STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

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

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,

Plaintiffs,

Court File No. C1-94-8565

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., B.A.T. INDUSTRIES P.L.C., LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH--U.S.A., INC., and THE TOBACCO INSTITUTE, INC.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY THE STATE OF MINNESOTA CONCERNING ADDICTION TO, YOUTH ACCESS TO, AND STATE INVOLVEMENT IN GAMBLING

I. INTRODUCTION

The State appears quite ready to infer evil motives from certain information that defendants have agreed to produce in discovery. It nonetheless refuses to provide defendants with that same information about its own conduct, even though the information is plainly relevant to impeach or rebut the State's allegations. The subject too sensitive and painful for the State to disclose is its own involvement in gambling.

Defendants propounded in their Sixth Set to the State eight narrowly focused document requests concerning gambling.[1] Affidavit of Paul R. Dieseth in Support of Defendants' Motion to Compel Production of Documents by the State of Minnesota Concerning Addiction to, Youth Access to, and State Involvement in Gambling, Exhibit A (all subsequent citations to Exhibits herein refer to the Exhibits appended to the Dieseth Affidavit). The State did not object that it would be burdensome in any way to provide the requested documents. Instead it objected to all eight requests on the grounds that they "see[k] information which is neither relevant nor likely to lead to the discovery of admissible evidence," and it refused to produce even a single document.[2] Its refusal extended even to such plainly relevant topics as "addiction" and the effects of advertising on minors.

The State's novel and unprecedented action raises numerous claims that could be refuted directly by documents the State has generated in the area of gambling. Those questions include:

-- Is tobacco "addictive"? When discussing the topic of gambling, the State may have used a different definition of "addiction" from the one it now advocates for tobacco.

-- Can people who are "addicted" to a certain substance or

The requests were for documents about whether or to what extent gambling is "an addiction" (No. 34) and imposes costs on society (No. 36); about the State's marketing and public relations strategies for (No. 18) and its expenditures for advertising of (No. 32) the State Lottery; about the effects of lottery advertising on minors (No. 33) and the State's efforts to discourage gambling by minors (No. 35); about the State's revenues from gambling of all kinds (No. 30) and its expenditures to help problem gamblers (No. 31).

The State reiterated its relevance objections during the meet and confer, and failed to advance any others. Transcript of Oct. 10, 1996 Meet and Confer, 38-40 (Exhibit B).

> activity nonetheless make an informed choice whether to accept the risks that substance or activity may entail? Again, the State appears to be answering this question differently for gambling "addicts" than for tobacco "addicts."
>
> -- Have defendants done everything they reasonably could do to prevent youths from buying cigarettes? When a company sells a product that may not legally be used by youths, what steps should it take to ensure that its advertising does not unduly appeal to youths? If the State has done no more on these issues in the area of gambling than the defendants have done in the area of cigarettes, that would be highly relevant.

The strikingly close parallels between the State's criticisms of defendants' sales of cigarettes and its own conduct in advertising and profiting from gambling make discovery into that area perfectly appropriate to develop impeachment and rebuttal evidence and evidence to support defendants' defenses.

II. ARGUMENT

A. The State Has Made Contentions And Sought Discovery About Tobacco "Addiction," Advertising, Profits, Sales To Minors, And Defendants' Efforts To Discover Health Effects.

The State alleges that cigarette smoking is "addictive," and that defendants are scoundrels for preying on the weakness of addicts for their own financial benefit.[3] In an effort to prove these accusations, the State has requested, and defendants have agreed to produce, documents concerning whether cigarettes are addictive.[4] The State also has requested, and the defendants have agreed to produce, documents that show the tobacco companies' profits since 1952 both nationally and in Minnesota.[5] It is unconscionable, plaintiffs apparently will argue to the jury, that the tobacco companies should earn large profits from selling a product to addicts.

Plaintiffs also argue that defendants are indifferent to the health consequences of cigarettes and to the use of cigarettes by minors. To

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See Complaint ¶¶ 47-51 (companies suppressed research on nicotine); ¶¶ 64-69 (nicotine is addictive and defendants control nicotine levels to create and sustain addiction).

See RFP 1-71 to -74 (Exhibit C).

RFP 1-16 (profits in US); id. -18 (sales and profits in Minnesota) (Exhibit C).

support this argument, plaintiffs have requested, and defendants have agreed to produce, information on how much money the companies have spent on smoking and health research and on development of a safer cigarette.[6] They also have asked for, and defendants have agreed to provide, information about how much money the defendants have spent trying to prevent or discourage smoking by minors.[7]

Plaintiffs will then compare those amounts not only to defendants' profits but also to the companies' expenditures on advertising -- expenditures about which plaintiffs have specifically requested information that defendants, again, have agreed to provide.[8] The disparity between defendants' advertising expenditures and their expenditures on health research or prevention of sales to minors, plaintiffs apparently will argue, can arise only from the supposed fact that defendants have no real interest in learning about the health risks of smoking or in discouraging minors from smoking.

To develop information to impeach and rebut these conclusions, defendants have requested, but the State has steadfastly refused to provide, the same information concerning the State's expenditures on and its income from legal gambling in Minnesota. The information about gambling provides an illuminating comparison that defendants should be entitled to put before the jury as impeachment or rebuttal evidence, and at the very least to explore in discovery.

B. ~~The State's Involvement In Gambling Raises Many Of The Same Issues~~

Interrogatory 1-18 (smoking and health research); id. -19 (safer cigarette) (Exhibit D).

Interrogatory 1-20 (Exhibit D).

Interrogatory 1-21 (amount spent on advertising, marketing and promotion for as far back as records exist) (Exhibit D); RFP 1-19 (expenditures on advertising, marketing and promotion since 1900) (Exhibit C).

Underlying The State's Accusations Against Defendants

The State has legalized and is closely involved in many forms of gambling, from which it profits handsomely. Through six different agencies, the State regulates permitted forms of gambling in various ways.[9] It also generates revenues from taxing and licensing the various forms of gambling.[10] In addition, the State since 1990 has actually operated a gambling scheme -- the Minnesota Lottery -- which it spends over $8 million per year to advertise and is played by almost two of every three Minnesotans.[11] Indeed, according to the leading local paper, "Today, gambling is as socially acceptable in Minnesota as a night at the movies and as commonplace as Little League baseball."[12]

Using the recently expanded definition of "addiction," many people now claim that gambling is "addictive."[13] The American Psychiatric Association's first

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The agencies are the Gambling Control Board, Minn Stat. § 349.151; the Minnesota Racing Commission, id. § 240.02(1); the Minnesota State Lottery Board, id. § 349A.02; the Department of Revenue, id. § 297E; the Department of Public Safety's Gambling Enforcement Division, id. § 299L; and the Attorney General's office, id. § 8.06 (attorney for all state officers, boards, commissions); id. § 297E.16 and 349.2125 (gambling contraband, forfeiture); id. § 297E.13 (gambling taxes, prosecution of violations; id. § 325E.42 (deceptive advertising); id. 349.22 and .36 (violations, penalties and hearings).

See Minn. Stat. § 297E.02(1-3), (6) (net profits tax on bingo, raffles and paddleboards; gross sales tax on pull-tabs and tipboards; combined receipts tax on bingo, raffles, and paddlewheels); id. § 240 (licensing of pari-mutuel horse racing).

Minnesota State Lottery Fiscal Year 1994 Annual Report at 1, 4 (Exhibit E).

"Dead Broke: How gamblers are killing themselves, bankrupting their families and costing Minnesota millions," Minneapolis Star-Tribune, Dec. 3, 1995, A1, at A18 col. 1 (hereinafter "Gamblers Killing") (Exhibit F).

See, e.g., "Dead Broke: Prevention starts with education, awareness," Minneapolis Star-Tribune, Dec. 6, 1995, A16, at A16 col. 1 (hereinafter "Education and Awareness")

diagnostic manual which contends that "nicotine dependence" is a disorder, the DSM-IV, also purports to recognize the disorder of "pathological gambling."[14] Indeed, some researchers have gone so far as to contend that gambling produces a "state of euphoria similar to the euphoria induced by drugs of abuse, particularly psychomotor stimulants;"[15] that "tolerance" develops (i.e., larger and larger bets are required to get the same effect);[16] and that "withdrawal symptoms are common among recovering gamblers."[17] Publications have estimated that there are probably 38,000 "addicted

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(Exhibit G) ("Where there is gambling, there will be gambling addicts, almost everyone agrees."). Although the State itself has referred to "gambling addiction," State of Minnesota Advisory Council on Gambling, Final Report to the Legislature and Governor 16 (Feb. 1, 1996) (Exhibit H), discovery is needed to understand exactly what the State's view is, and how it has changed over time.

Diagnostic and Statistical Manual of Mental Disorders, 243-47, 615-18 (4th ed. 1994) (Exhibit I). See also "Dead Broke: Minnesota is unsure how best to help gamblers and treatment efforts have been unaccountable," Minneapolis Star-Tribune, Dec. 6, 1995, A1, A14 col. 2 (Exhibit J) ("Most experts now use the term "pathological gambler" for the most serious addicted gambler . . . .").

Hickey, Haertzen, and Henningfield, "Simulation of Gambling Responses on the Addiction Research Center Inventory," 11 Addictive Behaviors 345, 347 (1986) (Exhibit K). See also Coventry & Brown, "Sensation seeking, gambling, and gambling addictions," 88 Addiction 541, 542 (1993) (Exhibit L) (sensation from gambling is accompanied by biochemical changes in the brain); Meintz & Larson, "Can You Spot This Kind of Addiction?" Reg. Nurse 42, 43 (July 1994) (Exhibit M) ("Even though compulsive gambling is a substance-free addiction, researchers have suggested that it can produce a `high' similar to the one associated with drug and alcohol abuse.").

Rosenthal & Lorenz, "The Pathological Gambler As Criminal Offender," 15 Clinical Forensic Psychiatry 647, 648 (Sept. 1992) (Exhibit N); Dickerson, "Compulsive Gambling As An Addiction: Dilemmas," 22 Scot. Med. J. 251, 252 (1977) (Exhibit O).

"Dead Broke: Theories emerge on why it's so hard to stop," Minneapolis Star-Tribune, Dec. 6, 1995, A15 col 6 (Exhibit P). See also Dickerson, supra, at 252 (Exhibit O) ("Furthermore, although not well documented, gamblers who stop betting report depressed mood, irritability, motor agitation, tremors, inability to concentrate and a wide variety of physical complaints. Most common of these are nausea and headaches.");

gamblers" in Minnesota,[18] and six million nationwide.[19]

Although the State deplores the defendants' supposed exploitation of "addicted" smokers, its own involvement in gambling is subject to the same attack, as commentators have noted:

> In addition, though the gaming industry hotly denies this as well, many therapists and researchers believe that legal gambling preys upon pathological gamblers. "They are the backbone of the industry," flatly declares the Intervention Institute's Marcotte. "It's not the individual who spends $20 or $30 a month on gambling who represents the biggest source of revenues. It's the people who get in way over their heads."[20]

The social effects of gambling are also claimed to be pervasive and well-recognized:

> [L]egalized gambling in Minnesota has created a broad new class of addicts, victims and criminals whose activities are devastating families and costing taxpayers and businesses millions of dollars.
>
> Thousands have ruined themselves financially, some have committed crimes, and a handful have killed themselves. Thousands more will live for years on the edge of bankruptcy, sometimes working two or three jobs to pay off credit-card debt. . . .
>
> Even conservative estimates of the social costs of problem gambling suggest that it costs Minnesotans more than $200 million

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Meintz & Larson, supra, at 43 (Exhibit M).

Gamblers Killing, supra, A1, col. 1 (Exhibit F).

Meintz & Larson, supra, at 42, 44 (Exhibit M).

"Chances Are: Do the social costs outweigh the benefits of legalized gambling?" University of Minnesota Alumni 6, at 7 col. 3 (Fall 1996) (Exhibit Q) (hereafter "Chances Are").

> per year in taxes, lost income, bad debts and crime."[21]

Indeed, State officials have conceded that, although the social costs are difficult to quantify, "`common sense tells you that there has to be some adverse effects. . . . We know that's there, we just don't know the extent of it.'"[22]

Moreover, many people claim that problems with gambling disproportionately affect young people. The DSM-IV states that pathological gambling among males "typically begins in early adolescence."[23] According to some, "[t]eenagers -- especially males -- are at an even higher risk than adults for becoming compulsive gamblers."[24] Although an estimated four percent of Minnesota adults "showed signs associated with problem gambling and gambling addiction,"

> [t]he potential for gambling addiction among youths -- the most vulnerable group -- is worse, many experts agree. The

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Gamblers Killing, supra, at A1 cols. 1, 4 (Exhibit F). See also Meintz & Larson, at 43 (Exhibit M) (destroyed personal relationships; loss of homes, families, and jobs; bankruptcy; prison sentences "for crimes they have committed to finance their addiction"; two out of 10 compulsive gamblers "attempt suicide to escape the problems their addiction has created."); Rosenthal & Lorenz, supra, at 652 (Exhibit N) (at least 40% of all white collar crime results from gambling; two thirds of Gamblers Anonymous members admit to illegal activities to support their gambling).

Gamblers Killing, supra, at A18 col. 1 (Exhibit F) (quoting Assistant Attorney General Alan Gilbert).

DSM-IV, supra, at 617 (Exhibit I). See also Rosenthal & Lorenz, supra, at 650 (Exhibit N) ("Male gamblers typically began gambling in childhood or early adolescence.").

Chances Are, supra, at 7 (Exhibit Q); id. (Even though State treatment and education programs are praised, therapists "worry about the effects on teenagers and children of growing up in a society in which gambling is not only legal, but actually promoted by the government."). See also Volberg, "The Prevalence and Demographics of Pathological Gamblers: Implications for Public Health," 84 Am. J. of Public Health 237, 240 (Feb. 1994) (Exhibit R) ("[E]xtensive childhood involvement in gambling is predictive of later gambling problems.").

> [University of Minnesota-Duluth] study found that 4.1 to 6.3 percent of teenagers in the state have experienced problems related to gambling.
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> "We're going to have our first generation of kids who grew up during a time of legal gambling, and we don't have a clue what's going to happen to them," said Bill Bergwall, senior consultant with the Compulsive Gambling Program at Fairview Behavioral Services in Minneapolis.[25]

How does the State fare in the comparison between its expenditures on gambling advertising and on problems associated with gambling?

> [T]he state spends $8 million a year advertising for the lottery. That's nearly eight times the amount it spends on efforts aimed at helping problem gamblers, including treatment, education, a compulsive-gambling hot line, research and other efforts.[26]

In short, through the State's involvement in gambling, the State has engaged in some of the very activities for which it criticizes the tobacco industry. The State therefore should be required to provide the same information about gambling that goes to the very heart of plaintiffs' claims against defendants.

C. ~~Information About Gambling Is Relevant And Reasonably Calculated To Lead To Discovery Of Admissible Evidence~~

1. ~~Documents About Addiction And Compulsive Gambling Are Highly Relevant To Impeachment And Rebuttal On Issues Central To The State's Case~~

To begin with, the State has refused to provide documents about whether

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Gamblers Killing, supra, at A18, col. 4 (Exhibit F). See also Bentall, Fisher, Kelly, Bromley, & Hawksworth, "The Use of Arcade Gambling Machines: demographic characteristics of users and patterns of use," 84 British J. of Addiction 555, 556 (1989) (Exhibit S) (majority of gambling machine users in British study were between 16 and 18 years of age, and majority of problem gamblers were between 17 and 19).

Gamblers Killing, supra, at A18 col. 2 (Exhibit F).

or to what extent gambling is "addictive." (Defts. RFP 6-34.) (Exhibit A.) That information obviously is germane. The State has made a big issue whether smoking is "addictive." To defend against plaintiffs' claims, defendants must be allowed to inquire about what the State understood the proper definition of "addiction" to be as that definition was applied to gambling -- particularly as it expanded over time. Obviously, any criticisms by State officials of the newly-minted "addiction" definition would provide critical impeachment and rebuttal evidence for the State's claims that tobacco should be considered "addictive."

Moreover, if the State embraced the expanded definition of "addiction," how did it justify profiting from its own sales to gambling "addicts"? Did it believe gambling "addicts" nonetheless were capable of exercising a free choice over whether to assume the risks of gambling? Evidence uncovered to date suggests that the State did indeed hold such a belief.

The Minnesota Advisory Council on Gambling recently recommended as a strategy to avoid problem gambling an effort to "help provide the information and skills needed for people of all backgrounds to make informed choices about whether, when, and how much to gamble."[27] Attorney General Alan Gilbert, a member of that Council, has likewise suggested: "Let people know what the odds are, and let them know that the longer you gamble, the more you're going to lose."[28]

Again, defendants should be entitled to develop evidence for purposes of

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State of Minnesota Advisory Council on Gambling, Final Report to the Legislature 7 (Feb. 1, 1996) (Exhibit H).

Education and Awareness, supra, at A16, col. 1 (Exhibit G).

rebuttal and impeachment that establishes the extent to which the State believed that education programs might foster free choice even by "addicted" gamblers. That would contradict one of the State's key claims in this lawsuit: that "addicted" individuals lack the ability or capacity to exercise free choice. Likewise, defendants should be allowed to determine to what extent the State issued warnings to lottery participants that gambling could be addictive. That information would bear directly on the State's claims that defendants should have warned smokers about the risk of addiction.

2. ~~Documents About The Societal Costs Of Gambling Are Relevant To Damages And Other Issues~~

Defendants should also be permitted to see State documents discussing the alleged societal costs of problem gambling (Defts. RFP 6-36) (Exhibit A). This is true for several reasons.

First, acknowledgement by the State that gambling imposes social costs, including increased expenditures by the State, gives defendants critical evidence to support their defense that this lawsuit is hypocritical and unfair. If gambling does increase State expenditures, can the State turn around and sue the gambling industry to recoup those extra costs? Does the fact that the State permits, regulates, and heavily profits from gambling mean such a suit is improper? If so, why doesn't the same argument bar the present suit, which seeks to recoup alleged excess costs from an activity the State also permits, regulates, and profits from? It is clear that evidence about the social costs of gambling supports a whole range of issues and questions that bear upon the defense of this case.[29]

This information also relates to other affirmative defenses, including unclean hands, estoppel, and others.

Moreover, those documents are highly relevant to the State's damage claims in this suit, about which the defendants have learned virtually nothing through discovery. The State has thus far refused to provide or identify the statistical damages model it will use. Furthermore, the State has indicated that Medicaid data tapes -- which defendants requested more than a year and a half ago -- contain the facts that will underlie their statistical model. But the State still has not produced all the tapes, nor has it produced all of the information necessary to understand them.

Information about social costs imposed by gambling will give defendants examples of models or methods the State has used to measure social costs from an activity, including excess costs to the State. Such evidence is critical for purposes of impeachment and rebuttal. It is important for defendants to learn what methods the State has favored and criticized in the gambling area, so they can compare those methods to those the State will use in this case, when they are known. Any inconsistencies between the approaches the State favors in assessing the costs of gambling on one hand and smoking on the other would obviously lead to the discovery of important evidence.

Moreover, how the State reconciles its own profit from and promotion of gambling in the face of the serious social costs gambling imposes will be most instructive. The justification again may be that any costs result from the free choice of gamblers (despite their supposed "addiction"), or it may be something else. In either case, defendants are entitled at least to discover the information, to rebut the State's claims against the tobacco industry.

3. ~~Defendants Are Entitled To Compare State Expenditures On Treatment Of Gambling "Addiction" And On Discouragement Of Gambling By Minors With The State's Expenditures On Advertising And Its Revenues From Gambling~~.

Defendants further want to know how much money the State spends advertising the lottery (Defts. RFP 6-32), and how much revenue the State receives from gambling in all forms (Defts. RFP 6-30). (Exhibit A.) They then want to subject those figures to the same comparison the State uses to belittle defendants' commitment to the prevention of smoking by minors and the investigation of their products' health effects. Specifically, defendants want to know how much money the State spends to discourage minors from gambling (Defts. RFP 6-35) and how much the State spends to help problem gamblers (Defts. RFP 6-31). (Exhibit A.)

Fairness requires that the State be forced to turn over this information, which provides essential evidence to impeach and rebut the State's attack on defendants' commitment to stop youth smoking and to investigate tobacco health effects.

4. ~~Documents About Gambling By And Advertising To Minors Are Highly Relevant~~

Defendants also have a strong and valid interest in determining what consideration the State has given to the problem of gambling by minors (Defts. RFP 6-35) (Exhibit A). The State alleges that defendants "are aware of the fact that smoking begins primarily among youth who are not yet 18 years of age." Complaint ¶ 74. To determine what conclusions may properly be drawn from that assertion, if proved true, defendants are entitled to know to what extent the State is aware of gambling by minors. Although the State appears hesitant to admit that minors gamble,[30] it is hiding

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For example, in setting forth the ages of those who gamble in various forms, the Advisory Council nowhere admits participation by persons under 18. See Advisory Council Final Report, supra, at 10-15. It is also noteworthy that the Council refers to persons "between the ages of 18 and 24" as "young adults," id. at 14, the supposed code word the tobacco industry allegedly uses to refer to minors. (Exhibit H.)

its head in the sand if it contends that they do not.

Access to gaming venues by young people is difficult to control, as evidenced by the numbers of high school students and underage college students who gamble in casinos, buy lottery tickets, and place bets on horse and dog races.[31]

If the State sells lottery tickets with knowledge that some will be bought by minors, that puts in better perspective the State's allegation that defendants sell cigarettes with knowledge that some will be bought by minors.

In addition to the State's awareness of the practice, defendants are entitled to know what precautions -- if any -- the State takes to ensure that the lottery and other forms of gambling are not available to minors. In response to the State's claims that ~~defendants~~ do not take sufficient steps to avoid ~~cigarette~~ sales to minors, defendants are entitled to develop impeachment evidence showing that the ~~State's~~ own efforts to avoid ~~gambling~~ by minors are no more extensive.

Defendants also have requested documents discussing the effects of lottery advertising on minors (Defts. RFP 6-33) (Exhibit A). These documents could provide vital evidence to defend against the State's strident accusations that defendants target minors with cigarette advertising.[32] How, if at all, does the State understand and minimize the possible influence of its own gambling advertising on minors, or for that matter on "young adults?" To what extent does the State advertise the lottery in

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Volberg, supra, at 240 (Exhibit R).

See Complaint ¶¶ 71-74 (industry knowingly attracts children and adolescents).

youth-oriented media?[33] Has it ever used or considered using cartoon characters in its ads?[34] Answers to these questions could provide important impeachment and rebuttal evidence against the State's attacks on cigarette advertising.

Finally, defendants seek documents that describe more generally the lottery's marketing and/or public relations strategies (Defts. RFP 6-18) (Exhibit A). Defendants' advertising practices cannot be evaluated in a vacuum. The State's own standards on advertising practices will provide a useful point of comparison and a critical source of impeachment and rebuttal evidence for the State's criticisms of defendants' practices.

III. CONCLUSION

Defendants and plaintiffs no doubt will disagree about the extent to which information about gambling ultimately will be admitted at trial. But the question of admissibility cannot be answered properly until discovery has been completed and defendants have made a record showing the foundation for admissibility.

Dated: October 21, 1996 DORSEY & WHITNEY LLP

By_____

Plaintiffs requested, and defendants have agreed to produce, documents summarizing the "media outlets" in which pre-July 1969 cigarette ads were placed. Pltfs. RFP 6-2 (Exhibit T.) Defendants understand that Plaintiffs are trying to establish to what extent defendants advertise in youth-oriented media.

The Complaint specifically alleges that one defendant's use of a cartoon character in its ads is a "notorious recent example of the industry['s] targeting of minors." ¶ 73.

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