STATE OF MINNESOTA **SECOND JUDICIAL DISTRICT**

COUNTY OF RAMSEY **Case Type: Other Civil**

THE STATE OF MINNESOTA,

COURT FILE NO. C1-94-8565

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

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R. J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
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 PLAINTIFFS' MOTIONS TO COMPEL RE LOBBYING ACTIVITIES AND DEFENDANTS' AGREEMENTS RELATING TO SETTLEMENT POLICIES, PAYMENT OF ATTORNEYS' FEES, INDEMNIFICATION, AND CONTRIBUTION

CONFIDENTIAL -- SUBJECT TO MINNESOTA PROTECTIVE ORDER

I. INTRODUCTION

Plaintiffs respectfully submit this memorandum in support of motions to compel on the following two issues:

1. Documents Relating to Defendants' Lobbying Activities in the State of Minnesota: These document requests were served in direct response to defendants' persistent arguments in this litigation relating to the actions of the State of Minnesota in regulating tobacco, including defendants' novel -- and insupportable -- contention that the Minnesota legislature is somehow "negligent" in legislating on tobacco control issues. Since defendants have placed this in issue, clearly plaintiffs are entitled to discovery on defendants' efforts to prevent the very type of regulation that they now argue should have been enacted.

2. Agreements Among Defendants Relating to Settlement Policies, Payment of Attorneys' Fees, Indemnification, and Contribution: These document requests relate to damage-sharing agreements among defendants, agreements by one defendant to pay another defendant's attorneys' fees, and agreements among defendants not to settle litigation. As the Manual for Complex Litigation notes, such agreements "should be discoverable" since, *inter alia*, they may create a disincentive for defendants to produce all available evidence.

II. DOCUMENTS RELATING TO DEFENDANTS' LOBBYING ACTIVITIES IN THE STATE OF MINNESOTA

A. Procedural Background

On July 9, 1996, plaintiffs served two document requests relating to defendants' lobbying activities in Minnesota to the extent that such activities relate "to any of the defenses in this lawsuit":

> Request No. 1: Produce all documents relating to lobbying activities in, or relating to, Minnesota, on behalf of you or any other defendant in this litigation, directly or indirectly, on issues relating to any of the defenses in this lawsuit, for the years 1946 to the present.
>
> Request No. 2: Produce documents sufficient to show all amounts of money spent on lobbying activities in Minnesota, on behalf of you or any other defendant in this litigation, directly or indirectly, on issues relating to any of the defenses in this lawsuit, for the years 1946 to the present.

Exhibit 1. (All exhibits are to the affidavit of Tara D. Sutton).[1]

At a hearing one week after this discovery was served, counsel for The Tobacco Institute, Inc. ("TI") -- the principal lobbying arm of the tobacco industry -- clearly acknowledged the relevancy and discoverability of these documents by stating that the lobbying requests sought relevant information and that responsive documents would be produced:

> Mr. Flynn: Every material document they want regarding lobbying or public appearances or speeches will be produced responsive to existing demands. Indeed, they just served one a week ago asking for everything about lobbying that we will respond to.
>
> * * *
>
> What is relevant is the lobbying, the speeches, the public contacts, and all of those materials and documents are being produced and will be produced in accordance with the existing demands.

Exhibit 3 at pp. 69-70 (emphasis added).

Subsequently, however, in a direct reversal from the promises made to this Court, TI -- and most other defendants -- served written responses to the lobbying requests at issue in which they refused to produce most of the requested documents. Exhibit 4. Nearly identical refusals were served by Philip Morris Incorporated ("Philip Morris"), R.J. Reynolds Tobacco Company ("RJR"), Brown & Williamson Tobacco Company ("B&W"), and The American Tobacco Company ("American"). Exhibit 5. Defendants B.A.T. Industries p.l.c. ("BAT"), The Council for Tobacco Research - U.S.A., Inc. ("CTR"), and Lorillard Tobacco Company ("CTR") responded that they had never engaged in lobbying activities directly or indirectly in Minnesota and therefore had no responsive documents. Id. [2] Only Liggett Group, Inc. ("Liggett") responded that it would produce responsive documents. Id.

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[1] In addition to the above requests, plaintiffs' first set of comprehensive document requests, served in June 1995, encompassed certain lobbying materials. See, e.g., Exhibit 2 (Request Nos. 26-31, 37).

[2] However, to the extent that BAT, CTR, and Lorillard have in their possession, custody, or control documents relating to the lobbying activities of other defendants, such as TI, these documents are called for by plaintiffs' discovery.

After a meet-and-confer, TI offered to produce only limited categories of "public" lobbying documents, i.e., only those materials that were sent, or otherwise made available, to state agencies or the legislature. In other words, TI is refusing to produce its internal documents discussing and analyzing its lobbying efforts in Minnesota. Similarly, in response to Request No. 2, TI agreed to produce only those reports of lobbying expenditures that TI was required to file pursuant to state law. Exhibit 6. Identical offers were made by Philip Morris, American, and RJR. Exhibits 7-9. Again, that information is public.

In sum, most defendants are refusing to produce any documents concerning the non-public aspects of their lobbying efforts. It is these highly-probative internal documents that are the subject of plaintiffs' motion to compel.

B. The Lobbying Documents At Issue Belie Defendants' Litigation Position Regarding the Allegedly Negligent "Choices" of the Minnesota Legislature

Defendants' refusal to produce probative lobbying materials is exceptional, given the positions taken by them in this litigation. In fact, the lobbying requests at issue were precipitated by defendants' persistence in arguing -- against common sense and well-established legal principles -- that the "choices" of the state legislature are relevant to this lawsuit. See, e.g., Exhibit 10. At the appropriate time, plaintiffs intend to move for summary judgment on this far-fetched contention that the Minnesota legislature was somehow "negligent." Plaintiffs believe, however, that the summary judgment motion should be presented upon an appropriate factual record, which would obviously include defendants' extensive and expensive lobbying efforts designed to influence these legislative "choices." [3]

[3] It is well established that the legislative branch is granted broad discretionary immunity from liability for conduct in its policy-making function. A recent Minnesota Supreme Court opinion found that such immunity exists "to prevent the courts from conducting an after-the-fact review which second-guesses 'certain policy making activities that are legislative or executive in nature.'" Watson v. Metropolitan Transit Comm., --- N.W.2d ---, 1996 WL 490754 * 4 (Minn. 1996) (citation omitted), Exhibit 11. Therefore, "[i]f a governmental decision involves the type of political, social and

Indeed, defendants themselves have served wide-ranging discovery relating to lobbying documents on plaintiffs and have stated that they will be filing a simultaneous motion today seeking access to files from the Minnesota legislature. Early in the meet-and-confer process, the State of Minnesota ("the State") offered to produce all lobbying documents from the executive branch (i.e. state agencies) but not the legislative branch (which is constitutionally protected from this discovery).[4] Defendants, however, continue to insist on unlimited discovery on this issue for themselves, and virtually meaningless discovery on this issue for plaintiffs.

The reason for defendants' refusal to produce documents from their internal files on lobbying is clear. Defendants recognize that -- contrary to their litigation posture attacking the State's efforts -- the State of Minnesota has been at the forefront of tobacco control issues. Indeed, the vice president of TI, Walker Merryman, has stated that "Minnesota is a state in which we always expect the worst." Exhibit 13 at p. 100.

Several internal documents produced in this litigation -- before defendants changed course and announced that these internal documents would not be produced -- echo this sentiment. One such document is a 1984 letter from William Kloepfer, a senior vice president at TI, to a B&W executive, stating:

> As we look forward, one of our tasks is to blunt in every possible way the march of the anti-smokers in Minnesota, where a special movement is underway, using legislation and propaganda to put the state in the forefront of the drive for a smoke-free society.

Exhibit 14.

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economic considerations that lie at the center of discretionary action, including considerations of safety issues, financial burdens, and possible legal consequences, it is not the role of the courts to second-guess such policy decisions." Id. See also Janklow v. Minn. Bd. of Examiners for Nursing, ---N.W.2d ---, 1996 Minn. LEXIS 598, * 10-11 (Minn. 1996) (Discretionary immunity exception to the abolishment of sovereign immunity was intended "to reinforce separation of powers by preventing judicial second guessing of legislative or executive policy decision through the medium of tort suits."), Exhibit 12.

[4] Given the cross-motions on these related issues, plaintiffs more recently informed defendants that we would await the Court's ruling on the parameters of production before proceeding.

To combat the pioneering efforts by Minnesota, defendants have engaged in a well-financed and carefully orchestrated campaign to influence and manipulate, in a wide variety of ways, the actions of the Minnesota legislature with respect to tobacco-control and tobacco taxes. The extent of defendants' lobbying efforts is revealed by a remarkable XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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Further evidence of defendants' efforts to derail legislative efforts in Minnesota comes from the files of one of the highest-ranking industry executives. A handwritten note dated May 8, 1987, from the files of Frank Resnick, CEO of Philip Morris, details a meeting with then-Senator David Durenburger about increases in cigarette excise taxes. Exhibit 16. The notes conclude: "Talk to Rudy Perpich - <u>enough is enough</u>." <u>Id.</u>

In short, there can be no question that discovery into defendants' extensive lobbying activities in Minnesota must be permitted to proceed, particularly as framed in the document requests at issue, which seek such documents only as they relate "to any of the defenses in this lawsuit." Exhibit 1.[5]

C. <u>There Is No Absolute Privilege Protecting Discovery of Defendants' Lobbying Materials</u>

In objecting to disclosure of their internal lobbying documents, defendants have asserted an array of objections, including the right to petition government granted by the first amendment. However, there is no such absolute prohibition under the first amendment against the discovery of

[5] Defendants' litigation contentions about legislative "negligence" also are contradicted by their advertising campaigns which challenge government regulation of tobacco. For example, RJR ran a series of ads in the Star Tribune in 1995 suggesting that "most smoking issues" are best "resolved through dialogue" rather than "further government intervention." Exhibit 17. A 1994 Midwest Edition of the New York Times included a full-page RJR ad featuring Archie Anderson, "a Minnesotan," proclaiming that "I'D LIKE TO GET THE GOVERNMENT OFF MY BACK" and that excise tax increases are "discrimination against smokers." Exhibit 18. And a document produced in this litigation consists of a TI new release titled, "ENOUGH IS ENOUGH," with an attached TI advertisement stating, "Enough Taxation!," "Enough Legislation!," "Enough Control!," "Enough Harassment!" Exhibit 19.

lobbying materials. Indeed, numerous courts have ordered production of lobbying documents in the presence of similar objections. See North Carolina Elec. Membership Corp. v. Carolina Power & Light, 666 F.2d 50, 53 (4th Cir. 1981) (Noerr-Pennington doctrine, which exempts lobbying activities from forming the basis of antitrust liability because of the first amendment right to petition, is "not a bar to discovery of evidence"); Assoc. Container Transp. v. United States, 705 F.2d 53, 59-60 & n. 10 (2d Cir. 1983) (enforcing government subpoena for lobbying materials since protections granted by the first amendment right to petition are inapplicable at discovery phase of litigation); In re Brand Name Prescription Drugs Antitrust Litig., 1995 WL 509666 * 2 (N.D. Ill. 1995) ("[T]he mere fact that the documents sought by the plaintiffs relate to or arise from lobbying activity is insufficient to bar their discovery."), Exhibit 20.

In the present case, the defendants -- not the plaintiffs -- have placed lobbying directly at issue. Thus, defendants can hardly be heard to argue that these documents are immune from discovery.[6]

For the foregoing reasons, plaintiffs respectfully request an order compelling defendants (except Liggett) to produce (1) all documents, public and non-public, relating to lobbying activities in Minnesota, by or on behalf of any defendant, which relate to any of the defenses in this lawsuit; and (2) all documents sufficient to show the amount of money spent on lobbying activities in Minnesota, by or on behalf of any defendant, directly or indirectly.[7]

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[6] Some courts balance the first amendment issues against the need for the discovery. See P&V Marina, Ltd. v. Lograndе, 136 F.R.D. 50, 62 (E.D.N.Y. 1991) (where defendants have been petitioning for at least five years, the balancing test "tips in favor of disclosure" since "[i]t is quite doubtful that [defendants'] exercise of their rights will in any way be chilled. . . ."). In the present case, where defendants are responsible for placing these documents at issue, the balancing test certainly mandates discovery.

[7] In addition to direct lobbying, defendants also reportedly provide funding to organizations -- such as the Minnesota Coalition of Responsible Retailers -- that lobby on the industry's behalf against cigarette tax increases and tobacco-control legislation or ordinances. Exhibit 21 at p. 57. To the extent documents concerning lobbying activities by the tobacco industry's front groups are in the possession, custody, or control of

III. AGREEMENTS AMONG THE DEFENDANTS RELATING TO SETTLEMENT POLICIES, PAYMENT OF ATTORNEYS' FEES, INDEMNIFICATION, AND CONTRIBUTION

On April 1, 1996, plaintiffs served a set of document requests relating to agreements among defendants about indemnification and contribution, settlement policies, and the payment by one defendant of another defendants' attorneys fees, as follows:

> **REQUEST NO. 1:**
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> All documents which refer to or relate to agreements, potential agreements, or understandings (oral or written) among one or more defendants (or their corporate affiliates) regarding indemnification, contribution, or subrogation for the settlement or judgment of smoking and health cases, including but not limited to any agreements, potential agreements, or understandings (oral or written) referenced in paragraph 10 of the Attorney General Settlement Agreement, attached hereto.
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> **REQUEST NO. 2:**
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> All documents which refer or relate to agreements, potential agreements, or understandings (oral or written) among one or more defendants (or their corporate affiliates) to render one or more defendants liable for any portion of a tobacco liability judgment entered against another defendant(s).
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> **REQUEST NO. 3:**
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> All documents which refer or relate to agreements, potential agreements, or understandings (oral or written) among one or more defendants (or their corporate affiliates) regarding policies for the settlement of smoking and health cases, including but not limited to any policies relating to the refusal to settle such cases.
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> **REQUEST NO. 4:**
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> All documents which refer or relate to agreements, potential agreements, or understandings (oral or written) among one or more defendants (or their corporate affiliates) to pay attorneys' fees or litigation costs of another defendant in smoking and health cases.

Exhibit 22 (emphasis added).

Defendants' responses contained, for the most part, a series of objections. Exhibit 23. After the exchange of correspondence, and a meet-and-confer, Exhibits 24-26, defendants continued to refuse to respond to Requests Nos. 1 and 2 insofar as they relate to "potential agreements" or "understandings" or to respond in any meaningful way to plaintiffs' Requests

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defendants, these documents also are encompassed by this motion.

Nos. 3 and 4 (with one limited exception).[8]

There can be no serious question that these documents are relevant to this litigation. As commentators and courts have noted, one possible danger of damage-sharing agreements among defendants is the potential for such agreements to limit the production of evidence by one party that might be harmful to the interests of a co-defendant. For example, the Manual for Complex Litigation concludes that "[s]haring agreements should be discoverable," stating:

> Defendants sometimes agree in advance to allocate responsibility for damages among themselves according to an agreed formula (often based on market share). These agreements serve the legitimate purposes of controlling parties' exposure and preventing plaintiffs from forcing an unfair settlement by threats to show favoritism in the collection of any judgment that may be recovered. They may, however, expressly prohibit or indirectly discourage individual settlements. They also create a disincentive for defendants to make available evidence indicating liability on the part of co-defendants. Therefore, while they are generally appropriate, the court may refuse to approve or enforce such agreements where they would violate public policy or prejudice other parties in these or other ways.
>
> Sharing agreements should be discoverable.

Manual for Complex Litigation, 3rd Ed., § 23.23 at p. 181 (1995) (emphasis added).[9]

A case on point is In re: San Juan Dupont Plaza Hotel Fire Litigation, 1993 U.S. Dist. Lexis 14191 (D.P.R. 1993), Exhibit 27. In that case, a group of defendants had entered into a "Judgment/Settlement Sharing Agreement." The defendants contended that the agreement allowed them to forge a united front

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[8] Defendants also claim that some documents are privileged but refuse to list any such documents on their privilege log. Exhibit 25 at p. 155.

[9] The Manual also notes that, under certain circumstances, such agreements may also be admissible at trial:

> Since Fed. R. Evid. 408 does not require exclusion of settlement agreements when offered for purposes such as proving bias, they may be admitted to attack a witness's credibility or demonstrate that formally opposing parties are not in fact adverse, accompanied by a limiting instruction that the agreement is not to be considered as proof or disproof of liability or damages.

Id.

while saving time and money, as well as the court's resources. The trial court, however, disagreed:

> We are not convinced, however, that this document is truly a 'defense cooperation' agreement emphasizing cost-effective joint litigation strategies; rather, we view it as a conscious effort by the signatories to impede the ongoing settlement process in this case. Similarly, the argument that the Agreement aids in the management of this case by helping defendants to dispose of the controversies among them and streamlining the defense work, falls flat because, in practical terms, the Agreement discourages settlements with the plaintiffs, and enhances an unnecessarily recalcitrant position by defendants toward the plaintiffs. Indeed, the result could very well be unfair and wasteful protraction of this case. . . . Courts must be particularly watchful of contracts among parties that serve to hide relevant facts or that otherwise hamper the truth-finding process under the guise of cost/task-sharing or settlement.

1993 U.S. Dist. Lexis 14191 at p. 4 (emphasis added).[10]

These considerations loom particularly large in the present case. For decades, the tobacco industry had uniformly refused to settle any smoking and health litigation and, instead, engaged in fierce and prolonged litigation. This united industry front was partially breached last March, when the smallest cigarette manufacturer, Liggett, broke ranks with the industry and entered into a settlement agreement with plaintiffs in several other smoking and health cases. Exhibit 28.

In fact, it was the Liggett agreement which, in large part, led to the document requests at issue in this motion. The Liggett agreement contains detailed provisions relating to contribution and indemnity. Id., at pp. 24-26. In addition, as a result of the Liggett agreement, it became known that Philip Morris, the industry leader, had entered into an agreement to pay Liggett's attorneys' fees "in defense of smoking and health product liability cases." Exhibit 29. This agreement was produced by Philip Morris last month after numerous requests from plaintiffs. Except for this agreement (and a related agreement between Philip Morris and Liggett), however, defendants have refused to produce any other documents relating to the payment by one

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[10] Similarly, other courts have ordered the discovery of sharing agreements among defendants. See, e.g., In re: Bell Atlantic Corp. Securities Litigation, 1993 W.L. 514408 at p. 3 (E.D. Pa. 1993); In re Braniff, Inc., 1992 Bankr. Lexis 1563 at p. 6 (M.D. Fla. 1992).

defendant of another defendant's attorneys' fees.[11]

Against this backdrop, it is clear that plaintiffs are entitled to full discovery into agreements between or among the defendants related to settlement, damages-sharing and/or attorneys' fees and costs. Plaintiffs also are clearly entitled to documents related to any potential agreements or understandings, notwithstanding defendants' disingenuous claims that they do not understand what a "potential agreement" or "understanding" is. All of these documents bear upon, as the San Juan court stated, "the truth-finding process."

IV. CONCLUSION

For all of the foregoing reasons, plaintiffs' respectfully request that this Court grant plaintiffs' motions to compel relating to lobbying and defendants' sharing and settlement agreements, as follows:

1. Lobbying Requests: Fully and completely respond to Plaintiffs' Requests for Production of Documents Relating to Lobbying Activities, Request Nos. 1 and 2, for the years 1946 through August 1994 (all defendants except Liggett).

2. Sharing and Settlement Agreements:

a. Fully and completely respond to Plaintiffs' Requests for Production of Documents Relating to Indemnity and Contribution Agreements, Request Nos. 1 through 4, insofar as each request relates to potential agreements or understandings, and

b. Fully and completely respond to Plaintiffs' Requests for Production of Documents Relating to Indemnity and Contribution Agreements Requests Nos. 3 and 4.

Dated this 21st day of October, 1996.

ROBINS, KAPLAN, MILLER & CIRESI

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[11] Philip Morris has stated that its agreement with Liggett is the only such agreement it has with respect to the payment of attorneys' fees. Exhibit 23. It is not known, however, whether other defendants in this litigaiton have similar agreements. Id.

By: /s/ Tara D. Sutton

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