STATE OF MINNESOTA
COUNTY OF RAMSEY
DISTRICT COURT
SECOND JUDICIAL DISTRICT

**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 PLC, BRITISH-AMERICAN TOBACCO COMPANY LIMITED, BAT (U.K. & EXPORT) LIMITED, LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH - U.S.A.,**
Defendants.

Court File No. C1-94-8565

April 8, 1997

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CLAIMS OF PRIVILEGE**

**REDACTED**

## I.

## INTRODUCTION

This Court's March 28, 1997 order directs each party to submit a Memorandum of Law setting forth authorities upon which that party will rely to oppose claims of privilege. Some authorities upon which plaintiffs rely, for example the crime/fraud exception to privilege, apply only under particular factual situations. Plaintiffs therefore also set forth in this memorandum relevant facts that are critical in plaintiffs' opposition to defendants' sweeping claims of privilege, and are an essential part of the record.

Defendants' claims of privilege in this case are staggering. To date, defendants have listed on privilege logs more than 130,000 documents (or more than an estimated 500,000 pages), and defendants have not yet indicated that their privilege logs are complete. This tactic comports with the industry's long-held strategy to withhold evidence about the dangers of smoking from both the public and the judicial system. Many of defendants' privilege claims are not even colorable. As shown below, defendants claim protection for many documents concerning scientific research into the health hazards of cigarettes, even for information exchanged between scientists, neither written by nor received by attorneys. Finally, there is evidence that defendants are claiming privilege over scientific research which was deliberately controlled by attorneys for purposes of erecting false walls of privilege to suppress disclosure.

The law is clear: neither attorney-client nor work product protections apply to scientific research. It is, of course, black-letter law that product manufacturers have a duty to keep informed of relevant scientific knowledge and to conduct appropriate research into the potential hazards of their products. The knowledge gained in fulfilling this duty is clearly discoverable. Indeed, it should be beyond dispute -- as a matter of law and as a matter of policy -- that information on the hazards of a product be not only produced in discovery but also publicly disclosed to consumers. (So basic is this law, that a court may determine in its discretion to conduct an *in camera* review of these types of documents without any special showing).

Moreover, even assuming that scientific research and related documents in this case are privileged, the crime/fraud exception vitiates these protections, including attorney-client, work product ("fact" or "opinion"), and join defense (which is only a derivative privilege). The premise for the crime/fraud exception is that communications that abuse the privileges -- i.e. the consultation with attorneys for advice in the commission of a "crime or fraud" -- are not worthy of protection.

The process for adjudicating the crime/fraud exception is well established:

> Before the court may order that documents be submitted for *in camera* review to determine crime/fraud, plaintiffs must demonstrate "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."

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*United States v. Zolin*, 109 S.Ct. 2619, 2631 (1989).

Next, the court must determine whether there is a "prima facie" showing that the allegedly privileged communications were made in furtherance of a crime or fraud. *Levin v. C.O.M.B.*, 469 N.W.2d 512, 515 (Minn. App. 1991). This showing is less than is required to substantively prove a crime or a cause of action for fraud. In facts, courts apply the exception beyond those circumstances where a prima facie showing of "crime" or "fraud" is established; other "misconduct" or "torts" or "bad faith breach of a duty" may suffice. *See In re A.H. Robins*, 107 F.R.D. 2 (D. Kan. 1986) (finding crime/fraud exception applies to ongoing concealment and misrepresentation of the hazards of a product).

As part of the determination of a prima facie case of crime/fraud, defendants are afforded an opportunity to be heard. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992). Defendants are not, however, guaranteed that overabundance of process they have requested in the past, i.e., mini-trials on a document-by-document basis. *In re A.H. Robins*, 107 F.R.D. at 15.

When the court determines that the required prima facie case has been demonstrated, the question becomes the extent to which privilege has been lost. Any document "closely related" to the crime or fraud loses its privilege. *Levin*, 469 N.W.2d at 515.

In the present case, as demonstrated below, plaintiffs satisfy both required showings: the reasonable belief that there may be a case of crime/fraud that justifies *in camera* review, and a prima facie case of crime/fraud that defeats any privilege. Documents produced in this litigation, as well as information in the public domain, provide extensive evidence of an ongoing fraud by the cigarette industry and its lawyers to misrepresent and withhold from the public information about the health hazards and addictiveness of cigarettes. Indeed, the facts indicting these defendants are so compelling that other courts have now resoundingly found that a prima facie showing of crime/fraud has been established, after review of evidence believed to be less extensive than available in the Minnesota proceedings.

## II.

## FACTUAL BACKGROUND

### A. Defendants Have Engaged in a Decades-Long Fraudulent Public Relations Campaign to Misrepresent and Suppress Damaging Evidence on the Health Hazards and Addictiveness of Smoking

The illegal combination and conspiracy which form the heart of this case began in the 1950s, when the industry was confronted with several scientific studies which sounded grave warnings on the health hazards of smoking. In response, the cigarette industry issued a public statement on January 3, 1954, known as the "Frank Statement":

> *We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.*
>
> We always have and always will cooperate closely with those whose task it is to safeguard the public health.
>
> We are pledging aid and assistance to the research effort into all phases of tobacco use and health.

Exhibit 1 (CTR MN 11309817) (emphasis added).[1] This statement was published as a full-page advertisement in newspapers throughout the country, including the Twin Cities. Exhibit 2.

With the publication of the "Frank Statement," the industry announced the formation of the Tobacco Industry Research Committee (later known as the Council for Tobacco Research, or "CTR"), whose stated purpose was [REDACTED]. Exhibit 3 (MNAT 00609873 at 00609880) (emphasis added) (CONFIDENTIAL).

Over the years, the industry has repeatedly renewed this pledge, through statements by individual defendants and their two trade groups, CTR and the Tobacco Institute, Inc. ("Tobacco Institute"):

> *In 1962: "We in the tobacco industry recognize a special responsibility to help science determine the facts. And we*

[1] All exhibits are to the Affidavit of Tara D. Sutton.

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> *believe we are fulfilling this responsibility through the Tobacco Industry Research Committee."*

Exhibit 4 (PM 1005136953) (Tobacco Institute press release) (emphasis added).

> *In 1970: "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding.... The findings are not secret."*

Exhibit 5 (Tobacco Industry 81352) (Tobacco Institute advertisement) (emphasis added).

> *In 1971: "Any organization in a position to apply resources in the search for those keys -- and which fails to do so -- will continue to be guilty of cruel neglect of those whom it pretends to serve."*

Exhibit 6 (Liggett Group, Inc. 0069275 at 0069279) (Tobacco Institute press release ) (emphasis added).

> *In 1972: "If our product is harmful, we'll stop making it."*

Exhibit 7 (RJR 500324162 at 500342163) (Philip Morris Incorporated ("Philip Morris") interview with the Wall Street Journal) (emphasis added).

> *In 1982: "Since the first questions were raised about smoking as a possible health factor, the tobacco industry has believed that the American people deserve objective, scientific answers. The industry has committed itself to this task."*

Exhibit 8 (B&W 670500617 at 670500618) (Tobacco Institute pamphlet) (emphasis added).

> *In 1990: "Our company intends … to continue to support such research in a continuing search for answers."*

Exhibit 9 (RJR 507703861) (correspondence from R.J. Reynolds Tobacco Company ("Reynolds") to Minnesota citizen) (emphasis added).

In spite of these solemn promises to conduct research about the health effects of smoking *and* to disclose the results of such research to the public, the industry has conducted a massive public relations effort aimed not at the truth but at creating doubt about the connection between smoking and disease. Indeed, the actual purpose of CTR - contrary to the "Frank Statement" -- is revealed in a December 8, 1970 memorandum to the president of Philip Morris, Joseph Cullman III, from the company's head of research and development, Helmut Wakeham:

> It has been stated that CTR is a program to find out the 'truth about smoking and health.' What is truth to one is false to another. CTR and the industry have publicly and frequently denied what others find as 'truth.' *Let's face it. We are interested in evidence which we believe denies the allegation that cigarette smoking causes disease.*

Exhibit 10 (PM 2022200161) (emphasis added).

The fraudulent nature of the industry's strategy is also described in a 1972 Tobacco Institute memorandum:

> For nearly 20 years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics and public opinion. While the strategy was brilliantly conceived and executed, it was not -- nor was it intended to be -- a vehicle for victory. *On the contrary, it has always been a holding strategy consisting of: creating doubt about the health charge without actually denying it….*

Exhibit 11 (Lorillard Tobacco Company 87657703) (emphasis added).

Thus, in public -- year after year, in statement after statement -- the industry has "creat[ed] doubt about the health charge."

> *In 1969: [T]here is no demonstrated causal relationship between smoking and any disease… If anything, the pure biological evidence is pointing away from, not toward, the causal hypothesis."*

Exhibit 12 (B&W 670307882) (CTR press release) (emphasis added).

> *In 1970: "The deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists."*

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Exhibit 13 (RJR 500015901 at 500015902) (CTR press release) (emphasis added).

> *In 1972: "After millions of dollars and over twenty years of research: The question about smoking and health is still a question."*

Exhibit 5 (TI MN 81352 (Tobacco Institute advertisement) (emphasis added).

> *In 1972: [T]he 1972 report of the Surgeon General … 'insults the scientific community' … [T]he number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public."*

Exhibit 14 (TI 120602) (Tobacco Institute press release) (emphasis added).

*In 1978: "Are we on the brink of paranoia? … The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists."*

Exhibit 15 (RJR 500184766 at 500184776) Tobacco Institute pamphlet) (emphasis added).

> *In 1983: "It has been stated so often that smoking causes cancer, its no wonder most people believe this is an established fact. But, in fact, it is nothing of the kind. The truth is that almost three decades of research have failed to produce scientific proof for this claim … In our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy.*

Exhibit 16 (RJR 504638051) (Reynolds advertisement) (emphasis added).

> *In 1984: "[S]cience has failed to establish a causal link."*

Exhibit 17 (RJR 502371212 at 502371215) (Reynolds' statement on ABC "Nightline") (emphasis added).

Incredibly, the strategy of "creating doubt about the health charge" persists to this day. At congressional hearings in 1994, the president and chief executive officer of CTR denied that smoking causes *any* disease, stating that "[n]o one has been able to demonstrate that smoking per se causes any diseases." Exhibit 18. In addition, the chief executive officers of all six manufacturing defendants testified to Congress, under oath, that nicotine is not addictive:

> William Campbell (PM): "I believe nicotine is not addictive, yes."
>
> James Johnston (Reynolds): "Mr. Congressman, cigarettes and nicotine clearly do not meet the classic definition of addiction."
>
> Andrew Tisch (Lorillard): "I believe that nicotine is not addictive."
>
> Ed Horrigan (Liggett): "I believe that nicotine is not addictive."
>
> Thomas Sandefur (B&W): "I believe that nicotine is not addictive."
>
> Donald Johnston (American): "And I, too, believe that nicotine is not addictive."

Exhibit 19.

And, finally, in responding to plaintiffs' requests for admission in this case, defendants also deny that smoking causes disease or is addictive. *See e.g.*, Exhibit 20, Responses of Defendant Reynolds to Plaintiffs' First Set of Requests for Admission, Req. Nos. 1-2, 5 and 7 ("It has not been scientifically established that smoking causes any type of cancer"; It has not been scientifically established that smoking causes heart disease"; "It has not been scientifically established that smoking causes emphysema"; "Reynolds denies that cigarettes (or nicotine) are addictive under any meaningful definition of that term…").

In these denials of causation and addiction, the tobacco industry stands virtually alone in the modern scientific world.

**B. Internally, Defendants Have Long Recognized the Health Hazards and Addictiveness of Smoking**

In glaring contrast to their public statements, industry scientists have long recognized -- in secret, internal memos -- the health hazards and addictiveness of cigarettes:

> In 1959, a top Reynolds scientist, Alan Rodgman, concluded that for the polycyclic hydrocarbons identified by Reynolds in cigarette smoke, "*there is a*

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*distinct possibility that these substances would have a carcinogenic effect on the human respiratory system*" and that "it would be better for the consumer if cigarette smoke were devoid of such compounds." Exhibit 21, RJR 500945942 (emphasis added).

In 1962, Rodgman concluded that [REDACTED]. Exhibit 22, RJR 504822847 at 504822850 (emphasis added) (CONFIDENTIAL).

In 1962, BAT[2] recognized at an internal smoking and health conference, attended by its subsidiary B&W, that cigarettes were addictive: "*[S]moking is a habit of addiction* that is pleasurable…" Exhibit 23, BAT 110070785 at 110070791 (emphasis added).

In 1964, after publication of the first Surgeon General's report, the head of research at Philip Morris, Helmut Wakeham, commended the "professional approach" of the Surgeon General and recommended that Philip Morris "embrace the health area" and "severely reduce[ ] reliance on TIRC and TI…" Exhibit 24, PM 1000335612 at 1000335619. Wakeham recommended that management "[a]dopt as internal policy for technical purposes the view that greater benefit will accrue from accepting the report's findings on face value and proceeding to cure the ills, real and alleged as they may be, than from engaging in disputing and refutation of these claims." *Id.* Indeed, Wakeham cautioned, failure by the industry to conduct such research "could give rise to negligence charges." *Id.* at 1000335622.[3]

In 1967, the Tobacco Research Council ("TRC," the British counterpart to CTR), described the tension between industry scientists and industry executives on the issue of causation in a letter sent to the general counsel of B&W and copied to several other U.S. cigarette manufacturers as well as CTR and the Tobacco Institute:

> The only real difficulties that we encountered arose out of the unavoidable paradox at the centre of our operations -- namely that, on the one hand the manufacturers control TRC's operations and do not accept that smoking has been proved to cause lung cancer while, on the other hand, *TRC's research programme is based on the working hypothesis that this has been sufficiently proved for research purposes. In addition, the Council senior scientists accept that causation theory…* We have not yet found the best way of handling this paradox.

Exhibit 26, Liggett Group, Inc. 298942 at 298943 (emphasis added).

In 1969, a key scientist at Philip Morris, William L. Dunn (the "Nicotine Kid"), in an internal memorandum to Helmut Wakeham, acknowledged that nicotine was a drug:

> I would be more cautious in using the pharmic-medical model -- do we really want to tout cigarette smoke as a drug? *It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls*.

Exhibit 27, PM 10032289921 (emphasis added).

In 1979, a long-time scientific consultant to BAT praised the new Surgeon General's Report. The BAT consultant called the 1979 report "an impressive document" that "was on the whole sound, scientific and unemotive." Exhibit 28, BAT 100214029 at 100214030. In fact, the BAT consultant blasted as "misleading" a Tobacco Institute publication which attempted to discredit the Surgeon General's report. *Id.* at 100214045. The consultant noted that the Tobacco Institute "does *not* appear to

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[2] As used herein, "BAT" refers to B.A.T. Industries plc and/or British-American Tobacco Company Limited. Over time, both entities have served as the corporate parent of Brown & Williamson Tobacco Corporation ("B&W").

[3] In contrast to Wakeham's internal complementing of the "professional approach" of the Surgeon General's report, Philip Morris circulated to the public a pamphlet which disparaged and distorted the report's findings:

> [REDACTED]

Exhibit 5, TIMN 55129 at 55135 (CONFIDENTIAL).

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> understand what causation is" and that the Tobacco Institute is "*so* highly selective in what material is presented that one almost gets the false impression there is hardly any case to answer at all." *Id.*[4]
>
> In 1980, BAT also recognized the implausibility of the industry's position on causation: The company's position on causation is simply not believed by the overwhelming majority of independent observers, scientists and doctors… The industry is unable to argue satisfactorily for its own continued existence because *all arguments eventually lead back to the primary issue of causation and on this point our position is unacceptable*.

Exhibit 30, BAT 109881322 at 109881323. Thus, there was a recommendation circulated to the highest levels of the company to break the industry's conspiracy of silence and admit that cigarettes cause disease and are addictive:

> We now accept that the smoking of tobacco products, *combined with* other factors … can be a cause of lung cancer, emphysema, and other respiratory and coronary diseases, many of which are fatal.
>
> ***
>
> …[S]moking is addictive/habituative in addition to being an additional risk and many smokers would like to give up the habit if they could.

*Id*. at 109881335 (emphasis in the original). This recommended approach, however, apparently lost out to "the severe constraint of the American legal position." *Id*. at 109881322-1331.

> In 1982, another long-time scientific consultant to BAT [REDACTED]

Exhibit 31, BAT 100432193 (emphasis added) (CONFIDENTIAL).[5]

> In 1984, a BAT scientist expounded on the drug qualities of cigarettes:
>
> [REDACTED]

Exhibit 32, BAT 100503495 at 100593496-497 (CONFIDENTIAL). The scientist concluded that, [REDACTED]. *Id*. at 100503505.

Thus, this is an industry which has not only survived but prospered for four decades by denying -- contrary to its internal views -- that cigarettes are addictive and kill when used as intended.

### C. Defendants' Attorneys Control Scientific Research Conducted By Individual Companies and Industry Trade Associations

To control the science and scientists within their companies, and to thwart discovery in smoking and health cases, industry lawyers early on interjected themselves into the scientific process. The extent of the takeover by lawyers of the science is remarkable.

Indeed, documents produced in this litigation include [REDACTED]. Exhibit 33, CTR SF 0800031 (CONFIDENTIAL) (emphasis added).

Thus, although defendants advertised CTR as an independent and objective scientific research body which would investigate the health hazards of smoking and report those results to the public, it is clear that legal -- not scientific -- considerations dominated. For example, [REDACTED]:

> [REDACTED]

Exhibit 34, Lorillard Tobacco Company 01421596 at 01421598 (emphasis added) (CONFIDENTIAL).

> Similarly, [REDACTED]:
>
> [REDACTED]

Exhibit 35, Lorillard Tobacco Company 01346204 (emphasis added) (CONFIDENTIAL).[6]

[REDACTED]

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[4] The "misleading" Tobacco Institute publication referenced by the BAT consultant was titled "Smoking and Health 1964-1979 THE CONTINUING CONTROVERSY." Exhibit 29, TIMN 84430. In this publication, the Tobacco Institute stated, *inter alia*, "It is time for all parties to this controversy to admit that there is much that is unknown." *Id.* at 84432A.

[5] The consultant concluded that BAT's position paper [REDACTED]. Exhibit 31 at 100432193 (CONFIDENTIAL).

[6] Plaintiffs served foundation discovery on Lorillard to confirm the author of this document. Lorillard refused to provide any information about the author on the grounds that plaintiffs' request was too "burdensome." Exhibit 36.

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In short, CTR has been a crucial element of defendants' ongoing fraud to misrepresent and withhold from the public the dangers of smoking. [REDACTED]. Exhibit 37, MNAT 00770693 (CONFIDENTIAL).

Another document produced in this litigation further describes the control exerted by lawyers over scientists and scientific research. This document is a 1964 report by two representatives from the TRC in England, written after discussions with representatives of the U.S. tobacco industry:

> In the U.S. by far the most important factor conditioning action is the law suit situation and the danger of costly damages being awarded against the manufacturers in a flood of cases…. The leadership in the U.S. lies with the powerful policy committee of senior lawyers advising the industry, and their policy, very understandably, in effect is "don't take any chances." It is a situation that does not encourage constructive or bold approaches to smoking and health problems, and it also means that the Policy Committee of lawyers exercises close control over all aspects of the problem.

Exhibit 38, PM 1003119099 at 1003119101.

A 1976 internal memo by a top tobacco scientist at BAT, S.J. Green, also discusses the extent to which "legal considerations" dominated scientific research:

> *The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. …* By repudiation of a causal role for cigarette smoking in general they [the companies] hope to avoid liability in particular cases. *This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease* and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research, etc.

Exhibit 39, BAT 109938433.[7]

Indeed, legal considerations were of such paramount importance that B&W recognized, [REDACTED]. Exhibit 41, B&W 51206944 at 51206960 (emphasis added) (CONFIDENTIAL).[8]

### D. Defendants Filter Scientific Information Through Their Attorneys To Create False Walls of Privilege

The privilege logs submitted in this case, as well as other discovery, recent court decisions, and documents in the public domain, establish that defendants have, for decades, filtered scientific information through their attorneys to shield information on the harmful effects of cigarettes from discovery.[9]

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[7] Legal considerations also dominated decisions about the types of scientific research that could be conducted. For example, a 1978 memorandum reveals that outside counsel for the tobacco industry was suppressing research on the addictive qualities of nicotine:

> … Ed Jacob [outside counsel] advised a total embargo on all work associated with the pharmacology of nicotine and the benefits conferred by smoking for three reasons:
>
> (i) The pending California lawsuit which indicted nicotine as an addictive substance.
>
> (ii) TI, CTR, and ICOSI (a European trade group) were only exempt from anti-trust proceedings as long as they were concerned with work on smoking associated *diseases*. Benefits were expressly excluded from the collaborative studies.
>
> (iii) In the USA, ASH, GASH and ACS have started suit against Califano to show cause why tobacco should not be brought under the powers of the FDA. Califano was resisting on the grounds that there was no evidence of personality alterations by nicotine nor of pharmacological benefits. Therefore, no *individual* company should work on benefits.
>
> ICOSI had agreed with this policy and Jacob had been sent to stop the Verband program on nicotine.

Exhibit 40, BAT 110083647 at 110083649-50 (emphasis in original).

[8] Similar sentiments were expressed in a March 1977 letter from a top official at B&W to a senior scientist at BAT: "I think you know that the position in the U.S. is still focused around the existence of high risk 'wipe out' liability; this leads to the continuing dominance of the legal attitude." Exhibit 42, BAT 110078077.

[9] For a detailed description of the use of the industry's attorneys, *See Hanauer, et al.*, "Lawyer Control of the Internal

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### 1. B&W's Creation of a Paper Trail

B&W's lawyers recognized that internal scientific research would be damning evidence against them in litigation. Thus, B&W lawyers became heavily involved in the handling of BAT-B&W scientific research to shield it from discovery. A November 1979 memorandum from J. Kendrick Wells, B&W corporate counsel, to Ernest Pepples, B&W Vice President of law, details how scientific information received from BAT should be treated in order to "afford some degree of protection against discovery." Exhibit 43, Philip Morris 2048322229. Wells proposed that "paper work should be established with BAT … to establish that documents of a certain nature are prepared for B&W in anticipation of litigation." *Id*. This paperwork was to be pure fabrication:

> I have in mind paperwork that would make this statement as a policy … but that in the operational context BAT would sent documents without attempting to distinguish which were and were not litigation documents.

*Id*. at 2048322230. Wells was also aware that this plan to create privilege through a fabricated paper trail may well have been fraudulent:

> The cost-sharing agreement between B&W and BAT, under which B&W pays for BAT scientific research and receives reports, is an obstacle because it would probably contradict the position that you were acquiring the reports for the purposes of litigation…

*Id*. at 2048322229.[10]

Perhaps fearing that this artificial paper trail would not be enough to prevent disclosure of potentially damaging scientific research, BAT directed in January 1985 that all sensitive "R&D Reports" emanating from BAT be sent directly to a law firm in Kentucky and that "[t]he recipient list must *not* contain the name of any B&W person…" Exhibit 44, BAT 107620309. [REDACTED]. Exhibit 55, B&W 680530888 (CONFIDENTIAL). [REDACTED]. *Id*.[11]

### 2. The Privilege Logs: Examples of Abuse

Defendants' privilege logs in this litigation appear to include extensive documentation and discussion of scientific research. Plaintiffs believe that these scientific documents -- withheld behind improper claims of privilege -- will shed light on critical issues in this case, including what the industry knew about the dangers of smoking and the degree to which the industry withheld this information from the public.

Reynolds, for example, [REDACTED]. *See* 2, Affidavit of Tara D. Sutton (CONFIDENTIAL). [REDACTED].[12] *Id*. at 3.

#### a. R.J. Reynolds Tobacco Company

The Reynolds' 4A database has provided an opportunity to uncover some of the best evidence of defendants' improper penchant for listing scientific research on privilege logs. Thus, although defendants' privilege logs contain superficial and inadequate descriptions of withheld documents, the Reynolds' 4A index has revealed more information about allegedly privileged documents, including the verbatim title of many documents.[13]

Through use of this 4A database, for example, plaintiffs have determined [REDACTED].

| Bates No. | Date | Reynolds 4A Index Title |
|---|---|---|
| | [REDACTED] | |

Exhibit 45 (CONFIDENTIAL).[14]

Reynolds' log provides countless other examples of efforts [REDACTED]:

[REDACTED]

Exhibit 46 (CONFIDENTIAL). A comparison of this entry against Reynolds' 4A index reveals the true topic of this document:

[REDACTED]

*Id*. (CONFIDENTIAL).

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Scientific Research to Protect Against Products Liability Lawsuits," *Journal of American Medical Association*, Volume 274, No. 3 at 234 (July 19, 1995).

[10] This internal B&W document was produced in this litigation by Philip Morris.

[11] [REDACTED]

[12] To date, Philip Morris has listed approximately 45,000 documents on its privilege log. *Id.* at 3.

[13] Of all defendants, Reynolds' 4A index most closely matches its privilege log. For other defendants, most notably (and inexplicably) Philip Morris, plaintiffs are unable to determine the titles of most documents withheld on claims of privilege.

[14] On Reynolds' privilege log, these documents are described in an innocuous and misleading manner. For example, [REDACTED]. Exhibit 45 (CONFIDENTIAL).

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[REDACTED]

Indeed, Reynolds asserts privilege over the most routine scientific documents. For example, Reynolds claims that a [REDACTED]. *See* Exhibit 47 (CONFIDENTIAL).

**b. Philip Morris Incorporated**

Philip Morris also has asserted privilege [REDACTED]. Exhibit 48, PM 2028817893-894 (CONFIDENTIAL). [REDACTED].

[REDACTED]. *Id*. PM 1000013918/3927 (CONFIDENTIAL). [REDACTED]. *Id*., PM 2022249518-9519 (emphasis added) (CONFIDEN-TIAL).

Philip Morris' privilege log also is replete with examples [REDACTED]. *Id*., PM 1000222617 (CONFIDENTIAL). Similarly, Philip Morris is asserting privilege over [REDACTED]. *Id*., PM 1000299103-104 (CONFIDENTIAL).[15]

**III.**

**OTHER COURTS HAVE FOUND THAT THESE DEFENDANTS HAVE ASSERTED INVALID CLAIMS OF PRIVILEGE**

Even with only a portion of the above record, other courts have found, after *in camera* review, that these defendants have asserted overly-broad and invalid claims of privilege. In fact, it appears that *every* court (of which plaintiffs are aware) that has reviewed defendants' documents *in camera* has concluded that at least some of the documents are not privileged or are subject to disclosure under the crime/fraud exception to privilege.[16]

However, given defendants' "General Patton" approach to litigation, to plaintiffs' knowledge only *one* document from the following series of decisions has *actually* been produced to the plaintiffs in those cases; the production of the other documents described below has been delayed by defendants' repeated procedural maneuvers.

**A. *Sackman v. Liggett Group, Inc.***

Last year, a federal magistrate judge found that 123 CTR "Special Projects" scientific research documents were not privileged in *Sackman v. The Liggett Group*, 920 F. Supp. 357 (E.D.N.Y. 1996), *vacated*, 167 F.R.D. 6, 23 (E.D.N.Y. 1996). After *in camera* review of the documents, including correspondence to and from counsel and minutes of meetings where counsel and/or executives discussed the projects, the magistrate found that the documents chronicled "attorneys [ ] serving a function other than that of legal advisor ... in a scientific, administrative, or public relations capacity ..." *Sackman*, 920 F. Supp. at 365. Since the "Special Projects" documents did not "relate to the rendition of legal advice or legal services," they did not fall under the attorney-client privilege. *Id*. The Special Projects documents also were "devoid of references to litigation strategies or other thought processes otherwise associated with litigation," thus were not protected by the work-product doctrine. *Id*. at 367. Since neither of these protections were available, defendants could not withhold the documents under the "joint defense" privilege, as "attorneys cannot be utilized as conduits of non-legal communications between parties claiming the joint defense privilege." *Id*. at 365-66.

As an alternative basis for this ruling, the magistrate in *Sackman* found that there was probable cause to find that "a fraudulent purpose existed in Liggett's use of CTR Special Projects" and that the documents "furthered the fraud perpetrated on the public," in that, while the stated purpose of CTR was to research smoking and health, the organization was used instead to "promote scientific research that would support the economic interests of the tobacco industry." 920 F. Supp. at 368. Thus, the magistrate found that the crime/fraud exception to the privileges was an independent basis to overrule the claims of privilege.[17]

**B. *Burton v. R.J. Reynolds Tobacco Company***

In *Burton v. R.J. Reynolds Tobacco Company*, 167 F.R.D. 134 (D. Kan. 1996), another

[15] [REDACTED], Philip Morris also is claiming privilege [REDACTED]. *Id*., PM 2025026314 (CONFIDENTIAL).

[16] Plaintiffs are aware of one reported decision, *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 138 (5th Cir. 1996), in which the court declined to order the production of allegedly privileged cigarette documents. The entire discussion of the privilege issue in that case consisted of one paragraph, in which it appears that there was no independent assessment of the evidence. *Id*. at 172.

[17] The magistrate's order in *Sackman* was vacated by the district Judge when the judge granted partial summary judgment in that personal injury case. The judge explained that the purpose of vacating the magistrate's order was "so that the court may consider the effect of the court's summary judgment decision on the various discovery issues." *Sackman*, 167 F.R.D. 357, 365 (E.D.N.Y. 1996). No criticism was made of the magistrate's findings 1) that attorney and executive documents about CTR Special Projects were not protected by the attorney-client or work product privileges, and 2) that there was probably cause to find a fraudulent purpose.

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personal injury case, the court analyzed privilege claims asserted by Reynolds for 33 CTR "Special Projects" documents. Before referring the documents to a magistrate for *in camera* review, the district court concluded preliminarily, without reviewing the documents, that Reynolds had made the "necessary showing to assert the attorney-client privilege, work product immunity, and the joint defense privilege." *Id*.., 167 F.R.D. at 140 (D. Kan. 1996). However, the district court held that a prima facie case of fraud had been established based *solely* on the "Frank Statement" and excerpts from an FDA Special Supplement entitled "Nicotine in Cigarette and Smokeless Tobacco Products is a Drug and These Products are Nicotine Delivery Devices under the Federal Food, Drug and Cosmetic Act." *Id*. at 142.[18]

As a result of this finding, the district court ordered the documents reviewed *in camera* by the magistrate judge. After review of the documents, the magistrate found that 32 of the 33 documents were *not* privileged, without even reaching the issue of crime/fraud. *Burton v. R.J. Reynolds Tobacco Company*, -- F. Supp. ---, 1997 WL 45229 (D. Kansas Feb. 3, 1997). The magistrate also found, with the benefit of *in camera* review, that there were "inconsistencies in the various submissions by RJR" (i.e., the subject documents, the privilege log and Reynolds' *in camera* memorandum). *Id*. at *2.

The magistrate then rejected Reynolds' sweeping view of privilege:

> RJR seems to believe and argues that when an attorney is somehow referenced within a document or generates a document, attorney-client privilege or work product immunity must protect disclosure of the subject document. Such is simply not the case.

*Id.* Thus, the magistrate rejected Reynolds' claims of privilege with respect to internal Reynolds memoranda relating to "research and development," letters from outside counsel relating to scientific research, literature reviews prepared by scientists at the direction of counsel, a letter from a consultant for outside counsel, minutes of a meeting of the CTR Industrial Technical Committee, and notes by Reynolds employees of industry meetings relating to scientific research and smoking and health issues. *Id*. at *4-8. The magistrate also concluded that three of the documents "*may contain evidence that RJR knew, during the relevant time period, that nicotine was addictive*." *Id*. at *8 (emphasis added).

### C. *Haines v. Liggett Group, Inc.*

Yet another court to reject certain of defendants' claims of privilege after *in camera* review was *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), *vacated on procedural grounds*, 975 F.2d 81 (3rd Cir. 1992). In *Haines*, the district court found that the CTR Special Projects documents:

> [S]peak for themselves in a voice filled with disdain for the consuming public and its health. Despite the industry's promise to engage independent researchers to explore the dangers of cigarette smoking and to publicize their findings, the evidence clearly suggests that the research was not independent; that potentially adverse results were shielded under the caption of 'special projects;' that the attorney-client privilege was intentionally employed to guard against such unwanted disclosure; and that the promise of full disclosure was never meant to be honored and never was.

*Id*. at 684. Accordingly, the district court rejected claims of privilege under the crime/fraud exception. *Haines*, 140 F.R.D. at 684.[19]

The Court of Appeals reversed on the grounds that the judge had violated the Federal Magistrate Act, and remanded. *Haines*, 975 F.2d at 98. On remand, however, the plaintiffs' law firm, exhausted by the industry's dilatory tactics, sought permission to withdraw, before the claims of privilege were ever resolved. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414 (D.N.J. 1993).[20]

### D. *Kueper v. R.J. Reynolds Tobacco Company*

In *Kueper v. R.J. Reynolds Tobacco Company*, 91-L-734 (Ill. Circuit Ct. 1992) (Exhibit 50), the

[18] *See* Exhibit 1 ("Frank Statement") and Exhibit 49 (FDA Special Supplement).

[19] *Haines* was a companion case to *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988). Remarkably, the existence of the CTR Special Projects a issue in *Haines* was not revealed until the trial in *Cipollone*, despite the fact that there had been years of pre-trial discovery. *Haines*, 140 F.R.D. at 685.

[20] The Court of Appeals also ordered the case reassigned to another judge on remand "in view of statements made in the district court's prologue to its opinion." 975 F.2d at 97. (In this prologue, the district court stated, *inter alia*, "[T]he tobacco industry may be the king of concealment and disinformation." *See Id*. at 97).

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court ruled that an outside consultant's report on the abrupt shutdown of Reynolds' Biological Research Division ("BRD") in 1970 should be produced, in redacted form. (This shutdown of the so-called "mouse house" resulted in the firing, without notice, of 26 Reynolds' scientists. *Id*. at 6). The court rejected Reynolds' claim of absolute work product privilege, finding that any privilege was waived, and, in any event, that the report contained only "a few, oblique references to litigation issues" that could easily be redacted. The court also noted that, "the issue of why Reynolds terminated twenty-six biochemists and halted BRD's activities may also be honestly dispatched with use of the Report." *Id*. Accordingly, a redacted version of the report was produced to the plaintiffs' counsel in *Kueper*. In the Minnesota litigation, however, Reynolds steadfastly claims that the report (known as "the Brubaker report") is privileged in its entirety. Exhibit 51.

**E. *State of Florida v. The American Tobacco Co. et al.***

Three months ago, in January 1997, the special master in the Medicaid cost reimbursement case filed by the State of Florida held that the State made the required prima facie showing that some of defendants' allegedly privileged documents are the product of crime/fraud. Exhibit 52. The court then offered defendants an opportunity to rebut this showing. *Id*.

**F. *Butler v. Philip Morris, et al.***

Two weeks ago, on March 26, 1997, a trial court judge in a personal injury case in Mississippi, *Butler v. Philip Morris, et al*., Civ. Action No. 94-5-53, reviewed *in camera* 11 Liggett documents produced as a result of the recent Liggett settlement (and identified as "joint defense") and ordered their production. Ex. 53. (In this order, the judge noted that, "this Court has previously determined that a prima facie showing of crime-fraud has been established." *Id*.) The remainder of the Liggett joint defense documents were referred to a special master for *in camera* review. *Id*. Other defendants sought an immediate writ of prohibition in the Mississippi Supreme Court, which stayed production of the 11 documents pending further review. *Id*.

## IV.

## DEFENDANTS' CLAIMS OF ATTORNEY-CLIENT AND WORK PRODUCT PROTECTION ARE OVERBOARD AND INVALID

Neither the attorney-client privilege nor the work product doctrine support defendants' sweeping claims of privilege in this case.

### A. Defendants' Assertions of Attorney-Client Privilege Over Scientific Research Are Meritless.

The attorney-client privilege protects confidential communications between an attorney and a client where legal advice is sought. *Burton v. R.J. Reynolds Tobacco*, 1997 WL 45229 at *2.[21] The purpose of the privilege is to encourage communication between a client and attorney to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In Minnesota, privileges are narrowly construed because their assertion results in the "suppression of relevant and essential evidence." *Baskerville v. Baskerville*, 75 N.W.2d 762, 771 (Minn. 1963). Thus, the burden "rests upon the party claiming the privilege to present facts showing it has a right to assert the privilege." *In re Parkway Manor Healthcare Ctr.*, 448 N.W.2d 116, 118 (Minn. App. 1989). Whether this burden is met is a question vested in the discretion of the trial court. *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987).

#### 1. Only Legal Advice, Not Scientific Information, Can Be Subject to the Attorney-Client Privilege

As illustrated above, defendants' privilege logs include numerous entries relating to scientific reports. Such information is not protected. The attorney-client privilege extends solely to "legal advice" from a legal advisor acting "in his capacity as such." *Brown v. St. Paul City Ry. Co*., 62 N.W.2d 688, 700 (Minn. 1954). Thus, an attorney making or receiving the allegedly privileged communication must do so in the capacity of a lawyer. Before any communication is privileged, is must "involve application of law to facts or the rendering of an opinion of law in response to the client's legal inquiries." *United States v. Am. Tel. & Tel., Co*., 86 F.R.D. 603, 615 (D.D.C. 1980).

Neither the attorney-client nor work product protection applies to communications made in the ordinary course of business. *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413, 416 (1942), *overruled in part on other grounds, Leer v. Chicago, St. Paul & Pac. Ry*, 308 N.W.2d 305 (Minn. 1981). When lawyers direct factual investigations, they are often acting in a

[21] The attorney-client privilege is codified at Minnesota Statute 595.02, subd. 1(b).

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business, not a legal, capacity. *Mission Nat'l Insur. v. Lilly*, 112 F.R.D. 160, 163-64 (D. Minn 1986) (where the investigation by in-house counsel included non-legal opinions and thoughts about the facts, as opposed to legal or trial matters, it was "ordinary business ... outside the scope of ... privileges"). Thus, "the attorney-client privilege does not protect client communications that relate only to business or technical data." *Simon v. G.D. Searle Co.*, 816 F.2d 397, 403 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) (collecting cases).

This information is discoverable because a "litigant cannot shield from discovery the knowledge it possessed by claiming it had been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer." *Rhone-Poulenc Rorer v. Home Indemnity Co.*, 32 F.3d 851, 864 (3d Cir. 1994); *see also Crowe v. Dyer v. Lederle Laboratories*, 510 N.Y.S.2d 228, 229 (N.Y. App. 1986) (scientific reports conducted to "monitor complaints," even if also used in litigation, are discoverable). Indeed, there are "few, if any, conceivable circumstances where a scientist or engineer employed to gather data" should be viewed as falling within the privilege. *U.S. Postal Service v. Phelps Dodge Refining Co.*, 852 F.Supp 156, 163 (E.D.N.Y. 1994).

In this case, scientific information listed on defendants' privilege logs will establish, among other things, the knowledge possessed by defendants about the hazards of cigarettes. Other courts, as noted above, have rejected claims of privilege after reviewing some of these scientific documents *in camera*. In *Sackman*, 902 F.Supp. at 365, the magistrate was very explicit: industry counsel who directed CTR scientific research acted in a "scientific, administrative or public relations capacity," not a legal capacity, thus no privilege attached to the 123 "Special Projects" documents. Likewise, in *Burton*, 1997 WL 45229, the magistrate found that all but one of 33 Special Project documents lacked privilege. Echoing the rule that information must be predominantly legal before privilege can attach, the court found that Reynolds' claims that a privilege attaches whenever an attorney is somehow referenced within a document or generates a document "is simply not the law." *Id*. at *2.

#### 2. Scientific Information Simply Transferred to Attorneys Is Not Privileged

Defendants logs show many claims for privilege for information simply transferred to attorneys. This is a clear abuse of the privilege as "counsel cannot suppress evidence by taking possession of it." Paul Rice, *The Attorney-Client Privilege in the United States*, U7.11, p. 525. The attorney-client and work product protections are "never available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure." *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied*. 375 U.S. 929 (1963). Information, including scientific research, does not become privileged by virtue of being filtered through attorneys. Nor does scientific information become privileged merely because it is incorporated into a communication between an attorney and client. *Upjohn*, 449 U.S. at 395-96. Legal departments "are not citadels in which public, business or technical information may be placed to defeat discovery..." *Simon*, 816 F.2d at 403.

### B. Defendants' Assertions for Work Product Protection Over Scientific Research Is Without Merit

Defendants also assert thousands of objections to discovery based upon the work product doctrine. Under this doctrine, documents or tangible things prepared in anticipation of litigation is subject to a *qualified immunity*. Minnesota Rule of Civil Procedure 26.02(c).[22]

Defendants' across-the-board invocation of work product ignores the limited nature of this protection. As the United States Supreme Court held in *Hickman v. Taylor*, 329 U.S. 495 (1947), the scope of the work product doctrine is limited:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.

*Id*. at 511. Thus, like the attorney-client privilege, the work product doctrine protects only information "primarily concerned with legal assistance." *In re Air*

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[22] Minnesota Rule of Civil Procedure 26.02(c), like its federal counterpart, allows discovery of work product in some circumstances:

> [A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party of by or for that other party's representative (including the other party's attorney, ...) only upon a showing that the party seeking discovery has *substantial need of the materials* ... and that the party is *unable without undue hardship to obtain the substantial equivalent* of the materials by other means.

Minn. R. Civ. P. 26.02(c) (emphasis added).

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*Crash Disaster at Sioux City Iowa*, 133 F.R.D. 515, 519 (N.D. Ill. 1990); *see also, U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (party claiming work product must show documents "were prepared principally or exclusively to assist" in litigation). Work product protection does not extend to investigations conducted "in the ordinary course of business...." *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982). Nor do pre-existing documents become "work-product" just because they were reviewed by an attorney in preparation for litigation. American Bar Ass'n Section on Litigation, *The Attorney Client Privilege and the Work Product Doctrine 2d*, p. 124 (1989).[23]

There are two species of work product. First, fact work product (often referred to as "ordinary" work product) is discoverable if the party seeking production can show "substantial need" and "undue hardship" in obtaining the materials or their equivalent by other means. *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986). The second type of work product consists of "mental impressions, conclusions, opinions, or legal theories or an attorney or other representative or a party concerning the litigation." *Id*. This opinion work product is given heightened protection.

While defendants have drafted many log entries to suggest the underlying documents are "opinion work product," such claims must be viewed skeptically. The mere incantation of the words "mental impressions" or "legal theories" does not activate the protection. As pointed out in *Re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988), the protection is narrow:

> Not every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions, or legal theories is protected as opinion work product. Were the doctrine to sweep so massively, exception would hungrily swallow up the rule.

*San Juan DuPont*, 859 F.2d at 1015.

[23] Other courts have also found that the mere fact that an attorney has gathered or selected documents from pre-existing documents does not convey work product protection to that activity. In *Compagnie Francaise D'Assurance v. Phillips Petroleum*, 105 F.R.D. 16, 41 (S.D.N.Y. 1984), the court questioned whether documents obtained from third parties by a party's counsel were protected by the work product doctrine. Surveying the cases on this issue, the court found that pre-existing documents, even when selectively assembled by counsel in preparation for trial, are not protected. *Compagnie Francaise*, 105 F.R.D. at 40-41.

Whether particular information is protected, or whether qualified protection has been overcome, lies within the trial court's discretion. *In re Indenture of Trust March 1, 1982*, 437 N.W.2d 430, 437 (Minn. App. 1989) (it is the trial court "familiar with the case" who is "in best position" to determine the substantial need/undue hardship calculus of Rule 26.02).

This discretion must be exercised with the function of work-product protection in mind. The boundaries of the doctrine are mapped by balancing the interest in providing lawyers with "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," against the societal interest in insuring that the parties obtain "[m]utual knowledge of all the relevant facts ... gathered." *Hickman*, 329 U.S. at 507, 510-11. The policy behind the rule is "not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). The work product privilege exists "to promote the adversary process, not to pervert it." American Bar Ass'n Litigation Section, *The Attorney-Client Privilege and the Work Product Doctrine 2d*, p. 151 (1989).

In other words, the protection cannot be used as a sword rather than shield. *See Snyker v. Snyker*, 72 N.W.2d 357, 359 (courts must not enforce evidentiary privileges in such a blind and sweeping manner that they become vehicles for the suppression of evidence which is not privileged). Overbroad protection will negate the purposes of the Minnesota Rules of Civil Procedure to avoid "the 'poker hand' concept of litigation, rewarding artifice and camouflage." *Boldt v. Sanders*, 111 N.W.2d 225, 227-28 (Minn. 1961).

### 1. Scientific Inquiry Into Health Hazards of Cigarettes Is Not Work Product

Scientific inquiry concerning a product is seldom predominantly for the purposes of litigation. Merely involving an attorney in non-legal matters does not transform such information into work product. *See Union Carbide Corp. v. Dow Chemical Corp.*, 619 F. Supp. 1036, 1051 (D.C. Del. 1985) ("factual recitations of technical data and research experiments conducted by Carbide's employees is not work product even if "the documents were prepared by or forwarded to Carbide's in-house counsel...").

Moreover, a manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products. *See Jenkins v. Raymark Indus.*

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*Inc.*, 109 F.R.D. 269, 278 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *see also* Minnesota Civil Jury Instruction Guides, No. 117 ("You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field"). The cigarette industry itself recognizes this duty. Exhibit 24 at PM 1000335622 ("The industry should abandon its past reticence with respect to medical research. Indeed, failure to do such research could give rise to negligence charges."). The research that results from this duty -- the scientific information establishing the knowledge possessed by a manufacturer about its products -- is discoverable. *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (product investigations motivated by a desire to improve the product, guard against adverse publicity, or protect a company's economic interests are not protected); *see also Hensel Phelps Const. Co. v. Southwestern Roofing and Sheeting Co.*, 29 F.R.Serv.2d 1095 (D. Colo. 1980) (documents regarding defective roof not work product because their purpose was to identify roofing problems). Even if this basic research into the dangers of defendants' products were "work product," plaintiffs would meet the "substantial need" and "undue hardship" showing that allows for discovery. Defendants have, in their own words, [REDACTED] this duty of research, conducting it instead through lawyers and purported expert consultants. *See* Exhibit 35. Thus, the scientific research is unavailable elsewhere and "exceptional circumstances" exist.

Thus, in *Laughlin v. A.H. Robins*, Minn. Dist. Ct. No. 776-868 (March 21, 1984) (Exhibit 54), Judge Lebedoff ordered that the defendant produce the results of six scientific tests, conducted at the direction of counsel, undertaken on the Dalkon Shield IUD. Although the defendant claimed the test results were work product, the court found they were unavailable elsewhere and that the plaintiff had thus overcome the limited work product protection. Moreover, Judge Lebedoff stated that "the defendants cannot order tests and then disclose only the tests most beneficial to them." *Id*.

In a similar circumstance in the asbestos litigation, the court in *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D.Pa. 1980) required the defendant to produce information concerning the manufacturer's knowledge of the health hazards of asbestos. Information in the hands of experts not expected to testify at trial was also discoverable:

> If GAF has knowledge of the matters requested ... and has employed experts whom GAF does *not* expect to call at trial, the Interrogatory should be answered anyway, for this information is directed at learning the extent of GAF's knowledge of asbestos and asbestos related diseases, which affects the very nub of plaintiff's contentions that GAF has and knew of a duty to protect plaintiff but breached it nonetheless. ... *Moreover, GAF has not suggested a practicable alternative method by which plaintiff can obtain this information. The circumstances, therefore, must be considered exceptional*.

*Roesberg*, 85 F.R.D. at 299 (emphasis added).

**2. The Use of "Litigation Consultants" Cannot Shield Scientific Research as Work Product**

Numerous of defendants' claims for work product protection are based on the fact that scientific information is not discoverable because it has been generated or used by defendants' consulting experts. This reflects an incorrect view by defendants of the scope of work product protection.

For example, in *Burton*, the magistrate found that reports written by outside consultants for defendants' long-time law firm lacked the predominantly legal character to be work product:

> Tab 20 is a report written by Rodger L. Bick, M.D., a consultant for Jacob & Medinger, outside counsel for RJR, and sent to Jacob & Medinger for review, related to tobacco glycoprotein. ... The fact that Mr. Bick was a consultant for a law firm representing one of the tobacco companies does not alone cloak his report with work product immunity.

*Id*., * 7. *See also Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 994 (D.C. Cir 1980) ("facts given by the party to the expert can no more be protected by that fact than facts given by counsel to a party can be brought within the attorney-client privilege." (citing 4 J. Moore, *Federal Practice*, U 26.66[2] (1976).

In this case, defendants' logs also show extensive claims of work product for scientific work done by defendants' own employees, apparently in a litigation "consulting" capacity. The predicate of this claim -- that in-house scientists or employees are somehow experts or consultants for the purposes of litigation -- has disturbed many courts. *Virginia*

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*Electric Pow. Co. v. Sun Shipbuilding*, 68 F.R.D. 397, 405 (E.D.Va. 1975) ("work performed and the reports made by in-house experts was not the work product of lawyers."). There "is a legitimate concern that a party may try to immunize its employees who are actors or viewers [in or of the events giving rise to a cause of action] against proper discovery by designating them experts retained for work on the case." 8 Wright, Miller & Marcus, *Federal Practice and Procedure*, U 2033, p. 466 (1994); 2 Herr & Haydock, *Minnesota Practice*, U 26.19, at 28 (information obtained from regular employee "experts," as opposed to specially retained experts, is available through routine discovery processes.) Thus, "courts should be exceedingly skeptical when employees who have otherwise discoverable information are designated 'experts' and efforts must be made to preserve the opportunity for the opposing party to discovery that information." 8 *Federal Prac. and Procedure*, at U 2033, p. 466.

### C. There is No Joint Defense Privilege For Documents Not Otherwise Privileged

Defendants also lodge thousands of objections to discovery based on the "joint defense privilege." The "joint defense privilege" is not an independent privilege, but rather simply an extension of other privileges in the multi-defendant context. *Griffin v. Davis*, 161 F.R.D. 687, 691-92 (C.D. Cal. 1995). Thus, if information is not, for any reason, including those set forth herein, protected by the attorney-client or work product doctrines, it cannot be protected by the joint defense privilege.[24]

## V.

## EVEN IF DEFENDANTS WERE TO SATISFY THEIR BURDEN OF SHOWING ATTORNEY-CLIENT OR WORK PRODUCT, MANY DOCUMENTS ARE DISCOVERABLE PURSUANT TO THE CRIME/FRAUD EXCEPTION

As shown above, defendants have engaged in a decades-long campaign to suppress scientific knowledge about the dangers of smoking, manipulated evidence of their knowledge of those dangers to conceal it from the public and the courts, and intentionally breached their duties -- and voluntary undertakings -- to the public to truthfully research and report these dangers. This evidence creates a prima facie case of crime/fraud. Thus, any alleged protection from either the attorney-client or the work product privileges is removed from any document containing information closely related to this "crime or fraud." *Craig v. A.H. Robins*, 790 F.2d 1, 4 (1st Cir. 1986). The crime/fraud exception also negates any protection for "opinion" work product, *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), and destroys any joint defense privilege. *See Haines*, 975 F.2d at 94-95, *Sackman*, 927 F. Supp at 365-66.

The guiding principle of the crime/fraud exception is that communications that abuse privileges are not worthy of protection. As the United States Supreme Court stated in the seminal case of *Clark v. U.S.*, 289 U.S. 1, 15 (1933):

> The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

The crime/fraud exception applies to ongoing or future "crimes or fraud," as opposed to past wrongs. Thus, in *United States v. Zolin*, 109 S. Ct. at 2626, the United States Supreme Court stated:

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection -- the centrality of open client and attorney communication to the proper functioning of our adversary system of justice -- "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing, but to future wrongdoing*." It is the purpose of the crime/fraud exception to the attorney-client privilege to assure that the "seal of secrecy" between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime.

(Citations omitted).

There are few Minnesota decisions on the crime/fraud exception. In 1979, the Minnesota Supreme Court stated, without mentioning the doctrine by name, that "privilege is not permitted to prevent disclosure of communications relating to commission of future crime

[24] On the other hand, a party asserting joint defense has the difficult burden to meet. First, the claimant must establish all elements of the underlying privilege. *Metro Wastewater Reclamation District v. Continental Casualty Co.*, 142 F.R.D. 471, 478 (D. Colo. 1992). Second, the claimant must meet the requirements of "joint defense," namely that 1) the communications were made in the course of a joint defense effort, 2) they were designed to further that effort, and 3) there has been no waiver. *In re Bevill, Bresler & Shuklman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).

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or fraud." *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979). More recently, in *Levin v. C.O.M.B.*, the Minnesota Court of Appeals adopted the "prima facie" standard of proof for the crime/fraud exception. *Id*., 469 N.W.2d at 515.[25]

"Crime/fraud" is somewhat of a misnomer as courts throughout the country have found that both law and policy require that the exception be applied beyond those circumstances where the technical definition of "crime" or "fraud" is met. *See In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) ("crime, fraud or other misconduct"); *United States v. AT&T*, 86 F.R.D. 603, 624-25 (D.D.C. 1979) ("crime, fraud or tort," including anti-trust violations); *Cooksey v. Hilton Int'l Co*., 863 F. Supp. 150, 151 (S.D.N.Y. 1994) ("intentional torts moored in fraud"); *Volcanic Gardens Management Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App. 1993) (for purposes of the exception, "fraud" is "much broader" than common law and criminal fraud, and can include "false suggestions" and "suppression of truth"). As the court stated in *Central Constr. Co. v. Home Indemnity Co*., 794 P.2d 595, 598 (Alaska 1990):

> "Acts constituting fraud are as broad and as varied as the human mind can invent. *Deception and deceit in any form universally connote fraud*. Public policy demands that the 'fraud' exception to the attorney-client privilege ... be given the broadest interpretation."

*Id*. (holding that the exception applies to communications "in aid of any crime or a *bad faith breach* of a duty").

Importantly, the party seeking discovery under the crime/fraud exception need make only a "prima facie" showing of one of these categories of wrongdoing that constitutes "crime/fraud." *Levin*, 469 N.W.2d at 515. This showing is less than is required to substantively prove a crime or a cause of action for fraud. *In re Berkley & Co*., 629 F.2d 548, 553 (8th Cir. 1980) (party "is not required to prove existence of crime or fraud" as a prima facie showing is sufficient); *Matter of Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988) ("the question here is not whether the evidence supports a verdict but whether it calls for inquiry"); *Duplan Corp. v. Deering Milliken*, 540 F.2d 1215, 1220 (4th Cir. 1976) (while a prima facie showing need not be such as to actually prove the disputed fact, it must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the undisputed fact is left unrebutted).[26] Requiring a stricter showing "may not be possible at the discovery stage, and would result in an overzealous protection of the attorney-client privilege in a context where the rationale for that privilege may be inapplicable." *Caldwell v. District Court*, 644 P.2d 26, 32-33 (Colo. 1982). Thus, a showing of "some foundation in fact is sufficient to invoke the crime exception." *Id*..[27]

This lessened standard is reflected in the consequences of a holding that "crime/fraud" exists. A finding of "crime/fraud" in the discovery context does not constitute a substantive finding that a party is guilty of a crime, or liable under the tort of fraud. *In re A.H. Robins*, 107 F.R.D. at 16-17.[28]

One analogous case -- also involving the safety of a product -- establishes that the crime/fraud exception applies to documents related to the defendants' knowledge and misrepresentations regarding health hazards. In *In re A.H. Robins, supra*, a case involving the Dalkon Shield IUD, the court found that the crime/fraud exception applied to documents relating to the following categories of behavior by the defendant:

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[25] In *Levin*, the Court of Appeals found that the crime/fraud exception was not established; however, only a single document was at issue, in the Court of Appeals' words, "an isolated ambiguous statement." *Id*. at 515.

[26] Other courts have phrased the "prima facie" requirement differently. *See Haines*, 140 F.R.D. at 694 (noting use of the words "probable cause" or "reasonable basis to believe that a party's objective was fraudulent"). Essentially, "all these proposed standards amount to the same basis proposition -- has the party seeking discovery presented evidence which, if believed by the fact-finder, supports plaintiff's theory of fraud?" *Id*.

[27] There is a split of authority as to the degree to which the party withholding documents has a right to rebut the prima facie showing made by the party seeking discovery under the crime/fraud exception. *See In re A.H. Robins*, 107 F.R.D. at 6-7 (no evidentiary hearing required). *Haines* holds that defendants have an absolute right to be heard, but doesn't fully describe the scope of that right. *Haines*, 975 F.2d at 97. In any event, any right of rebuttal should not turn into a series of mini-trials.

[28] A minority of courts have held that, to prove the crime/fraud exception in discovery, a party has to prove every element of a substantive cause of action for fraud. *See Laser Industries, Ltd. v. Reliant Tech. Inc.*, 167 F.R.D. 417 (N.D. Cal. 1996). This is not the law in Minnesota. *Levin*, 469 N.W.2d at 515, establishes that the standard is a "prima facie" showing, less than proving every element of a substantive cause of action. Furthermore, requiring proof of each element of a cause of action for fraud would negate the principle that the crime/fraud exception applies where a crime or fraud is intended or attempted, even if never completed. *BP Alaska Exploration, Inc. v. Superior Court (Nahama & Weagant Energy Co.)*, 245 Cal.Rptr. 682, 697 (Cal.App. 1988); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (crime/fraud exception does not require proof of elements of a crime or fraud as it does not require a completed crime or fraud but only client's consultation with attorney), *cert. denied*, 117 S. Ct. 333 (1996).

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> [Robins] failed to adequately test the Dalkon Shield before marketing it; attempted to develop hard evidence that misrepresented the nature, quality, safety and efficacy of the Dalkon Shield; ignored the mounting evidence against the Dalkon Shield, with knowledge of the potential harm caused by the product; relied upon invalid studies in an effort to refute or ignore the dangers potentially caused by the Dalkon Shield; and attempted, with the assistance of counsel, to devise strategies to cover up Robin's responsibilities and lessen its liabilities with respect to the Dalkon Shield.

*In re A.H. Robins Co*., 107 F.R.D. at 14-15. Additionally, attempts by Robins to "neutralize adverse publicity and comment" was found to constitute "crime/fraud." *Id*. at 15.

Dilatory discovery tactics also was a factor in the *In re A.H. Robins* decision. The court surveyed various Dalkon Shield personal injury cases, finding a pattern by defendant A.H. Robins of delaying discovery "with stalling tactics, such as motions for reconsideration, requests for stays or attempted appeals of discovery orders." Finding that the ultimate goal of this pretrial posturing was to avoid producing documents, the court held that "the repeated delays and instances of nonproduction provide support for the application of the crime/fraud exception." *In re A.H. Robins*, 107 F.R.D. at 14. *See also* Geoffrey C. Hazard, "An Historical Perspective on the Attorney-Client Privilege," 66 *Cal. L. Rev*. 1061, 1064 (1978) (illegitimate litigation tactics may constitute "crime/fraud").[29]

In another case involving the Dalkon Shield IUD, a federal court of appeals similarly found "a pervasive picture of covering up a defective product and continuing to merchandise it by misrepresenting both its efficacy and its safety," and stated that "this kind of continuing fraudulent misrepresentation and cover-up vitiates not only any attorney-client privilege but also any work product immunity." *Craig v. A.H. Robins Co*., 790 F.2d at 2-4.

Similarly, in *Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co*., 660 N.E.2d 812 (Ohio Com. Pl. 1995), the defendant claimed privilege over a memorandum prepared by its medical director for in-house counsel essentially informing counsel that asbestos causes asbestosis. Nevertheless, Owens denied in an interrogatory answer that it had any knowledge that its products caused health problems. *Id*. at 818. Finding that the answer represented a fraud on the court "perpetrated by the officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication," the court found that the underlying memo had lost its privilege. *Id*.

A breach of a fiduciary duty relationship also can be a basis for applying the crime/fraud exception. *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W.2d 476 (Ky. 1991) ("breach of a fiduciary relationship [is] on an equal par with fraud and deceit" and "equivalent to fraud"); *see also Central Constr. Co. v. Home Indemnity Co*., 794 P.2d 595 (Alaska 1990) (holding, in bad faith insurance case, that exception applies to communications "in aid of any crime or a *bad faith breach* of a duty.").

There is a split of authority as to whether a court may rely on the allegedly privileged documents themselves in determining whether a prima facie showing has been made. *Compare Zolin*, 109 S. Ct. at 2628 (documents at issue can be reviewed as "the court is not required to avert its eyes...") with *In re A.H. Robins*, 107 F.R.D. at 9 (Kansas statute requires sufficient evidence "apart from the communication itself" for prima facie showing). In Minnesota, the law appears to permit assessment of the disputed documents in this determination. *See Levin, supra*. In the present case, however, where there is a abundance of evidence of "crime or fraud" independent of the disputed documents, the prima facie showing is easily established without resort to the allegedly privileged documents. As demonstrated in detail above, the very basis of defendants' decades-long public relations campaign -- to keep the scientific "controversy" alive -- constitutes "crime/fraud."[30]

With this showing of crime/fraud, the next step in the analysis is a determination of the extent to which the privileges are vitiated. The privilege is lost on those documents "closely related to the fraud." *Levin*, 469 N.W.2d at 515. In this case, this universe of information will include all information regarding research into the hazards of cigarettes, all information regarding attempts by the defendants or their attorneys to suppress information.

[29] The court in *In A.H. Robins Co.* applied Kansas law and, with respect to Minnesota law, stated: "Minnesota law does not differ substantially from the law applied in the present case. In fact, Minnesota law appears to be more stringent than Kansas law regarding the crime or fraud exception." 107 F.R.D. at 10. It is not clear, however, in which particular respects, if any, Minnesota law is more stringent than Kansas law.

[30] In addition to this memorandum and attachments, plaintiffs incorporate by reference all prior related proceedings in this litigation.

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**DEFENDANTS' PROPOSED PROCEDURES ARE A RECIPE FOR DELAY AND ARE UNWARRANTED UNDER THE LAW**

At this point in the litigation, there is no alternative to *in camera* review of the documents over which defendants claim privilege. *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987) ("without inspection of the documents themselves, the discovery order is based on mere speculation").

Without an *in camera*, inspection of the documents, the court cannot be satisfied that a basis for asserting the privilege exists. *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 226 (D.D.C. 1995). The alternative to *in camera* review is to take defendants at their word alone; the fallacy of this approach -- particularly with these defendants -- was described by the magistrate's finding of "inconsistencies" in Reynolds' submissions in *Burton*. Moreover, even without such a record, courts have soundly rejected such a "fox guarding the chicken house" approach:

> The question remains as to how the court can verify that what a party claims is attorney opinion work product is, indeed, what he claims it is. To put it another way, must the court accept, without inquiry, investigation or verification, the defendant's word that documents, records and other writings are, or contain, attorney opinion work product? To ask the question is to answer it.

*Snowden ex rel. Victor v. Connaught Labs.*, 137 F.R.D. 325, 334-39 (D. Kan. 1991), *appeal denied*.[31]

Defendants, knowing that it is easier to claim (particularly *ex parte*) that a document is privileged than to demonstrate privilege from the document itself, argue against this Court or Special master review documents *in camera*. Outside of the "crime/fraud" context, however, there is no special showing required before the Court is empowered to review documents *in camera* to make the determination of whether they are privileged. Indeed, it is the "most judicious" procedure. *In Re Grand Jury Proceedings Involving Berkley*, 466 F.Supp. 863, 868 (D. Minn. 1979); *see also In re Fish & Neave*, 519 F.2d 116, 118 (8th Cir. 1975) (the proper method for resolving work product issues is *in camera* review).

Moreover, with respect to the crime/fraud determination, the threshold showing that allows the Court to review documents *in camera* has been easily established in this case. A "prima facie showing of crime-fraud is not required before an *in camera* inspection is appropriate." *In re Grand Jury Investigation*, 974 F.2d 1068, 1073 (9th Cir. 1992). Instead, *in camera* review to determine the existence of the crime/fraud exception is appropriate if plaintiffs can show 'a reasonable belief that *in camera* review of materials *may* reveal evidence to establish the claim that the crime-fraud exception applies.'" *Id*. at 1073, citing *Zolin*, 491 U.S. at 572 n. 7 (emphasis in original).

Taken together, defendants' exaggerated claims in the cursory logs they have submitted, defendants' history of overly-broad claims in other cases, and the decades-long conspiracy of fraud demonstrated above, support "a reasonable, good faith belief that *in camera* inspection may reveal evidence that the information in the materials is not privileged." *In re Grand Jury Investigation*, 974 F.2d at 1074-75. Once that threshold is satisfied, the Court has discretion to order *in camera* review, taking into account such factors as the volume of material to be reviewed, its relevancy to the case, and the likelihood that the information will establish that the privilege is not properly invoked. *In re Grand Jury Subpoena 92-1*, 31 F.3d 826, 830 (9th Cir. 1994).

Plaintiffs recognize that *in camera* review of the multitude of documents for which defendants claim privilege presents a burden to the Court, albeit a much smaller one than the full-blown mini-trials on a document-by-document basis which defendants have proposed. Plaintiffs would, therefore, suggest methods of streamlining the review. First, defendants should list the documents for which they claim privilege which also appear on the privilege log of another defendant. Second, defendants should be asked to submit the documents for *in camera* review according to categories. These categories could include:

> Any document which any court or master has previously found either not

[31] Certainly, defendants' privilege logs in this case do not provide the Court with sufficient information to "determine the facts which support the claim of privilege." *In re Wirebound Boxes Antitrust Litigation*, 129 F.R.D. 534 (D. Minn. 1990). In fact, the privilege logs are so deficient that it would be within this Court' discretion to find a waiver of privilege on that basis alone. *See Plaintiffs' Motion to Waive Privilege for Documents Inadequately Described on Defendants' Privilege Logs*, filed September 16, 1996. *See Willemijn v. Apollo Computer*, 707 F. Supp. 1429, 1443 (D. Del. 1989) (ordering documents produced *solely* on the grounds that they were inadequately described on the privilege log); *United States v. Constr. Prod. Research, Inc.*, 72 F.3d 464 (2d Cir. 1996) (party resisting discovery had not satisfied its burden of establishing privilege because the parties' logs were deficient).

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protected by the attorney-client privilege or work product doctrine, or discoverable under any exception to those protections (such as crime/fraud);

All documents written by scientists;

All documents written by lawyers that discuss scientific research;

All documents written by or discussing the "Committee of Counsel" or the "Policy Committee" of lawyers;

All documents regarding CTR "Special Projects" or "Special Accounts";

All documents relevant to the issues of medical causation or addiction;

All documents that refer to or discuss advertising or promotion of cigarettes.

While the categorization of documents does not alleviate the need for *in camera* review, any further submission and any orders of the Court would address documents in categories. *See In re A.H. Robins*, 107 F.R.D. at 15 (allowing defendants to object to the application of crime/fraud to "particular batches of documents"); *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 505 (E.D.N.Y. 1986) (categorizing documents by basis for denial of privilege).

Defendants will no doubt seek full-blown evidentiary hearings, involving affidavits, legal memoranda, live witnesses and oral argument, on an individual document-by-document and *ex parte* basis. Defendants are not, however, legally entitled to such excessive process. The fundamental requisites of due process "consist of notice and an opportunity to be heard." *In re A.H. Robins Co. Inc.*, 107 F.R.D. at 7. In *In re A.H. Robins*, the court found that the compelling interest of efficient administration of the courts justified the court's reliance on legal memoranda -- as opposed to an evidentiary hearing -- to find that allegedly privileged documents were discoverable under the crime/fraud exception. *In re A.H. Robins*, 107 F.R.D. at 6-9.

Nor must the defendants be granted the right to submit materials *ex parte*. *Haines*, 975 F.2d at 97 (counsel for both sides of the dispute should be involved in any hearing on privilege). The participation of all sides to the dispute is simply more efficient as it provides for an "adversarial focusing of judicial inquiry." Rice, *supra*, U 11.15 at 1006.

**CONCLUSION**

Defendants have for decades suppressed their knowledge concerning the dangers of smoking from the public and, using calculated claims of privilege, from the courts. As shown above, and as found by several courts, the law does not countenance such suppression. Defendants' excessive and abusive claims of privilege must be closely scrutinized and, unless clearly authorized by the law, rejected.

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