STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: Other Civil

Case No. C1-94-8565

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,
and
BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED;
R.J. REYNOLDS TOBACCO COMPANY;
BROWN & WILLIAMSON TOBACCO CORPORATION;
B.A.T. INDUSTRIES P.L.C.;
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.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS TO COMPEL RE LOBBYING ACTIVITIES AND DEFENDANTS' AGREEMENTS RELATING TO SETTLEMENT POLICIES, PAYMENT OF ATTORNEYS' FEES, INDEMNIFICATION, AND CONTRIBUTION

I. INTRODUCTION

Plaintiffs respectfully submit this reply memorandum on their two pending motions to compel 1) documents relating to defendants' lobbying activities in the State of Minnesota, and 2) documents relating to defendants' agreements on settlement policies, payment of each other's attorneys' fees, indemnification, and contribution.

II. DOCUMENTS RELATING TO DEFENDANTS' LOBBYING ACTIVITIES IN THE STATE OF MINNESOTA

A. Introduction

By way of this motion, defendants find themselves in the untenable position of arguing that, while the State of Minnesota's actions in regulating tobacco were allegedly negligent, plaintiffs are not entitled to meaningful discovery on how defendants obstructed -- through extensive and expensive lobbying -- any such action. In other words, defendants request that this Court address this issue of whether the "choices" of the State were negligent in a vacuum.

The legal analysis in defendants' memorandum is an academic discussion of general first amendment law which bears no relationship to the issues presented in this case. Most of defendants' cases do not even involve lobbying activities. Moreover, the law is clear that there is no absolute first amendment privilege and that defendants, by themselves interjecting this issue into the litigation with their affirmative defenses, have "opened the door" to discovery.

Perhaps realizing the weakness of their position, defendants state in their memorandum -- for the first time -- that they are "producing internal lobbying documents responsive to plaintiffs' other earlier document requests. . . ." See Defendants' Lobbying Memorandum ("Defs. Lobbying Mem.") at p. 5. This offer is wholly inadequate, since none of plaintiffs' previous document requests specifically sought documents relating to Minnesota tobacco control or excise tax legislation. Thus, under defendants' position, plaintiffs would be deprived of discovery on defendants' efforts to prevent the very type of

regulation they now argue should have been enacted.[1]

Defendants also side-step the assurances to this Court of counsel for The Tobacco Institute, Inc. ("TI") that lobbying materials were relevant and would be produced. Defendants now argue that counsel did not "suggest" that "TI planned to produce internal lobbying documents." Defs. Lobbying Mem. at n. 2. This is directly contrary to counsel's statements to this Court that "Every material document they want regarding lobbying or public appearances or speeches will be produced responsive to existing demands. . . ." See Exhibit 3 to October 21, 1996 Sutton Affidavit. Nowhere does counsel state, as defendants now maintain, that "every material document" excludes non-public lobbying documents. Defendants' motivation for wanting to conceal their lobbying efforts is obvious. As demonstrated in plaintiffs' opening memorandum, and further detailed below, defendants have engaged in a well-organized and well-financed campaign to thwart what defendants themselves recognized as Minnesota's "revolutionary attack on our industry."

B. By Placing Lobbying Directly At Issue, Defendants Have Waived Any Claim that the First Amendment Protects Lobbying Documents From Disclosure

Most of the cases cited by defendants do not even concern the issue presented here: discovery of lobbying information from a party that has itself injected the issue into the litigation. See Defs. Lobbying Mem. at pp. 9-11.[2] Defendants also fail to address the issue of waiver. Defendants -- not plaintiffs -- placed their lobbying activities directly at issue in this litigation. Thus, defendants have waived any claim that these document may be

[1] Neither is defendants' offer to produce reports of lobbying expenditures filed pursuant to state law sufficient in response to Document Request No. 2. These reports will not reveal the extent of defendants' expenditures in funding third-parties that lobby on their behalf in Minnesota.

[2] Indeed, many of defendants' cases do not even involve lobbying activities. Most involve the constitutionality of forced disclosure of membership lists. See Defs. Lobbying Mem. at n. 5. The relevance of these cases is severely weakened by the fact that TI -- the principal lobbying arm of the tobacco industry -- has already identified, in interrogatory answers, the individuals or entities that engage in lobbying activities on its behalf in the State of Minnesota. Exhibit 1. (All exhibits are to the affidavit of Tara D. Sutton.)

shielded from discovery.

In Household Goods Carrier's Bureau v. Terrell, 452 F.2d 152, 158 (5th Cir. 1971), the Fifth Circuit Court of Appeals held that evidence of defendants' lobbying activities was admissible where defendants themselves "open the door" by introducing such conduct in defending suit. Similarly, in a case cited by defendants, Britt v. Superior Court of San Diego County, 574 P.2d 766 (Cal. 1978) (en banc), the court concluded that a waiver of first amendment rights may occur where the first amendment activities "are directly relevant to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit. . . ." Id. at 775 (emphasis added). In Britt, the court found that the plaintiff, the party resisting discovery, had not placed in issue any of their first amendment activities. Id. at 776. By contrast, in the present case, there can be no doubt that defendants' efforts to influence and manipulate the actions of the legislature are "directly relevant" to their affirmative defenses that the "choices" of the State in regulating tobacco were negligent. Id. at 775. Moreover, there can be no "fair resolution" of this issue unless a complete factual record -- which includes defendants' extensive lobbying efforts -- is presented. Id.

C. The Need for Discovery Outweighs Any First Amendment Interests of Defendants

In the authorities cited by defendants which do involve civil discovery of first amendment activities, the courts merely apply a balancing test to determine discoverability. Thus, there is no absolute privilege which shields lobbying documents from discovery. Some courts -- as noted in plaintiffs' opening memorandum -- order production of lobbying documents without conducting any balancing test. See North Carolina Elec. Membership Corp. v. Carolina Power & Light, 666 F.2d 50, 53 (4th Cir. 1981) (first amendment right to petition is "not a bar to discovery of evidence"); Assoc. Container Transp. v. United States, 705 F.2d 53, 59-60 & n. 10 (2d Cir. 1983) (ordering production of lobbying materials since first amendment right to petition is inapplicable at discovery phase). Even under the balancing test used in

defendants' cases -- most of which do not even involve lobbying materials -- the documents at issue are discoverable.

In Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205 (N.D. Calif. 1983), the court found that "[a] good-faith interjection of First Amendment privilege to a discovery request . . . mandates a comprehensive balancing of plaintiffs' need for information sought against the defendants' constitutional interests in claiming the privilege." Similarly, in Snedigar v. Hoddersen, 786 P.2d 781 (Wash. 1990), the court applied the following balancing test for discovery of meeting minutes of a minority political party:

> [O]nce a threshold showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevancy and materiality of the information sought, and to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful. With regard to relevancy, the interest in disclosure will be regarded as relatively weak unless the information goes to the "heart of the matter", or is crucial to the case of the litigant seeking discovery.

Id. at 786.[3]

Thus, according to the balancing test enunciated in defendants' own cases, defendants' lobbying materials are discoverable. First, plaintiffs seek non-public lobbying materials that are not available anywhere else. Second, the lobbying documents at issue meet even any heightened standard of relevance since they go to the "heart" of defendants' claims that the State was negligent in tobacco control matters. Moreover, since defendants have waived any first amendment claim by placing lobbying directly at issue, any balancing test clearly weighs in favor of disclosure. See, e.g., Grandbouche v. Clancy, 825 F.2d 1463, 1467 (10th Cir. 1987) (where party resisting discovery has "placed" their first amendment activities "into issue," this

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[3] In Crocker v. Revolutionary Communist P.L.P., 533 N.E.2d 444 (Ill. App. Dist. 1988), another case cited by defendants involving discovery of a political party membership list, a nearly identical two-part test was applied:

> (1) the information sought must be so relevant the party seeking disclosure that it goes to the heart of the matter, that is, it must be crucial to the party's case; and (2) the party seeking the information must have exhausted every reasonable alternative source of information.

Id. at 448.

factor weighs in favor of discovery.)[4]

Indeed, the limited number of probative, non-public lobbying documents produced to date by defendants leave no doubt that the documents at issue "go to the heart" of defendants' affirmative defenses by directly contradicting defendants' claims that the State was negligent in its efforts to regulate tobacco. These documents demonstrate that Minnesota was perceived -- by defendants themselves -- as a national leader on tobacco control and that defendants themselves went to extraordinary lengths to defeat tobacco control legislation in Minnesota.

One 1985 TI document, for example, characterizes the situation in Minnesota as "uncommonly active" and "a revolutionary attack on our industry." Exhibit 2, at 680581757. Indeed, this "non-public" memorandum states:

> This situation . . . promoted an environment not witnessed since the days of Hubert H. Humphrey's tenure as mayor of Minneapolis in the 1940's.

Id. at 680581758.

This memo, written to Roger Mozingo, TI vice president for state activities, proceeds to describe how the tobacco industry would counter Minnesota's efforts to regulate tobacco. In fact, the memo concludes with an expression of fear that unless these tobacco control initiatives were stopped, other states would follow Minnesota's lead:

> Every possible legislative, political, social and theoretical angle is being utilized in our efforts to get out of this session unscathed. 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. We will employ all means to secure that victory.

Id. at 680581765 (emphasis added).

Similarly, another 1985 memorandum sent from TI executive Mozingo to Joseph Robbie, executive director of the Minnesota Candy & Tobacco

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[4] Defendants attempt to argue that lobbying documents are relevant only to the issue of the State's awareness of the risks of smoking. See Defs. Lobbying Mem. at p. 1 ("These documents have no conceivable relevance to what the government did or knew about smoking."). This, of course, ignores defendants' repeated insistence that the "choices" of the State on virtually all tobacco control issues are relevant.

Association, Inc., describes the "pretty bleak picture" and "rash of anti-industry legislation" in Minnesota, and states:

> [I]t is vital that you, Mr. Lebens and your membership be as helpful as possible in our efforts to defeat these anti-industry measures. If in the unfortunate circumstances we suffer heavy losses in Minnesota, it would give real impetus for the Surgeon General [Koop] to carry his crusade, utilizing Minnesota's example, to other state legislatures nationwide. As a result of this onerous activity, we are evaluating and assessing all efforts utilized by the tobacco family to derail the anti-industry legislative agenda.

Exhibit 3, at 680581766.

In short, given the record in this case, there can be no question that the documents at issue go to the heart of defendants' affirmative defenses and, thus, are discoverable.[5]

III. AGREEMENTS AMONG DEFENDANTS RELATING TO SETTLEMENT POLICIES, PAYMENT OF ATTORNEYS' FEES, INDEMNIFICATION, AND CONTRIBUTION

Behind their rhetoric, defendants continue to refuse to produce probative and relevant material:

- Agreements on policies for settlement of smoking and health cases;
- "Potential agreements" or "understandings" apportioning damages between or among defendants or relating to indemnification, contribution, or subrogation;
- Agreements between or among defendants for the payment of another defendant's attorneys' fees and costs. (All

[5] In their opening memorandum, plaintiffs cited to a number of cases finding that lobbying documents were discoverable over a party's first amendment objections. See Plaintiffs' Lobbying Mem. at pp. 8-9. Defendants argue -- in a footnote -- that these cases involved the Noerr-Pennington doctrine and that this doctrine is not based on the first amendment. Defs. Lobbying Mem. at n. 8. Defendants' own cases, however, recognize that the Noerr-Pennington doctrine is based on the first amendment right to petition. See Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1364 (5th Cir. 1983) ("Petitioning immunity reflects not only first amendment concerns but also a limitation on the scope of the Sherman Act."); Golub, The Exception of Noerr-Pennington Materials from Discovery Under the Petition Clause of the First Amendment, 66 St. John's Law Review 1095, 1096 (1993) ("This [Noerr-Pennington] exclusion from the antitrust laws is founded primarily on the First Amendment right to petition the government"); see also Calif. Mtr. Transport v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972) (holding that the rights of association and petition are protected under the Noerr-Pennington Doctrine).

defendants except Philip Morris Incorporated have refused to produce these documents.)

Defendants argue that any such agreements are irrelevant because they do not directly relate to any "substantive allegations" of the complaint. This argument ignores the authorities cited in plaintiffs' initial memorandum explaining the rationale behind discovery of these materials: their direct relevance to credibility issues of any defendants who are parties to such agreements. (In addition, such agreements may be relevant to plaintiffs' antitrust and conspiracy claims.)

Indeed, as the Minnesota Supreme Court noted in ruling that "Mary Carter" settlement agreements must be disclosed:

> This kind of settlement can affect the motivation of the parties and, indeed, the credibility of witnesses, and only by bringing these settlements into the open can a trial proceed in a fair and proper adversarial setting.

Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983). A "Mary Carter" settlement agreement, of course, has nothing to do with the substantive allegations before the trier of fact. Its impact on credibility, however, makes it clearly discoverable and potentially admissible.[6]

None of the authorities cited by defendants take issue with the fundamental premise that an agreement between or among defendants relating to payment of attorneys' fees, costs, damages, or settlement can impact on the motivation of a defendant to be fulsome and truthful in its litigation conduct. Such agreements have the potential to create a "motive for the evaporation of adversary vigor," Degan v. Bayman, 86 S.D. 598, 608, 200 N.W.2d 134, 139 (1972). "A party's financial interest in litigation derived from an

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[6] Defendants cite Rule 408, Minn. R. Evid., that limits the admissibility of statements made in the context of settlement negotiations to certain circumstances. Rule 408, however, does not create an absolute discovery privilege. "It is meant to limit the introduction of evidence of settlement negotiations at trial and is not a broad discovery privilege." Computer Associates Intern. v. American Fundware, 831 F.Supp. 1516, 1531 (D. Colo. 1993). See also NAACP Legal Defense Fund v. U.S. Dept. of Justice, 612 F.Supp. 1143, 1146 (D.D.C. 1985); Morse/Diesel, Inc. v. Fidelity & Deposit Co., 122 F.R.D. 447, 449 (S.D.N.Y. 1988). See also 2 J.Weinstein & M.Berger, Evidence ¶ 408(1) at 408-15 to 408-16 (1986) ("[A] party is not allowed to use Rule 408 as a screen for curtailing his adversary's rights of discovery.").

agreement with some of the other litigants, is a proper subject for cross-examination and proof." Cox v. Kelsey-Hayes Co., 594 P.2d 354, 358 (Okla. 1978).

With respect to settlement policies, it is clear that agreements between or among defendants relating to settlement --or more accurately in this case, agreements not to settle -- are discoverable. Indeed, this was precisely the type of agreement at issue in In re: San Juan Dupont Plaza Hotel Fire Litigation, where the defendants had entered into a "rigid and exclusive settlement mechanism for the participants," which the court concluded was a "conscious effort by the signatories to impede the ongoing settlement process in this case." 1993 U.S. Dist. LEXIS 14191 at p. 4 (D.P.R. Sept. 14, 1993), Exhibit 27 to October 21, 1996 Sutton Affidavit. The court's primary concern was that "the Agreement discourages settlements with the plaintiffs, and enhances an unnecessarily recalcitrant position by defendants towards the plaintiffs." Id.

Any agreement or understanding between or among the defendants in this case that discusses or establishes any policies for settlement of this or any other smoking and health case has the same potential to discourage settlements and enhance an unnecessarily recalcitrant position by the defendants. Just as in In re: San Juan, any such agreement is probative and clearly discoverable.

With respect to the issue of "potential agreements" or "understandings," plaintiffs believe that this terminology in our discovery requests is critical because -- despite evidence of the existence of a variety of indemnity/contribution agreements among defendants[7] -- defendants continue to maintain that there are no such "agreements." This, combined with defendants' verbal contortions to evade the clear meaning of these requests, raises the distinct possibility that defendants are attempting to evade discovery by, once again, engaging in word games.

For example, defendants have raised the specter that they had reached certain "understandings" that somehow differed from what they were willing to

[7] See, e.g., Exhibit 28 to October 21, 1996 Sutton Affidavit.

characterize as "agreements." As defense liaison counsel stated at a meet and confer:

> To the extent that an understanding reached the point of an agreement, we have answered it. To the extent that an understanding means something other than agreement, we don't understand what it means and we are objecting to the term.

Exhibit 25 to October 21, 1996 Sutton Affidavit, at p. 145.

Defendants apparently are attempting to limit their responses to some formalized, mechanistic definition of an "agreement," presumably one reduced to writing and formally executed. In the real world, particularly as it relates to the close cooperation among these defendants throughout many years of litigation, there can certainly be "understandings" or "potential agreements" that have not yet been reduced to the formal requisites defendants now attach to the term "agreement." Any such understandings or potential agreements may be referenced in any number of documents, which may be the only source of information concerning their existence and content.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully urge the Court to compel defendants to produce all lobbying documents at issue and all documents relating to agreements, potential agreements, or understandings with respect to settlement policies, payment of attorneys' fees, indemnification and contribution in this or any other smoking and health case.

Dated this 8th day of November, 1996.

ROBINS, KAPLAN, MILLER & CIRESI

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