STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

Court File No. C1-94-8565

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

and

Blue Cross and Blue Shield of Minnesota,

Plaintiffs,

vs.

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.

ORDER WITH RESPECT TO NON-LIGGETT DEFENDANTS' OBJECTIONS TO THE SPECIAL MASTER'S REPORT DATED SEPTEMBER 10, 1997

The above matter came on for hearing on October 14, 1997, before the Honorable Kenneth J. Fitzpatrick. Murray Garnick, Esq., appeared and began arguments on behalf of Philip Morris Incorporated specifically and on behalf of all Defendants generally, with the exception of Liggett Group, Inc. (herein "Non-Liggett Defendants"). Roberta Walburn, Esq., appeared and began arguments on

behalf of Plaintiffs. The following also were present at the hearing and identified themselves as appearing on behalf of the party or parties set forth opposite their names:

Name	Party
Corey Gordon	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Martha K. Wivell	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Tara Sutton	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Thomas Pursell	State of Minnesota
Julie Ralston	State of Minnesota
Peter W. Sipkins	Philip Morris Incorporated ("Philip Morris")
Paul Dieseth	Philip Morris Incorporated
Even Hurwitz	Philip Morris Incorporated
Chip Nunley	Philip Morris Incorporated
Anne Walker	Philip Morris Incorporated
Duane Mauney	Philip Morris Incorporated
Michael York	Philip Morris Incorporated
James Simonson	R. J. Reynolds Tobacco Company ("RJR")
Jonathan Redgrave	R. J. Reynolds Tobacco Company
Jeffrey Jones	R. J. Reynolds Tobacco Company
Jack M. Fribley	Brown & Williamson Corporation
James Munson	Brown & Williamson Corporation
Gerald Svoboda	B.A.T. Industries, p.l.c. ("BAT Industries")
Jeremy Marshall	B.A.T. Industries, p.l.c.
Arthur C. Fahlbusch, Jr.	British-American Tobacco Company Limited ("BATCO")
Tom McCormack	BAT (U.K. & Export) Limited ("BATUKE")
Byron Starns	BAT (U.K. & Export) Limited
John Getsinger	BAT (U.K. & Export) Limited and The American Tobacco Company
David G. Martin	Lorillard Tobacco Company ("Lorillard")
Linda Kay Knight	Lorillard Tobacco Company
Connie Iversen	Lorillard Tobacco Company
Stanton Farmer	Lorillard Tobacco Company
Craig Proctor	Lorillard Tobacco Company
Denise Talbert	Lorillard Tobacco Company
Mary T. Yelenick	The American Tobacco Company ("American")
Kirk Kolbo	The Council for Tobacco Research - U.S.A., Inc. ("CTR")
Larry Purdy	The Council for Tobacco Research - U.S.A., Inc.
George Flynn	The Tobacco Institute, Inc. ("TI")

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

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

WHEREAS, the Non-Liggett Defendants jointly, and a number of them separately, have raised certain objections to the Report of Special Master: Findings of Fact, Conclusions of Law, and Recommendations, filed September 10, 1997 (CLAD docket # 1321) ("Special Master 's Report"), with respect to the documents Liggett has agreed to release as part of its settlement with the Attorneys General ("Liggett Settlement Documents");

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

WHEREAS, the Court finds that the Non-Liggett Defendants had numerous opportunities to be heard with respect to the Liggett Settlement Documents for which they asserted a joint defense as well as the procedure by which said documents were to be examined and evaluated;

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

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

THEREFORE, IT IS HEREBY ORDERED:

1. The Findings of Fact, Conclusions of Law, and Recommendations of the Report of the Special Master dated September 10, 1997 (CLAD docket #1321) incorporated herein by reference, are hereby approved and adopted by this Court with the clarifications stated below. The Report as

clarified shall constitute an Order of this Court in this action. Said document shall be released from seal, clarified as stated below, and made a part of the public record.

a. Paragraphs 8 and 9 of the Special Master's Report shall be clarified by the addition, at the end of each paragraph, of the following footnote: "B.A.T. Industries, p.l.c. ("BAT Ind."), British-American Tobacco Company Limited ("BATCo"), and B.A.T. (U.K. and Export) Limited ("BATUKE") have never been members of the Tobacco Industry Research Committee ("TIRC") or the Council for Tobacco Research ("CTR") and did not themselves sign the "Frank Statement." Their subsidiary or sister corporation in the United States - Brown and Williamson Tobacco Company ("B&W") - did sign the Frank Statement and was a member of the TIRC, later CTR."

b. Paragraph 142 of the Special Master's Report shall be clarified by the addition, after the words "defendant companies and organizations," of a footnote containing the statement: "Attorneys representing BAT Ind., BATCo, or BATUKE exclusively were not members of the Committee of Counsel. Attorneys representing their subsidiary or sister corporation in the United States - B&W - were active members."

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

(1) Scientific research on smoking and health was conducted in the United Kingdom by or through BAT group and shared with its United States subsidiary or sister corporation, B&W, "under a cost sharing agreement between B&W and BAT, under which B&W pays for BAT scientific research and receives reports. . . ." PM 2048322229.

2. Defendants' 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 is **DENIED**.

3. Defendants may claim no privilege for the following documents (hereafter "Released Liggett Documents"):

a. All Liggett Settlement Documents designated by Defendants as Category 1 "Other Litigation"

b. All 187 Liggett Settlement Documents designated by Defendants as Category 3 "Science"

c. All Liggett Settlement Documents designated by Defendants as Category 4b "Special Projects"

d. All Liggett Settlement Documents designated by Defendants as Category 5 "Public Statements"

e. All Liggett Settlement Documents designated by Defendants as Category 7 "Children"

Any Liggett Settlement Documents which were designated by Defendants into more than one category ("Multi-Category Documents") need not be released at this time if any one or more of the designations is other than Category 1, 3, 4b, 5, or 7.

4. The Liggett Released Documents shall be made available for Plaintiffs' review within five (5) days from the date this Order is filed.

5. With respect to those Multi-Category Documents which include a Category 1, 3, 4b, 5, or 7 designation, within five (5) days from the date of filing of this Order, Non-Liggett Defendants shall provide a listing of Multi-Category Documents designated in Category 2, 4a, 4c, 6, and 8-12 to the Court and Plaintiffs. Within ten (10) days from the date of filing of this Order, Non-Liggett Defendants

shall propose redactions of those designated Multi-Category Documents in Category 2, 4a, 4c, 6, and 8-12 and shall provide the Special Master with the following for each such document:

a. Privilege Log Entry;
b. Multi-Category Document in unredacted form; and
c. Multi-Category Document in redacted form proposed by Non-Liggett Defendants.

The Special Master shall review the proposed redactions and determine if and to what extent the Multi-Category Document shall be released to Plaintiffs.

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

7. This Order does not apply to any document from which Non-Liggett Defendants have withdrawn their claim of privilege.

8. The attached memorandum is incorporated herein by reference.

Dated: December 16, 1997

BY THE COURT:

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

MEMORANDUM

BACKGROUND:

Early in 1997, one of the defendants in this action, Liggett Group, Inc. ("Liggett") entered into a settlement agreement with one of the plaintiffs in this action, the State of Minnesota by Hubert H. Humphrey, III, its Attorney General ("Minnesota"). As part of that settlement agreement, Liggett agreed to produce certain documents to Minnesota. When it attempted to do so, the other defendants in this action (the "Non-Liggett Defendants") objected, claiming a joint defense/common interest privilege in many of the documents. Plaintiffs demanded production of the documents. Non-Liggett Defendants refused. The parties then met and conferred in attempts to resolve the issue. They discussed the Liggett documents and other documents for which the Non-Liggett Defendants claimed privilege. Unable to come to a mutually agreeable solution, the parties filed submissions with the Court, including their briefs and motions seeking relief, and sought this Court's determination as to whether certain documents must be produced.

The parties argued the matter of privilege claims, and the crime-fraud exception thereto, orally before this Court on April 8, 1997, and April 15, 1997. On May 9, 1997, this Court entered its Order Regarding Privilege and the Crime-Fraud Exception and Setting Forth Procedures to Determine Privilege Beginning with the Liggett Documents (CLAD #943) ("May 9 Order").[1] The Order included findings of fact and conclusions of law, including:

Because the Court set forth specific findings of fact and quoted many of the documents, the May 9 Order was initially filed as "Confidential - Subject to Minnesota Protective Order" and available to counsel and the court only. After subsequent hearings and deliberation, the May 9 Order was unsealed and made a part of the public record in this action (Order Unsealing Findings of Fact Nos. 1-9 of Order Dated May 9, 1997, filed August 15, 1997 (CLAD #1275 and #1276)) .

10. The Plaintiffs have met their threshold burden of establishing a reasonable basis to believe that the crime-fraud exception to the general rule of privilege should be invoked in this matter with respect to the documents for which Defendants claim privilege. Defendants are now allowed an opportunity to present evidence to rebut the *prima facie* finding.
Id. at p. 12.

The Order set forth the initial procedures for review of documents for which privilege was claimed, including the Court's determination that the documents, due to the immense number for which privilege is claimed, could not be individually examined but would be divided into categories for review:

12. The extraordinary number of documents which have been designated as privileged in this case makes it impossible to conduct an *in camera* inspection of each document individually to determine whether it is so closely related to Plaintiffs' *prima facie* showing of crime-fraud that any claim of privilege is lost. If each document for which privilege were claimed were to be examined individually, the trial in this matter could not commence until the next millennium. Accordingly, this Court must fashion a process and procedure which will balance the need for judicial efficiency and timeliness with due process.

13. In order to accommodate the competing needs of the parties in this case, it is necessary to categorize the documents subject to the claims of privilege. Such categories would necessarily include, but not be limited, to 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 of the document, if any.

14. Once categorized, the Special Master appointed by the Court in this matter shall set a schedule for hearing the parties with respect to each such category of document and make his determination as to the application of privilege.

Id. at p. 13. No party sought appeal of the May 9 Order.

The parties were encouraged and did meet and confer to determine those categories into which the documents would be placed. After presenting their positions[2] to the Court, the Court established the categories as follows. The initial categories were those documents for which Attorney-Client privilege

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Plaintiffs suggested fourteen categories. Defendants refused to submit categories, deferring to Plaintiffs. Thus the Court ordered the parties to designate the documents for which the parties claimed privilege into these fourteen categories.

was claimed, those which contained Opinion Work Product, and those which contained Ordinary or "Fact" Work Product. Documents within each of the initial categories were to be further divided into the following categories:

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

See Order Setting Forth Document Categories for Determination of Privilege Claims, filed May 22, 1997 (CLAD #963). No party appealed this order.

The issues of privilege and loss of privilege based on the crime-fraud exception were referred to the Special Master appointed in this matter (*see* May 9 Order at p. 13, para. 14). The parties and the Special Master met to discuss deadlines for category designation and to begin the process for resolution of the privileges claimed and challenged. These meetings included those held on May 28, 1997, June 9, 1997, June 17, 1997, and June 24, 1997.

The Special Master issued an order on June 16, 1997 (CLAD #1023) ("June 16 Order") which provided that he would determine privilege "based upon a thorough working knowledge of the documents and the characteristics therein that define privilege status within each classification." Id. at p. 4. He expressly placed the parties on notice that documents would be randomly selected for review and that:

> The Special Master need not notify the parties regarding which documents are reviewed. However, the Special Master may provide such notification to the parties if, in his discretion, further information from the parties would be of assistance in the privilege determination.

Id. at para. II.C. No party appealed the June 16 Order.

The parties continued to meet with the Special Master to discuss the process for review of all documents for which privilege was claimed, including hearings on July 1, 1997, and July 10, 1997. Opening briefs, responses, and reply briefs with respect to the Liggett documents were scheduled and ultimately submitted by the parties.

Non-Liggett Defendants were allowed four days for hearings before the Special Master to rebut the Court's *prima facie* findings of crime-fraud and to set forth their arguments as to why the joint

defense privilege they claimed for certain Liggett documents should be sustained. (*See* Third Order Establishing Procedures for the Review of Documents Subject to Privilege Claims, filed July 10, 1997 (CLAD #1129), at para. 1.) The hearings, which began on July 16, 1997, and concluded on July 18, 1997,[3] provided Non-Liggett Defendants virtually unlimited opportunity to make *ex parte* and *in camera* arguments to the Special Master. The Non-Liggett Defendants were not prohibited from making their case with any of the documents for which they claimed privilege. Plaintiffs, then, were given the opportunity to respond.

After presentations and arguments by the parties, the Special Master, pursuant to the procedures earlier established by Order of this Court, randomly selected a limited number of documents from each category for review. Meanwhile, the parties were ordered to submit their proposed findings of fact and conclusions of law for consideration by the Special Master. (*See* Fourth Order Establishing Procedures for the Review of Documents Subject to Privilege Claims, filed July 22, 1997 (CLAD #1179), at para. 1.) The Defendants were allowed yet another opportunity to submit *ex parte* evidence to support their position. (Id. at para 2.)

After review of the record and of hundreds of randomly selected documents,[4] the Special Master issued the Report of Special Master: Findings of Fact, Conclusions of Law, and Recommendations (CLAD # 1321, filed September 10, 1997) ("Special Master's Report). In his

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The Liggett document hearings before the Special Master concluded one day earlier than originally requested by the parties' mutual consent.

How many documents were reviewed by the Special Master? With the exception of Category 1 documents, the Special Master's Report identifies the Bates numbers of the documents randomly selected and reviewed. Category 1 contained 292 documents, each of which was reviewed by the Special Master. In addition, the Special Master reviewed each document presented by the parties as exhibits during the July 16-18, 1997, hearings.

extensive and well-supported report, the Special Master found that the Non-Liggett Defendants failed to rebut the Court's *prima facie* finding of crime-fraud and that privilege was lost with respect to certain categories of documents. He also found that some categories contained documents which were not, in the first instance, attorney-client privileged. The Special Master recommended release of the 864 documents the Non-Liggett Defendants placed in categories 1, 3, 4b, 5, and 7 . The Special Master sustained the Non-Liggett Defendants' claim to the joint defense privilege for documents in categories 2, 4a, 4c, 6, 8, 9, 10, 11, and 12.

The Non-Liggett Defendants, however, raised numerous objections to the Special Master's Report. The Court offered them yet another opportunity to be heard - the opportunity to present the Court with their objections and rebuttal arguments at the hearing on October 14, 1997. After review of the record herein, the objections and argument of Defendants, oral and written, as well as Plaintiffs' response thereto, this Court finds that the evidence of record unequivocably supports the findings of the Special Master; and the Court adopts each and every recommendation of the Special Master. The claims of privilege for documents placed by the Non-Liggett Defendants in categories 1, 3, 4b, 5, and 7 are denied.

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

Before addressing the objections to the Special Master's Report, the Court notes that abuse of privilege and court-ordered processes for determination thereof, as well as violation of the Minnesota Rules of Court, constitute sufficient grounds for imposition of sanctions, including the sanction of denial of the Non-Liggett Defendants' claim of a joint defense privilege.

The Court is granted broad discretion under the Minnesota Rules of Civil Procedure and Minnesota case law to fashion a sanction appropriate to the violation:

- Rule 11 provides:

> The signature of an attorney or party constitutes a certification that the pleading, motion, or other paper has been read; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both an appropriate sanctions, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing or the pleading, motion or other paper, including reasonable attorney fees.

Minn. R. Civ. P. 11 (emphasis added). Rule 26.07 mirrors Rule 11, applying the same standards and sanctions with respect to responses or objections to discovery requests -- with the additional factor that signing certifies that the response or objection is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Minn. R. Civ. P. 26.07.

- Rule 16.06 provides:

> If a party or party's attorney fails to obey a scheduling or pretrial order . . . the court, upon motion or upon its own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Rule 37.02(b)(2), (3), (4). In lieu of or in addition to any other sanction, the court shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Minn. R. Civ. Pro. 16.06 (emphasis added).

- Rule 37.02(b) provides:

> **Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, employee, or managing agent of a party or a person designated in Rules 30.02(f) or 31.01 to

testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made pursuant to Rules 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(3) An order striking pleadings or part thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Minn. R. Civ. P. 37.02 (emphasis added).

- In Uselman, the Supreme Court of Minnesota listed many of the sanctions available to the court, including "an order precluding the litigation of certain claims or defenses." Uselman v. Uselman, 464 N.W.2d 130, 145 (Minn. 1990).

The Court recommends that the parties carefully note this authority. When reckless or willful disregard of an order of the Court is evident, as it is in this matter, the Court will not hesitate to exercise its authority and its discretion to end abuse of the judicial process.

The Court is not amused by the Non-Liggett Defendants' disregard of the Court's Order of September 16, 1997 (CLAD #1341) with respect to the 40-page limitation for "combined Defendants," which limit was established pursuant to the parties' agreement (*see* Letter of David Martin

(CLAD #1323)). Yet the Non-Liggett Defendants' submissions included a 39-page "Brief in Support of Defendants' Objections" (CLAD #1407), Attachments to Brief (Conventional Filing; CLAD # 1396A), and a 34-page "Appendix to Brief" (CLAD #1408). Additional objections were filed by BATCo/BATUKE and by BAT Industries, p.l.c. (CLAD #1363 and 1371, respectively). The Non-Liggett Defendants' also filed their Motion for Supplemental Findings of Fact and Conclusions of Law on the Jones Day Legal Memorandum . . . and their Memorandum in Support thereof (CLAD #1366-67). This, as is any other blatant violation of a court order, is unacceptable and punishable by sanction.

The Court is deeply concerned by the fact that the Non-Liggett Defendants violated the June 16 Order when they failed to provide Plaintiffs with a complete index of the materials defendants planned to submit *in camera* and *ex parte* to the Special Master. The parties are aware of the Court's reluctance to conduct any proceedings *ex parte*, yet such proceedings were deemed necessary to a limited extent to preserve privileges properly claimed. To guard against abuse of the *ex parte* process, the June 16 Order provided:

> B. All written ex parte and in camera submissions shall:
>
> * * *
>
> 2. Be accompanied by an index in electronic form, retrievable by opposing counsel, which lists with particularity for each document:
>
> a. A description of the document and each subpart of the document [parenthetical omitted] with, at a minimum, the same information as would be provided in a privilege log;
>
> b. The number of pages comprising each document and each subpart;
>
> c. Where applicable, the Bates numbers of each document and each subpart.

3. The requirements of this paragraph apply to all materials or documents or groupings of documents provided in any manner to the Special Master or the Court.
June 16 Order at para. V.D. Non-Liggett Defendants did not provide Plaintiffs with a complete set of the materials submitted *ex parte* in advance of or during the hearing. Plaintiffs did not receive a complete set until September 15, 1997, two months after privilege claims for the Liggett documents were heard. Non-Liggett Defendants' violation of this Order hampered Plaintiffs in their response to Non-Liggett Defendants' arguments before the Special Master and interfered with Plaintiffs' due process rights.

Once the complete list was provided, Plaintiffs' examination of the list revealed what the Special Master found -- that many documents were not even arguably privileged. Such documents should not have been submitted *in camera* and *ex parte*. Examples include a press release (which by its very nature is intended for dissemination, not secrecy), a patent (a public record) (*see* Defendants' In Camera Exhibits 67 and 68), and a so-called "Privilege Map" prepared by counsel. Had they been provided the complete index in a timely fashion, Plaintiffs could have directed the Special Master's attention to particular documents during the July hearings.[5]

The existence of one particular exhibit submitted *ex parte* and *in camera* did come to light during the hearings. On the third and last day of the Special Master's hearings, Plaintiffs learned that, on the first day of the hearings, the Non-Liggett Defendants introduced *ex parte* a document entitled "Privilege Map" (Exhibits to the Affidavit of Tara D. Sutton in support of Plaintiffs' Memorandum filed October 8, 1997 (CLAD #1419), at Tab 2). This is an organizational chart prepared by counsel used to show how decisions to conduct and fund scientific research were made. In the first place, the chart

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Further abuse, abuse of the *ex parte* process in the form of misrepresentation of the "Jones Day Memorandum," is addressed below.

contains no privileged material and should not have been submitted *in camera* and *ex parte*. More disturbing, however, is the fact that Defendants sought to admit a revised chart on the third day, the Plaintiffs not having been made aware of or provided the Privilege Map in its first incarnation. The chart submitted on the first day of the hearings appeared to show that the Industry sent research proposals to Industry Counsel (which communications were claimed to be privileged) and that Industry Counsel decided whether to pass the research proposal on to the CTR Scientific Director or to Special Account or Special Projects recipients. The chart as submitted on the third day of the hearings had been modified (Id. at Tab 1). Defendants stated they had made a mistake on the first chart because, as drawn, it implied that all research proposals had to be approved by Industry Counsel before being passed on to the appropriate researchers. The second chart shows, instead, that the Industry passed some research proposals to Industry Counsel for approval (claiming privilege for these communications) and some research proposals directly to the CTR Scientific Director for approval (no privilege claimed). (*See* Exhibits of the Special Master's Hearings July 15-18, 1997, i.e., Plaintiffs' Exhibit 403 (the Privilege Map as it was first offered by Defendants) and Defendants' Exhibit 41 (the modified Privilege Map).) Non-Liggett Defendants' actions with respect to this non-privileged Privilege Map are suspicious at best.

The Court is gravely disturbed by the Special Master's finding that the Non-Liggett Defendants failed to produce joint defense agreements pursuant to court order[6] (Order Re: Joint Defense

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These allegations were made by Plaintiffs at the October 14, 1997, hearing as a part of their response to Non-Liggett Defendants' Objections to the Special Master's Report. This Court remanded the issue of production of joint defense agreements to the Special Master and on October 27, 1997, the Special Master issued his Order and Recommendation (CLAD # 1488). Subsequently the Court found that reasonable minds could not differ in their interpretation of the provisions of the Special Master's Fifth Order requiring defendants to produce joint defense agreements (Order with Respect to Certain Issues

Agreements: Recommendation to Judge Fitzpatrick Re: Sanctions, filed by the Special Master October 27, 1997 (CLAD #1588)). The Special Master is the agent appointed and empowered by the Court, and his orders shall be given full effect under authority of this Court. Those who violate any Order issued by the Special Master shall be sanctioned.

Not only were Court Rules and Orders violated by acts of commission and omission, the Non-Liggett Defendants abused the joint defense privilege doctrine. Many documents randomly selected and reviewed revealed that Non-Liggett Defendants claimed privilege for transmittal memos and cover letters which contained nothing of a privileged nature nor any privileged attachments (Special Master's Report, para. E(1) Category 1, para .E(3) Category 3, and para. E(5) Category 4b. *See also,* e.g., the Liggett documents Bates-stamped nos. 2005788 and 2017191). One document simply transmitted without comment proposed California legislation (#2024088-105, Special Master's Report, para. E(9)). Did the Defendants claim privilege for such material simply to create more of a "haystack" in which to hide their "needles"? Did they fail to conduct a review of the documents sufficient to make a good-faith claim of privilege in the first instance? Whatever the reason, claiming privilege where none even arguably exists constitutes abuse. Moreover, a pattern of improper claims of privilege taints the entire submission. After all, the documents cited above came to light after only a random selection of documents were "spot-checked." How many more would have been found if time and resources where unlimited and more documents reviewed?

The Non-Liggett Defendants' abuse of privilege, abuse of the *ex parte* process, and violations of the Court's Orders and the Minnesota Rules of Civil Procedure demands sanction. Minnesota Rules

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Raised at the General Status Conference Heard November 4, 1997, filed November 14, 1997 (CLAD #1720)). The matter of appropriate sanctions is presently under advisement.

of Court permit appropriate sanctions and, indeed, mandate award of reasonable attorneys fees. Accordingly this Court imposes the sanctions it deems best fashioned to the abuse and violations found - - denial of privilege for the categories of documents where abuse of privilege was found.

Indeed, the court need not address the objections of the Non-Liggett Defendants. The Non-Liggett Defendants' abuse of and disregard for the judicial process provide sufficient evidence upon which to impose the sanction of denial of privilege for the Liggett documents. The Court notes, however, that the record also contains sufficient evidence to support the Special Master's findings of fact and conclusions of law. The Non-Liggett Defendants' Objections primarily fall into three groups, as set forth below.

NON-LIGGETT DEFENDANTS' DUE PROCESS RIGHTS

Non-Liggett Defendants complain that their Due Process rights were violated because the category-by-category review prevented them from adequately defending their privilege claims and presenting rebuttal evidence[7] and allowed Plaintiffs to shirk their burden of showing that any document was "in furtherance of" and "closely related to" a crime or fraud. The Court rejects this argument.

The Non-Liggett Defendants' argument does not apply to the documents in Category 1 - Documents Found Not Privileged by Other Courts - because the Special Master did, in fact, review each and every one of the 292 Liggett documents in this category. The courts of at least one other jurisdiction also found these documents not privileged (*see* State of Florida v. American Tobacco Co. et al., (Fla. 1997), *review denied,* American Tobacco et al. v. State of Florida, No. 97-1405 (Fla. Ct. App. July 23, 1997); Burton v. R.J. Reynolds Tobacco Company, 170 F.R.D. 481 (D. Kan. 1997), *reconsideration denied,* ___F.Supp. ___, No. 94-2202-JWL, 1997 WL 536084 (August 14, 1997). *Cf.* Sackman v. The Liggett Group , 950 F.Supp. 357 (E.D.N.Y. 1996), *vacated and remanded,* 16 F.R.D. 6 (E.D.N.Y. 1996), *reaff'd on remand,* 173 F.R.D. 358 (E.D.N.Y. 1997); Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992), *rev'd on procedural grounds,* 975 F.2d 81 (3d Cir. 1992); Butler v. Philip Morris (Miss. 1996), *rev'd on other grounds,* No. 97-M-00383 (Miss., March 28, 1997), No. 94-5-53 (April 21, 1997)).

Essential elements of due process are notice and an opportunity to be heard. Omdahl v. Hadler, 459 N.W.2d 335, 360 (Minn. Ct. App. 1990). Due process challenges require application of a three-pronged balancing test, considering: (1) the private interest affected by the government action; (2) the risk that the process provided will result in erroneous deprivation of the private interest and the probable value of additional safeguards, and (3) the state's interest in the procedures provided, including the administrative burden and expense the additional procedures sought would require. In re Conservatorship of Foster, 547 N.W.2d 81, 85 (Minn. 1996); Baker v. Baker, 494 N.W.2d 282, 287 (Minn. 1992).

Notice was provided to the Non-Liggett Defendants from the onset (*see* May 9 Order). The parties were invited to participate in establishment of a procedure which would accommodate the parties' and Court's interests and concerns. The Special Master expressly advised the parties, at hearings and in his Orders, that he would review a random selection of documents from each category. Defendants received adequate notice.

The Non-Liggett Defendants were provided repeated notice and numerous opportunities to be heard (many of which are noted in the Background section, above). They had the opportunity to examine the Liggett documents in full, documents which they shared as part of the joint defense. The Non-Liggett Defendants had the opportunity to determine which of those documents were entitled to protection under a claim of joint defense/common interest privilege. They were offered the opportunity to participate in development of a process for review of the unprecedented amount of privileged documents at issue. The Non-Liggett Defendants chose to make a joint argument and make a united stand with respect to the privilege (e.g., no one Defendant took the position that it claimed a joint defense privilege for only some of the Liggett documents and not all the Liggett documents at issue; no

one Defendant claimed it participated in the joint defense for a particular period of time and not the entire 40-year period). The Non-Liggett Defendants admit they had an opportunity to file submissions with respect to the Liggett documents on April 15, June 2, June 27, July 11, and July 29, 1997. They were also given numerous opportunities to be heard orally, including a three-day hearing wherein they had liberal opportunity to present evidence *ex parte* and *in camera*, as well as in open court, with respect to privilege and to rebut the Court's May 9 *prima facie* findings. And finally, they were provided the opportunity to file objections to the Special Masters' Report and their briefs with respect to same, arguing the matter before this Court on October 14, 1997[8]. This certainly constitutes opportunity to rebut the Court's *prima facie* findings and the conclusions drawn by the Special Master based on his review of the randomly selected documents, which were identified in his Report. Under the circumstances of this case, how much more opportunity could the Non-Liggett Defendants have received "to be heard at a meaningful time in a meaningful manner." In re Henry Youth Hockey Ass'n, 511 N.W.2d 452, 457 (Minn. Ct. App. 1994). There can be no question that Non-Liggett Defendants had ample opportunity to be heard.

Defendants argue that only a document-by-document review and a document-by-document opportunity for rebuttal would constitute due process. The Court disagrees. It is fundamental that due process is flexible, not static. *See* Baker, 494 N.W.2d at 287 ("The requirements of due process are

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In a letter in response to Plaintiffs', Defendants admit: "To support their argument on this point [that defendants were deprived of their right to make a meaningful rebuttal to the Special Masters's report], defendants presented the Court with rebuttal argument that defendants would have made had they been given the opportunity." (Letter from Even Hurwitz of Arnold & Porter to Roberta Walburn of Robins, Kaplan, Miller & Ciresi dated October 16, 1997, and repeated in the letter from Peter Sipkins, Defendants' litigation liaison counsel, to the Court dated October 22, 1997 (CLAD #1559).) It follows, therefore, that the Defendants have presented their entire argument, including exhibits for rebuttal argument and cannot seriously claim they have been denied due process.

flexible and call for such procedural protections as the particular situation demands."); Humenansky v. Minnesota Bd. of Medical Examiners, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994). In a case of normal size, certainly a document-by-document review can be conducted. Defendants in this action, however, claimed privilege for more than 150,000 documents. As this Court reasoned in its May 9 Order, a document-by-document review was utterly impractical in a case of this magnitude; such a review would take years, delaying the case for an unconscionably lengthy period of time. This Court must consider the due process rights of all parties. Plaintiffs, too, are entitled to due process, the right to make their case at trial while this generation of citizens still breathes. Accordingly, the Court had to fashion procedures that would provide due process while balancing the interests of all parties.

The Court fashioned a method by which it could review a manageable number of documents and, from that review, form an opinion about the remaining documents. Because Defendants knew the contents of their documents intimately, the Court required each Defendant to place the documents for which it claimed privilege into categories, the categories being related to claims at issue in this action. After all, if each Defendant properly designated its documents as privileged, a review of a random number of documents in any category would reveal only proper claims of privilege. If, however, review of a number of documents in a category revealed abuse of privilege claims, that category was "tainted" and that Defendant sanctioned for the abuse by denial of privilege for the documents in the tainted category. For example, when review of nine documents randomly selected from a category containing 187 documents reveals multiple abuses of privilege, it is unlikely that only the "bad apples" just happen to have been selected. More likely than not there would be similar problems found in the remaining 178 documents. It is reasonable to conclude that the randomly selected documents reflect what would be found among the remaining documents in the category.

It was and is recognized by all that a certain amount of documents for which privilege is otherwise properly claimed would lose their privileged status via use of this procedure. However, this unfortunate result has to be weighed against the sheer magnitude of documents at issue in this action. When the three-pronged balancing test is applied, the Non-Liggett Defendants' due process challenge fails. First, the "private interest affected" by the state action is that of the Defendants in protecting their documents from disclosure. Certain documents are indeed entitled to protection under the venerable laws of attorney-client privilege and work product doctrine, but only when such protection is properly claimed and not waived or lost. This factor is not inconsequential. Second, "the risk that the process provided will result in erroneous deprivation of the private interest and the probable value of additional safeguards" is weighed. As discussed above, it is recognized that otherwise privileged documents may lose their privileged status if and when review of less than the entire category reveals abuse of the privilege. However, the law provides that sanctions may be imposed for abuse of process and disregard of court rules and orders. The resulting sanction -- loss of privilege for a category of documents -- is in line with those sanctions authorized by statute and case law in this jurisdiction. Moreover, the Court did consider safeguards. The Non-Liggett Defendants were permitted input as to process; they had the opportunity to review the documents as they were placed into the selected categories to once again evaluate the appropriateness of their claim of privilege; they were given virtually unlimited *ex parte* and *in camera* access to the Special Master; only redacted versions of exhibits were required to be provided to opposing counsel; in the Special Master's Report, they were informed of the specific documents which were randomly selected for review and given the opportunity to object and rebut via briefings and oral argument before this Court. These safeguards gave the Non-Liggett Defendants numerous opportunities to demonstrate the appropriateness of their privilege claims. The

final factor in the balancing test is "the state's interest in the procedures provided, including the administrative burden and expense the additional procedures sought would require." The state's interest is not only to provide a proper forum for determination of the matters at issue, it includes making determinations in a timely fashion so that justice is not unduly delayed. As previously noted, a document-by-document review of all Defendants' documents would require massive quantities of resources (the services and related expenses of numerous "attorney-special master assistants" dedicated to reviewing documents and properly committed to confidentiality) and massive quantities of time (years). Thus, the administrative burden and expense, combined with the state's interest in just and timely resolution of disputes, is a critical factor. Balancing these three factors, the Defendants' challenge of the process chosen falls short. The due process rights of the Non-Liggett Defendants have not been violated.

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

The Non-Liggett Defendants claim that the Special Master applied too narrow an interpretation of the attorney-client privilege. Based upon the portions of the Report quoted by Defendants in their brief (CLAD #1407 at para. II.A.1.), however, it appears that counsel has placed too much emphasis on the words "in the first place," construing it as referring to the attorney-client privilege. The Court has examined the record in its entirety and the Special Master's Report as a whole. When the phrase is read in context, it is clear that the Special Master was referring to his finding that lawyers may have controlled certain research through maneuvers intended to "create" privileges (*see* Special Master's Report, para. 34) and his conclusion that research (with the exception of that funded by the Scientific Advisory Board) was effectively controlled by the Committee of Counsel and falls within the confines of

the crime-fraud exception to the attorney-client privilege (*see* Special Master's Report, para. 145 and 146). As this Court ruled on May 9, the Defendants have an independent obligation to conduct research into the safety of their products and to warn of hazards associated therewith. Scientific research does not become privileged merely by insertion into a communication between attorney and client. Upjohn Co. V. United States, 449 U.S. 383, 395-395 (1981). In light of the record in this matter, the Court finds the Special Master did not too narrowly apply the attorney-client privilege.[9]

The Court has considered and rejected Non-Liggett Defendants' argument that the Special Master did not consider the work product privilege. The parties and the Court have used the term "privilege" to encompass claims based on attorney-client privilege and the work product doctrine. Simply because the Special Master found no need to expressly base his recommendations upon the application of this doctrine does not mean his report is flawed. Indeed, the crime-fraud exception causes loss of privilege whether that privilege claim is based on the work product doctrine or the attorney-client privilege.

The Court considered and rejected Non-Liggett Defendants' arguments that an incorrect legal standard was used for the crime-fraud determination. The Court finds that the Levin standard has been correctly applied. The Levin court set forth the test which must be met to invoke the crime-fraud exception: "that the communication was (1) made in furtherance of a crime or fraud, and (2) was closely

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Nor does the Court find the rebuttal arguments set forth in the Non-Liggett Defendants' Appendix persuasive. With respect to Category 5, for example, Non-Liggett Defendants note that two of the documents randomly selected were documents from which Defendants' withdrew their claims of privilege (*see* Defendants' Appendix Cat. 5 n. 2), which withdrawal was made on July 16, 1997, more than a month after the documents were to have been categorized. Apparently Defendants, too, realized that the documents did not merit a claim of privilege. Rather than helping the Defendants' case, this only underscores the correctness of the Special Master's Report.

related to the fraud.". Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. Ct. App. 1991). The Special Master expressly stated that one prong of his inquiry was whether it has been "demonstrated by a preponderance of the evidence that the involvement of defendants' attorneys was in furtherance of the conduct or was closely related to it?" Special Master's Report, para. 135-136. The first prong of the Special Master's inquiry was properly whether "the defendants were engaged in criminal or fraudulent conduct." Id. These inquiries are near verbatim applications of the Levin standards.

Defendants state that the Special Master improperly relied on product liability theories, not intentional common-law civil fraud, when making his findings. It is not necessary, however, to rely solely upon intentional fraud, because application of the crime-fraud exception is not limited to "crime" and "fraud" but includes intentional torts as well. *See, e.g.*, In re Sealed Case, 1997 WL 530337, *4 (D.C. Cir. August 29, 1997). Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. Ct. App. 1991). The exception has been applied to cases involving misrepresentations of a product's safety, including In re A. H. Robins, 107 F.R.D. 2 (D. Kan. 1985) (applying the crime-fraud exception to documents related to failure to test the product, attempts to create evidence misrepresenting the product's safety, ignoring studies of dangers potentially caused by the product, and attempts to cover up and reduce liability with assistance of counsel). The bottom line is that Special Master did properly incorporate the Levin standard in his analysis of the documents for which the Non-Liggett Defendants claimed privilege.

The Court will not engage in the exercise, no matter how pleasurable, of repeating the analysis set forth in its May 9 Order. Enough trees have been destroyed in this litigation (and imagine how many more would have been destroyed if we had not chosen to use the CLAD system).

The Special Master concluded that "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." Special Master's Report at para. 143. His conclusions also included the following: "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 the 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 . . ." Id. at para. 146. The Special Master did not misapply the Levin standard. Non-Liggett Defendants failed to present sufficient evidence to rebut the *prima facie* case for application of the crime-fraud exception. This Court agrees.

FACTUAL FINDINGS AS BASIS FOR CONCLUSIONS

The Non-Liggett Defendants argue that the Special Master erred in concluding that (1) lawyers controlled and directed scientific research, which in turn may have prevented the companies from fulfilling a duty to conduct research and warn the public (Special Master's Report at para. 139-140, 146); (2) the public could confuse industry-sponsored research as independent research when published research failed to expressly distinguish CTR Special Projects funding from funding by the CTR Scientific Advisory Board (Id. at para. 144); and (3) defendants knew internally that smoking was associated with certain diseases, but failed to publicly acknowledge that fact except with the intent to create doubt about causation (Id. at para. 127). Indeed, the Special Master's Findings of Fact are supported by the record and by the documents so painstakingly cited.

The Special Master's Findings of Fact are even-handedly made. He finds and sets forth many facts found in the record to support certain of the Defendants' positions, as well as certain of the

Plaintiffs' positions. In doing so, he makes careful distinctions. The Special Master acknowledged that Defendants conducted research. He finds that, at these hearings, no evidence was produced that Defendants conducted significant independent research. Special Master's Report at para. 140 (emphasis added). The Special Master does not rely on that fact to prove that Defendants perpetrated a crime or fraud, rather he expressly notes that the matter of the quality or quantity of "significant independent research" is a vitally important factual question to be decided in the case in chief by the fact-finders, the jury. Plaintiffs are entitled to discovery with respect to the research so that appropriate evidence can be presented to the jury.

The Special Master does find that a joint defense agreement was entered into by the Defendants. Plaintiffs presented exhibits to evidence that the Defendants joined together and conspired to suppress certain research. Two of these exhibits, made a part of the record by Plaintiffs, are: (1) document PM 1001607055, p.4, referencing the "gentlemans [sic] agreement" that the tobacco companies would not conduct in-house biological experiments on the effects of smoking; and (2) document BAT 110315968, p.2, referencing this "tacit agreement" pursuant to which Philip Morris complained about the in-house biological work at R.J. Reynolds, resulting in closure of the "mouse house" biological research section. There is no dispute, however, that many if not all of the Defendants conducted some research.

The Court's own review of the documents reveals a conspiracy of silence and suppression of scientific research. The documents reveal, for example: (1) a Committee of Counsel policy statement that only authorized attorneys can use the literature/information retrieval system and a note from a Liggett Research & Development person to other R&D persons that "even the existence of the system should be kept hidden" 2019203, 2011197-2300; (2) a 1955 transmittal memo referencing Dr.

Auerbach's study which was "interpreted by several of our better [Bureau of Research] science writers as indicating that tobacco smoking was an influence in the etiology of lung cancer" 2005758; (3) handwritten meeting notes suggesting teams to test studies and referencing Huff " . . . publication later a possibility but now we control whether it happens" and "DeHart Kill 300,000 figure somehow" 2001344-5350; (4) "confidential" memo to General Counsel from Mr. Steven, General Counsel of Lorillard, summarizing their January 10, 1984, discussion, including listing as one of the seven action items: "status and plans regarding LS Inc. and removing Special Projects and Special Account 4 from CTR and to LS Inc." 2001008-1009.

Non-Liggett Defendants argue that the Special Master erred in finding that researchers misled the public when they published reports or made statements in which they failed to expressly distinguish between CTR Special Projects (which the Special Master concluded functioned entirely under the direction of the Committee of Counsel and whose projects were selected for their favorable prospects) (Special Master's Report para. 142) and projects funded by the CTR Scientific Advisory Board (whose research the Special Master found to be independent, i.e., free of attorney influence)(Id. at para. 96). The Special Master explained that a reader who was not an "industry-insider" would not understand whether the research was sponsored by the "neutral" Scientific Advisory Board of CTR or was a "pro-tobacco" CTR Special Project. Id. at para. 144. The record supports the Special Master's findings, and the conclusions he draws from them, that CTR Special Projects was controlled by the Committee of Counsel to search for and publish favorable research and opposition to unfavorable research. Id. at 145. Based on the record in this case, the Court agrees.

Non-Liggett Defendants object to the Special Master's rejection of their proposed finding of fact that Defendants have "long publicly acknowledged that smoking has been statistically associated

with certain diseases and is a risk fact for those diseases, including lung cancer." *See* Special Master's Report at para. 121. The Court, however, finds the evidence on record and the findings set forth in the Special Master's Report at para. 122-126 persuasive and agrees with the conclusions reached by the Special Master: that Defendants have not "long publicly acknowledged" the link between smoking and health. In fact, Defendants used the statistical evidence, when they referenced it at all, to claim that such evidence did not constitute causation (Id. at para. 127-128), a position they continue to espouse even today .

The evidence supports the factual findings of the Special Master, and such findings are properly considered in determining whether the joint defense privilege claimed by the Non-Liggett Defendants should be sustained or denied.

NON-LIGGETT DEFENDANTS' 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

The Non-Liggett Defendants seek specific findings of fact with respect to the documents they chose from the universe of categorized Liggett documents and which they presented to the Special Master to make their case. They cite the Jones Day Legal Memorandum (LG 2008121-142), which was the subject of two *in camera* affidavits and live *in camera* testimony by the attorney who drafted the document, the sole witness called by the Non-Liggett Defendants, as the "quintessential" example of a document which would, on its face, be entitled to protection under any of privilege theories: attorney-client, opinion work product, or fact work product. Pursuant to the procedures established for review and the recommendation of the Special Master, however, this document is, by virtue of its designation as a Category 1 document, not entitled to a claim of privilege.

The document is unquestionably attorney work product, prepared for and communicated to its client, R. J. Reynolds. The document is referred to as having been "prepared in anticipation of litigation" (Id. at p. 6); by "Reynolds' attorneys" (Id.); "while acting in their capacity as legal advisers to Reynolds" (Id. at p.7); for "our client" (Id.). Counsel describes the document as "quintessential attorney opinion work product . . . transmitted to Reynolds as legal advice and . . . held in confidence[10] . . ." (Defendants' Memo re Jones Day at sec. I, p. 3, filed September 22, 1997 (CLAD #1367)(emphasis added). The privilege, however, has been lost.

The process devised and ordered for review of the 150,000 allegedly privileged documents in this case (which review began with the Liggett documents) requires that privilege be sustained on a category-by-category basis. Abuse of the privilege is cause for sanction, the sanction being loss of claim of privilege for the category. The document at issue was included in Category 1. The Special Master found sufficient evidence to recommend denial of the claim of privilege for documents in this category. For the reasons set forth above, this Court adopts and orders the recommendations of the Special Master. Because privilege was lost or denied for documents found in this category, privilege is lost and denied for all Liggett documents in the category. If the Special Master began making exceptions, he would be back to a document-by-document review which procedure has been considered and determined to be unworkable in this action.

If the document was truly "held in confidence," how did the memorandum end up in the hands of Liggett and become a part of the documents offered in settlement? The only basis upon which the Non-Liggett Defendants can claim privilege with respect to the Liggett documents is that of joint defense. The Non-Liggett Defendants summarily explained that Liggett obtained a copy of the memorandum to provide joint defense.

Non-Liggett Defendants request findings of fact and conclusions of law with respect to this document and each document which they presented to the Special Master. They cite the Court's Order Referring Certain Matters to a Special Master (providing that he "shall make findings of fact and conclusions of law with respect to the matters presented by the parties"); Rule 53.05 of the Minnesota Rules of Civil Procedure; and the Special Master's statement at the July 1, 1997, hearing that the Report would address evidence presented by the parties." The Court has examined the Special Master's Report and finds that these standards are met. The Court notes that nowhere in the Rules or otherwise is the Special Master required to prepare written findings of fact with respect to every single piece of evidence that is presented to him. Such a task would be practically impossible in this case due to the multitude of exhibits presented by the parties. The Court discourages repetitive argument, whether by a party or by the court. If every piece of evidence required written findings of fact, repetition would surely occur to no good cause. Suffice it to say, the Court finds the Special Master has reviewed and considered the record before him, including the documents filed as part of the parties' briefs and the documents provided as exhibits during the hearing. It is not erroneous to address the pieces of evidence and submissions most pertinent and relevant to the issues of this case.

Plaintiffs cite the document for another reason - to show that Defendants abused the *ex parte* and *in camera* opportunities provided them by making misrepresentations to the Court.[11] Plaintiffs quote the Non-Liggett Defendants: "Nothing is said [in this document] about making 'false' statements or suppressing research." Appendix A to Defendant's General Rebuttal, Category 1, p. 2. Plaintiffs

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Plaintiffs explain that they were able to obtain a copy of the document because it has been released in the State of Florida after the Florida Court of Appeals sustained the district court's crime-fraud finding.

quote from the document: "A recent memo . . . suggests that in 1984 the Committee of Counsel thwarted the industry scientists' desire to assure the safety of the product by testing ingredients adequately." (Jones Day Memorandum, p. 7, n.2); "A laboratory report based on low-temperature pyrolysis allegedly indicated that CAMEL regular cigarettes contained extremely fine particles which could be asbestos." (Id. at p. 16, n.9); "If ingredients [in the 'Kentucky Reference Cigarettes' which were tested] are claimed to be the 'cause' of disease, then both the industry and its critics have tested the wrong product, and much of the prior research is flawed." (Id. at p. 3.) In addition to the misrepresentations made to the Special Master, Non-Liggett Defendants further abused the *ex parte* procedure; they failed to disclose (until they provided the complete exhibit list in September, 1997) to Plaintiffs that a second version of the document was presented to the Special Master *ex parte* despite this version being produced from Jones Day files. Nor has R.J. Reynolds entered the second version of the document on its privilege log.

BAT INDUSTRIES, BATCO, AND BATUKE OBJECTIONS

In addition to joining in the general objections filed on behalf of all Non-Liggett Defendants, B.A.T. Industries, p.l.c. ("BAT Ind."), British-American Tobacco Company Limited ("BATCO"), and British-American Tobacco U.K. & Export Company Limited ("BATUKE") filed objections to the Special Master's Report.

BAT Ind., BATCo, and BATUKE themselves have never been members of the Tobacco Industry Research Committee or the Council for Tobacco Research or ever issued statements in the "Frank Statement" (BAT Ind. Objections filed September 24, 1997 (CLAD #1371) and BATCo/BATUKE Objections filed September 22, 1997 (CLAD #1363)). The record to date supports the express language of such statements, and a footnote shall be appended to paragraphs 8

and 9 of the Special Master's Report for clarification. BAT Ind., BATCo, and BATUKE also object to the implication that their attorneys were members of the Committee of Counsel, stating that they were not. Id. The record to date does not indicate otherwise with respect to these entities, and a footnote shall be appended to paragraph 142 of the Special Master's Report to clarify the finding.

The arguments that the BAT Group defendants raise, however, have already been made. (*See* Defendants' BAT Ind., BATCo, and BATUKE's Amended Memorandum in Response to Plaintiffs' April 8, 1997, Memorandum, filed April 16, 1997 (CLAD #884).) The Court rejected the arguments then (*see* May 9 Order) and rejects them now. These defendants are not allowed a second bite of the apple now.

With respect to the Liggett documents, the Court notes that BAT Ind., BATCo, and BATUKE claim a joint defense/common interest privilege in all of the documents at issue, although they have not stated the date when the joint defense agreement commenced. The acts and statements of a conspirator are attributable to each member of the conspiracy. *See* Nathan v. St. Paul Mut. Ins. Co., 86 N.W.2d 503, 510 (Minn. 1957); Van Riper v. U.S., 13 F.2d 961, 967 (2d Cir. 1926) ("What one does pursuant to their common purpose, all do, and , as declarations may be such acts, they are competent against all." (Hand, J.). By joining in the joint defense privilege claim, the BAT defendants necessarily claim that the documents at issue were designed to further a joint defense effort.

Fundamentally, BAT Ind., BATCo, and BATUKE are members of the same corporate family, a family that includes Brown & Williamson Tobacco Company ("B&W") in its own right and as successor by merger to American Tobacco Company ("American").[12] B&W, the BAT subsidiary

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BAT Ind. is the parent company of B&W in the United States and of BATCo and BATUKE in the United Kingdom. BATCo is the former parent of B&W and is now a sister corporation. Prior to

operating in the United States, was a signatory to the Frank Statement and is or has been a member of the Tobacco Industry Research Committee ("TIRC") or, as it was later known, The Counsel for Tobacco Research - U.S.A., Inc. ("CTR") and its attorneys participated in meetings and decisions of the Committee of Counsel. Evidence in the record reveals that BAT Ind. directed the actions of its United States subsidiary, B&W; examples include (i) BAT Ind. advised B&W to use a particular publication that "shows no causal association between smoking and disease" in "discussion with the authorities" and as a "public relations tool" (*see* BAT 202213866; (ii) BAT Ind. distributed a memorandum to its subsidiaries in 1981 to keep them "constantly aware of BAT Industries' stance on Smoking and Health. . . . No conclusive scientific evidence has been advanced and the statistical association does not amount to cause and effect. Thus a genuine scientific controversy exists" (*see* B&W 620789910). These statements were made despite the knowledge of the BAT group, revealed as early as the 1958 trip report (*see* Special Master's Report, para. 37), recognized at a 1962 conference which B&W also attended: "smoking is a habit of addiction that is pleasurable. . . . " (*see* BAT 110070785 at 791); reported by a BAT group scientist in 1969: "[i]t 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. . . ." (BAT 109938433 at 436).

BAT linked itself to CTR through its United States subsidiary, B&W: ". . . our contact there is through Brown & Williamson" (BAT 110070785 at 793). Scientists employed by BATCo or BATUKE came to the United States and met with TIRC and CTR staff and scientists in 1958 (*see* BAT 105408490 at 491) and in 1973 (*see* BAT 100226995 at 7010).

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corporate restructuring on July 23, 1976, BAT Ind. was known as Tobacco Securities Trust Company, Limited.

Finally, BAT Ind., BATCo, and BATUKE object to footnote 2 of the Special Master's Report, stating that BAT Ind., BATCo, and BATUKE "are three separate corporate entities, and should be treated as such." (BATCo/BATUKE Objections filed September 22, 1997 (CLAD #1363), para. 3; BAT Ind. Objections filed September 24, 1997 (CLAD # 1371) at p.4.) This objection is not well taken. First, the footnote does not "define" BAT, it merely explains the term the Special Master has chosen to use to refer to these three related entities in his report. The Special Master found no reason to distinguish the entities for the purposes of his report and the Court finds no material reason to do so at this time. Second, until relatively recently in this litigation, "BAT" or "BAT Group" has been used by counsel themselves to refer to the three entities. At the October 14, 1997, General Status Conference at which these objections were heard, counsel for the first time signed in as representing either BAT Industries, p.l.c., BATCo, or BATUKE (formerly counsel merely signed in as representing "BAT" or "BAT Ind.") The first filings made separately by BAT Industries, p.l.c., BATCo, or BATUKE occurred only after filing of the Special Master's Report in September, 1997 (and, it is noted, BATCo and BATUKE together filed one set of objections and both were represented by the same counsel). Neither BATCo, BATUKE, nor BAT Ind. made a separate appearance before the Special Master at the July hearings.[13] Third, the three entities have been represented by Fabyanske, Westra & Hart, P.A.; Simpson Thacher & Barlett; Leonard, Street and Deinard; and Chadbourne & Parke, with at least one attorney appearing for two of the entities. For example, at the October 14, 1997, status conference Attorney McCormack represented that he appeared for BATUKE; at the November 4, 1997, status conference he represented that he appeared for BATCo. If counsel can't or won't

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In fact, BAT made no individual appearance nor argued any issues separately or as a group. They joined in and relied upon the argument filed by the Non-Liggett Defendants jointly.

distinguish the three corporate entities, it is not surprising that others would not make the distinction. The Special Master did not err in defining the term "BAT" as it has commonly been used by the parties in this litigation to date.

This Court will not raise form over substance. The objections raised by BAT Ind., BATCo, and BATUKE are substantially meaningless. Flawed arguments do not improve upon repetition. With the clarifications noted above, the Special Master's Report with respect to BAT Ind., BATCo, and BATUKE shall stand.

CONCLUSION

Non-Liggett Defendants have been found to have committed numerous abuses of privilege and certain violations of Court Orders and the Rules of Court. Non-Liggett Defendants have been afforded notice and innumerable opportunities to be heard. No violations of their due process rights have occurred. The record supports the factual findings of the Special Master. Application of the law of privilege and the crime-fraud exception was properly applied by the Special Master. The Findings of Fact and Conclusions of Law of the Special Master are adopted and made a part of this Order as clarified herein. Having been carefully considered by this Court, Non-Liggett Defendants' remaining objections are dismissed. The Liggett documents designated by the Non-Liggett Defendants as category 1, 3, 4b, 5, and 7 shall be released as herein ordered.

K.J.F.

POSTSCRIPT:

The Court is not unmindful of Defendants' request that this order be issued as quickly as possible in light of the subpoena served upon certain of the Non-Liggett Defendants (or their affiliates) by the Honorable Tom Bliley, Chairman of the Committee on Commerce in the United States House of

Representatives, for the 864 Liggett documents. This matter, however, is not one to be decided in a summary fashion. "One cool judgment is worth a thousand hasty counsels. The thing to be supplied is light, not heat."[14] Light is exactly what is needed in this case. The process of review was designed to determine whether information could properly remain in the dark. The facts and application of law demand that the light of discovery penetrate to some of the darkest bowels of the tobacco industry, revealing what the industry knew, when it knew it, and if the information was disseminated. Once the information comes to light, it can be examined; conjecture and rumor must yield to facts. Whether the information and its dissemination were sufficient to discharge the duties of the Defendants remains an issue for the ultimate fact-finders, the jury. K.J.F.

Woodrow Wilson, in a January 29, 1916, speech in Pittsburgh, PA.