STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF RAMSEY

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

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.

Court File No. C1-94-8565

December 6, 1994

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF B.A.T. INDUSTRIES TO DISMISS FOR LACK OF PERSONAL JURISDICTION

I.

INTRODUCTION

In this motion, B.A.T. Industries, P.L.C. ("BAT") -- one of the largest cigarette conglomerates in the world—requests that the action against it be dismissed, despite the fact that there has been no discovery in this lawsuit and despite the fact that publicly-available information already discloses the direct and extensive involvement of BAT itself in the decades-long conspiracy, directed at the United States market, which rests sat the hart of this case. This active conduct establishes not only the predicate for the ultimate liability of BAT in this litigation, but also the foundation for this Court's assertion of personal jurisdiction. Clearly, discovery is warranted—indeed mandated—to further establish the active engagement of this defendant in the illegal conduct set forth in the complaint.

BAT, formerly known as British-American Tobacco and based in London, operates worldwide through numerous wholly-owned subsidiaries—including Brown & Williamson Tobacco Corporation ("Brown & Williamson"), one of the Big Six cigarette manufacturers in the United States and a co-defendant in this action. BAT is a named defendant in this action not merely because of its 100% ownership of Brown & Williamson but also because of its own deliberate and wrongful actions aimed directly at the State of Minnesota.

In fact, BAT and Brown & Williamson became the focus of public controversy earlier this year when internal documents, authored by both the parent and the subsidiary, were provided to the media and to Congress. These documents begin to chronicle the manner in which BAT—or the "BAT Group." as the company refers to its worldwide operations—has directed and participated in intentional and tortious acts expressly aimed at the U.S. market, including the State of Minnesota.

The recent disclosures are so extraordinary that a federal judge in Washington, D.C., indicated that internal corporate documents "may reveal that the Brown & Williamson tobacco company concealed for decades that it knew its products to be both health hazards and addictive" and may be "the proverbial 'smoking gun' . . ." Another indication of the explosive nature of BAT Group documents is that a Brown & Williamson attorney, facing mounting pressure from cigarette litigation in the United States some years ago, recommended declaring certain documents "deadwood" and shipping them "to BAT" in England—obviously in an attempt to remove them from the jurisdiction of the United States.

The recent disclosures reveal that:

- Decades ago, as evidence of the health hazards of cigarettes began to mount, BAT recognized that the survival of the industry was at stake and that it was necessary to coordinate the policies on smoking and health of its operating companies worldwide, including Brown & Williamson in the United States. BAT designed Brown & Williamson as "our contact" with the Council for Tobacco Research, the trade group through which the U.S. cigarette manufacturers have coordinated their research and public

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relations efforts. The BAT board of directors also issued a "policy" that there would be no competition with other cigarette companies, outside of the BAT Group, on health grounds. BAT also advised Brown & Williamson to withhold company research from U.S. authorities.

• To this day, Brown & Williamson—and the rest of the Big Six cigarette manufacturers in the United States—continue to deny that cigarette smoking causes adverse health effects. Despite this public denial, research conducted by BAT—and shared with Brown & Williamson—has confirmed the deadly properties of cigarettes. BAT Group research has concluded that cigarette smoke condensate is "a complete carcinogen" and that "the scientific basis for the case against smoking . . . has long ceased to be an area for scientific controversy."

• BAT, working with Brown & Williamson, attempted to develop a "safer" cigarette and, indeed, may have succeeded in a design with "substantially reduced biological activity." However, the chairman of BAT made it clear, decades ago, that the sale of a "safer brand" would create "a very difficult public relations situation" because it would be an admission that other types of cigarettes "might be harmful."

• BAT also conduct extensive research on nicotine, recognizing that its addictive qualities were critical to the survival of the industry. More than 30 years ago, a BAT official concluded that "smoking is a habit of addiction" and that "nicotine is not only a very fine drug, but the techniques of administration by smoking have considerable psychological advantages . . ." The BAT Group also designed and tested cigarettes with increased levels of nicotine, and cigarettes of this type apparently were marketed in the United States. Yet to this day, Brown & Williamson—and the rest of the Big Six cigarette manufacturers—continue to publicly deny that nicotine is addictive.

In view of this evidence, it is remarkable that BAT has filed an affidavit with this Court—the sole "factual" basis for its present motion—in which the company secretary denies that BAT ever researched, tested, or designed any tobacco products intended for sale in the United States. This affidavit stands in stark contrast to the documents described above. Indeed, the affidavit is also contradicted by BAT's most recent annual report to stockholders, in a statement authored by the *same* corporate official, which describes "the Group's" research into "various aspects of the current medical controversy on smoking." The most obvious explanation for this discrepancy is that BAT, with its extended and complex structure, is attempting to engage in a corporate shell game.

In sum, even without the benefit of any discovery, the facts developed to date compel the exercise of personal jurisdiction. Several well-established legal doctrines are applicable, particularly the "effects" test under which intentional misconduct causing an effect in the forum state will establish personal jurisdiction. This doctrine, as set forth by the United States Supreme Court in *Calder v. Jones*, recognizes the imperative of a broad extension of personal jurisdiction where intentional misconduct, as opposed to mere untargeted negligence, is involved. The *Calder* doctrine is especially relevant in the present case, given the magnitude of the intentional wrongs and the staggering effects in the State of Minnesota. Indeed, "traditional concepts of fair play and substantial justice" mandate that BAT be held accountable for its intentional and willful misconduct—wherever the harm may have resulted, including the State of Minnesota.

II.

STATEMENT OF FACTS

A. The Corporate Structure of BAT Industries, "The World's Most International Cigarette Manufacturer"

BAT is the second largest cigarette manufacturer in the world. Exhibit 1 to Affidavit of Roberta B. Walburn (hereinafter "Exhibit ___), at 2. Based in London, this multinational corporation describes itself as "the world's most international cigarette manufacturer." Exhibit 2 at 4. Through its operating companies, BAT manufactures, distributes, and sells tobacco products in more than 48 countries, including the United States. *Id*. In corporate publications, BAT repeatedly refers to itself and its subsidiaries as "the Group," an indication of the close cooperation of the affiliated BAT companies worldwide. *Id*. at 2-5, 14.

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One of the members of the BAT Group is Brown & Williamson, the third largest cigarette company in the United States. *Id.* at 4. BAT owns 100% of Brown & Williamson through a complex succession of corporate intermediaries. Exhibit 3.[1]

In 1993, BAT reported revenues of $21.6 billion and profits of $2 billion from tobacco sales alone. Exhibit 4 at 4 (converted to U.S. dollars). A significant percentage of these 1993 revenues and profits—approximately $3 billion and $300 million, respectively—was generated primarily by sales in the United States and the rest of North America. *Id.* at 18. In Minnesota, BAT's subsidiary, Brown & Williamson, reported sales into the state of more than 4 million cartons of cigarettes in the most recent one-year period alone. Affidavit of Wayne Lang.[2]

BAT was previously known as British-American Tobacco Company, Ltd. ("British-American Tobacco"). Exhibit 5 at 12. The name was changed to BAT in 1976, when the operations of British-American Tobacco were merged with another company. Exhibit 7 at 1.

However, in another complex corporate maneuver, it appears that at the same time British-American Tobacco merged and changed its name to BAT in 1976, an entity of the same name—British-American Tobacco—also became a new subsidiary of BAT and now serves as BAT's tobacco operating company in the United Kingdom. *Id.*; *see also* Exhibit 2 at 4. Given this corporate history, in the present memorandum the terms "BAT," "British-American Tobacco," and "BAT Group" are used interchangeably for events and documents prior to 1976. For post-merger activities, the term "BAT Group"—which generally appears on corporate documents and research reports, along with "British-American Tobacco"—is used.

B. The BAT Group's Unified and Interdependent Approach to Issues Relating to Smoking and Health

For decades, the BAT Group has controlled and directed its worldwide subsidiaries on a wide range of crucial issues involving smoking and health, including policy decisions, research and development activities, and event he design of cigarettes. Thus, while each of the corporate documents cited in support of this memorandum came from the files of Brown & Williamson, the majority appear to have originated with the BAT Group. Indeed, the BAT Group has systematically integrated its worldwide network of subsidiaries to insure a unified approach:

- As a group, the BAT companies convene at regular conferences—held in locations spanning the globe and attended by representatives from its worldwide operating subsidiaries, including Brown & Williamson—to address issues vital to the survival of the cigarette industry. *See, e.g.*, Exhibits 8-24. Some of these conferences have been held in the United States. Exhibits 9, 14, and 20.

- Much of the conglomerate's research on smoking and health is conducted by "BAT Group Research and Development Centre," located in Southampton, England, and shared with BAT subsidiaries worldwide, including Brown & Williamson. *See, e.g.*, Exhibits 25-30. BAT has also published "guidelines" for this research and a "cigarette design handbook." Exhibit 22 at 01829-30; Exhibit 31 at 01403.

- BAT has also instituted a cost-sharing system to pay for this research and requires that its subsidiaries, including Brown & Williamson, contribute funds. Exhibit 14 at 03871; Exhibit 32 at 20-21.

In internal documents, the BAT Group recurrently emphasizes its commitment to a coordinated approach to issues of smoking and health, stating that this strategy is intended "to assist, advise and encourage the R&D function in any operating company" and to achieve "co-ordination of research and development programmes and co-operation across the Group . . ." Exhibit 11 at 01457; Exhibit 14 at 03872;

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[1]The corporate ownership chain is as follows:

B.A.T. Industries, P.L.C.

South Western Nominees Ltd.

BATUS Holdings, Inc.

BATUS Tobacco Services, Inc.

Brown & Williamson Tobacco Corp.

Exhibit 3. Each of the intermediaries in the above chart is 100% owned by its immediate parent, endowing BAT with 100% ultimate ownership of Brown & Williamson. *Id.*

[2]BAT is also attempting to expand its tobacco empire in the United States by acquiring another of the Big Six cigarette manufacturers, and another defendant in this action, the American Tobacco Company. Exhibit 6.

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see also Exhibit 24 at 03118.

As detailed below, this unified approach among BAT and its operating companies has had a direct impact on the U.S. market and on critical issues in the present litigation.

1. BAT Control Over Policies on Smoking and Health

There are numerous indications that BAT has directed and controlled crucial corporate policies of Brown & Williamson in a manner that was intended to further the conspiracy of willful and intentional wrongdoing in the United States. For example:

- *Concealment of Research*: The chairman of the board of directors of BAT advised Brown & Williamson to withhold scientific research from the U.S. Surgeon General. Exhibits 33 and 34. Apparently, however, at least some of the BAT Group research was shared with other cigarette manufacturers in the United States. *Id.*

- *Industry-Wide Agreement Not to Compete*: The BAT Group agreed not to compete with other cigarette manufacturers on health grounds. Exhibit 8 at 01516, 01554; Exhibit 15 at 01782. As alleged in the complaint in this action, this industry-wide combination and conspiracy resulted in the suppression of information and research on the health hazards of cigarettes and the suppression of a "safer" cigarette. *See* Complaint at ¶¶ 37, 44-45, 92, and 98.

- *Testing of Tar and Nicotine*: The BAT Group agreed to "do everything possible to defend and maintain the present standard test procedure" of the U.S. Federal Trade Commission, even though it was recognized that certain studies questioned the accuracy of this methodology in measuring the amount of tar and nicotine inhaled by smokers. Exhibit 22 at 01836.

A clear example of the BAT Group's unified stance on smoking and health is provided in a report from a BAT conference on "Smoking and Health - Policy Research" held in Southampton in 1962. Exhibit 8; *see also* Complaint at ¶ 55. This conference was chaired by A.D. McCormick, BAT chairman, and attended by BAT Group delegates from around the world, including the United States. Exhibit 8 at 01511.

The backdrop of this meeting was growing public concern about the health hazards of cigarettes, implicating the survival of the industry. *Id.* at 01512, 01536. Sir Charles Ellis, a top BAT official, set forth the "policy" of the BAT board of directors, as follows:

> *I will state carefully what is the policy of the Board in this matter.* The Board recognizes that this problem must be tackled from two sides, the first being medical research on the origin of lung cancer and bio-assay on the biological effects of smoke, and the second being the composition of smoke and the possibilities of modifying it. *The Board has decided that if this Company makes any significant scientific discovery clearly relevant to health it will share its knowledge with its co-members of T.M.S.C. [Tobacco Manufacturers' Standing Committee, a British trade group] and not seek to obtain competitive commercial advantage . . .* This is a very important decision of the Board, and we must all be careful to appreciate what it means.

Id. at 01516 (emphasis added).

Not only did BAT decide to cooperate with other cigarette companies in England, but BAT also decided to embark on the same course of action in the United States. Thus, Sir Charles stated that the BAT Group would participate in the Tobacco Industry Research Council, now known as the Council for Tobacco Research, through Brown & Williamson. *Id.* at 01517. The Council, another defendant in the present action, is the trade group through which the Big Six cigarette manufacturers in the United States have coordinated much of the industry's campaign of deceit and misinformation. *See* Complaint at ¶¶ 16, 21-33. Sir Charles stated that "*our* contact there [at the Council] is through Brown & Williamson." Exhibit 8 at 01517 (emphasis added).

Conference participants in 1962 also discussed the pivotal issue of BAT Group's public position on the causal connection between smoking and lung cancer. One BAT scientist advocated a candid approach, telling the conference that "we should adopt the attitude that the causal link between smoking and lung cancer was proven, because then at least we could not be any worse off." *Id.* at 01540; *see*

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also Complaint at ¶ 55b. But Mr. McCormick, the board chairman, disagreed with this approach, stating:

> [I]t was very difficult when you were asked, as Chairman of a Tobacco Company, to discuss the health question on television. You had not only your own business to consider but the employees throughout the industry, retailers, consumers, farmers growing the leaf, and so on, and you were in much too responsible a position to get up and say: "I accept that the product which we and all our competitors are putting on the market gives you lung cancer," whatever you might think privately.

Id. at 01556 (emphasis added); *see also* Complaint at ¶ 55d.

On the same theme, Mr. McCormick also stated his concern that if BAT manufactured safer brands, "how to justify continuing the sale of other brands . . . *[I]t would be admitting that some of its products already on the market might be harmful. This would create a very difficult public relations situation*." *Id.* at 01542 (emphasis added); *see also* Complaint at ¶ 55e.

2. BAT Group Research on the Carcinogenic Properties of Smoke and the Design of "Safer" Cigarettes

For decades, the BAT Group conducted extensive biological testing of cigarettes in an attempt to define their carcinogenic properties and to develop "safer" cigarettes. *See e.g.*, Exhibits 35 and 36. As part of this biological research, the BAT Group recurrently tested Brown & Williamson cigarettes manufactured in the United States. Exhibit 37 at 00268; Exhibit 38 at 00208, 00212; Exhibit 39 at 00244, 00246; Exhibit 40 at 00223, 00230, and Exhibit 41 at 00610.

Repeatedly, BAT Group research confirmed the harmful propensities of cigarettes:

- By 1957, BAT researchers were using the code name "zephyr" for cancer. For example, in a march 1957 report, BAT stated, "As a result of several statistical surveys, the idea has arisen that there is a causal relation between zephyr and tobacco smoking, particularly cigarette smoking." Complaint at ¶ 54; *see also* Exhibit 42 at 5.

- By 1965, BAT began a major biological testing program, code named "Project JANUS." Exhibit 35. Project JANUS focused on experiments in which smoke condensate was painted on the backs of mice. *Id.* The BAT Group and its researchers recognized that mouse-skin painting was "the ultimate court of appeal on carcinogenic effects" and that "[t]he occurrence of skin tumours within the painted area is considered to be a measure of the carcinogenic potency of the various condensates." Exhibit 10 at 01471; Exhibit 43 at 04374. Project JANUS "repeatedly found that tobacco caused tumors when painted on mice skin." Exhibit 5 at 24; *see also* Exhibit 44 at 00342-43; Exhibit 45 at 01188. Some of the Project JANUS work was performed by Brown & Williamson—in the United States—at the request of BAT. Exhibit 46 at 00432.

- By 1978, the BAT Group acknowledged that, "[t]here has been no change in the scientific basis for the case against smoking . . . [G]enerally this has long ceased to be an area for scientific controversy." Exhibit 47 at 01786.[3]

As part of its biological testing, the BAT Group—including the parent company and Brown & Williamson—attempted to develop a "safer" cigarette. Exhibit 10 at 01469, 01476; Exhibit 49 at 04513-14. Possible design modifications included non-tobacco smoking materials, additives to modify the combustion process, and new types of filters. *Id.*; *see also* Exhibit 50 at 00189.

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[3]Documents such as these prompted a lawyer for Shook, Hardy & Bacon, which has represented the cigarette industry for years, to warn:

> In our opinion. . . *documentary evidence from the files of either BAT or B&W* which seems to acknowledge or tacitly admit that cigarettes cause cancer or other disease *would like be fatal to the defense . . . in a smoking and health case*.

Exhibit 48 at 23 (emphasis added). In-house counsel for Brown & Williamson also expressed concerns about BAT Group research. One Brown & Williamson attorney recommended routing research documents through lawyers in an attempt to create a claim of attorney-client privilege. *Id.* at 3. (As alleged in the complaint, it appears that at least some cigarette lawyers have actively participated in the industry's decades-long conspiracy through the fraudulent assertion of attorney-client privilege to conceal information on the harmful effects of smoking. *See* Complaint at ¶ 31.)

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By 1977, a BAT Group research report concluded that a new design "produced a smoke condensate with the lowest tumorigenic activity so far observed; additionally, *none of the tumors were malignant*." Exhibit 51 at 04462 (emphasis added). In 1978, at a BAT Group conference in Australia, researchers reported that "we may have already achieved a SRBA ["substantially reduced biological activity"] cigarette." Exhibit 47 at 01786, 01791-91.

However, while it appears that the BAT Group was successful in many respects in developing a "safer" cigarette, there is apparently no public record of the marketing of this type of cigarette. Indeed, the collective failure of the cigarette industry to market a "safer" cigarette is one of the conspiracy allegations in this case. *See* Complaint at ¶¶ 37, 44-45, 92 and 98; *see also* ¶ 45.

3. BAT Group Research on Nicotine and the Design Of Cigarettes With Increased Nicotine Content

The BAT Group conducted extensive research on nicotine, including sophisticated investigations of its effects on the brain. *See, e.g.*, Exhibits 52-55. The BAT Group also explored the creation of nicotine analogues, a synthetic replacement for nicotine, and apparently investigated the work on analogues by two researchers in Minneapolis. Exhibits 25 and 27; Exhibit 17 at 03510.

The purpose of much of BAT's nicotine research was to maintain the viability of the industry. As one BAT report stated:

> It has been suggested that a considerable proportion of smokers depend on the pharmacological action of nicotine for their motivation to continue smoking. If this view is correct, the present scale of the tobacco industry is largely dependent on the intensity and nature of the pharmacological action of nicotine. A commercial threat would arise if either an alternative product became acceptable or the effect of nicotine was changed.

Exhibit 25 at 12079 (emphasis added); *see also* Exhibit 9 at 01488; Exhibit 30 at 10238-39, and Exhibit 58 at 01589.[4]

In order to ascertain whether the commercial threat could be avoided, the BAT Group conducted various experiments to examine the effect of different levels of nicotine delivery. *See, e.g.*, Exhibit 59 at 11806 (discussing increasing the "impact" of nicotine by using chemical additives in cigarette filters); Exhibit 16 at 02287 (discussing "the use of high nicotine tobacco"); Exhibit 60 at 03228 (discussing altering the amount of nicotine in smoke through pH modification). These experiments also included research on "nicotine spiked" cigarettes. Exhibit 16 at 02252-53, 02255-58, and 02260.

One of the major investigations undertaken by the BAT Group was code-named Project Wheat. The objective was to design cigarettes "of increased acceptability" by altering nicotine levels. Exhibit 61 at 01581, 01583-84; *see also* Exhibit 16 at 02292. As one Project Wheat report stated:

> In considering which product features are important in terms of consumer acceptance, the nicotine delivery is one of the more obvious candidates . . . The importance of nicotine hardly needs to be stressed, as it is so widely recognized.

Exhibit 58 at 01589; *see also* Exhibit 27 (describing Project Wheat test of cigarettes with four different nicotine delivery levels).

Eventually, Project Wheat researchers recommended that a new type of cigarette be developed—with low or medium tar but high levels of nicotine. Exhibit 62. This cigarette was designed to appeal to smokers with particular concerns about the health risks of smoking, who would focus their concerns on the levels of tar. *Id.*; *see also* Exhibit 16 at 02299.

At the same time, however, the BAT Group recognized potential health risks—including cancer and cardiovascular disease—associated with nicotine itself, as opposed to other components of cigarettes, including tar. *See, e.g.*, Exhibit 49 at 04514; Exhibit 17 at 03506; Exhibit 11 at 01464; Exhibit 23 at 01975. In fact, a BAT Group "Position Paper" concluded that "caution was required in the development of low delivery products with higher than average nicotine/tar ratios . . ." Exhibit 20 at 01856. This recommendation, however, was rejected at a 1980 BAT Group research conference in Sea Island, Georgia. *Id.*

[4]By 1962, at the group research conference in Southampton detailed above, Sir Charles stated that "smoking is a habit of addiction" and that "nicotine is not only a very fine drug, but the techniques of administration by smoking has considerable psychological advantages..." Exhibit 8 at 01515, 01527; *see also* Complaint at ¶ 55a.

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Indeed, there is evidence that the BAT Group proceeded to develop—and market in the United States—a low tar, high nicotine cigarette. Exhibit 32 at 42-48. This cigarette contained dramatically increased nicotine levels, as a percentage of weight. Exhibit 5 at 22; *see also F.T.C. v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 38 (D.C. Cir. 1985).

All of this evidence is directly relevant to the claims in the present case of the cigarette industry's intentional misrepresentations about the addictive qualities of cigarettes and the industry's ability to manipulate the levels of nicotine in order to maintain its market. *See* Complaint at P¶ 64-70.

III.

ARGUMENT

A. BAT's Actions Constitute Sufficient Minimum Contacts For Personal Jurisdiction in Minnesota

1. Jurisdiction Exists Upon a Prima Facie Showing Of Minimum Contacts

At this pretrial stage of litigation, only a *prima facie* showing of minimum contacts is necessary to defeat a motion to dismiss for lack of personal jurisdiction. *See, e.g., Hardrives, Inc. v. City of LaCrosse*, 307 Minn. 290, 240 N.W.2d 814, 816 (1976); *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 832 (Minn. Ct. App. 1991). Moreover, the plaintiffs' complaint, affidavits, and supporting evidence must be taken as true and all doubts regarding the sufficiency of contacts resolved in favor of retaining jurisdiction. *Hardrives*, 240 N.W.2d at 816, 818; *Larson v. Dunn*, 460 N.W.2d 39, 43 (Minn. 1990); *see also National City Bank v. Ceresota Mill Ltd*., 488 N.W.2d 248, 252 (Minn. 1992). Based upon this standard—and the law as detailed below—the facts in this case overwhelmingly support the exercise of jurisdiction by this Court.

Indeed, Minnesota's long-arm statute is intended to "have the maximum extraterritorial effect allowed under the due process clause of the federal constitution." *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 719 (1985), *cert. denied*, 474 U.S. 1006 (1985); *see also Valspar Corp. v. Lukken Color Corp*., 495 N.W.2d 408, 411 (Minn. 1992). If due process is satisfied, the requirements of the Minnesota long-arm statute also are met. *Id.*[5]

Due process requires that a defendant have "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Larson*, 460 N.W.2d at 43 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Minimum contacts exist where a nonresident defendant has "purposefully availed itself of the privilege of conducting activities within the jurisdiction." *Rostad*, 372 N.W.2d at 719 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The purposeful availment requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated contacts'" or the unilateral activity of another party." *Leach v. Curtis of Iowa, Inc.*, 399 N.W.2d 656, 659 (Minn. Ct. App. 1987) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Actual physical presence, however, is not required, and a defendant's *indirect* contacts with a state can establish jurisdiction. *Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat jurisdiction there.").

2. Plaintiffs Have Established a *Prima Facie* Case Of Purposeful Availment by BAT

Courts have endorsed several approaches in determining whether a defendant has sufficient contacts with a forum state, three of which establish jurisdiction in the present case: the "effects test," the "stream of commerce" doctrine, and an analysis of the interrelationship between the parent and subsidiary corporations.

a. The Calder "Effects Test" Supports Jurisdiction

In cases involving allegations of intentional misconduct—as opposed to mere untargeted negligence—the United States Supreme Court and the Supreme Court of Minnesota have recognized the appropriateness of a broad exercise of personal jurisdiction where a defendant's wrongful acts have an "effect" in the forum state. Clearly, in the present case—where a decades-long pattern of intentional and willful misconduct continues to cause thousands of deaths and hundreds of millions of dollars in excess health care costs *in the State of Minnesota* each

[5]Under Minnesota's long-arm statutes, jurisdiction is proper when a corporation commits any act causing injury in Minnesota, provided that the burden placed on the defendant does not violate fairness or substantial justice. Minn. Stat. § 543.19, subd. 1. *See also* Minn. Stat. § 325.D54, which provides for jurisdiction in antitrust cases whenever there is an effect on trade or commerce in the State of Minnesota.

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year—the "effects test" supports the assertion of personal jurisdiction.

The leading case is *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). In *Calder*, a California resident sued the National Enquirer and the author and editor of an article which, plaintiff claimed, intentionally sought to damage her reputation. The author and editor resided in Florida and claimed they had no contacts with California. These defendants argued, in part, that as "ordinary employees" they did not control the marketing or sale of the magazine and that the mere fact that they could "foresee" the circulation of the article in California was not sufficient to establish jurisdiction. 465 U.S at 789. The Florida defendants, arguing by analogy, maintained that they were no different than a welder employed in Florida who works on a boiler that subsequently explodes in California. *Id.* The Supreme Court emphatically rejected this argument:

> Petitioner's analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious actions were expressly aimed at California.

Id. at 789-90 (citations omitted). The Supreme Court also noted that the defendants were "primary participants in an alleged wrongdoing . . . " *Id.* at 790. The Court concluded:

> We hold that jurisdiction over petitioners in California is proper because of their *intentional conduct* in Florida *calculated to cause injury* to respondent in California.

Id. at 791 (emphasis added).

Minnesota has specifically embraced *Calder*. In *Larson v. Dunn*, 460 N.W.2d 29, 43 (Minn. 1990), suit was brought against a mother and grandparents for intentionally keeping a child from her father. The grandparents' intentional acts began while they lived in Minnesota and continued after they moved to California. In finding that the California actions also supported jurisdiction, the Court stated:

> Personal jurisdiction also is proper since the [grandparents'] allegedly tortious conduct continued after they moved to California. *See* Minn. Stat. § 543.19, subd. 1(d) (out-state act causing in-state injury). *The United States Supreme Court held that personal jurisdiction properly could be exercised over nonresident media when the effects of their intentional conduct were felt in the forum state* . . . The [grandparents'] alleged acts were at least indirectly aimed at depriving Larson of his custody rights and the effects of these acts clearly harmed Larson in Minnesota.

Id., 460 N.W.2d at 43 (citing *Calder*) (emphasis added).[6]

The Supreme Court of Minnesota also has found the effects test applicable where, as in the present case, there is an out-of-state conspiracy that causes injury in this state. Thus, in *Kopperud v. Agers*, 312 N.W.2d 443, 445 (Minn. 1981), a decision pre-dating *Calder*, investors brought suit in connection with an Arizona land development. The Supreme Court found jurisdiction despite the fact that the defendant was an Arizona resident whose relevant actions took place in Arizona. The Court stated:

> Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction.

312 N.W.2d at 445 (quoting *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 191, 311 (1969), *cert. denied*, 397 U.S. 1010 (1970)).

The Court also stated:

> This is not a case of an isolated or unforeseeable contact with Minnesota. Richey purposefully availed himself of this state to carry out a scheme to defraud investors. Although his direct contacts with this state were limited, he was instrumental in setting in motion the fraudulent scheme and keeping it going. The cause of action arises directly out of the fraudulent transactions. Minnesota has an obvious interest in providing a forum since Minnesotans were defrauded.

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[6] In *Johnson v. Sel-Mor Distributing Co., Inc.*, 430 N.W.2d 495 (Minn. App. 1988), the court distinguished *Calder* in a defamation case brought against a Wisconsin corporation. The court found that unlike *Calder*, the Wisconsin corporation "initiated no contact with Minnesota." *Johnson*, 430 N.W.2d at 498.

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Id. at 445.[7]

The present action presents a paradigm setting for application of the *Calder* test. BAT is "not charged with mere untargeted negligence" and the conduct detailed herein is not "random" or "fortuitous." *Burger King*, 471 U.S. at 475; *Calder*, 465 U.S. at 789; *Leach*, 399 N.W.2d at 659. Instead, BAT's intentional and tortious actions—stretching over a period of decades—were expressly targeted at the State of Minnesota. BAT acted directly—and as a "primary participant" with Brown & Williamson—in conducting research and development, designing cigarettes, concealing information on the health hazards of smoking, and engaging in a conspiracy with other cigarette manufacturers. *See Calder*, 465 U.S. at 790. BAT knew that this conduct would cause adverse health effects in millions of smokers and would cause the cost of medical care to increase dramatically—wherever Brown & Williamson cigarettes were sold in the United States, including the State of Minnesota. *See* Complaint at ¶ 75. The fact that BAT's intentional wrongdoing has been so vast as to encompass literally the entire United States, cannot—in logic or law—preclude jurisdiction in the State of Minnesota. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) ("no unfairness in calling [defendant] to answer" anywhere substantial numbers of magazines sold); *Coblentz GMC/Freightliner Inc. v. General Motors Corp*., 724 F.Supp. 1364, 1372 n. 12 (M.D. Ala. 1989) (even if defendants' actions subjected them to "virtual nationwide jurisdiction," liability would be proportional "to the magnitude of the effects of their intentional actions . . ."). This is not only "consistent with"—but also mandated by—"traditional concepts of fair play and substantial justice." *See International Shoe*, 326 U.S. at 316: *Larson*, 460 N.W.2d at 43.

b. The Stream of Commerce Doctrine Supports Jurisdiction

BAT also has minimum contacts with the State of Minnesota under a stream-of-commerce analysis. Under this doctrine, personal jurisdiction exists when a corporation participates in research, design, manufacture, distribution, or marketing with the expectation that the product will be purchased in the forum state. *See Worldwide Volkswagon*, 444 U.S. at 197-198; *Rostad*, 372 N.W.2d at 719; *Kohn v. La Manufacture Francaise defendant's Pneumatiques Michelin*, 476 N.W.2d 184, 187 (Minn. Ct. App. 1991); *Warren v. Honda Motor Co*., 669 F.Supp. 365 (D. Utah 1987) (cited in *Kohn)*.

In *Rostad*, for example, the manufacturer of a bat weight claimed it was not subject to jurisdiction because the product was sold in Minnesota through intermediary distributors and the manufacturer itself had no direct contacts with this state. *Id*., 372 N.W.2d at 718-20. However, the Supreme Court of Minnesota held that "[a] manufacturer who places its product in the stream of commerce in an effort to serve, directly or indirectly, markets in a jurisdiction is subject to suit in that jurisdiction under *World-Wide Volkswagen*." *Id*. at 721. The Court found that the weight arrived in Minnesota not by some "fortuitous happenstance," such as a plaintiff bringing the product into the state, but by purposeful marketing efforts of the defendants and their distributors, and this supported jurisdiction. *Id*. at 721.[8]

BAT's suggestion that the stream-of-commerce theory only applies to distributors and manufacturers is inaccurate. BAT Memorandum at 8. The stream-of-commerce theory also encompasses participation in the research and design of a product. For example, in *Kohn*, one of the primary cases upon which BAT relies, the Minnesota Court of Appeals reviewed a case in which a French company *designed* a tire for an American sister company, which manufactured and distributed the tire in the United States. *Id*., 476 N.W.2d at 186. The court found that *"[t]he trial court correctly analyzed the French company's activities under a stream-of-commerce theory . . ."* *Id*. at 187 (emphasis added). However, the court found no jurisdiction on a record with limited facts, even after discovery and a trial on the merits. *Id*.

[7]In *Stangel v. Rucker*, 398 N.W.2d 602, 607 (Minn. Ct. App. 1986), cited by BAT, the court distinguished *Hunt* and *Kopperud* because the one contact in *Stangel* which was allegedly an intentional tort -- a phone call from the plaintiff to the defendant -- was "isolated" and "not purposeful." In addition, this phone call was initiated by the unilateral action of the plaintiff -- no the defendant. *Id.* at 605.

[8]*Compare Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 112 (1987), where a component part of a tire valve manufactured in Japan was sold to a company in Taiwan which incorporated the valve into tires sold in the United States. Four justices found that "something more" was necessary for jurisdiction than simply selling a component to another foreign company with knowledge that it might be sold in the United States. *Id.*, 480 U.S. at 112. Because five justices refused to join the opinion, however, Minnesota courts have held that the stream of commerce theory advanced in *Rostad* has not been limited by *Asahi*. *See Stanek*, 474 N.W.2d at 833-34; *Kohn*, 476 N.W.2d at 187 n. 1. In any event, in the present case, BAT has clearly done "something more" than simply selling a component of a product which was placed in the stream of commerce. BAT has affirmatively participated in intentional and wrongful conduct, including research and design activities relating to the total product, which have been directed specifically at the Minnesota market. Indeed, in *Asahi*, the plurality opinion recognized that designing a product for market in a forum state could constitute "something more" for the purposes of due process requirements. *Id.*, 480 U.S. at 112.

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at 186-88.[9]

Two cases cited by the Minnesota Court of Appeals in *Kohn* also support the application of the stream-of-commerce analysis in the present case. *See Weissinger v. Vetter Corp.*, 685 F. Supp. 769, 777 (D. Kan. 1987) (foreign subsidiary which designed motorcycles had sufficient minimum contacts under stream-of-commerce theory since the "design was a product"); *Warren*, 669 F. Supp. at 370 (design of a product for a worldwide market was an action purposefully directed toward the forum state under the stream-of-commerce theory).

Since BAT has participated in the research and design of cigarettes sold by Brown & Williamson in Minnesota, the stream-of-commerce theory of personal jurisdiction applies.

c. A Parent-Subsidiary Analysis Sup-ports Jurisdiction

Numerous decisions recognize that a parent's contacts with its subsidiaries on matters relating to the litigation at issue are relevant to the determination of personal jurisdiction. Indeed, in *Wicken v. Morris*, 510 N.W.2d 246, 250 (Minn. Ct. App. 1994), the Minnesota Court of Appeals stated that to ignore the parent-subsidiary relationship "would thwart an appropriate jurisdictional analysis in light of *International Shoe*."[10] Similarly, in *Daher v. G.D. Searle & Co.*, 695 F.Supp. 436, 438-39 (D.Minn. 1988), the court found jurisdiction under Minnesota's long-arm statute based upon the parent company's tortious acts -- "independent [] but in concert" with its subsidiary -- in misrepresenting the safety of an intrauterine device.

Warren, supra, a case cited with apparent approval by the Minnesota Court of Appeals in *Wicken* and *Kohn*, is particularly instructive in the present case. In *Warren*, the court exercised jurisdiction over Honda Research and Development Company ("Honda R & D), a wholly-owned Japanese subsidiary of Honda Motor Company ("Honda Motor"). Honda R & D designed products for its parent and did not manufacture or sell any products in the forum state. *Id.*, 669 F. Supp. at 366. Nevertheless, the court found that the parent-subsidiary relationship itself was a "minimum contact" for purposes of personal jurisdiction. *Id.* at 369. Furthermore, the court concluded that Honda Motors' purposeful act of placing the product in the market should be attributed to Honda R & D since:

- The companies were engaged in a "joint effort" to place the product in a worldwide market;
- The profits of both companies were "dependent on the performance of the other;" and,
- The companies, while maintaining a separate corporate existence, were "interdependent."

Id. at 370.[11]

Other decisions are in accord. *See, e.g., Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412, 1421 (E.D. Wis. 1983) ("the forum activities of affiliated entities may be considered in assessing . . . the constitutionality of [service of process] under the due process clause, notwithstanding the adherence of the parent and subsidiary to the formalities of corporate separateness"); *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463, 1471 (D. Kan. 1983) ("corporation's relationship with an affiliated corporation in the forum is relevant to the due process question"); *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 507 (D. Kan. 1978) ("[1] non-resident corporation's tie to the forum, as established through its relationship with an affiliated corporation physically present or transaction business there, is one factor upon which a court may rely to determine whether jurisdiction over the non-resident may be constitutionally exercised.").

In cases upon which BAT relies, the courts simply found that on the record of each case -- in one case after discovery and a full trial on the merits -- there were virtually *no* facts upon which to base jurisdiction.

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[9] In *Kohn*, there was virtually no evidence of a relationship between the French company and its American affiliate. *Id.*, 476 N.W.2d at 188. There was no evidence that the French corporation actually designed the tire for sale throughout the United States or of "the volume or extent" of the "common enterprise" between the French corporation and its American affiliate. *Id.* at 187-188. Even the licensing agreement between the French and American companies was not in evidence. *Id.* at 188. Moreover, there was no risk that the plaintiff would be precluded from full recovery since the American corporation had sufficient assets to cover the entire amount of damages awarded at trial. *Id.* at 188. Thus, Minnesota's interest in providing a forum for the plaintiff was severely diminished. *Id.* at 187.

[10] *Wicken* found "no facts" to support stream of commerce jurisdiction, but remanded "to allow proper consideration of jurisdictional contacts, not limited to the stream-of-commerce context." *Id.*, 510 N.W.2d at 250.

[11] *Warren* distinguished two cases finding no jurisdiction, *State ex rel. Honda Research & Development Co. v. Adolf*, 718 S.W.2d 550 (Mo. App. 1986), and *Kloepfer v. Honda Motor Co.*, slip op. 85C-11765 (D. Utah, Feb. 18, 1987), since neither analyzed corporate interactions to determine "if that relationship was a contact relevant to the jurisdictional question." *Id.*, 669 F.Supp. at 368.

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See, e.g., Kohn, 476 N.W.2d at 186 (after trial, no evidence of a relationship between the French company and its American affiliate); *Aeration Industries, Inc. v. Aerobic Systems, Inc.*, No. 4-86-1987 WL 6841, at * 4 (D. Minn. Feb. 20, 1987) ("plaintiff has alleged no facts, nor has it presented any evidence indicating that defendants were engaged in a conspiracy"); *I.S. Joseph Co. v. Meannesmann Pipe and Steel Corp*., 408 F.Supp. 1023 (D. Minn. 1976) (no specific fact relating to conspiracy cited by court).[12]

By contrast, in the present case, even prior to discovery, plaintiffs have demonstrated significant contact between BAT and Brown & Williamson regarding issues resting at the core of this litigation. Indeed, in may respects, the two companies -- parent and subsidiary -- were completely "interdependent" and engaged in a "joint effort" to sustain Brown & Williamson's market for cigarettes in the State of Minnesota. *See Warren*, 669 F.Supp. at 370. Thus, minimum contacts also exist by virtue of BAT's relationship with Brown & Williamson.

B. Plaintiffs Are Entitled to Discovery on Jurisdiction

In the present case, the facts clearly establish the foundation for the assertion of personal jurisdiction. However, even if there were any doubt, it is well established that discovery may be appropriate -- and, in certain situations, mandated -- prior to a ruling on jurisdictional issues. *See, e.g., Insurance Corp. of Ireland v. Compagnie defendant's Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (court authorized to strike jurisdictional defense when defendant failed to comply with discovery order); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978) ("discovery is available to ascertain the facts bearing on [jurisdictional] issues"); *Hardrives*, 240 N.W.2d at 819 n. 8 (evidentiary hearing may be advisable in "close cases of jurisdiction"); *Domtar, Inc. v. Niagara Fire Insur. Co*., 518 N.W.2d 58, 60 (Minn. Ct. App. 1994) (*further* discovery ordered on personal jurisdiction motion); 4 Moore's Federal Practice ¶ 26.07(6) at 26-165-66 ("In cases in which jurisdiction depends upon complicated facts, . . . it has been held that it is error to grant a motion to dismiss without affording the plaintiff an opportunity for discovery.").

Indeed, where, as in the present action, determination of personal jurisdiction is intertwined with the merits of the case, the trial court has the discretion to delay final ruling on personal jurisdiction until trial, especially if a *prima facie* showing has been made. *Preiss v. Fisherfold*, 535 F. Supp. 1271, 1275 (S.D. Ohio 1982) ("Delaying evidence on the jurisdictional issue until trial is appropriate where the jurisdictional facts are intertwined with the merits of the case . . . This procedure avoids the risk of prejudicing plaintiff's case on the merits by allowing plaintiff to present his case in an orderly fashion"); *see also* 4 Moore's Federal Practice ¶ 26.07(6) at 26-166-67.[13]

As this Court is aware, no discovery has been conducted in this action. However, a number of relevant documents have been provided to the media and to Congress, initially by an anonymous source and subsequently by Brown & Williamson (to Congress). These documents begin to reveal a pattern of illegal conduct unparalleled in the annals of American law. In fact, as Judge Harold H. Greene, of the U.S. District Court for the District of Columbia, wrote last June in a decision quashing Brown & Williamson's motion to subpoena members of Congress:

> This is a seemingly arcane dispute over subpoenas and motions to quash them. But what is involved at bottom is not arcane at all: it is a dispute over documents which may reveal that the Brown & Williamson tobacco company concealed for decades that it knew its products to be both health hazards and addictive. The subpoenas are the means

[12]BAT argues that under *Busch v. Mann*, 397 N.W.2d 391 (Minn. Ct. App. 1986), the corporate veil must be pierced in order to exercise jurisdiction over a foreign parent corporation. *See* BAT Memorandum at 7. However, in *Wicken*, the Minnesota Court of Appeals rejected and distinguished *Busch*, stating that in *Busch* "the record reveals no significant parent-corporation contacts with the subsidiary corporation . . ." 510 N.W.2d at 249. Similarly, in *Keeton*, the United States Supreme Court stated that in analyzing jurisdiction in a parent-subsidiary context, "[e]ach defendant's contacts with the forum state must be assessed individually.: *Id.*, 465 U.S. at 781 n. 13. In the present case, there is ample evidence of significant contacts between Bat and Brown & Williamson. Thus, at the present time, plaintiffs do not seek to establish personal jurisdiction over BAT simply because of its ownership of Brown & Williamson. Rather, personal jurisdiction exists based upon BAT's own affirmative acts in participating in wrongful activities. Discovery into the relationship between BAT and Brown & Williamson may, however, reveal that it is also appropriate to retain jurisdiction based upon an agency or veil-piercing theory. *See* Complaint at ¶ 12; Section III B, *infra*.

[13]BAT would not waive its personal jurisdiction defense by participating in pre-trial proceedings. *See Johnson Brox.*, 459 N.W.2d at 162 (defendant's assertion of cross claims and participation in discovery does not waive personal jurisdiction defense):; *Wilkie v. Allied Van Lines*, 396 N.W.2d 607, 611 (Minn. Ct. App. 1986) (discovery subsequent to assertion of a jurisdictional defense does not constitute waiver); *Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 102 N.W.2d 293, 300 (1960) ("It is now well-settled that where the defense of lack of jurisdiction is timely asserted, it is not waived by proceeding with a trial on the merits . . . Since the defendants here properly challenged the jurisdiction of the court by a motion to dismiss, their subsequent appearances did not constitute a waiver of the defense.").

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> by which the company is seeking to intimidate, and in a sense to punish, both Dr. Williams, the discoverer of evidence of this possible concealment, and the national legislators who are seeking to investigate the subject further and bring the results to the attention of the Congress and the public . . . [T]here are several rules, even constitutional doctrines, that stand in the way of so high-handed a course of conduct, and one so patently crafted to harass those who would reveal facts concerning B&W's knowledge of the health hazards inherent in tobacco.
>
> ***
>
> One may well doubt, to put it charitably, that B&W would be mounting a tremendous and costly effort . . . if the documents at issue did not represent the proverbial 'smoking gun' evidencing the company's allegedly long-held and long-suppressed knowledge that its product constitutes a serious health hazard.

Maddox v. Williams, 855 F.Supp. 406, 415-16 & n. 31 (D.C.D.C. 1994).

A review of the documents indicates that many were authored by BAT or the BAT Group -- and then shared with Brown & Williamson. *See, e.g.*, Exhibits 25-32, 44, 56-57, 62. Yet, in its moving papers before this Court, BAT asserts -- based upon a short, conclusory affidavit by David Wilson, company secretary -- that it had no involvement in tobacco products intended for sale in the United States. Mr. Wilson stated in his affidavit:

> BAT PLC is a holding company which has never manufactured, tested, designed, marketed, packaged, sold, distributed or advertised anywhere in the United States, nor conducted research with respect to tobacco products or any other goods or products sold or intended for sale anywhere in the United States, including the State of Minnesota.
>
> ***
>
> No subsidiary of BAT PLC has ever held express or implied authority to act as BAT PLC's agent to . . . conduct research with respect to tobacco products or any other goods or products anywhere in the United States, including the State of Minnesota.

Affidavit of David Wilson at ¶¶ 3, 5. This affidavit is directly contradicted by document after document from BAT's own files. Unquestionably, BAT -- and the BAT Group, which BAT controls -- has researched, tested, and designed cigarettes sold and intended for sale in the United States, including the State of Minnesota. Indeed, Mr. Wilson himself, in a statement in BAT's most recent annual report, emphasized the unified and coordinated efforts of the BAT Group worldwide, stating:

> *The Group's activities* are concentrated on the development of new products, new processes, quality improvement of existing products and cost reduction programmes in the tobacco industry. *research is also undertaken into various aspects of the current medical controversy on smoking,* including significant funding of independent medical studies.

Exhibit 4 at 3 (emphasis added).

Of course, at this stage of the proceedings, plaintiffs' -- not defendant's -- affidavits and evidence must be taken as true. Moreover, to the extent BAT attempts to rationalize the assertions in Mr. Wilson's affidavit by an elaborate corporate shell game, and obscure BAT's identity in a maze of corporate intricacies, discovery is clearly mandated. *See, e.g., Katz v. Princess Hotels Int'l Inc.*, 839 F. Supp. 406, 408 (E.D. La. 1993) (motion to dismiss denied without prejudice and plaintiff granted discovery where a "maze" of corporate structures was raised as barrier to personal jurisdiction).

An example of BAT's attempt to hide behind corporate intricacies is its assertion in its moving papers that only paragraph 12 of the Complaint "mentions" BAT. *See* BAT Memorandum at 3. However, BAT fails to note that paragraphs 52-56 and 61 of the Complaint further detail BAT's wrongful acts. While the word "BAT" is not contained in these paragraphs, the references to BAT are obvious. Indeed, paragraphs 55 and 56 refer to Brown & Williamson's "London-based parent company." Similarly, paragraphs 54 and 61 refer to one of Brown & Williamson's "British affiliates." In any event, in the present memorandum and supporting exhibits, the jurisdictional allegations have been set forth in substantially more detail -- and must be taken into account and accepted as true. *Hardrives*, 240 N.W.2d at 816, 818.

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Further evidence of the BAT Group's willingness to use its complex corporate structure as a shield against liability is a memo written in 1985 by Brown & Williamson's corporate counsel. Exhibit 48 at 3. The memo, although titled "Document Retention," demonstrates a clear attemp[t] to cleanse the files of Brown & Williamson by secreting documents in England. The memo states:

> I explained I had marked certain of the document references with an X. The X designated documents which I suggested were deadwood in the behavioral and biological studies area. I said that the "B" series are "Janus" series studies and should also be considered as deadwood. . . . I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.

Id. (emphasis added); *see also* Complaint at ¶ 12, 63.

In his present affidavit, Mr. Wilson denies that BAT received or controlled "any documents of such nature," and thus attempts to create a factual dispute. Clearly, the veracity of Mr. Wilson's assertions -- and his concept of the corporate identity of BAT -- must be pursued through discovery. However, for the purpose of this motion, the plaintiffs' allegations must be taken as true.

C. Minnesota's Strong Interest in Providing a Forum and The Convenience of the Parties Also Favor Jurisdiction

Minnesota's interest in providing a forum for this litigation is manifest. The actions of BAT and its co-defendants have caused cigarette smoking to become the most pervasive public health issue of our time. Complaint at ¶ 76. In Minnesota, smoking-related diseases cause more than 6,000 deaths a year. *Id*. at ¶ 77. In addition to the human toll, the health care costs of cigarette smoking amount to more than an estimated $350 million each year in the State of Minnesota. *Id*. at ¶¶ 78-79. The premise of the present action is that the cigarette industry, including BAT -- and not the citizens of the State of Minnesota -- should pay for these staggering costs. *Id*. at ¶ 4.[14]

Finally, with respect to the convenience of the parties, Minnesota has no alternative forum in which to pursue BAT and its co-defendants, while BAT -- as a large multinational corporation which has reaped billions in profits from U.S. sales -- certainly will not be substantially inconvenienced. This is a corporation which boasts that it is "the world's most international cigarette manufacturer," Exhibit 2 at 4, and which has directed its substantial, worldwide resources in a decades-long pattern of intentional and wrongful conduct directly aimed at the State of Minnesota. Certainly, there is no injustice in holding BAT answerable for the harm it has so caused.

IV.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that BAT's motion to dismiss be denied or, in the alternative, stayed pending discovery.

Respectfully submitted,

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[14]BAT's suggestion that Minnesota's interest is "diminished" by the fact that joint and several liability will ensure full recovery from other defendants is, at best, premature. BAT Memorandum at 11. The case which BAT cites for this proposition, *Kohn*, was decided after trial and after plaintiff was guaranteed full recovery. BAT, of course, has not offered to guarantee any judgment against its subsidiary.

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