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., 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.

**MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
REGARDING MARKETING DOCUMENTS**

Defendant Philip Morris Incorporated ("Philip Morris") respectfully submits the following memorandum in support of its Motion for a Protective Order Regarding Marketing Documents.

I. INTRODUCTION

Plaintiffs have served sweeping document requests relating to Philip Morris' advertising, marketing and promotional activities ("Marketing Requests"). Plaintiffs' Marketing Requests are -- on their face -- dramatically overbroad and, if read literally, might call for all of the marketing documents created throughout the company over half a century, yielding millions of documents that could have no conceivable relevancy to the claims asserted in this action.[1] Some limited number of the documents requested -- setting forth Philip Morris' marketing strategies and goals -- might be thought to have some relevancy to this action. As argued below, even those documents relating to corporate policies in the marketing area are not legally relevant by reference to the allegations of the Complaint, and to applicable law.

Literal compliance with the Marketing Requests might require Philip Morris to review the millions of pages of files maintained by all 150 persons in its marketing department, including lower-level personnel whose files are not likely to yield any documents setting forth the marketing strategies and objectives adopted by the company. Even in the context of this litigation, such a task would be Herculean -- Philip Morris conservatively estimates that the cost of such compliance would exceed 24 million dollars.

In responding to the Marketing Requests, Philip Morris had two essential choices. First, it could have addressed their overbreadth and irrelevancy on a request-by-request basis, and sought to negotiate language (or have the Court tailor language) reasonably likely to lead to the discovery of admissible evidence. The other course -- and the one proposed by Philip

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The requests themselves contain no temporal limitations. Philip Morris objected to them on that ground, and agreed to produce documents created after January 1, 1946.

Morris to Plaintiffs (and argued in this motion) -- would require Philip Morris to live with the requests' overbreadth, but would allow it to limit the search for responsive documents to those locations reasonably likely to yield materials with even an arguable modicum of relevancy.

Despite the enormity of the undertaking, Philip Morris is prepared to collect and review (and, indeed, has begun the collection and review of) documents from: (a) all files of top and middle management throughout its marketing department; and (b) all marketing department files maintained in storage. Those are the sources from which documents setting forth company policies are likely to be found. Nevertheless, Plaintiffs objected to Philip Morris' proposed limitation (or, for that matter, to negotiate any reasonable limitation).

It bears mention that the task of complying with Philip Morris' own proposal is unprecedented. No Court has ever required Philip Morris to collect documents from across its entire marketing department, and Philip Morris has never done so. Complying with Philip Morris' own proposal is expected to cost the company more than 14 million dollars. Still, Plaintiffs want more.

By this motion, Philip Morris respectfully requests that the Court balance the overbreadth of the requests, the marginal relevancy (at best) of marketing materials to this lawsuit, and the additional costs that would be entailed in literal compliance. To the extent the Court deems that any of the marketing documents sought by Plaintiffs have any relevancy to the allegations of this lawsuit, Philip Morris requests that it fashion an order requiring Philip Morris to undertake only that burden reasonably necessary to locate those relevant materials. The open-ended search demanded by Plaintiffs would cost Philip Morris an additional 9.8 million dollars, and add little or nothing of value to this action. Philip Morris seeks the Court's assistance in preventing such a pointless and wasteful endeavor.

II. FACTUAL BACKGROUND

To date, Plaintiffs have served 30 document requests relating to advertising, marketing and/or market survey activities. For purposes of this

motion, those requests are referred to as the "Marketing Requests."[2]

A. The Marketing Requests

Certain of the Marketing Requests purport to seek broad categories of documents that relate, in any manner whatsoever, to the advertising of cigarettes at any time up to the present. Request No. 106 (first set), for example, asks for all documents "relating or referring to the effects of cigarette advertising." Whatever that means,[3] most of the documents concerning the advertising of Philip Morris products might be viewed as relating in some way to the "effects" of advertising, yet most are completely irrelevant to the issues in this lawsuit.

Other requests purport to require the production of all documents relating to the advertising and promotion of individual brands of cigarettes. Thus, Request No. 39 (second set), seeks production of

> "All documents relating or referring to Virginia Slims advertising campaigns, including reports, notes, memoranda, evaluations, marketing surveys, advertisements and promotions."

The Virginia Slims brand was introduced in 1968 and, as might be expected, there exist huge volumes of documents "relating to" the advertising and promotion of that brand throughout the ensuing 28 years. Declaration of Nancy Brennan-Lund ("Brennan-Lund Decl.") ¶ 8. Again, most of them are of a routine type, id., that are -- or should be -- of absolutely no interest in this litigation.

Another example of the requests at issue is one seeking all documents "to or from or referring or relating to" Leo Burnett Co., Inc., which has served as Philip Morris' principal outside advertising agency for more than

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The Marketing Requests covered by this motion are: Nos. 5, 12, 19, 37, 65, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114 (first set); No. 39 (second set); and No. 14 (third set). They are reprinted, along with Philip Morris' responses, as Appendix A hereto.

Philip Morris objected to the ambiguity of the term "effects" See Response to Request No. 106.

forty years.[4] See Request No. 14 (third set). Philip Morris' files contain hundreds of thousands (or millions) of pages of such material, most of them routine communications between client and agency. Brennan-Lund Decl. ¶ 9. Such documents can have no relevancy to this action.

Finally, a set of requests labelled "Surveys, Market Research and Advertising," see Requests Nos. 102-114, contains various demands relating to research, surveys, focus groups, studies or information on consumers' views or perceptions concerning, for example, "the levels of tar and nicotine in cigarettes" (Request No. 105). As with the categories previously discussed, these requests seek oceans of routine research documents that might conceivably contain a pint or a quart of relevant information. Again, however, a literal reading of the requests might require the company to search and review every file cabinet in its headquarters (and storage facilities).

Before turning to discuss Philip Morris' responses to the Marketing Requests, we pause to describe the company's marketing department and its structure.

B. The Philip Morris Marketing Department

Philip Morris' marketing department, which has responsibility for advertising, promotion, marketing and market research functions within the company, comprises more than 150 employees. Brennan-Lund Decl. ¶ 2. In terms of its organization, the department falls within the larger marketing and sales department, which is headed by an Executive Vice President. Id. ¶ 4. Below that position are two Senior Vice Presidents, one Group Vice President and five Vice Presidents in the marketing area. Id. Four individuals with the title of Category Director and nine individuals with the title of Director report to those Vice Presidents. Id.[5] Below the Director level are

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The only limitation on the requested Burnett documents is that they "refer or relate to the advertising, marketing or promotion of cigarettes." Those, of course, are the subjects on which Philip Morris and Burnett communicate.

In the past year, one Vice President left that position and was replaced. In compliance with its offer, Philip Morris collected documents from both individuals.

approximately 125 lower-level marketing employees with titles such as Brand Manager, Assistant Brand Manager, etc. Id.

Virtually every member of the marketing department maintains a set of active files. Id. ¶ 5. Moreover, many of them have sent inactive files to storage in an offsite warehouse. Id. The offsite warehouse also houses many of the files of persons who were, but no longer are, in Philip Morris' marketing department.[6] Id.

Within Philip Morris, marketing strategies and objectives must be approved at the middle or top-management level (by Directors, Vice Presidents or their superiors). Id. Lower level managers implement such strategies and objectives, and may be involved in their development. Id. Nevertheless, it remains the case that marketing strategies and objectives are not adopted without approval by a person with the title of Director or Vice President. Id. ¶ 6.

As a consequence of the department's structure, documents setting forth the marketing strategies and objectives adopted by the company are reasonably likely to be found in the files of those at or above the Director level. Id. While copies of such documents may appear in the files of lower level employees as well, it would be unlikely for such documents not to appear in the files of a Director or Vice President. Id.

C. Philip Morris' Written Responses, And The "Meet And Confer" Process To Date.

In analyzing the Marketing Requests, Philip Morris made two observations: First, a literal reading of the requests might be thought to impose upon the company an obligation to review all documents maintained by all employees in the marketing department, and all marketing records maintained in storage. Second, the language of the requests was dramatically overbroad, sweeping in millions of pages of routine advertising and marketing

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In the ordinary course, when an employee leaves the department (or the company), his or her files are transferred to a successor, or to storage. Brennan-Lund Decl. ¶ 5.

records in which Plaintiffs could have no interest whatsoever.

Philip Morris could have, but did not, assert and stand on relevancy, overbreadth and burden objections. Rather, the company sought to fashion a way to respect Plaintiffs' right to arguably relevant material, while at the same time protecting itself from the open-ended and undue burden that would be entailed in collecting documents from every employee and reviewing every inactive file.

Philip Morris proposed to respect both sets of interests by producing materials responsive to the Marketing Requests without limiting their breadth, but limiting the universe of persons from whom documents would have to be reviewed and collected. Thus, in its written responses, Philip Morris agreed to produce responsive documents authored by, sent to, or in the files of top corporate management (or other persons in whom Plaintiffs had expressed interest by name). See, e.g., Response to Request No. 102 (first set). Plaintiffs objected to this limitation. See Declaration of Mark B. Helm ("Helm Decl.") ¶ 4.

Next, Philip Morris provided Plaintiffs with a set of the company's organizational charts relating to the marketing department, and invited them to propose the persons whose files they thought should be reviewed for relevant material. Id. Plaintiffs refused this request as well. Id.

Finally, in one last effort to reach agreement, Philip Morris proposed to undertake a massive collection and review effort covering the entire top and middle management levels within its marketing department. Id. ¶ 5. and Exh. B. Active files would be collected, copied and reviewed for all marketing personnel at the Executive Vice President, Senior Vice President, Vice President and Director levels. In instances where one of those persons did not maintain his or her own files, but rather relied on a subordinate to maintain files, that subordinate's files would be reviewed. Recognizing that Plaintiffs had made a specific request for documents relating to the advertising of the Virginia Slims brand (and that the person primarily responsible for implementation of that brand's advertising is not a Director), Philip Morris agreed to collect, copy and review her files, as well. Next,

Philip Morris agreed to review and produce documents that previously had been collected from any person in the marketing department in an earlier collection effort (i.e., pre-1995-96). Id. ¶ 7 and Exh. D. Finally, Philip Morris is prepared to copy and review all of the inactive files from the marketing department maintained in storage.

Philip Morris conservatively estimates that the comprehensive offer set forth above will entail the copying and review of approximately two million pages of materials, and that the processing of those materials will cost more than 14.6 million dollars. Declaration of Willaim F. Lynch, III ("Lynch Decl.") ¶ 6. If Philip Morris were required to review all active files maintained by all members of the marketing department, such an undertaking might be expected to add an additional 1.3 million pages, and an additional 9.8 million dollars to that cost. Id. ¶ 7. Once again, it is important to emphasize that such an expanded search would not be reasonably likely to yield significant relevant material beyond that contained in the files of persons whose files Philip Morris has already offered to search.

Plaintiffs rejected this last proposal without the benefit of any rationale, and without making any counter-proposal. Remarkably, Philip Morris' offer was rejected despite the fact that it was made without prejudice to Plaintiffs' right to seek additional documents -- and argue that additional files should be searched -- after receiving and reviewing those produced as agreed. Helm Decl. ¶ 5 and Exh. B. Philip Morris submits that meeting and conferring in good faith demands more.

III. ARGUMENT

A. Documents Sought By The Marketing Requests Are Irrelevant, Or Have Marginal Relevancy, At Best.

Rule 401 of the Minnesota Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." What is of "consequence" in a given case depends on "the scope of the pleadings, the theory of recovery and the substantive law." Minn. R. Evid. 401, committee comment (1977). Accordingly,

a determination of the relevancy of documents relating to the advertising of cigarettes (and related marketing activity) in this litigation requires a review of the allegations asserted by Plaintiffs, and their theories of recovery.[7]

The gravamen of Plaintiffs' complaint is that members of the tobacco industry knew of alleged health risks associated with smoking, withheld such knowledge from the public, and made intentional misrepresentations regarding smoking and health. Plaintiffs also allege that the industry made and then broke promises to conduct and disseminate the results of independent research in the area of smoking and health. Finally, Plaintiffs allege that Defendants' advertising targets juvenile consumers, thereby "increas[ing] young people's risk of smoking." Complaint ¶ 72(c). The Complaint focuses on R.J. Reynold's "Joe Camel" campaign as "the most notorious recent example of the industry targeting of minors." Id. ¶ 73. Notably absent from the Complaint are any allegations regarding advertising by Philip Morris in support of its brands.

Based upon their core allegations, Plaintiffs have asserted nine counts. Those counts, and the irrelevancy of advertising and marketing documents to them, are addressed in turn.

1. Virtually All Documents Relating To The Advertising Of Cigarettes Are Irrelevant.

At the outset, it should be noted that the actual advertisements published by Philip Morris in connection with the marketing of its cigarette brands are not at issue. Philip Morris maintains a comprehensive archive of advertisements that have been published, and has agreed to produce the ones requested by Plaintiffs. Helm Decl. ¶ 11; see Response to Request for

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While the concept of "relevancy" for discovery purposes is broader than that applied in determining whether evidence is admissible at trial, discovery requests must still be "reasonably calculated to lead to the discovery of admissible evidence." Minn. R. Civ. Pro. 26.02(a); see also Herbert v. Lando, 441 U.S. 153, 177 (1979) ("The requirement . . . that the material sought in discovery be 'relevant' should be firmly applied, and [trial] courts should not neglect their power to restrict discovery.")

Production No. 1 (sixth set). At issue are the millions of documents generated by the company in connection with its everyday marketing and advertising activities. For the reasons shown, such materials are irrelevant to the claims asserted in this action.

Before turning to examine those specific claims, two overarching hurdles faced by Plaintiffs are worthy of mention. First, to the extent that any of Plaintiffs' claims are construed as being based -- in whole or in part -- on Philip Morris' alleged failure to include in advertisements warnings about health risks related to smoking, such claims are preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341. Liggett Group, Inc. v. Cipollone, 505 U.S. 504 (1992).[8]

Second, insofar as Plaintiffs' intentional misrepresentation claims rely on allegedly "false" lifestyle images portrayed in advertisements, they are highly unlikely to succeed. For, as discussed below, similar "misrepresentation" claims based on lifestyle advertising have been roundly rejected by the courts which have examined them. E.g., Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 500 n.9 (10th Cir. 1983); rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

With that background, we turn next to examine the individual counts, and the reasons why the Marketing Requests do not seek material relevant to any viable legal theories encompassed in them.

a. Negligence

Count One alleges that Defendants voluntarily assumed a duty to render public health services and to assist others engaged in public health care. Complaint ¶ 85. More specifically, Plaintiffs allege that Defendants assumed a duty "to aid and assist the research effort" into cigarette smoking and health, and to provide information about smoking and health. Id. Thus, as pleaded, Plaintiffs' negligence claim has two prongs, one alleging a breach

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The core holding of Cipollone was that common law claims which would "require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion" would be preempted. 505 U.S. at 525.

of a duty to conduct research, the other alleging a breach of a duty to disseminate information.

It does not appear that Plaintiffs' advertising allegations, or the marketing discovery they now seek, are related in any way to the "research prong" of their negligence claim. And, upon examination, the Marketing Requests are not relevant to the "dissemination prong," either.

Conceivably, Plaintiffs might argue that the duty "to provide complete . . . information about cigarette smoking and health," see Complaint ¶ 85, encompasses a duty to incorporate such "information" in all advertising. Such an argument -- if it indeed is a part of Plaintiffs' negligence theory -- suffers two fatal defects.[9]

First, a substantively identical argument was considered, and rejected in Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987). The plaintiff in Gunsalus argued that the Tobacco Institute has "under[taken] the task of collecting and disseminating . . . information about tobacco to the public, and pledged to cooperate with those responsible in government." Id. at 1156; see also Complaint ¶ 85. In support of that allegation, the plaintiff quoted various Tobacco Institute statements that are similar or identical to those cited in Paragraphs 27 and 28 of this Complaint action. The District Court held that such statements were "insufficient to create a duty and any failure to fulfill their promises did not increase the risk of harm to plaintiff." Id. at 1157. The Court thus granted summary judgment motion on the plaintiff's negligence claim, based on a failure to allege a legally cognizable duty.

Second, even if a negligence claim for failure to disseminate health warnings in advertisements were to withstand scrutiny under state negligence principles, it would be preempted by the Federal Cigarette Labeling and

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Moreover, even if such an argument were viable legally, it would not begin to support discovery such as the Marketing Requests. At most, it would allow for the discovery of Philip Morris' published advertisements, which have already been made available to Plaintiffs.

Advertising Act, 15 U.S.C. §§ 1331-1341, under the Supreme Court's holding in Liggett Group, Inc. v. Cipollone, 505 U.S. 504 (1992).

In sum, no legally viable negligence theory supports the advertising and marketing discovery now sought by Plaintiffs.

b. Restraint of Trade; Monopolization

Counts Two and Three allege restraint of trade in violation of Minn. Stat. § 325D.51, and monopolization in violation of Minn. Stat. § 325D.52, respectively.[10] The advertising allegations contained in the Complaint, however, do not appear to have any relevancy to these counts, and it is difficult to imagine how Philip Morris' internal advertising and marketing documents could be probative with respect to such issues. In short, the Marketing Requests do not seek any information that would appear to be relevant to Plaintiffs' antitrust claims.

c. Consumer Fraud; Unlawful Trade Practices; Deceptive Trade Practices; False Advertising

The Fourth, Fifth, Sixth and Seventh Counts allege violations of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, the Minnesota Trade Practices Act, Minn. Stat. § 325D.13, the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44(1), and the Minnesota False Advertising Act, Minn. Stat. § 325F.67. With minor wording differences to reflect statutory language, the allegations upon which those counts rely are identical. Specifically, Plaintiffs allege the following misconduct in each:

- "fraudulent, misleading, and deceptive statements and practices relating to the issue of smoking and health . . ."
- "fraudulent, misleading, and deceptive statements and

In support of both counts, Plaintiffs allege that Defendants "restrain[ed] and suppress[ed] research on the harmful effects of smoking; restrain[ed] and suppress[ed] the dissemination of information on the harmful effects of smoking; and restrain[ed] and suppress[ed] the research, development, production, and marketing of a higher quality and safer cigarette." Complaint ¶ 92. As additional support for Count Three, Plaintiffs allege that Defendants "collectively have . . . maintained a monopoly over the sale of cigarettes in Minnesota and used their monopoly power to affect competition in the sale of cigarettes in Minnesota. See Complaint ¶ 97.

> practices relating to the industry's false promises to conduct and disclose objective research on the issue of smoking and health . . ."
>
> _ "fraudulent concealment of information relating to the issue of smoking and health and failure to disclose material facts . . ."

Complaint ¶ 103; see also id. ¶¶ 108, 113, 118.

The elements of a claim under each of Counts Four through Seven are also substantially identical. To state a claim for violation of the Consumer Fraud Act based on false advertising, a plaintiff must prove, among other things, that:

> (1) defendant made false statements of fact about its own products or plaintiff's products in its advertisements;
>
> (2) those advertisements actually deceived or have the tendency to deceive a substantial segment of their audience; and
>
> (3) such deception is material because it is likely to influence buying decisions.

Alternative Pioneering Systems, Inc. v. Direct Innovative Products, 822 F. Supp. 1437, 1441-42 (D. Minn. 1993); Nordale, Inc. v. Samsco, Inc., 830 F. Supp. 1263, 1272 (D. Minn. 1993). The same requirements apply to claims brought under the Unlawful Trade Practices Act and the Deceptive Trade Practices Act, Alternative Pioneering, 822 F. Supp. at 1441; Nordale, 830 F. Supp. at 1272.[11]

Philip Morris recognizes that any requests for marketing materials might, at first glance, seem to be relevant to any false advertising claims. Philip Morris submits, however, that -- upon closer examination -- the Marketing Requests served by Plaintiffs are not reasonably calculated to lead to evidence relevant to the allegations of the Complaint.

It bears repeating that Philip Morris has agreed to produce all published advertisements requested by Plaintiffs. See Response to Request for Production No. 1 (sixth set). Published advertisements are the only materials in which any public misrepresentations could have been made. Yet, despite

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Although there is no case law interpreting the False Advertising Act, the terms of the statute are difficult to distinguish from the other statutes, and it is likely that the same requirements would apply.

their availability, Plaintiffs have not alleged or pointed to a single "false statement of fact" in any Philip Morris advertisement ever. At the very least, Plaintiffs should be required to review published advertisements, and allege which ones (if any) contain a false statement of fact. At that point, discovery concerning those advertisements or campaigns might become relevant.

In their Complaint, Plaintiffs seek to avoid the requirement of pointing to particular false statements asserting that all cigarette advertising is somehow "misleading", on the ground that it appeals to minors. There are a number of responses to any such attempt. First, Plaintiffs have not pointed to any Philip Morris advertisements intended to appeal to minors. Second, if the alleged basis for any "appeal to minors" lies in "lifestyle" advertising, it will not support a false advertising claim in any event.

In Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 500 n.9 (10th Cir. 1983); rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the State of Oklahoma claimed that alcoholic beverage advertisements were inherently misleading because they "project an image of wine drinkers as successful, fun-loving people, without warning of the dangers of alcohol." 699 F.2d at 500 n.9. In rejecting the state's claim, the Tenth Circuit noted that the portrayal of product users as successful, fun-loving people is "present in the advertising of almost any product from automobiles to junk food." Id. The Court went on to state that such portrayals are not "inherently misleading."

Similarly, in Kotler v. American Tobacco Co., 731 F. Supp. 50 (D. Mass. 1990), the plaintiff brought a misrepresentation claim against a tobacco company based on advertisements that asserted "that the extra length of Pall Mall cigarettes gave them a more sophisticated appearance and a cooler smoke, . . . that the tobacco was 'bulked,' and that smart people smoked Pall Malls." 731 F. Supp. at 52. Rejecting plaintiff's misrepresentation claims, the Court remarked, "[t]here is no showing that these statements were either related to health or untrue." Id.

Finally, if Plaintiffs' advertising allegations are read in their most

natural sense -- to allege that Defendants failed to include certain information and warnings in their advertisements -- then their state law claims for false advertising are preempted by the Federal Cigarette Labeling and Advertising Act under Liggett Group, Inc. v. Cipollone, 505 U.S. 504, 525, 530-31 (1992); see also Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 662 (Minn. 1989) (claims for "fraudulent concealment of information . . . would really be a variation of the duty to warn and hence preempted").

In sum, despite the presence of boilerplate allegations of "unfair" and "deceptive" advertising, (1) Plaintiffs have pointed to no allegedly false statements in any advertisement; and (2) they have alleged no particular Philip Morris advertisements that "target" minors. Moreover, the law is quite clear that state law claims based -- expressly or impliedly -- on a failure to include warnings in advertisements are preempted.

d. Restitution

Counts Eight and Nine, which are both entitled "Restitution," contain slightly different allegations. Count Eight, which bears the subtitle "Performance of Another's Duty to the Public," alleges that Defendants "embarked on a campaign of denial, subterfuge, and deceit to deny responsibility and to avoid paying for the consequences of the harm they have caused." Complaint ¶ 122. Count Nine, subtitled "Unjust Enrichment," alleges that Defendants "have reaped substantial and unconscionable profits from the sale of cigarettes in Minnesota," and "failed to pay for the consequences of their unlawful conduct." Id. ¶¶ 126-27.

Restitution is an equitable remedy, and not an independent cause of action. If one focuses on Plaintiffs' subtitles (rather than their titles), it is noteworthy that no Minnesota Court appears ever to have recognized a claim for "performance of another's duty to the public." Accordingly, the proper contours of both "counts" are murky, and the former is absolutely mystifying.

The Ninth Count might be read as a claim for unjust enrichment, which is a recognized equitable claim under Minnesota law. It is founded on the principle that "a defendant who has received money, which in equity and good

conscience should have been paid to the plaintiff, should pay the money over." Fort Dodd Partnership v. Trooien, 392 N.W.2d 46, 48 (Minn. App. 1986). The theory has been deemed applicable to "claims based upon failure of consideration, fraud in the inducement of [a] contract, mistake, or other situations where it would be morally wrong for one party to enrich itself at the expense of others." Id.

It is difficult to see how Plaintiffs' advertising allegations are more relevant to the Ninth Count than they are to the ones already addressed, or how such a claim would survive the infirmities that have been discussed. To the extent Plaintiffs hope to rely on failures to warn in advertisements, or on lifestyle advertisements, the same legal hurdles come into play. If they seek to argue that Philip Morris has been unjustly enriched by "targeting" minors, the Court should recall that they have not alleged any advertising by Philip Morris that has that purpose or effect. Moreover, even if Plaintiffs were to do so, it would -- at most -- render discoverable material related to such advertising. It would not support the burden inherent in discovering all of the materials generated by the company in the ordinary course in connection with its marketing, advertising and market research activities.

In sum, Plaintiffs' equitable claims add little or nothing to the foregoing analysis of their legal claims, and the assertion of such claims certainly does not support the widespread nature of the discovery they have served.

2. Even If It Is Determined That The Marketing Requests Seek Some Relevant Documents, The Requests Are Overbroad On Their Face.

The overbreadth of the Marketing Requests, as framed by the Plaintiffs, is largely self-evident and deserves little by way of argument on a request-by-request basis. Philip Morris respectfully refers the Court to the Marketing Requests hemselves, and trusts that even a cursory review will reveal their dramatic overinclusiveness. One or two examples may be instructive, however.

As previously discussed, Request No. 14 (third set) requests all documents "to or from or referring or relating to" Leo Burnett Co., Inc. that

"refer or relate . . . to the advertising, marketing or promotion of cigarettes." The idea that all documents to or from the company's advertising agency in the ordinary course over a forty year period is preposterous. If there are particular subjects in which Plaintiffs were interested, they might have tailored proper requests accordingly. Their failure to do so impelled Philip Morris to try and negotiate some reasonable limitation on the discovery to be provided.

The previously mentioned requests for "[a]ll documents relating or referring to the effects of cigarette advertising," No. 106 (first set); "[a]ll documents relating or referring to Virginia Slims advertising campaigns," No. 39 (second set); and all documents relating to "research, surveys, focus groups, interviews, studies or information on consumers' views or perceptions concerning the levels of tar and nicotine in cigarettes," No. 105 (first set) suffer from the same defect, as do the others covered by this motion. Even if they are read to call for some relevant information, they are so broad as to sweep in huge volumes of material generated by the company every day in the ordinary course, and of no conceivable relevancy to this litigation. Thus, for example, a request for documents "relating to" Virginia Slims advertising would call for all documents relating to the creation, placement, and payment for placement of each of thousands of individual advertisements over the course of nearly thirty years. Documents "relating to" research surveys, focus group and studies of consumers' views on each of a number of topics would capture essentially all documents created by the market research department of a company that conducts extensive market research.

B. Literal Compliance With The Marketing Requests Would Be Unduly Burdensome, Even In The Context Of This Action.

Rule 26.02(a)(3) of the Minnesota Rules of Civil Procedure provides that a Court may limit discovery when "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Minn. Rule Civ. P. 26.02(a)(3). Thus, even though broad discovery is permissible under the Rules of Civil Procedure,

"discovery is not without limits." Buysse v. Baumann-Furrie & Co., 428 N.W.2d 419, 425-26 (Minn. App. 1988) (affirming trial court's order limiting discovery under Rule 26.02 where, inter alia, it would be burdensome and expensive), rev'd on other grounds, 448 N.W.2d 865 (Minn. 1989).

Rule of Civil Procedure 26.03 grants trial courts tremendous discretion to fashion protective orders in order "to protect parties from burdensome or unfair use of the discovery process." Narveson v. White, 355 N.W.2d 474, 476 (Minn. App. 1984). Rule 26.03 provides that, upon motion and for "good cause" shown, the Court "may make any order which justice requires to protect a party or person from . . . oppression, or undue burden or expense . . . ." Minn. Rule Civ. P. 26.03.

Minnesota Courts have, for many years, recognized their duty to strikea reasonable balance between the requesting party's legitimate need for discovery of "relevant and essential evidence," on the one hand, and the responding party's right to be protected against oppression, undue burden or expense, on the other. Baskerville v. Baskerville, 75 N.W.2d 762, 769 (Minn. 1956); D.F. Herr & R.S. Haydock, 2 Minnesota Practice § 26.21, at p. 38 (2d ed. 1985 & 1995 Supp.) [hereinafter cited as "Minnesota Practice"] (Rule 26.03 "balances one party's need to obtain information with the other party's right to some protections.") .

In Baskerville, the Minnesota Supreme Court instructed that trial courts should exercise their discretion under the Rules of Civil Procedure "with liberality in issuing orders which justice requires for the protection of parties" from unreasonable expense or oppression. Baskerville, 75 N.W.2d 762, 769 (1956) (emphasis added) (affirming issuance of protective order against burdensome and costly document production under predecessor to Rule 26.03, Rule 30.02). Under Rule 26.03, Minnesota Courts are to fashion appropriate and reasonable protections tailored to the circumstances of each case: "What protective orders or procedures are adopted will vary according to the type of action, the issues involved, and all the related and surrounding circumstances." Id. at 769. As with the substantially identical federal rule -- Fed. R. Civ. P. 26(c) -- "a court may be as inventive as the necessities of

a particular case require in order to achieve the benign purposes of the rule." Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2036, at p. 489 (1994).[12]

A recent decision of the Minnesota Court of Appeal is particularly instructive. In Zahavy v. University of Minnesota, 544 N.W.2d 32 (Minn. App. 1996), that Court affirmed the issuance of a protective order against literal compliance with a discovery request, where such compliance "would require a manual investigation of the individual personnel files" of an enormous number of persons, yet would likely yield no additional probative evidence. Id. at 39 (protective order granted to prevent defendant from having to review files of thousands of employees for responsive documents, which Court concluded "would be very time-consuming and burdensome.").

In the instant case, Philip Morris does not seek the extreme relief granted in Zahavy, Baskerville, and Buysse. The company does not, for example, seek an order from this Court that "the discovery not be had" under Rule 26.03(a). On the contrary, as explained above, Philip Morris is proposing to undertake a massive and hugely expensive process of collecting, copying and reviewing millions of pages of marketing documents in order to comply with Plaintiffs' requests. Philip Morris seeks only to have this Court exercise its broad discretion under Rule 26.03 in limiting the scope and breadth of that undertaking, in a manner that strikes a reasonable accommodation between the parties' competing interests. See, e.g., Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 107 (D.N.J. 1990) (in granting protective order, court follows "those cases that have addressed the concerns of discovery and burdensomeness by limiting the number of . . . files" to be reviewed and produced, even though such a protective order may exclude the production of some relevant evidence) (citing cases).

Minnesota Courts look to federal decisions interpreting the analogous federal rule (Fed. R. Civ. P. 26(c)) for guidance in interpreting Minn. Rule 26.03. See Minnesota Practice § 26.2, at p. 2 (1995 Supp); see also id. § 26.25, at p. 41 (looking to federal decisions under Fed. R. Civ. P. 26(c) to analyze proper scope of Minnesota Rule 26.03).

It is disappointing, if not surprising, that Plaintiffs have refused to negotiate a reasonable limitation on the scope of the search to be conducted.[13] The fact is, however, in light of the dubious relevancy (at best) of documents likely to be collected from lower level employees, Plaintiffs would suffer no substantial hardship if this Court were to grant the relief requested. See General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (in ruling on motion for protective order, courts should consider "relative hardship to the non-moving party should the protective order be granted"), cert denied, 414 U.S. 1162 (1974).

In sum, a reasonable balancing of: (1) the overbreadth of the Marketing Requests; (2) the sweeping scope of the search Philip Morris has proposed; (3) the dubious relevancy of any material that might be captured by an even wider search; and (4) the staggering cost of such an additional search reveals that the burden proposed by Plaintiffs is plainly "excessive." See Minnesota Practice § 26.30, at p. 43 ("Excessive expenses incurred in discovery responses may justify a protective order.").

IV. CONCLUSION

For all the foregoing reasons, Philip Morris respectfully requests that the Court enter an Order providing that, in connection with the Marketing Requests, Philip Morris will be deemed to have met its discovery obligations by reviewing and producing responsive documents from the following sources:

> (1) All active files maintained by persons within the marketing department holding the title of Executive Vice President, Senior Vice President, Group Vice President, Vice President, Category Director or Director;
> (2) In instances where an Executive Vice President, Senior Vice

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In McGowan v. General Dynamics Corp., 794 F.2d 361, 363 (8th Cir. 1986), the Eighth Circuit affirmed issuance of a protective order granted as protection against discovery requests that were "extremely broad in scope" where the requesting party "made no effort to limit the scope of her requests." Id. Similarly here, Plaintiffs have made no effort to negotiate a reasonable universe of persons whose files must be reviewed for responsive documents. At this point, Philip Morris submits that Plaintiffs have not met and conferred in good faith in an attempt to reach a reasonable accommodation so as to avoid burdening this Court with this matter, as required by this Court's March 29, 1995 Case Management Order.

President, Group Vice President, Vice President, Category Director or Director indicates that he or she relies on a subordinate to maintain his or her files, all active files maintained by that subordinate;

(3) All active files maintained by the brand manager for the Virginia Slims brand;

(4) All documents from the marketing department (irrespective of source) that were collected by counsel for Philip Morris in prior collections; and

(5) All inactive files from the marketing department maintained in storage.

Philip Morris respectfully submits that such an Order fairly respects Plaintiffs' right to discover relevant material, while balancing that right against the burden to which Philip Morris should be put in meeting its discovery obligations.

Dated: April 22, 1996

Respectfully submitted,

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/s/

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