypothesis that this has been sufficiently proved for research purposes. In addition, the Council senior scientists accept that causation theory . . . We have not yet found the best way of handling this paradox.

Plaintiffs' Tab 34, Plaintiffs' Ex. 26(1), LG 298942 at 298943.

1. In October 1976, BAT scientist S.J. Green criticized the industry's public position on causation:

The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for 'scientific proof' whereas such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous.

Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), p. 1, BAT 109938433. Dr. Green concluded that "It may therefore be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be." Id., p. 4.

1. In 1979, P.N. Lee of BAT expressed his impressions of a 1979 Surgeon General's report dated January 11, 1979. In this memorandum, Lee considered at length the Tobacco Institute publication entitled "The Continuing Controversy," also identified as TA73. Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), BAT 100214029, beginning at 100214045. That document itself is identified as TIMN 84430. Lee characterized the report as "misleading." He wrote that the report did not appear to understand what causation is. Lee wrote:

Discussion of the role of other factors can be particularly misleading when no discussion is made of relative magnitudes of effects. For example, heavy smokers are observed to have 20 or more times the lung cancer rates of non-smokers. Sure, this does not prove smoking causes lung cancer, but what it does mean, and TA73 never considers this, is that for any other factor to explain this association, it must have at least as strong an association with lung cancer as the observed association for smoking (and be highly correlated with the smoking habit).

...

TA73 seems ready to accept evidence implicating factors other than smoking in the aetiology of smoking associated disease without requiring the same stringent standards of proof that it requires to accept evidence implicating smoking. This is blatantly unscientific.

BAT 100204046.

1. In fact, in 1980 BAT considered breaking ranks with the industry and admitting that smoking causes disease because BAT acknowledged that the "no causation" position was not credible:

The company's position on causation is simply not believed by the overwhelming majority of independent observers, scientists and doctors. The industry is unable to argue satisfactorily for its own continued existence because all the arguments eventually lead back to the primary issue of causation, and on this point, our position is unacceptable.

Plaintiffs' Tab 36, Plaintiffs' Ex. 30(1), p. 2, BAT 109881322 at 323. The countervailing interest to this break from the industry's public dogma was the "severe constraint of the American legal position." *Id.*, p. 10.

1. In 1982, a BAT consultant, Francis Roe, found the industry position on causation "short of credibility," noting that "[i]t is not really true, as the American Tobacco industry would like to believe, that there is a raging worldwide controversy about the causal link between smoking and certain disease." Plaintiffs' Tab 37, Plaintiffs' Ex. 79(3), BAT 100432193.
2. Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive.
3. Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness. For example:
4. In 1962, the Tobacco Institute issued a press release stating that:

The causes of cancer are not now known to science. Many factors are being studied along with tobacco. The case against tobacco is based largely on statistical associations, the meanings of which are in dispute.

Plaintiffs' Tab 2, Plaintiffs' Ex. 4(1), PM 1005136953.

1. In 1969, a CTR press release stated:

There is no demonstrated causal relationship between smoking and any disease....If anything, the pure biological evidence is pointing away from, not toward, the causal hypothesis.

Plaintiffs' Tab 40, Plaintiffs' Ex. 12(1), B&W 670307882.

1. In 1970, a CTR press release said:

The deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists.

Plaintiffs' Tab 41, Plaintiffs' Ex. 13(1), RJR 50001 5901.

1. In 1970, a Tobacco Institute advertisement stated:

After millions of dollars and over 20 years of research: The question about smoking and health is still a question.

Plaintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMN 0081352.

1. In 1972, a Tobacco Institute press release, stated:

The 1972 report of the Surgeon General... 'insults the scientific community'... [T]he number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public."

Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TIMN 012062.

53. In 1977, a Tobacco Institute pamphlet stated:

Has the Surgeon General's report established that smoking causes cancer or other disease? No.

Plaintiffs' Tab 45, Plaintiffs' Ex. 25(1), TIMN 0055129.

1. In 1978, a Tobacco Institute pamphlet stated:

The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists.

Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TI 120602.

1. In 1979, the Tobacco Institute circulated a report entitled "Smoking and Health 1964-1979: The Continuing Controversy." This report, which followed the 1979 Surgeon General's Report, stated that:

The American public would be better served if high government health officials and private interest groups which encourage them abandoned the myth of waging war against diseases and their alleged causes.... Indeed, many scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous. Unfounded because evidence on many critical points is conflicting. Dangerous because it diverts attention from other suspected hazards.

Plaintiffs' Tab 47, Plaintiffs' Ex. 29(1), TIMN 0084430. (Internally, however, the tobacco industry acknowledged that the 1979 Surgeon General's report was "no doubt...an impressive document" and that "[t]he way in which the information was presented was on the whole sound, scientific and emotive." Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), at 2, BAT 100214029 at 030.)

1. In 1983, an RJR advertisement 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...in our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy.

Plaintiffs' Ex. 16(1), RJR 504638051.

1. On February 2, 1984, the chairman of the board of RJR made the following comments as part of a panel discussion on the Nightline television program:

It is not known whether cigarettes cause cancer. RJR 502371216.

Despite all the research to date, there has been no causal link established [between smoking and emphysema]. RJR 502371217.

...as a matter of fact, there are studies that while we are accused of being associated with heart disease, there have been studies conducted over ten years that would say, again, that science is still puzzled over these forces. RJR 502371217.

Plaintiffs' Tab 50, Plaintiffs' Ex. 17(1), RJR 502371216.

1. These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking also were published in Minnesota. For example, the St. Paul Pioneer Press published the following articles:
2. On October 13, 1954, the Pioneer Press quoted Timothy Hartness, chairman of TIRC, as stating that "no clinical evidence has yet established tobacco to be the cause of human cancer." Plaintiffs' Ex. 395.
3. On November 24, 1954, the Pioneer Press quoted E. A. Darr, president of RJR, as stating that "there still isn't a single shred of substantial evidence to link cigarette smoking and lung cancer directly." *Id.*
4. On April 19, 1963, the Pioneer Press quoted the director of the CTR scientific advisory board, C.C. Little, as stating:

It is at present scientifically unwise and indeed may be harmful to attribute a simple definitive causative role to any one of them or to attempt to assign them relative degrees of importance.

Id.

1. On February 7, 1965, the Pioneer Press quoted a tobacco industry spokesman saying that the link between smoking and disease is still unproved despite the Surgeon General's report. *Id.*
2. On August 17, 1968, the Pioneer Press quoted the Tobacco Institute as attacking a Surgeon General's task force for a "shockingly intemperate defamation of an industry which has led the way in medical research to seek answers in the cigarette controversy." *Id.*
3. On January 4, 1971, the Pioneer press quoted Joseph Cullman III, the CEO of Philip Morris, as reiterating the industry position that cigarettes "have not been proved to be unsafe" to human health. *Id.*
4. On January 11, 1979, the Pioneer Press quoted the Tobacco Institute as stating that the "preoccupation with smoking may be both unfounded and dangerous. . . because evidence on many critical points is conflicting. . . (and it) diverts attention from other suspected hazards." *Id.*

III. DEFENDANTS REBUTTAL EVIDENCE

1. In the early 1950's, several researchers reported the results of laboratory and epidemiological studies that, they claimed, linked smoking to disease. See Affidavit of Kenneth M. Ludmerer, M.D., dated February 12, 1997.
2. On January 4, 1954, in response to widespread publicity generated by these studies, the major cigarette manufacturers (except Liggett) and other tobacco-related organizations caused "A Frank Statement to Cigarette Smokers" to be published in numerous newspapers. (See Finding 9 above). The "Frank Statement" stated that these companies were forming a "joint industry group," to be known as the Tobacco Industry Research Committee ("TIRC"). 1954 Frank Statement, Pl. Ex. 2 (1).
3. Because of concerns relating to a long history of antitrust difficulties and litigation dating back to at least 1911, representatives of the tobacco industry invited the United States Department of Justice ("DOJ") to meet with them to discuss the formation of TIRC. Although DOJ declined to attend this meeting, the tobacco companies kept DOJ advised as to the industry's joint research efforts through CTR and in January 1954 provided DOJ with a copy of CTR's "Statement of Purpose." See Affidavit of Irwin Tucker dated January 28, 1997 ¶ 4; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob, dated February 15, 1997, ¶¶ 48-51.
4. In 1964, TIRC changed its name to The Council for Tobacco Research -- U.S.A. In 1971, The Council for Tobacco Research -- U.S.A., Inc. was incorporated. See Affidavit of Glenn, ¶ 6. These organizations collectively are referred to herein as "CTR".

The Nature of CTR

1. The uncontroverted evidence before the Court establishes that: (1) the major U.S. tobacco companies, other than Liggett, have been members of CTR since 1954, See Affidavit of Glenn, ¶¶ 6,8; (2) Liggett was a member of CTR from 1964 to 1968, and (3) after its withdrawal from CTR, Liggett participated in some jointly-sponsored research activities including certain CTR Special Projects research.
2. Continuously since 1954, CTR has acted as a joint industry group for the tobacco companies that are its members. CTR's principal function throughout that time has been to fund scientific research by receiving monies from the tobacco companies and providing them to scientific investigators. See Affidavit of Glenn, ¶¶ 6-9; See Affidavit of McAllister, ¶ 7.
3. Since 1954, one of CTR's principal activities has been to fund scientific research by independent scientists through its grant-in-aid program, under the supervision of its Scientific Advisory Board (SAB) supplemented on occasion by research contracts. See Affidavit of Glenn, ¶ 7; See Affidavit of McAllister, ¶ 7. (CTR itself has not conducted any scientific research. See Affidavit of Glenn, ¶ 9.) Through this research program, from 1954 through 1996 CTR has provided approximately \$282 million to fund over 1,500 research projects by approximately 1,100 independent scientists. See Affidavit of Glenn, ¶ 16; 1996 Report of The Council for Tobacco Research -- U.S.A., Inc. p. 5.
4. The researchers who have received CTR grant funding have been affiliated with approximately 300 medical schools, universities, hospitals and other research institutions, including such prestigious institutions as Harvard Medical School, Yale School of Medicine, Stanford University, numerous institutions in the University of California system, Johns Hopkins School of Medicine, the University of Chicago Medical Center, the Scripps Research Institute, the Mayo Clinic and the Salk Institute. See Affidavit of Glenn, ¶ 9 & Ex. B. The researchers who have received this funding have not been employees of the tobacco companies or CTR. CTR's grantees have included many distinguished scientists, three of whom have won Nobel Prizes. See Affidavit of Glenn, ¶ 10; See Affidavit Rubin, ¶ 8 (4/25/96).
5. The evidence presented included an affidavit by Dr. Emanuel Rubin, the Chairman of the Department of Pathology at Jefferson Medical College, who has reviewed CTR's grant-in-aid program. Dr. Rubin concluded that "CTR funded excellent research by well-qualified scientists that was relevant to the scientific issues associated with tobacco use and health." See Affidavit of Rubin, ¶ 6 (2/10/97).
6. CTR's written policy provides that SAB grant-in-aid recipients are to "work with the greatest freedom," and are allowed to publish their results in scientific journals. See Affidavit of McAllister, ¶ 16 & Ex. A. CTR encourages such publication. See Affidavit of Glenn, ¶ 14. Since 1956, research projects funded by CTR grants and contracts have resulted in approximately 6,100 scientific publications, many of which have been in highly respected, peer-reviewed scientific journals that are frequently cited in the scientific literature. See Affidavit of Glenn, ¶ 16; 1996 Report of the Council for Tobacco Research -- U.S.A., Inc. p. 5; See Affidavit of McAllister, ¶¶ 19-21.
7. Each year since 1956, CTR has made available to the scientific community an Annual Report containing abstracts of reports of research by CTR grant-in-aid requests that have been published in scientific journals, and a list of the research projects being funded by CTR SAB grantees. Report of the Council for Tobacco Research -- U.S.A., Inc. (1956-1996); See Affidavit of Glenn, ¶ 15; See Affidavit of McAllister, ¶ 8; Sommers *Cipollone* Tr. 8587-88; See Affidavit of Rubin, ¶ 7 (4/25/96). In this way, the research results from CTR's SAB grant-in-aid program have been shared with the scientific community.
8. There is no evidence in the record before the Court that, over the course of CTR's 43 years, CTR has prevented any of its over 1,100 SAB grantees from publishing their research findings. See Affidavit of McAllister, ¶ 18.
9. There is no evidence in the record before the Court that, over the course of CTR's 43 years, any scientific research by

CTR SAB grantees has been tainted by scientific impropriety, such as the falsification of data or improper reporting of research results.

10. Some of the research funded through CTR grants has led to reported findings that have linked smoking with diseases including lung cancer and emphysema, and that have supported the view that cigarettes are addictive. The evidence presented included the affidavits of Dr. Rubin, who stated that "[numerous publications from CTR-funded research provide important information indicating adverse effects of cigarette smoking." See Affidavit of Rubin, ¶ 6 (2/10/97). Some of these research findings have been reported in the general media. See Affidavit of McAllister, ¶ 22 & Ex. O; 10/22/66 Article of the N.Y. Times (Ex. 46). Over 250 of the scientific articles published by CTR grantees have been cited in reports relating to smoking and health of the U.S. Surgeon General (or his advisory committee), and 75 were cited in the 1996 report by the Food and Drug Administration on nicotine. See Affidavit of McAllister, ¶¶ 19, 23, 24.
11. Many of the researchers who have received CTR SAB grants have also received co-funding for their research from organizations such as the American Cancer Society, the National Cancer Institute and the National Institutes of Health. See Affidavit of Glenn, ¶¶ 11.
12. The research conducted by CTR SAB grantees has been directed to matters concerning tobacco use and health, and in particular to the causation of diseases associated with smoking. See Affidavit Rubin, ¶ 6 (2/20/97); See Affidavit of Glenn, ¶¶ 17, 19; See Affidavit of McAllister, ¶¶ 26-28; See Affidavit of Lisanti, ¶ 22 (4/11/97). The focus of that research has shifted over the years, since 1954, in accord with changes in scientific research generally. See Affidavit of Rubin, ¶¶ 14-15 (2/10/97); See Affidavit of Glenn, ¶¶ 18, 19; See Affidavit of McAllister, ¶¶ 27, 28.
13. In 1954, CTR appointed as its Scientific Director Dr. Clarence Cooke Little, a nationally known scientist. See Affidavit of Glenn, ¶ 8. Dr. Little was the founder and director of the Jackson Memorial Laboratory in Bar Harbor, Maine. He had been the President of the University of Michigan and the University of Maine, and had been the managing director of the forerunner of the American Cancer Society. See Affidavit of Glenn ¶ 8. As Scientific Director of CTR, Dr. Little was responsible for CTR's scientific program. See Affidavit of Lisanti, ¶ 7 (4/11/97). Dr. Little served as CTR's Scientific Director from 1954 until 1971. See Affidavit of Glenn, ¶ 8. He was succeeded as Scientific Director of CTR by other prominent scientists. See Affidavit of Lisanti ¶ 9 (4/11/97).
14. The appointment of Dr. Little as the Scientific Director of CTR was consistent with the statement in the 1954 Frank Statement that a scientist of "unimpeachable integrity and national repute" would be in charge of CTR's research activities.
15. In 1954, CTR formed a Scientific Advisory Board ("SAB") to guide its grant-in-aid program by evaluating applications for funding received by CTR. See Affidavit of Glenn, ¶ 12; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob, ¶¶ 27-29. The SAB originally consisted of seven members, and that number has gradually increased to 15. See Affidavit of Glenn, ¶ 12; See Affidavit of McAllister, ¶ 15; 1996 Report of the Council for Tobacco Research -- U.S.A., Inc.
16. The members of the SAB have not been CTR employees (except for CTR's Scientific Director, who has been both a CTR employee and a member of the SAB). See Affidavit of Glenn, ¶ 12. The members of the SAB have been employees of universities, medical schools and research institutions such as Harvard, the University of Chicago, Stanford, Johns Hopkins, the University of Southern California and Duke. See Affidavit of McAllister, ¶ 15; Report of the Council for Tobacco Research -- U.S.A., Inc. (1956-1996). Several current SAB members are also members of the National Academy of Science. See Affidavit of McAllister, ¶ 15. The members of the SAB have been, and are, outstanding scientists in a number of fields, including cancer research, cardiology, pulmonology, immunology and pathology. See Affidavit of Glenn, ¶ 12; Affidavit of McAllister, ¶ 15; Affidavit of Rubin, ¶ 8 (2/10/97).
17. Since 1954, the SAB has advised CTR on the awarding of research grants-in-aid. The SAB reviews and evaluates grant proposals by a peer review process that is standard in the scientific community. See Affidavit of Glenn, ¶ 13. Grants that are approved by the SAB are evaluated and given a numerical score by each SAB member; the scores are compiled and the applications are ranked. See Affidavit of Lisanti, ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13; *Sommers Cipollone* Tr. 8580-83. CTR's scientific staff has the actual decision-making authority to award CTR grants-in-aid. *Sommers Cipollone* Tr. 8583; See Affidavit of Lisanti, ¶¶ 4-6 (7/11/97); Affidavit of McAllister ¶ 13. These decisions about the award of grants have adhered closely to the SAB's ranking of grant applications. See Affidavit of Lisanti ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13.
18. CTR's procedure for evaluating and awarding research grants is similar to the procedures used by organizations that fund scientific research. *Sommers Cipollone* Tr. 8589; See Affidavit of Lisanti ¶ 13 (4/11/97); Affidavit of McAllister ¶ 11.
19. The tobacco company representatives constitute CTR's Board of Directors. See Affidavit of Glenn ¶ 20; *Sommers Cipollone* Tr. 8594; Affidavit of Lisanti ¶¶ 17, 18 (4/11/97). However, the tobacco companies deny that they have participated in or controlled the SAB's evaluations of grant proposals, or that they have participated in or controlled CTR's decisions to award research grants-in-aid. See Affidavit of Glenn ¶¶ 20, 23; *Sommers Cipollone* Tr. 8595; Affidavit of Lisanti ¶ 19 (4/11/97); Affidavit of McAllister ¶ 14.
20. The evidence in the record before the Court included the affidavit of from Dr. Vincent F. Lisanti, a scientist who was employed by CTR from 1964 until 1994 and attended over 90 SAB meetings. See Affidavit of Lisanti ¶¶ 15 (4/11/97). Dr. Lisanti stated:

I do not believe that the SAB ever rejected a grant application because it proposed research the results of which might be detrimental to the tobacco industry. The SAB members cared about promoting science and making a contribution to scientific knowledge, not about the potential impact of any scientific research on the interests of the tobacco companies. . . . [M]embers of the SAB were scientists and persons of great integrity. Any statement or suggestion that the evaluations and

recommendations of the SAB were controlled or influenced by tobacco company lawyers is simply false.

See Affidavit of Lisanti ¶¶ 15-16 (¶¶ 4/11/97).

1. The evidence in the record before the Court also included the affidavit of Dr. James F. Glenn, CTR's Chairman and CEO (and formerly the Scientific Director of CTR), who is a professor of surgery and a former medical school dean. Dr. Glenn stated:

I am not aware of any instance during the ten years in which I have been affiliated with CTR in which any of the member companies, or any of their attorneys, have attempted in any way to influence decisions on what research will be funded as part of CTR's grant-in-aid program.

The fact is that CTR, continuously from the time that I became affiliated with it in 1987 through today, has maintained a thoroughly independent SAB and grant-in-aid program. While our members may have opinions regarding CTR's research program and are certainly entitled to express them if they wish, I can say categorically that throughout my [ten year] tenure at CTR, the grant-in-aid program has been operated independently of industry influence.

See Affidavit of Glenn ¶¶ 23, 25 (2/12/97) (emphasis added).

1. The evidence in the record before the Court also included an affidavit from Dr. Harmon C. McAllister, the Scientific Director and Vice President for Research of CTR, in which Dr. McAllister stated:

In my 14 years of experience with CTR, I have attended 28 SAB meetings at which grants were evaluated, at which more than three thousand grant-in-aid proposals have been considered. I have also attended dozens of meetings of CTR's scientific staff where grants were awarded. Throughout that time, neither the SAB nor the scientific staff of CTR has ever considered in evaluating grant applications whether the proposed research would be likely to establish connections between smoking and disease or whether the proposed research will be favored or disfavored by the tobacco industry. Throughout that time, to the best of my knowledge there has been no participation by the tobacco companies, their employees, or their lawyers in any decisions to grant or deny funding to any investigator, to any institution, or to any research area.

See Affidavit of McAllister ¶ 14 (2/12/97).

1. The evidence in the record before the Court also included testimony at a 1988 trial by former Scientific Director of CTR, Sheldon C. Sommers, who testified as follows about how he would have reacted to the tobacco companies' playing a role in the SAB grant approval process: "[I]f it had happened at the time I was invited to join [the SAB] I would certainly not have joined and if I saw it happen or knew it was happening I would resign [from the SAB]." Sommers Cipollone Tr. 8595. Dr. Sommers was a member of the SAB for 23 years, from 1966 until 1989. See Affidavit of Glenn, Ex. D.
2. With the exception of certain legal advice, and the evidence offered by Defendants as referred to below, the record does not contain evidence that lawyers determined what research would be funded by the CTR SAB grant program. See Affidavit of Lisanti ¶¶ 77 (2/14/97); In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶ 41.
3. From 1978 until 1982, lawyers for CTR reviewed grant proposals to CTR that related to the effects of nicotine on the central nervous system. See Affidavit of Lisanti ¶ 27, 29 (2/14/97); In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶ 41. During that period, CTR's lawyers provided legal advice about the funding by CTR of those proposals. The Court has reviewed in camera privileged information about the substance of that legal advice. See Affidavit of Lisanti ¶ 29-31 (2/14/97); In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶¶ 53-63. In Camera and Ex Parte Affidavit of. Edwin J. Jacob ¶¶ 41, 63.
4. 95. The Jacob and Lisanti affidavits state that the advice given to CTR by its lawyers related to the antitrust laws. Concern about a possible violation of the antitrust laws by this "joint industry group" had existed since the formation of TIRC in 1954. See Affidavit of Tucker ¶ 4. In 1954, TIRC advised DOJ in writing that it would conform to the requirements of the antitrust laws and the consent decrees affecting the tobacco industry, that it would not "give consideration to any matters affecting the business conduct or activities of its members," and that it would be "proceeding under the advice of legal counsel selected from among the counsel or nominees of its members." See Affidavit of Jacob Ex. B. The Court has reviewed in camera privileged information about this antitrust concern on the part of counsel. See Affidavit of Jacob ¶¶ 43-54.
5. Other than providing the legal advice referred to above, there is no evidence in the record before this Court that lawyers influenced the selection of research to be funded through CTR's SAB grant-in-aid program.

Research Contracts

1. In the 1970's and early 1980's, as a supplement to the grant-in-aid program, CTR began to enter into research contracts. See Affidavit of Lisanti ¶ 33 (2/14/97). Research contracts were used by CTR where grants-in-aid were not feasible, such as where the research involved large-scale, long-term inhalation studies or the development of

cigarette-based technology such as standard reference cigarettes and smoking machines for use by researchers. *Id.*; Sommers *Cipollone* Tr. 8597; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 65. The results of CTR-funded contract research have appeared in a large number of publications in scientific journals. *See In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 70.

2. The research contracts entered into by CTR were approved by the SAB. *See* Affidavit of Lisanti ¶ 33 (2/14/97); Sommers *Rogers* Dep. Tr. 56-57.
3. 99. There is no evidence to indicate that contract research funded by CTR interfered with or compromised the integrity of the CTR grant-in-aid program.
4. Contract research is a standard and common vehicle within the scientific community for funding research, and there is nothing misleading or improper about CTR engaging in contract research. *See* Affidavit of Hamm ¶¶ 11,12; Sommers *Cipollone* Tr. 8594-95; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 65.
5. By funding the CTR SAB grant-in-aid and contracts programs under the guidance of the SAB, the tobacco companies that were members of CTR have acted consistently with the statement in the 1954 Frank Statement that it would provide significant "aid and assistance" to research into smoking and health.
6. 102. From about 1966 until 1990, CTR administered CTR Special Projects. The Defendants claim no privilege to the research itself nor to communications between the researchers and counsel. The researchers were free to publish their results and had the responsibility for publishing their results if they chose to do so. *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶95.
7. The researchers who received funding under CTR Special Projects were informed that any publication of their research results should bear an acknowledgment that it was a "Special Project of the Counsel for Tobacco Research." There was no evidence introduced at the hearing in this matter which indicated that this acknowledgment had the effect of distinguishing Special Projects research from SAB Grant research.
8. Special Projects were scientific research projects selected for funding by the tobacco companies' litigation counsel to support the defendant's position in the litigation, legislative and regulatory contexts. *See* Haines Special Master Report at 8-10; *See In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶¶90-93. CTR provided funding for those projects out of a separate budget. Gertenbach Decl. ¶ 8; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 98; Affidavit of Glenn ¶¶ 32-36; Affidavit of Holzman ¶¶ 6,9; *See* CTR Financial Statements, 1964-1990 attached to Affidavit of Craig Proctor.
9. Proposals for CTR Special Projects were not reviewed or evaluated by the SAB. *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 98. They were, however, reviewed by the Scientific Director of CTR, and a determination by the Scientific Director that a proposed CTR Special Project had scientific merit was required before it could receive funding as a CTR Special Project. *See In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 100; Gertenbach Decl. ¶ 7; Affidavit of Glenn ¶31.
10. The researchers who received CTR Special Projects funding were affiliated with a variety of research institutions, including Harvard Medical School, the University of Pennsylvania School of Medicine, the University of California at San Francisco and Case Western Reserve University. *See* Affidavit of Glenn ¶ 33. Many of these researchers also received funding for their research from other services, including the National Institutes of Health and the National Cancer Institute. *See* Affidavit of Rubin ¶ 10 (4/25/96); Affidavit of Glenn ¶ 33 & Ex. G.

107. The recipients of CTR Special Projects funding were free to publish the results of their research. *See* Affidavit of Glenn ¶ 34; Glenn Cong. Test. at 362-63; Affidavit of Rothschild ¶ 5; Affidavit of Schrauzer ¶¶ 4-6; Affidavit of Furst ¶ 7; Bick Decl. ¶ 9; Affidavit of Guttstein ¶ 6; Jensen Decl. ¶ 4; Holzman Decl. ¶10. There is no evidence in the record that any CTR Special Project recipient was restricted in his or her research or publication in any way, except to the extent that the original funding decision, or funding continuation decision was made by the attorneys for defendants.

1. The evidence in the record before the Court included affidavits from several CTR Special Project researchers, who have stated as follows:

When I was awarded my CTR Special Project, I understood from the beginning that I would be free to conduct my research and publish my results without any interference. In the course of my work, no one interfered with my research or sought to influence me with respect to my work or my publications. I published over a dozen articles based on my CTR Special Project research. Guttstein Aff. ¶¶ 6, 7.

I was completely free to publish the results of my Special Projects, and the decision not to publish was entirely my own. Furst Aff. ¶ 7 (4/29/96).

From the outset, I knew that I had complete freedom to conduct my research as I saw fit, and to publish my results whenever and wherever I deemed appropriate. No one associated with CTR, the tobacco companies, or lawyers for those organizations ever attempted to influence my research or my publications. Jensen Decl. ¶ 4 (5/6/96).

I had complete freedom to conduct and report on my CTR Special Project research as I saw fit. No one from CTR, the tobacco companies or the lawyers representing the companies, ever attempted to affect my research in any way. Also, the decision not to publish was my own. Bick Aff. ¶ 9 (4/8/96).

I understood at all times that I was permitted to publish my findings from the research that was sponsored by CTR Special Projects. I estimate that 15 published articles and 17 published abstracts resulted from this research, including articles that were published in The Journal of the National Cancer Institute and Cancer, which are peer-reviewed journals. Rothschild Aff. ¶ 5 (4/30/96).

When I was awarded these CTR Special Project funds, I understood that I was entirely free to pursue my research as I saw fit and to analyze the relevant data with an open mind and without any bias or preconceptions. In the course of my work, no one interfered with my research or sought to influence me in any way with respect to the methodology or outcome of my research. At no time did anyone from the tobacco industry ever attempt to influence my thoughts or shape my research. Nor did I ever submit any draft of my research to any CTR or tobacco industry representative for their review, and I was never asked to do so. I felt I had complete intellectual freedom. Schrauzer Aff. ¶¶ 4-6 (5/10/96).

I also understood from the beginning that I had complete freedom to publish or not publish the results of my research. . . . Here again, the decision to publish was entirely my own and I was not influenced by anyone concerning that decision. Schrauzer Aff. ¶ 6 (5/10/96).

109. Numerous scientific publications resulted from CTR Special Products. See Affidavit of Glenn ¶¶ 33 & Ex. G; Glenn Cong. Test. at 362-63. There is no evidence in the record that any of these publications contain scientifically invalid methodology or results or deliberately false or misleading information. There is also no evidence in the record of the use of CTR Special Projects to suppress research findings.

1. None of the documents for which defendants claim privilege constitute reports of research conducted as CTR Special Projects, and there is no evidence in the record that the defendants or their counsel have claimed privilege for the results of CTR Special Projects research.
2. 111. CTR Special Projects did not interfere with or otherwise affect CTR's SAB-guided grant-in-aid research or CTR contract research. See Affidavit of Glenn ¶¶ 32, 36; Gertenbach Decl. ¶ 8; *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 98; Affidavit of Holtzman ¶¶ 6, 9.
3. From about 1971 until 1983, CTR had a Literature Retrieval Division ("LRD"). See Affidavit of Gertenbach ¶ 8 (8/8/86). LRD, like its predecessor, International Information Incorporated (31"), which was not affiliated with CTR, was a computerized information storage and retrieval system. *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 108 (2/15/97).
4. The principal purpose of LRD was to assist outside litigation counsel for the cigarette manufacturers by coding, analyzing and retrieving publicly available, published medical literature, dealing with medical-legal issues arising in cases brought against the tobacco companies, and for use in preparing to represent their clients in regulatory proceedings and before Congress. Outside litigation counsel specified the materials to be identified, acquired, stored and retrieved, and they directed the manner in which this work was performed. See *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 103.
5. LRD's employees and office facilities were separate from CTR's, and LRD's budget was separate from the budget for CTR's funding of research. See *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 104. CTR administered LRD (including, for example, handling its payroll and employee benefits) from that separate budget. See *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶¶ 102-104.
6. CTR's administration of LRD did not affect CTR's funding of scientific research. See *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶¶ 102, 105.
7. In 1983, the functions LRD served were moved to a separate corporation at another location LS, Inc., where it remains to this day. See *In Camera* and *Ex Parte* Affidavit of Edwin J. Jacob ¶ 104. LS, Inc. and CTR are unrelated. *Id.*
8. 117. CTR's administration of LRD from 1971 until 1983 as a service to the tobacco companies was not misleading, improper or inconsistent with the 1954 "Frank Statement."
9. Defendants contend that it has long been a matter of common knowledge that there are health risks associated with smoking. Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (quoting Roysdon v. R. J. Reynolds Tobacco Co., 623 F.Supp. 1189, 1192 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988), *remanded in part on other grounds*); see also Cameron v. American Legion Post 435, 281 N.W.2d 720, 722 (Minn. 1979); Paugh v. R.J. Reynolds Tobacco Co., 834 F.Supp. 228, 231 (N.D. Ohio 1993); Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996), *cert. denied*, 117 S. Ct 599 (1996); Lonkowski v. R.J. Reynolds Tobacco Co., No. 96-1192, 1996 WL 888182, at *7 (W.D. La. Dec. 10, 1996); American Tobacco Co. v. Grinnell, No. 94-1227, 1997 WL 33658, at *5-6 (Tex. June 20, 1997); Consumers of Ohio v. Brown & Williamson Tobacco Corp., No. 94-3574, 1995 WL 234620, at *1 (6th Cir. Apr. 19, 1995); Varga v. Brown & Williamson Tobacco Corp., No. G88-568 CA6, 1988 WL 288977, at *3 (W.D. Mich. Nov. 7, 1988); Austin v. State, 48 S.W. 305, 306 (Tenn. 1898), *aff'd as modified sub nom.*, Austin v. Tennessee, 179 U.S. 343 (1900).
10. The Surgeon General issued its first smoking and health report in 1964. The Surgeon General has subsequently issued 22 additional reports on smoking and health which discuss tens of thousands of publications in the smoking and health field.

11. Defendants also contend that Minnesotans and the State of Minnesota itself have long been aware of the risks of smoking. (See Affidavit of Michael E. Parrish, ¶¶ 8 and 9, April 14, 1997 (awareness of Minnesota Legislature), ¶¶ 9 - 11 and 20 - 24 (awareness of Minnesota's education leaders), and ¶¶ 13-17 (Minnesota newspaper articles) and Berman Expert Report, ¶ 23 ("The State of Minnesota has been aware of the health risks associated with cigarettes and smoking as early as the 1800s . . . Over the last century and a half, the state of Minnesota has claimed leadership in smoking prevention and control."))
12. In their proposed Findings in this case, defendants have asked me to make the following Finding of Fact:

75. The defendants have long publicly acknowledged that smoking has been statistically associated with certain diseases and is a risk factor for those diseases, including lung cancer. (See, e.g., Affidavits of Cathy L. Ellis, Ph.D., ¶ 6, February 12, 1997; Alexander White Spears, III, ¶ 15, February 17, 1997; William Samuel Simmons, Ph.D., ¶ 6, February 12, 1997.) (See also, e.g., LG 0069276 (press release stating that the "public has total awareness that smoking may be a health hazard"); RJR 507703862 (certain "diseases often statistically associated with smoking"); and PM 1005136953.)

The references made by defendants within their proposed Finding do not bear out the use of the phrase "publicly acknowledged."

1. The Ellis Affidavit, ¶ 6, reflects the corporate knowledge of Phillip Morris that there is a statistical association between cigarette smoking and lung cancer and other disease. In the same paragraph of her Affidavit, Dr. Ellis also reports that Phillip Morris denies that a causative link has been established. The Affidavit does not address at all the issue of public acknowledgment or discussion of the statistical association.
2. The Spears Affidavit, ¶ 15, describes Lorillard's position that smoking has been established as a "risk factor for certain diseases." He refers to testimony he has given in litigation to that effect. In the same paragraph, Mr. Spears maintains the Lorillard position that "...it has not been scientifically proven that smoking causes illness in humans."
3. In the Simmons Affidavit, ¶ 6, Dr. Simmons writes, "Although cigarette smoking has been epidemiologically associated with, and therefore is, a risk factor for certain diseases in humans, it has not been scientifically established that smoking causes diseases in humans. Association does not establish causation."
4. Liggett Doc. 0069276, a press release, reads in relevant part:

The public has total awareness that smoking may be a health hazard," [Kornegay] said. "But they demands facts, not surmises..."

1. RJR Doc. 507703862 reads, in pertinent part:

Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking. The answers to the many unanswered controversies surrounding smoking -- and the fundamental causes of the diseases often statistically associated with smoking -- we believe can only be determined through much more scientific research.

1. I conclude that defendants' proposed Finding No. 75 is inappropriate. First, the text of the references simply does not support a conclusion that defendants intended to acknowledge that there was a statistical association between smoking and disease except as part of a denial of causation. Second, the public statements, i.e., Liggett Doc. 0069276 and RJR Doc. 507703862 are plainly intended to create doubt as to causation, rather than function as an "admission."
2. The affidavits relied upon in proposed Finding 75 are not public statements at all; rather, they represent the defendants' official position that statistical associations do not necessarily imply causation, and they were prepared for litigation rather than publication. I conclude, therefore, that the defendants' evidence does not reflect a public acknowledgement of a statistical association, nor does the evidence reflect a public consideration of the meaning of the debateable link between such association and causation.

B. STANDARD OF REVIEW B. STANDARD OF REVIEW

The standard for invoking the crime fraud exception is prima facie.

1. Judge Fitzpatrick found that plaintiffs had made a prima facie showing of crime-fraud with respect to:

Defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance...." May 9 Order, p. 5.

Defendants' assurances "that the tobacco industry was committed to providing safe products." Id., p. 5.

Defendants' "intentionally den[ying] or minimiz[ing] known health risks...." Id., p. 7.

Defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues." *Id.*, p. 9.

Defendants' attempts "to create doubt as to a connection between smoking and illness" and "to create doubt that cigarette smoking causes illness." *Id.*, pp. 9, 10.

Defendants' "safety-related" or "health-related" research...." *Id.*, p. 28.

1. Following the opportunity of the claimant of the privilege to present rebuttal evidence, it is not clear what the standard of review is to be. In *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512 (Minn. App. 1991), Judge Short wrote:

Yet the record before us shows the trial court did not abuse its discretion by implicitly finding Levin failed to make a *prima facie* case of fraud at the motion hearing. *Id.* at 469 N.W.2d 515, 516.

Judge Short made this observation in reference to the trial court's consideration of affidavits submitted by the plaintiff and testimony submitted by the defendant. Thus, the trial court was making a final determination as to admissibility, and not a threshold determination whether an *in camera* inspection should occur. Thus, the *C.O.M.B.* decision stands for the proposition that if there is still a *prima facie* case after defendants have been provided an opportunity to rebut the threshold evidence, the privilege is lost.

1. This does not resolve the problem, however. What is the quantum of proof sufficient to rebut? The *C.O.M.B.* opinion does not address this question. In their supplemental Memorandum of Law of July 29, 1997, Defendants argue that the plaintiffs must carry the burden of proof by a preponderance of the evidence. I accept this proposition. *Laser Indus. v. Reliant Technologies*, 167 F.R.D. 417, 438 (N. D. Cal. 1996); *The American Tobacco Co. et. al. v. The State of Florida*, Case No. 97-1405 at p. 6. (Florida 4th District Court of Appeals, July 23, 1997).
2. In Judge Fitzpatrick's Order of May 9, 1997, he set forth the analytical method to be used in this case:

Assuming that the party asserting the privilege can demonstrate the necessary elements for privilege to attach, the information may yet be discoverable. The privileges are not absolute. "[S]ince the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 84 (3rd Cir. 1992) (citing with approval *Fisher v. United States*, 425 U.S. 391, 403 (1976)). In this matter, Plaintiffs argue that the privilege asserted by the Defendants is lost by application of the crime-fraud exception and, therefore, the documents should be made available.

The purpose of the crime-fraud exception to documents otherwise protected by the attorney-client privilege is "to ensure that the 'seal of secrecy' between lawyer and client does not extend to communications from the lawyer to the client made by the lawyer for the purpose of giving advice for the commission of a fraud or crime." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992) (emphasis in the original). "The advice must relate to future illicit conduct by the client..." *Id.* This is exactly what the Plaintiffs argue - that counsel for the tobacco industry advised the industry to conceal documents and research harmful to the industry by depositing the documents with counsel, by routing correspondence through the industry counsel, by naming damning research projects as "special projects" purportedly ordered by counsel, etc., to cover potentially dangerous materials under a blanket of attorney-client privilege protection, and Plaintiffs wish to tear this blanket away. The Court, however, does not determine whether the crime or fraud averred has in fact occurred; it does not opine about the merits of the assertions of crime or fraud. It merely examines known facts to determine whether or not the party seeking disclosure has made a *prima facie* showing of crime or fraud. *In re A. H. Robins Co., Inc.*, 107 F.R.D. 2, 9 (1985). The privilege blanket is torn away if the court finds that the documents in question "bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *Robins*, 107 F.R.D. at 15, citing *In Re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977).

In considering whether the crime-fraud exception may be applied to the facts of this case, this Court has made several findings relating to statements made by the Defendants to the public. Collectively, these statements could be characterized as assurances by the industry that it would make an honest attempt to learn whether the smoking of cigarettes created health hazards. The Court also concludes that the Defendants had an independent obligation to conduct research into the safety of its product, and to warn the product's consumers if the research results supported negative conclusions. A manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products. See *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 278 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); see also Minnesota Civil Jury Instruction Guides, No. 117 ("You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field") and No. 119 (duty to warn). The cigarette industry itself has recognized this duty. PM 1000335622. Plaintiffs have presented evidence, and the Court has found, however, that the Defendants have claimed that safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege.

At the same time, it is indisputable that the Defendants have made public statements intended to minimize or reduce fears that smoking is dangerous to one's health. This Court does not believe that Defendants should be permitted to use in its advertising and public relations campaigns, health-related research which supports their economic interests, and to claim privilege for research which may to lead the opposite conclusion. See *Laughlin v. A.H. Robins*, Minn. Dist. Ct. No. 776-868

(March 21, 1984). If the Defendants had an obligation to disclose the hazards of tobacco products, and this Court concludes that they did, their obligation to disclose cannot be eliminated by the assertion of attorney-client privilege.

A two-part test is necessary in determining whether the crime-fraud exception applies to the privileged material.

First, there must be a *prima facie* showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

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).

The burden of establishing that the crime-fraud exception should apply now falls on the Plaintiffs. The Plaintiffs "bear[] the burden of presenting a *prima facie* case that the crime-fraud exception applies. Levin v. C.O.M.B. Co., 469 N.W. 2D 512, 515 (Minn. Ct. App. 1991). Just what constitutes a *prima facie* case has been expressed by the courts in different words, yet the evidentiary standard is fundamentally the same. The Supreme Court used these words: "To drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that it has some foundation in fact.' When the evidence is supplied, the seal of secrecy is broken." Clark v. United States, 289 U.S. 1, 14-15 (1933) (citations and footnote omitted). The Second Circuit phrased it a little differently: "[The tests] require that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984).

The evidentiary burden is lessened when disclosure is initially made only to the Court or Special Master for an *in camera* review, because such an inspection is a lesser intrusion into the attorney-client communications than full public disclosure. United States v. Zolin, 491 U.S. 554, 572 (1989).

Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. Id.

Thus, the Court or Special Master may examine the submission of the Plaintiffs and decide whether there is enough factual evidence "to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud." Haines v. Liggett Group Inc., 975 F.2d 81, 96 (3rd cir. 1992). This is only a preliminary step, however. It can result, at best, in an *in camera* review of the challenged document. To determine whether or not the exception applies, the Defendants must "be given an opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." Id. at 97. This evidentiary hearing must provide due process, i.e. "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." In re A.H. Robins Co., Inc., 107 F.R.D. 2, 6 (1985) (citing In Goldberg v. Kelly, 397 U.S. 254, 267 (1970)). The fact finder then will apply the crime-fraud exception only when it "determines that the client communication or attorney work-product in question was *itself* in furtherance of the crime or fraud." In re Richard Roe, 68 F.3d 38, 40 (2nd Cir. 1995).

The court has the discretion whether or not to engage in an *in camera* review and the extent of that *in camera* review.

[T] decision whether to engage in *in camera* review [should] rest[] in the sound discretion of the [trial] court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the [] court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

United States v. Zolin, 491 U.S. 554, 572 (1989). It follows, then, that the court must exercise its discretion in light of the factors set forth in Zolin to create a process that balances the need for judicial efficiency with the parties' due process rights. The process set forth herein, infra, has been designed to do just that.

1. In their submissions, defendants have urged that I accept a common law definition of "fraud" and require a demonstration by the defendants that each of the elements of common law fraud have been demonstrated and not rebutted. I decline to do so. First, such a requirement would be inconsistent with Judge Fitzpatrick's Order of May 9, 1997. Second, the particular facts and allegations of this case cause me to believe that the issue of "fraud" rests at least in part in Minn. Stat. § 325F.69 which makes it unlawful, at subd. 1 to use "...any fraud, false pretense, false promise, misrepresentation, misleading statement or deception practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has, in fact, been misled, deceived or damaged thereby..." Thus, the element of actual reliance is eliminated by statute.

2. Additionally, Levin v. C.O.M.B., Co., 469 N.W.2d 512, 515 (Minn. App. 1991) does not, to my reading, specify that all elements of common law fraud be demonstrated. Rather, the opinion observes that application of the crime-fraud exception should not be based on a rigid analysis. Instead, the focus should be on whether the detriment to justice from foreclosing inquiry into pertinent facts is outweighed by the benefits to justice from a franker disclosure in the lawyer's office. Id. at 469 N.W.2d 515.
3. The defendants in this case, whether through a voluntary undertaking embodied by the Frank Statement, or whether by operation of law, were obliged to conduct research into the safety of their products and to warn the product's consumers if the research supported negative conclusions. See Fitzpatrick Order dated May 9, 1997.
4. Accordingly, my inquiry in this case is this:

Am I satisfied by a preponderance 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 a 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?

Discussion of the Evidence

1. In support of their allegations of crime fraud, plaintiffs have argued that the projects sponsored by the Scientific Advisory Board of CTR were not related to the alleged relationship between smoking and lung cancer. In support of such arguments, plaintiffs point to comments made by scientists and researchers associated with the industry. (See plaintiffs' proposed Findings of Fact 13-22). In response to this, defendants have offered affidavits from other scientists and researchers, which affidavits defend the integrity of the SAB projects and which attempt to demonstrate the context of the statements to which plaintiffs point.
2. The defendants' responses to the evidence produced by plaintiffs regarding the SAB were voluminous. Affidavits from employees, researchers and attorneys describing the operation of the SAB rebut, in my opinion, an inference that the grant-making process of the Board was guided by an intention to provide cover for the tobacco industry, or that the grant-making process was subverted to result in false or irrelevant research.
3. The question remains, however, whether the defendants in any fashion did fulfill their legal obligation to conduct appropriate research into the safety of their products. It is not possible for the Special Master to conduct a scientific evaluation of the research which the SAB did sponsor. The Affidavit of Emanuel Rubin dated February 10, 1997 (Item 24, Appendix B to defendants' joint Memorandum) is a defense of the SAB research product. He writes, at paragraph 14 of that Affidavit:

I am particularly disturbed by plaintiff's [the State of Florida] attacks on the basic scientific research funded by CTR. In the early years, CTR's program was oriented toward directed research, such as studies involving cigarette smoke, condensate, smoke components and similar compounds. Even then, however, basic scientific research was an essential component of CTR's research program. As time passed, basic research assumed a greater and greater role, to the point that it now represents virtually all of the current research activity supported by CTR. This has been described by plaintiff's experts as further evidence of a scientific fraud. They are entirely wrong. I would be critical of the program if it had not undergone this transformation.

Whether the research funded by SAB under the auspices of CTR is sufficient to discharge the defendant's individual responsibilities under the law will be a factual question litigated in the case in chief. It is not susceptible of an answer in these proceedings.

1. There was no evidence presented in these hearings that the defendant companies conducted significant independent research, i.e., that which was not jointly sponsored through CTR. Plaintiffs argue that this is the result of a "gentleman's agreement." Plaintiffs Proposed Findings 23-26. I find it improbable that it is simply a coincidence that the individual defendants did not conduct such research.
2. In his in camera and ex parte affidavit, Edwin Jacob, long-time counsel for CTR writes:

The decision to fund research created the related questions of whether that research should be performed internally or by outside researchers and, if the research was to be performed by outside researchers, whether the companies should direct the research or have it directed by others. The companies concluded that internal research or research conducted by outside researchers under industry contracts would not be given proper credit if, as they expected, it supported their belief regarding causation. Conversely, if the results were equivocal, the parts suggesting causal possibilities would be exaggerated. Further, the companies were concerned that, if the companies conducted research only internally, some would claim that they were pursuing the research half-heartedly, pursuing it improperly, or suppressing the results. Accordingly, the companies determined that the most effective and efficient way for the companies to conduct this research was to fund outside researchers selected by a board of eminent, independent scientists.

1. With respect to the CTR special projects, I conclude that they functioned entirely under the direction of the Committee of Counsel, i.e., the attorneys of the defendant companies and organizations, or their representatives. In reaching this conclusion, which is essentially admitted by the defendants, I note that the projects were selected for funding by the attorneys on the basis of utility in litigation, congressional testimony, administrative proceedings and for public relations purposes. There is no evidence before me which would cause me to conclude that the CTR special projects were intended to provide research product which might be unfavorable to the tobacco industry. Rather, the projects were selected for their favorable prospects.
2. I also conclude that the contemporaneous corporate knowledge of the defendants as to the safety of their products is an appropriate area of inquiry and discovery in a case such as this. This inquiry should not be defeated because the research function was controlled by attorneys.
3. Many of the researchers who worked on CTR special projects published their research. Although these researchers were informed that their publications should bear an acknowledgment that the research was a "Special Project of the Counsel for Tobacco Research," it is unlikely, in my opinion, that any reader other than an industry insider would understand that the research was not, in fact, sponsored by the Scientific Advisory Board. This would result in confusion and a perception that the favorable research was sponsored by the supposedly neutral SAB.
4. It is my conclusion, therefore, that with the exception of that research funded by the Scientific Advisory Board, industry research was effectively controlled by the Committee of Counsel. It is my further conclusion that the research directed by the attorneys was not intended to be independent; rather, it was intended to be used in opposition to unfavorable research, whether in litigation, legislation, administrative forums, or public relations.
5. I also conclude that this attorney-directed control of an industry's research does, in fact, fall within the confines of the crime-fraud exception to the attorney-client privilege. The failure on the part of defendants individually to investigate the safety of their product, coupled with their ongoing assurances that causation of illness was unproved and speculative, necessarily implicates the holding of Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991) which poses this test: Is the detriment to justice from foreclosing inquiry into pertinent facts outweighed by the benefits to justice from a franker disclosure in the lawyer's office?
6. On the facts of this case, I conclude that the answer to the question posed within the C.O.M.B. decision is that further inquiry must be permitted. I conclude that plaintiffs in this case must be permitted to inspect the documents which reveal the control exerted by the tobacco industry attorneys over the research conducted by that industry. If the research conducted by the industry as a whole through the Scientific Advisory Board has been sufficient to satisfy the industry's obligations, and consequently the individual defendant's obligations, that is a decision which must be made within the case in chief.

E. PRIVILEGE STATUS OF DOCUMENTS IN CATEGORIES 1-12.

(1) Category 1 - Other Litigation.

The Special Master has reviewed all of the Liggett documents in Category 1. These documents, for the most part, are communications among the attorneys representing the tobacco industry. Many of these documents are transmittal letters. There are hand-written minutes of the meetings of the Committee of Counsel, i.e., those persons serving as General Counsel of the defendant companies, which meetings were also attended by other attorneys for the tobacco industry. The correspondence among these attorneys routinely considered pending and proposed CTR special projects and their relative utility, or lack thereof.

To the extent that these documents reflect attorneys selecting and directing research projects, and to the extent that the documents represent information as to the "corporate knowledge" of the defendants at relevant times, I am of the opinion that the documents should not be privileged in the first place. If corporate research directors had selected and directed research on safety issues, the documents generated during the decision making process would have been discoverable.

The minutes of the Committee of Counsel also reflect discussion, on a routine basis, of legal concerns of those attending the meeting, including appearances before regulatory agencies, reactions to congressional initiatives, and progress of litigation occurring around the United States.

Several of the documents within Category 1 provide insight into the relationships between the tobacco companies and CTR, between CTR and its SAB, and among the several companies.

These documents are subject to the crime-fraud exception because they demonstrate the actual involvement of the attorneys for the defendant companies in the selection, funding, and funding continuation for CTR special projects, and because these documents provide relevant evidence of the response by the defendants to allegations from external sources to the effect that the defendant's products were unsafe.

It is recognized that substantial portions of the documents within Category 1 are not relevant to the questions of research, knowledge and response. Because of the necessity of dealing with these documents by category, it is recommended that each document be individually considered for relevancy and be subjected to possible redaction prior to its being received as

The ink was not yet dry on this report before our lobbyists initiated an aggressive and focused effort in communication with legislative leadership and targeted key legislative activists. This effort was successful in preventing a majority of the report from seeing its way from the drafting board to a legislator's hand.

Tobacco Institute Memo
April 11, 1985



LEGAL AFFAIRS

SO MUCH FOR SMOKING OUT BIG TOBACCO'S SECRETS

The deal may let companies keep documents under wraps

When Mississippi Attorney General Mike Moore announced the proposed \$368 billion tobacco settlement on June 20, he claimed that it would force the industry to turn over a treasure trove of previously secret internal documents. "We wanted to make sure that every single person, not only in America but this entire world, knows the truth about what the tobacco industry has done.... And we are satisfied that we have done that," Moore exulted.

Critics of the deal now charge that Moore's declaration is an empty boast. In fact, they say, the pact may actually prevent the disclosure of documents that would have come to light through litigation. When the settlement was announced, tobacco foes immediately pounced on how the pact limits nicotine regulation and treats company liability. But Minnesota Attorney General Hubert H. Humphrey III has said that document disclosure is an issue of equal importance: "This fight was supposed to be about lies and cover-ups, but this deal allows the and cover-ups to live on."

The fight over disclosure

threatens to create another major hurdle for the proposed settlement. Alan Morrison, the attorney analyzing the deal for the review committee chaired by former Food & Drug Administration Chief David A. Kessler and former Surgeon General C. Everett Koop, says that as the deal stands, "the most significant documents will still be withheld... for many years, and possibly forever." And Representative Henry A. Waxman (D-Calif.) on June 12 introduced a bill that would require the companies to surrender far more paperwork than is required under the pact.

The main criticism of the deal's disclosure provisions is that they let the in-

HUMPHREY: "This deal allows the lies and cover-ups to live on"

dustry continue shielding incriminating papers behind attorney-client privilege. Last month, for example, Waxman revealed that Liggett Group Inc. had used attorney-client privilege to keep confidential a memorandum in which attorneys told the company not to market a safer cigarette because "it may incite accelerated tobacco litigation."

"WOEFULLY DEFICIENT." Tobacco's antagonists have no way of knowing exactly what information the industry may have hidden. But Stanton A. Glantz, a professor at the University of California at San Francisco and a longtime tobacco critic, believes that companies may have used privilege to avoid releasing market research, information on plans to recruit teenagers, studies of the dangers of tobacco, and memos on political strategy. He says such revelations would be highly valuable to Congress—especially as members consider how the industry should be punished and weigh how nicotine should be regulated.

The tobacco papers can be unsealed under the proposed settlement—but in each case a panel of three federal judges must rule on whether the privilege protection should be waived. Morrison calls that "woefully deficient." Jacksonville (Fla.) plaintiffs' attorney Norwood S. Wilner, who has more than 100 private personal-injury claims against the industry, says companies could stall the panel by insisting on line-by-line review of mountains of paperwork. "It will take years to get stuff resolved," says Wilner. "I don't have the resources to deal with [that]."

Wilner, Waxman, and Morrison all want the companies to abandon any claim to attorney-client privilege, as Liggett did in its March settlement. But one tobacco lawyer says this demand is unfair and has never been imposed on an industry before—"nothing close."

Matt Myers, executive vice-president of the Campaign for Tobacco-Free Kids and a negotiator of the pact, argues that the agreement furthers disclosure. "This system moves the ball in terms of document disclosure way ahead of where we would be if we just continued to pursue the litigation," he says. But that may not be enough.

By Mike France in New York, with Gail DeGeorge in Miami and John Carey in Washington

Losing the Paper Trail

INCOMPLETE DISCLOSURE The deal does not force the companies to turn over hundreds of thousands of documents covered by attorney-client privilege.

RED TAPE Tobacco opponents can appeal industry claims of attorney-client privilege, but that requires approval by a special three-judge panel.

LAWSUIT LIMITS Because the settlement imposes barriers on future suits, critics worry that lawyers won't try to obtain attorney-client documents.

DATA: PUBLIC CITIZEN LITIGATION GROUP

OPTION 3: MAJOR CHANGES TO THE SETTLEMENT

Amount of Funds Available for Health Investments:

- In addition to the changes described above, this option would index the inflation adjuster to GDP, since it is more in line with health cost growth, and would triple the youth look-back surcharge and allow 50 percent of it to be used for health investments.
- This both increases the funds and allows it sustained growth over time.

Options for Uses of Funds (in addition to previous option):

- **Coverage expansion:** If Settlement funds were increased, a coverage expansion could be funded. The following options range in cost from \$1 to 4 billion per year and would allow you to continue your incremental, targeted approach to coverage expansion. They also address groups who could defensibly be described as having been disproportionately harmed by tobacco.

Option 3. Major Changes in Settlement (\$ billions)			
	<u>1 Yr</u>	<u>5 Yrs</u>	<u>10 Yrs</u>
Residual funds:			
Settlement:	3-4	22	58
Additional:			
<u>Subtotal:</u>			
Uses:			
Research supplement:	1-2	11	26
Public health initiative:	0.2-0.4	1-2	5-10
Other:			
Coverage options:	0.5-4	3-11	14-55
Child care:			
Congress set-aside:	0.5		
<u>Subtotal:</u>	<u>3-4</u>	<u>22</u>	<u>58</u>

Pre-Medicare buy-in (\$2-4 billion per year): This policy would allow people between ages 55 and 65 to buy into Medicare with some type of capped premium assistance. Tobacco use is a major factor used to increase health insurance premiums in the individual insurance market, where a disproportionate number of 55 to 65 year olds buy insurance. Tobacco as well as age "rating" leaves many older Americans with few affordable insurance options.

Workers changing jobs (\$2-3 billion per year): This provision would make the coverage made accessible through the Kassebaum Kennedy bill affordable. The most common reason why people lose health insurance is job change or loss. Job changes often tighten a family's income, making it more difficult to purchase insurance. Targeting this group is also least likely to buy out private coverage, since they have lost their employer contribution. This policy provides temporary premium assistance for families losing insurance due to job transitions.

Medicaid outreach for children (\$500 million to \$1 billion): States would not receive a higher Medicaid matching rate for enroll uninsured children eligible for Medicaid. This initiative is consistent with the Settlement negotiators' original intent: that unspecified funds be used for children's health insurance. Funds to options could be used for a higher or lower amount than offered.

- pumellies

- after such

[Handwritten signature and initials]

U.S. at 563-64 (citing Friedman v. Rogers, 440 U.S.

-End Footnotes-

... of a tobacco billboard ban may understandably be tempted to base
 ... on the first prong, and thereby avoid the difficulties posed by
 Hudson's other prongs. The argument could draw on the fact that, while
 tobacco may legally be sold to adults, every state in the union now prohibits
 the sale of tobacco products to minors. n103 Therefore, tobacco billboard ads
 promote an illegal activity.

-Footnotes-

n103 K. Michael Cummings et al., The Illegal Sale of Cigarettes to U.S.
 Minors: Estimates by State, 84 Am. J. Pub. Health 300, 302 (1994) (showing that,
 as of 1991, such laws were in effect in the District of Columbia and in every
 state except Louisiana, Missouri, Montana, and New Mexico); La. Rev. Stat. Ann.
 <sect> 14:91.8 (West Supp. 1997); Mo. Ann. Stat. <sect> 407.931 (West Supp.
 1997); Mont. Code Ann. <sect> 16-11- 305 (1995); N.M. Stat. Ann. <sect> 30-49-3
 (Michie Supp. 1996).

25 of 1991

-End Footnotes-

[*499]

The argument is appealing but probably would not prevail. When the Cen- tral
 Hudson Court stated that "commercial speech related to illegal activity" was
 unprotected by the First Amendment, n104 it cited its earlier decision in
 Pittsburgh Press Co. v. Human Relations Commission, n105 in which it upheld an
 ordinance that barred sex discrimination in "help wanted" advertising be- cause
 such advertising was abetting illegal discrimination. n106 Thus, the Court
 probably intended to exclude from First Amendment coverage only sollicita- tions
 to commit acts that are illegal for everyone, not acts that are illegal only
 with respect to children. n107

-Footnotes-

n104 Central Hudson, 447 U.S. at 563-64.

n105 413 U.S. 376 (1973).

n106 Id. at 388.

n107 In another First Amendment context, the Court has made clear that it
 would not tolerate the com- plete suppression of sexually explicit "indecent"
 speech for the entire population simply to protect children. See Butler v.
 Michigan, 352 U.S. 380 (1957). As the Court put it, "Surely, this is to burn the
 house to roast the pig." Id. at 383.

-End Footnotes-