STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: Other Civil

THE STATE OF MINNESOTA, | Court File No. C1-94-8565

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;
LIGGETT GROUP, INC.;
THE COUNSEL FOR TOBACCO
RESEARCH-U.S.A., INC.; AND
THE TOBACCO INSTITUTE, INC.,

Defendants.

DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO ASSERT A CLAIM FOR PUNITIVE DAMAGES

The above-named defendants (excluding Liggett) respectfully submit this joint memorandum in opposition to plaintiffs' Motion for Leave to Assert a Claim for Punitive Damages. Plaintiffs' Memorandum acknowledges, and then fails to distinguish, controlling Minnesota case law prohibiting the assertion of punitive damages in this action. *Independent School District No. 622 v. Keene Corporation*, 511 N.W.2d 728 (Minn. 1994) ("*Keene*"); *Eisert v. Greenberg Roofing & Sheet Metal*, 314 N.W.2d 226 (Minn. 1982) ("*Eisert*").

In both *Keene* and *Eisert*, the Minnesota Supreme Court expressly held that when a plaintiff has been injured by a product and has only suffered economic loss as opposed to personal injury, a punitive damages claim is prohibited as a matter of law. *Keene*, 511 N.W.2d at 732; *Eisert*, 314 N.W.2d at 228. There is no question that plaintiffs in this case have only suffered economic loss arising from a product. The Supreme Court opinions in *Keene* and *Eisert* demonstrate that it is the injury to the particular plaintiff trying to make the claim, not to other persons arising out of the same alleged wrongful conduct, that controls whether punitive damages are available. These cases require the denial of plaintiffs' motion regardless of the facts alleged and regardless of whether plaintiffs could otherwise meet their burden under the Minnesota punitive damages statutes, a burden which they do not meet.[1]

I. THESE PLAINTIFFS, WHO ONLY CLAIM ECONOMIC LOSS, CANNOT ASSERT A PUNITIVE DAMAGES CLAIM AS A MATTER OF MINNESOTA LAW.

Plaintiffs correctly and understandably predicted that defendants would point to *Keene*, as binding precedent requiring denial of their punitive damages motion. There is current uncertainty under Minnesota law as to whether punitive damages can be recovered in any case where the plaintiff does not claim to have suffered personal injury. There is *no* uncertainty, however, as to whether punitive damages may be allowed in a products case where plaintiff's claimed injury is not personal injury, but rather economic loss: they cannot be allowed as a matter of law, under the express dictate of the Minnesota Supreme Court in *Keene* at 732 and before that in *Eisert* at 228. There is no coherent argument that can be advanced to distinguish the Minnesota Supreme Court's holding in *Keene* from the issue raised by plaintiffs' motion.

Defendants will first summarize Minnesota law on the recoverability of punitive damages in cases of purely economic loss, without personal injury. Defendants will then address the impossibility of distinguishing *Keene* from the issue now before the Court. Regardless of how one chooses to reconcile

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[1] Minn. Stat. §§ 549.191, 549.20 (1978).

Keene with other Minnesota case law and regardless of whether one believes that punitive damages can be recovered in any case not involving personal injury, punitive damages *cannot* be recovered by these plaintiffs in this case as a matter of law.

A. Punitive damages and economic loss: an ultimately immaterial dispute.

Plaintiffs' history of Minnesota law on this issue, leaving aside their interpretations and editorializing and their omission of the fact that *Molenaar* was every bit as much a split panel decision as *Soucek*,[2] is generally correct. (Pl.Mem. at 8-12). Punitive damages were codified in Minnesota in 1978 by a statute requiring "clear and convincing evidence" of a defined level of misconduct.[3] Minn. Stat. § 549.20 (1978). *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), a personal injury case against a manufacturer of flammable children's pajamas, held that punitive damages could be awarded in a product liability case if the manufacturer's misconduct met the legal standard. *Eisert* held that because of the higher value placed on the protection of persons than the protection of property, punitive damages could *not* be recovered in a product liability case by a plaintiff which only suffered property damage, not personal injury.

Significantly, *Eisert* involved urethane spray foam insulation that was alleged to burn with explosive speed and with dense clouds of black, toxic smoke. The fire at issue in *Eisert* not only caused property damage to Crookston High School for which a school district sought recovery, but also killed two high school students whose trustees sought recoveries under the wrongful death statute.[4]

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[2] *Compare Soucek v. Banham*, 524 N.W.2d 478 (Minn.App. 1994), *review denied* (January 25, 1995), and *Molenaar v. United Cattle Company*, 553 N.W.2d 424 (Minn.App. 1996), *review denied* (October 15, 1996).

[3] The statute initially required clear and convincing evidence of "willful indifference" to the rights or safety of others. Minn. Stat. § 549.20(1988). In 1990, the statute was amended to require "deliberate disregard" of the rights or safety of others. Act of May 3, 1990, ch. 555, § 15, subd. 1(a), 1990 Minn. Laws 1557, 1563, *codified at* Minn. Stat. § 549.20, subd. 1(1990).

[4] The *Eisert* opinion held that the Minnesota wrongful death

All plaintiffs sought to bring claims for punitive damages against the manufacturer of the insulation, but their claims were rejected as a matter of law. The Supreme Court did not analyze the manufacturer's allegedly egregious misconduct, but instead held that punitive damages can never be recovered in a products case by a plaintiff who had not suffered personal injury, because of the extraordinary nature of the remedy and the higher value placed on persons than property. 314 N.W.2d at 228.

It is true, as plaintiffs point out, that cases subsequent to *Eisert* allowed punitive damages in non-product liability situations involving only economic loss, suggesting though not definitively deciding that *Eisert* might be limited to product liability cases. *See, e.g., Bucko v. First Minn. Savings Bank*, 471 N.W.2d 95 (Minn. 1991); *Advance Training Sys. v. Caswell Equip. Company*, 356 N.W.2d 1 (Minn. 1984).

Then came *Keene*, in 1994. *Keene* was one of the many thousands of cases that have been brought against manufacturers of asbestos-containing products. An asbestos-containing fireproofing material manufactured by Keene Corporation was installed at Tartan High School when it was constructed in 1969. Because of the health hazards associated with asbestos, the School District was required to engage in a highly expensive asbestos removal project at the high school during the 1980s, and it sued Keene Corporation and others to recover the costs of the project. It also sought punitive damages against Keene, alleging (as will be later discussed in more detail) that the manufacturer knew prior to 1969 that asbestos caused lung disease and not only failed to disclose this fact, but took affirmative steps to conceal it. The School District alleged theories of negligence, strict liability, breach of warranty, fraud, restitution and conspiracy.[5] After trial, the jury found in favor of plaintiff on all counts and awarded both compensatory and punitive damages. 511 N.W.2d at 730.

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statute did not allow for punitive damages. 314 N.W.2d at 228. The wrongful death statute was subsequently amended to allow a claim for punitive damages by a wrongful death plaintiff. Minn. Stat. § 573.02, subd. 1, amended by 1983 Minn. Laws, c. 347, § 2 (1983).

[5] The restitution and conspiracy counts were dismissed prior

Keene Corporation, of course, cited *Eisert* as authority for the proposition that the punitive damages award could not stand as a matter of law. The School District responded that *Eisert* should be limited to strict liability claims only. Plaintiff's argument was that the Minnesota Supreme Court must have intended to disallow punitive damages to economic loss plaintiffs on strict liability theories because no moral culpability is involved, but to allow punitive damages to economic loss plaintiffs on other theories (such as fraud) because the defendant is morally culpable under those theories. The School District sought to distinguish its asbestos case from *Eisert* because the asbestos manufacturer had engaged in egregious misconduct (*i.e.*, fraudulent concealment of the hazardous nature of its product) and because the plaintiff was advancing theories other than strict liability, theories such as fraud which clearly involved moral culpability by the defendant.

Quite simply, this argument was specious. Long before *Eisert*, by undeniable statute and a long history of case law, it was already clear that there could be no punitive damages without moral culpability, that is, without clear and convincing evidence of willful indifference (and later, deliberate disregard) of the rights or safety of others. Minn. Stat. § 549.20. If a claim only involved a theory of strict liability for an unreasonably dangerous product, with no additional evidence of willful indifference or deliberate disregard, then by definition there could not properly be a claim for punitive damages regardless of *Eisert* and regardless of whether the claim involved personal injury or purely economic loss. If this was what *Eisert* meant, *Eisert* meant nothing.

Not surprisingly, then, *Keene* rejected this argument. The unanimous, *en banc* opinion of the Minnesota Supreme Court held that the School District's assertion of legal theories other than strict liability was not a "sufficient distinguishing factor to limit the application of our reasoning in *Eisert*. . .We believe now as we did in *Eisert* that denying punitive damages where a plaintiff only suffers property damage reflects the greater importance society places on protecting people. We reverse the award of

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to trial; the fraud count remained. 511 N.W.2d at 729-730.

punitive damages in its entirety." 511 N.W.2d at 732 (*footnote omitted*). Note that "property damage" must include purely economic loss and is not limited to sudden, physical damage caused by traumatic events like fires or explosions, since the School District's asbestos removal program was a purely economic loss that did not involve any sudden, traumatic event.

The only relevant Minnesota Supreme Court case law on this issue subsequent to *Keene* is *Phelps v. Commonwealth Land Title Insurance Co.*, 537 N.W.2d 271 (Minn. 1995), in which a punitive damages award was upheld in an age discrimination case without reference to *Eisert* or *Keene*. The *Phelps* plaintiff did not claim a bodily injury, but did claim and indeed recover $75,000 for mental anguish, a personal injury claim. Thus the impact of *Phelps* on the debate that has arisen over the scope of *Eisert* and *Keene* is at best ambiguous.

A dispute has arisen over the scope of *Keene*, but that dispute is ultimately immaterial to plaintiffs' motion here. The Minnesota Court of Appeals has issued two divided, mutually inconsistent opinions on whether *Keene* means that punitive damages can never be awarded under any fact situation not involving personal injury to the plaintiff, or whether its prohibition applies only to product liability fact situations without personal injury to the plaintiff. The first interpretation was adopted by Justice Peterson in his dissent in *Molenaar* and by Justices Peterson and Huspeni in the majority opinion in *Soucek v. Banham*, 524 N.W.2d 478 (Minn. App. 1994), *review denied*, (January 25, 1995). *Soucek* held that no punitive damages could be awarded to a plaintiff whose dog had been shot by police officers because no personal injury occurred, even though a pre-*Eisert* case involving the same fact situation had allowed punitive damages. *Wilson v. City of Eagan*, 297 N.W.2d 146 (Minn. 1980). The *Soucek* majority, in other words, understood *Keene* to prohibit punitive damages in all cases involving only economic harm to the plaintiff.

The two-justice majority of Justices Lansing and Harten in *Molenaar* (on which plaintiffs attempt to rely) and Justice Lansing, writing in dissent in *Soucek*, disagreed and interpreted *Keene's*

prohibition of punitive damages to apply only to claims for economic injury stemming from harm caused by products - exactly the situation here.

In short, two justices of the Court of Appeals (with Justice Lansing writing twice) have adopted an interpretation of *Keene* that would bar punitive damages in cases such as the present, where the plaintiff suffered only economic harm in a case arising out of danger from a product. Two other justices (with Justice Peterson writing twice) would bar punitive damages in this case and all other cases in which the plaintiff claims no personal injury.

B. For purposes of this motion, *Keene* is indistinguishable.

The *Keene* allegations were that Keene Corporation and others in its industry profited for decades from the manufacture of products which were efficacious for the purpose for which they were manufactured, but which were extremely hazardous to human health. In fact, the products were alleged to cause a variety of lung diseases which over the years caused thousands of product users to suffer painful injuries and death. The allegations were that the industry, and in the *Keene* case the Keene Corporation specifically, acquired knowledge of the health hazards of their products which they not only failed to reveal, but took affirmative steps to fraudulently conceal. It was alleged in *Keene* that the manufacturer took part in a trade organization[6] which actively worked to control negative publicity concerning the health hazards of the product. 511 N.W.2d at 729. The manufacturer was alleged to have considered the manufacture of a safer product, but to have refrained from doing so because of the potential effect on the sales of the hazardous product. *Id.* This alleged egregious misconduct by Keene Corporation, part of an entire industry's pattern of similar alleged misconduct, was claimed to have not only caused economic loss to the School District, but to have resulted in the death and serious injury from lung diseases of thousands of innocent victims. Indeed, it was only because Keene's product was hazardous and had killed or injured people through lung disease, and not because the

[6] The Sprayed Mineral Fiber Manufacturers Association. *See*

product didn't work for the purposes for which it was intended, that the School District was required to incur the economic losses it claimed. Similar claims against Keene and other members of the industry have clogged the courts of this country with thousands of hotly disputed product liability cases, both by personal injury plaintiffs and by plaintiffs claiming only economic loss. All of the claims, however, arise from the allegedly hazardous condition of the product. The product is asbestos.

For purposes of this motion, the plaintiff's allegations in *Keene* are indistinguishable from the plaintiffs' allegations in this case. Plaintiffs' Memorandum on this motion states that *Keene* involved the struggle courts have had with awarding punitive damages in strict product liability cases where the product manufacturer is not morally culpable. (Pl. Mem. At 13.) There is no "struggle" with awarding punitive damages where manufacturers are not alleged to be morally culpable; punitive damages are neither awarded nor allowed to be asserted in those cases. Neither *Soucek* nor *Molenaar* were products cases. The controversy between the majorities in *Soucek* and *Molenaar* is not over whether a plaintiff who only suffers economic losses due to a defective product can claim punitive damages against the morally culpable product manufacturer. Both cases agree that *Keene* clearly prohibits such a claim. The only dispute between the opinions is over whether punitive damages can ever be awarded in other, non-product related claims for economic loss. Regardless of how this dispute is ultimately resolved, punitive damages cannot be awarded in the situation now before this Court.

Plaintiffs' Memorandum suggests that *Eisert* and *Keene* are different from this case because in this case the State and Blue Cross allege that tobacco has caused personal injury to people, albeit not to the State and Blue Cross. (Pl. Mem. at 13.) This is obviously not correct, since *Eisert* involved the deaths of two high school students and *Keene* involved allegations that asbestos injured thousands of people. The decisions of the Minnesota Supreme Court in these cases make clear that it is the injury to the particular plaintiff seeking punitive damages, not injury to some other individual arising out of the

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511 N.W.2d at 729.

same alleged wrongful conduct, that determines whether punitive damages are available. These plaintiffs were very willing to stress, when it suited their purposes, that "The instant case is not an action on behalf of individual smokers." (Memorandum of Plaintiff State of Minnesota in Opposition to Defendants' Motion to Compel Initial Depositions of a Limited Number of Medicaid Recipients at page 8.) Accordingly, whatever ability individual smokers may or may not have to assert punitive damages claims, these plaintiffs have no such ability under Minnesota law.

The tobacco case at issue is a products case in that all claimed damages arose from the allegedly hazardous condition of a product, just like the asbestos case that was before the Court in *Keene*. As in *Keene*, the plaintiffs are corporate entities (one a private corporation, one a government entity like the School District in *Keene*) which claim to have suffered economic loss because a product caused lung disease and injured people, requiring the plaintiffs to expend money which they would not have had to spend if the product had not been hazardous and if the manufacturer(s) had not engaged in fraudulent concealment of the hazards. Like the School District in *Keene*, the plaintiffs claim they should escape the holding in *Eisert* because of the legal theories they allege, even though their case is premised upon the dangerous condition of a product. Like the School District's claim in *Keene*, plaintiffs' effort to recover punitive damages must be denied as a matter of law.

While defendants will now discuss plaintiffs' failure to meet their burden under the Minnesota punitive damages statutes, *Keene* and *Eisert* alone require denial of plaintiffs' motion without any further analysis.

II. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN.

Parties seeking the extraordinary remedy of punitive damages bear a heavy statutory burden. In particular, they cannot meet that burden by passing reference to a record that was developed on a different issue and that has since been rebutted by additional evidence.

As the factual predicate for their motion, plaintiffs rely on findings of fact made by Judge

Fitzpatrick and Special Master Gehan, which were made "... for the limited purpose of establishing a *prima facie* case for application of the crime-fraud exception to privilege ..." (See Order Regarding Privilege and the Crime Fraud Exception and Setting Forth Procedures To Determine Privilege Beginning With the Liggett Documents filed May 9, 1997 and Report of Special Master: Findings of Fact, Conclusions of Law and Recommendations filed September 10, 1997) (emphasis added). Plaintiffs overlook the fact that while this motion must be viewed through the "prism"[7] of the clear and convincing evidence standard, this Court in rendering its findings as to the crime-fraud exception specifically indicated that the plaintiffs' burden then was at most to show that a prudent person would have a reasonable basis to suspect perpetration or attempted perpetration of a crime or fraud, and that the attorney-client communications were in furtherance thereof. [Court's Memorandum filed May 9, 1997 at page 33, *citing In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032,1039 (2d Cir. 1984)]. In other words, the prior Order was based at most on a preponderance of the evidence standard, while here the Court in reviewing this motion must consider that plaintiffs at trial must prove their case for punitive damages by clear and convincing evidence. *Swanlund, supra* at 154.

Plaintiffs also ignore that since the preliminary findings of this Court and the Special Master were made, defendants have submitted additional rebuttal evidence of relevance to those findings. Thus it is inappropriate to consider them as *establishing* anything in the context of this motion.

Plaintiffs' theory of crime-fraud is, at its most basic level, that the defendants knew certain things about cigarettes which they hid from the public. As defendants have shown throughout the proceedings relating to crime-fraud, this notion is unfounded.

1. Defendants have rebutted the *prima facie* findings of crime-fraud.

In connection with the privilege/crime-fraud proceedings herein, defendants have made a

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[7] Swanlund v Shimano Industrial Corporation, Ltd., 459 N.W.2d 151, 154 (Minn.1990).

substantial record rebutting the *prima facie* findings of crime-fraud,[8] and it would be wasteful and

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[8] In order to avoid duplicative and voluminous submissions, defendants hereby incorporate by reference and make a part of the record for purposes of this motion the following documents which defendants submitted in connection with the Court's consideration of the *prima facie* finding of crime-fraud, and Special Master Gehan's consideration of the privilege issues and crime-fraud in connection with the Liggett documents:

a. Defendants' Memorandum In Response To Plaintiffs' April 8, 1997 Memorandum Concerning Privilege Issues filed April 15, 1997.

b. Defendants' Joint Memorandum and Statements Supporting Joint Defense/Common Interest Privilege Over Liggett Documents filed June 3, 1997.

c. Defendants B.A.T. Industries p.l.c., British-American Tobacco Company Limited, and British-American Tobacco U.K. & Export Company Limited's General Rebuttal to Plaintiffs' Crime/Fraud Submission filed June 27, 1997.

d. Defendant's General Rebuttal To The Court's Prima Facie Crime/Fraud Findings filed June 28, 1997.

e. Appendix to Defendants' General Rebuttal To The Court's Prima Facie Crime/Fraud Finding filed June 28, 1997.

f. Defendants B.A.T. Industries p.l.c., British-American Tobacco Company Limited, and B.A.T. U.K. & Export Company Limited's Genera Reply rebuttal to Plainitffs' Crime/Fraud Submission filed July 11, 1997.

g. Defendants' Reply Brief In Opposition To Plaintiffs' Memorandum of Law Regarding The Liggett "Joint Defense" Documents And In Support Of Their General Rebuttal To The Court's Prima Facie Crime/Fraud Finding filed July 12, 1997.

h. Corrected Defendants' (Except Liggett) Proposed Findings Of Fact And Conclusions Of Law Regarding Liggett Privileged Documents filed July 30, 1997.

In addition, plaintiffs rely on materials submitted to Special Master Gehan in connection with the hearing on the non-Liggett defendants claims of privilege. These matters are currently pending before Special Master Gehan and have not been ruled upon. To the extent the Court considers such evidence, defendants hereby incorporate by reference the following documents:

a. Defendants' Joint Brief In Support of Their Privilege Claims and In Response To Plaintiffs' Memorandum In Opposition To Defendants' Privilege Claims filed October 9, 1997.

b. Defendant Brown & Williamson's Section of Defendants' Memorandum In Support of Privilege Claims filed October 9, 1997.

c. Defendant B.A.T. Industries P.L.C.'s Objections To The September 10, 1997 Report Of The Special Master: Findings Of Fact, Conclusions Of Law and Recommendations filed September 22, 1997.

d. Defendant British-American Tobacco Company Limited ("BATCO") and British American Tobacco U.K. & Export Company Limited ("BATUKE") Objections To The Report Of The Special Master Dated September 10, 1997 filed September 22, 1997.

e. Defendants' Objections To The Report of Special Master: Findings Of Fact, Conclusions Of Law And Recommendations filed September 22, 1997.

f. Defendants' Notice Of Motion And Motion For Supplemental Findings Of Fact And Conclusions Of Law On The Jones Day Legal Memorandum And Other Documents Specifically Referenced By Defendants In These Proceedings Or, In the Alternative, To Modify Report Of Special Master filed September 23, 1997.

g. Defendants' Memorandum In Support Of Their Motion For Supplemental Findings Of Fact And Conclusions Of Law On the Jones Day Legal Memorandum And The Other Documents Specifically Referenced By Defendants In These Proceedings Or, In The Alternative, To Modify Report of Special Master filed September 23, 1997.

h. Defendants' Objections To The Report Of Special Master: Findings Of Fact, Conclusions Of Law and Recommendations filed September 24, 1997

i. Memorandum In Support Of Defendant B.A.T. Industries P.L.C.'s Objections To September 10, 1997 Report Of Special Master: Findings Of Fact, Conclusions Of Law And Recommendations filed September 30, 1997.

j. Defendants' Corrected Appendix To Brief In Support Of Defendants' Objections To Special Masters' Recommendations With Respect To Liggett Documents filed October 1, 1997.

k. Defendants' Corrected Brief In Support Of Defendants' Objections To Special Master's Recommendations With Respect To Liggett Documents filed October 2, 1997.

duplicative to restate all of this evidence here. Accordingly, defendants will touch only briefly on a few examples and rely on the record previously submitted to rebut the factual predicate relied on by plaintiffs.

a. Research efforts

As shown in connection with the Liggett privilege hearings, the U.S. tobacco industry funded significant independent research through the Council for Tobacco Research ("CTR") and its Scientific Advisory Board ("SAB") (See Report of Special Master: Findings of Fact, Conclusions of Law and Recommendations dated September 10, 1997 ¶¶ 71-96). "[s]ome of the research funded through CTR grants has led to reports linking smoking with diseases including lung cancer and emphysema, and . . . have supported the view that cigarettes are addictive." (Id. at ¶79.)

In addition, the manufacturing defendants conducted, participated in and funded significant smoking and health-related research other than through CTR. (See Defendants' Joint Brief In Support

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l. Appendix of the Council for Tobacco Research – U.S.A., Inc. to Defendants' Joint Submission on Privileged Documents.

m. Lorillard Tobacco Company's Submission in Support of Privilege Claims and exhibits.

n. Defendant B.A.T. Industries P.L.C.'s Memorandum in Support of its Claims of Privilege; Affidavit of David Wilson in Support of Defendant B.A.T. Industries P.L.C.'s Memorandum in Support of its Claims of Privilege; Affidavit of Joseph M. McLaughlin and Attached Exhibits in Support of Defendant B.A.T. Industries P.L.C.'s Memorandum of its Claims of Privilege; Exhibit to the Affidavit of David Wilson in Support of Defendant B.A.T. Industries P.L.C.'s Memorandum in Support of its Claims of Privilege; List of B.A.T. Industries' Exhibits being filed Pursuant to Paragaph 7 of the Fifth Order Establishing Procedures for the Review of Documents Subject to Privilege Claims.

o. Defendant R.J. Reynolds Tobacco Company's Supplemental Section to Defendants' Joint Memorandum.

p. Defendants British-American Tobacco Company Limited's and British American Tobacco (U.K. & Export) Company Limited's Submission in Support of Their Claims of Privilege and Work

of Their Privilege Claims and In Response To Plaintiffs' Memorandum In Opposition To Defendants' Privilege Claims at pp. 18-47 detailing examples of research funded or conducted by Philip Morris, Reynolds, Brown & Williamson and BATCo., Lorillard and American.)

This research was published, and nothing about this research was hidden from the public or the State of Minnesota.

b. Nicotine

Despite plaintiffs' attempts to draw such a conclusion, Judge Fitzpatrick's May 9th Order did not make a finding relating to "addiction" and "nicotine manipulation." As defendants have shown previously, the question of whether nicotine is addictive is a matter of opinion, in part depending on the definition of addiction, and that definition has changed over time. (Id. at 51-91 and Defendant Brown & Williamson's Section of Defendants' Memorandum In Support of Privilege Claims at 23-58.) Defendants' position regarding nicotine is supported by some medical experts. (Id. at 70-71.) Nicotine does not satisfy the objective criteria of "addiction" (Id. at 61-65) and people can and do quit smoking (Id. at 65-70). In addition, the manufacturing defendants have shown that their work with nicotine was not secret and they were unsuccessful in trying to develop a denicotinized cigarette. (Id. at 76-91.) Thus, plaintiffs' allegations regarding nicotine do not form the basis of any punitive damages claim.

2. There is no factual basis for an award of punitive damages to these plaintiffs.

As shown above, defendants have rebutted the *prima facie* showing of crime or fraud alleged by plaintiffs. In addition, punitive damages are not recoverable by the State of Minnesota because there has been no showing of acts of the defendants done with willful indifference or deliberate disregard of the rights or safety of these plaintiffs. The crux of plaintiffs' entire lawsuit is that the defendants lied to them and hid from them the hazards of smoking. The uncontroverted facts, however, establish that the State and Blue Cross neither relied upon defendants' statements nor were misled by their acts.

Product.

In 1985, the Minnesota Legislature issued specific findings as follows:

(1) Smoking causes premature death, disability, and chronic disease, including cancer and heart disease, and lung disease;

(2) smoking related diseases result in excess medical care costs; and

(3) smoking initiation occurs primarily in adolescence.

The legislature desires to prevent young people from starting to smoke, to encourage and assist smokers to quit, and to promote clean indoor air.

Minnesota Omnibus Non-Smoking Act, Minn.Stat. §§144.391-393.

The Minnesota Omnibus Non-Smoking Act was the culmination of at least twenty years of discussion and study of smoking by the State of Minnesota, dating back to the Surgeon General's 1964 report entitled "Smoking and Health: Report of the Advisory Committee to the Surgeon General." As set forth in detail in defendants' Memorandum in Support of Motion for Summary Judgment Based on the Expiration of the Statutes of Limitations (October 21, 1997, CLAD filing 1537), the State and Blue Cross have long been aware of the very facts they accuse defendants of concealing in this case.

For example, in 1983, State Commissioner of Health Sister Mary Madonna Ashton appointed a Technical Advisory Committee on Nonsmoking and Health. The charge to that committee stated "smoking accounts for approximately 4,800 Minnesota deaths and a corresponding amount of disability and medical costs annually." Minnesota Plan for Non-Smoking and Health, at 6 (Ex. 7 to Affidavit of Dean A. LeDoux). Dr. Andrew Dean, leader of the Technical Advisory Committee, has testified in this case that, in 1983, "the health consequences of smoking had been quite well defined." A. Dean Depo., Vol. II, p. 283 (Ex. 34 to Affidavit of Dean A. LeDoux). At a December 14, 1983 meeting of the Technical Advisory Committee, Dr. Leonard Schuman, professor of epidemiology at the University of Minnesota School of Public Health, stated: "Smoking is an addiction. There is evidence to suggest that there is no relationship to cost and smoking rates. Addicted persons

will pay any price." Minutes of December 14, 1983 meeting of Technical Advisory Committee at p. 6 (Ex. 10 to Affidavit of Dean A. LeDoux).

In short, the acts of defendants about which plaintiffs complain did not preclude plaintiffs from learning about the alleged health effects of smoking and its attendant medical costs. Hence, there is no factual basis for an award of punitive damages in this case.

CONCLUSION

Plaintiffs not only fail to meet the statutory standard justifying the assertion of punitive damages claims, they fail to distinguish controlling case law from the Minnesota Supreme Court forbidding the assertion of such claims in this case as a matter of law. The motion to amend the Complaint to assert claims for punitive damages should be denied.

Dated: November 4, 1997 **FAEGRE & BENSON LLP**

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