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 and Williamson Tobacco Corporation, B.A.T. Industries, p.l.c., 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., Inc., and The Tobacco Institute, Inc.,
Defendants.

File # C1-94-8565

ORDER REGARDING PRIVILEGE AND THE CRIME-FRAUD EXCEPTION AND SETTING FORTH PROCEDURES TO DETERMINE PRIVILIEGE BEGINNING WITH THE LIGGETT DOCUMENTS

(REDACTED)

The above matter came on for hearings on April 8, 1997, and April 15, 1997, before the Honorable Kenneth J. Fitzpatrick. Roberta Walburn, Esq., appeared and argued on behalf of Plaintiffs. David Bernich, Esq., appeared and argued on behalf of all Defendants with the exception of Liggett Group, Inc. The following also were present at one or both of the hearings and identified themselves as appearing on behalf of the party or parties set forth opposite their names:

Name	*Party*
Susan R. Nelson	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Corey Gordon	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Gary Wilson	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Tara Sutton	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Martha K. Wivell	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Tom Pursell	State of Minnesota
Cheryl Heilman	State of Minnesota
Carol Bennett	State of Minnesota
Luanne Nyberg	State of Minnesota
Heather Gould	State of Minnesota
Brenda Mammerga	State of Minnesota
Joe Lovelad	State of Minnesota
Tom Gilde	Blue Cross and Blue Shield of Minnesota
Peter Sipkins	Philip Morris Incorporated
Bob Schwartzbauer	Philip Morris Incorporated
Maurice Leiter	Philip Morris Incorporated
Timothy Lindon	Philip Morris Incorporated
James I. Ham	Philip Morris Incorporated
Anne Walker	Philip Morris Incorporated
Chip Nunley	Philip Morris Incorporated
Tom Silfen	Philip Morris Incorporated
Charles Scarborough	Philip Morris Incorporated
Paul Dieseth	Philip Morris Incorporated
James Simonson	R.J. Reynolds Tobacco Company
Jonathan Redgrave	R.J. Reynolds Tobacco Company
Christopher Skorina	R.J. Reynolds Tobacco Company
Jack M. Fribley	Brown & Williamson Corporation
Ram Padmanabhan	Brown & Williamson Corporation
Patrick Bonner	B.A.T. Industries, p.l.c.
Gerald Svoboda	B.A.T. Industries, p.l.c.
David Martin	Lorillard Tobacco Company
Howard Roston	Lorillard Tobacco Company
John Monica	Lorillard Tobacco Company
Jeff Nelson	Lorillard Tobacco Company
Connie Iversen	Lorillard Tobacco Company
Craig Proctor	Lorillard Tobacco Company
Byron Starns	The American Tobacco Company
Tom McCormack	The American Tobacco Company
John Getsinger	The American Tobacco Company
Mary Yelenich	The American Tobacco Company
Larry Savell	The American Tobacco Company
Steven Kelley	Liggett Group, Inc.
Jim Stricker	Liggett Group, Inc.

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Kirk Kolbo	The Council for Tobacco Research - U.S.A., Inc.
Eric Falkenstein	The Council for Tobacco Research - U.S.A., Inc.
Hal Shillingstad	The Tobacco Institute, Inc.
George Flynn	The Tobacco Institute, Inc.

David Shaffer of the St. Paul Pioneer Press, David Phelps of the Minneapolis Star Tribune, and other members of the public and media also attended and observed the proceedings.

Based upon the record and arguments of counsel, the Court makes the following

FINDINGS OF FACT

[Paragraphs 1-9 of this Order contain the specific findings of fact upon which this Order is based. Because the underlying documents were filed, pursuant to this Court's Orders, as "Confidential - Subject to Minnesota Protective Order," the findings of fact herein are filed under seal and available only to attorneys of record pending further Order of this Court.]

Conclusion

10. The Plaintiffs have met their threshold burden of establishing a reasonable basis to believe that the crime-fraud exception to the general rule of privilege should be invoked in this matter with respect to the documents for which Defendants claim privilege. Defendants are now allowed an opportunity to present evidence to rebut the *prima facie* finding.

11. The Court's finding that Plaintiffs have made a *prima facie* case for crime-fraud is a finding made for the preliminary purpose of pretrial discovery procedure; this preliminary finding is *not* a finding that Defendants or any one of them has committed crime or fraud in this action.

12. The extraordinary number[1] of documents which have been designated as privileged in this case makes it impossible to conduct an *in camera* inspection of each document individually to determine whether it is so closely related to Plaintiffs' *prima facie* showing of crime-fraud that any claim of privilege is lost. If each document for which privilege were claimed were to be examined individually, the trial in this matter could not commence until the next millennium. Accordingly, this Court must fashion a process and procedure which will balance the need for judicial efficiency and timeliness with due process.

13. In order to accommodate the competing needs of the parties in this case, it is necessary to categorize the documents subject to the claims of privilege. Such categories would necessarily include, but not be limited to, the type of privilege claimed (e.g., opinion work product, fact work product, attorney-client, or joint defense), the subject matter of the document, the maker of the document, and the recipient of the document, if any.

14. Once categorized, the Special Master appointed by the Court in this matter shall set a schedule for hearing the parties with respect to each such category of documents and make his determination as to the application of privilege.

ORDER

1. Based on the foregoing, the issues of privilege, and loss of privilege based on the crime-fraud exception, are herewith referred to the Special Master for consideration of the following;

A. Which documents subject to a claim of privilege are associated with the alleged crime-fraud of the Defendants to the extent that any valid claim of privilege would be lost.

B. With respect to the remaining documents, which documents are subject to valid assertions of privilege.

2. In resolving these questions, the Special Master and parties are instructed that consideration of these questions is o occur by category or grouping of documents, rather than on a document-by-document basis. To facilitate this process of review, the Special Master and the Court Observer shall require the parties to meet and confer within five (5) days to agree on and establish such categories. On the fifth day after filing of this Order, the parties shall submit their proposed categories to the Special Master via filing on CLAD. In the event that no such agreement can be reached by the parties, the Court will resolve the question itself, naming the categories into which the parties shall place their allegedly privileged documents. Once the categories have been established, the parties shall have ten (10) additional days to divide the documents for which they claim privilege into such categories and shall submit their categorized documents for review by the Special Master and argument by counsel on a schedule to be

[1] The parties have represented that at least 150,000 documents have been listed on the privilege logs to date; no party with the exception of Liggett, has yet completed its privilege logs.

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determined by the Special Master.

3. The process for review of documents to determine whether or not the documents are privileged, and whether or not such privilege has been lost or waived, shall begin with the Liggett documents:

A. All Liggett documents for which the Non-Settling Defendants do not claim a joint defense/common interest privilege shall be unsealed and released to Plaintiffs. The documents shall be placed in the Minneapolis depository in accordance with the procedures established in this case. Such documents include:

(1) Of the five boxes of Liggett documents filed with the Court, under seal on March 28, 1997:

(A) All documents designated by Liggett as Liggett-only privileged documents, *with the exception* of those listed in paragraph 1 of this Court's Order Unsealing Certain Documents of Liggett Group, Inc., dated April 15, 1997 (CLAD A01 873).

[Previously released. See Stipulated Order Regarding Court's April 15, 1997, Order, filed April 28, 1997 (CLAD A01 903).]

(B) All documents, release of which has been agreed to by the Non-Settling Defendants, to wit:

LG 2004953/4960
LG 2004997/5006
LG 2004973/4996
LG 2004961/4972
LG 2006143
LG 2004915/4917
LG 2006651/6652
LG 2008291/8294
LG 2001184
LG 2004179
LG 2004270
LG 2006217/6219
LG 2006426/6429
LG 2006430/6451
LG 2006452/6473
LG 2006474/6477
LG 2006518/6551
LG 2006558/6561
LG 2007170/7175
LG 2007279/7281
LG 2007311/7341

[Previously released. See this Court's Order Unsealing Certain Documents of Liggett Group, Inc., dated April 15, 1997 (CLAD A01 873), paragraph 3, and Order Unsealing a Second Group of Certain Documents of Liggett Group, Inc., dated April 28, 1997 (CLAD A01 902).]

(C) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett's Privilege Log - Joint Defense Documents -2, filed April 28, 1997 (CLAD A01 893) - Exhibit T), to wit:

LG 2001258/1438
LG 2001634/2059
LG 2002064/2105
LG 2002106/2137
LG 2002138/2173
LG 2002765/2801
LG 2002802/2837
LG 2002869/2902
LG 2002903/2938
LG 2002940/2941
LG 2002942/2979
LG 2002986/2987
LG 2003119/3136
LG 2003137/3171
LG 2003172/3192
LG 2003193/3226
LG 2003247/3292
LG 2003294/3298
LG 2003299/3304
LG 2003307/3311
LG 2003336/3337
LG 2003338/3349
LG 2003440/3514
LG 2003515/3550
LG 2003551/3586
LG 2003796/3832
LG 2003878/3885
LG 2003898/3934
LG 2003939/3942
LG 2003947/3951
LG 2003952/3992
LG 2003993/3997

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(D) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett's Privilege Log -Joint Defense Documents -2, filed April 28, 1997 (CLAD A01 893) - Exhibit U), to wit:

LG 2002939
LG 2003118
LG 2003313/3314
LG 2003315
LG 2008313

(2) Of the two boxes of Liggett documents received by Defendants on April 8, 1997:

(A) That document to which Liggett does not assert any privilege or protection and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure, filed April 23, 1997 (CLAD A01 893) - Exhibit I, to wit:

LG 0304127/4176

[Apparently released. See Letter to Hon. Kenneth J. Fitzpatrick, dated April 30, 1997 (CLAD A01 911).

(3) Of the one box of Liggett documents received by Defendants on April 10, 1997:

(A) Those documents to which Liggett does not assert any privilege or protection and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure, filed April 23, 1997 (CLAD A01 893) - Exhibit M, to wit:

LG 0310305/0311
LG 0310505/0506

[Apparently released. See Letter to Hon. Kenneth J. Fitzpatrick, dated April 30, 1997 (CLAD A01 911).]

(B) That document to which Liggett does not assert any privilege or protection and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure, filed April 23, 1997 (CLAD A01 893) - Exhibit N, to wit:

LG 0308366/8374

[Apparently released. See Letter to Hon. Kenneth J. Fitzpatrick, dated April 30, 1997 (CLAD A01 911).]

(4) Of the eight boxes of Liggett documents filed with the Court, under seal, on April 10, 1997:

(A) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box A, filed April 28, 1997 (CLAD A01 905) - Exhibit Y), to wit:

LG 2008950/8952
LG 2008953
LG 2008954/8956
LG 2008957
LG 2010193/0195
LG 2010196/0198
LG 2010199/0203
LG 2010204/0209
LG 2010210/0212
LG 2010213/0215
LG 2010216/0222

(B) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box A, filed April 28, 1997 (CLAD A01 905) - Exhibit Z), to wit:

LG 2008897/8900
LG 2008913/8915

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LG 2008921/8922
LG 2008973/8975
LG 2008976/8977

(C) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box B, filed April 28, 1997 (CLAD A-01 905) - Exhibit DD), to wit:

LG 2011851/1853
LG 2011880/1882
LG 2011854/1857
LG 2011859/1863
LG 2011864/1869
LG 2011870/1872
LG 2011873/1879

(D) The document to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box B, filed April 28, 1997 (CLAD A01 905) - Exhibit EE), to wit:

LG 2011858

(E) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box D, filed April 28, 1997 (CLAD A01 905) - Exhibit KK), to wit:

LG 2017753/7755
LG 2017975/7981
LG 2017982/7984
LG 2018465/8466
LG 2018495/8496
LG 2018500
LG 2018501
LG 2018502
LG 2018503
LG 2018504
LG 2018505
LG 2018506/8607
LG 2018508/8513
LG 2018514
LG 2018515
LG 2018516/8518
LG 2018546
LG 2018547/8548
LG 2018549/8552
LG 2018554/8555
LG 2018558
LG 2018563
LG 2018564/8565
LG 2018566/8568
LG 2018569/8570
LG 2018572/8575
LG 2018576
LG 2018577/8591
LG 2018593
LG 2018594/8595
LG 2018596
LG 2018597/8600
LG 2018601/8602
LG 2018605/8606
LG 2018615/8622
LG 2018624
LG 2018627/8628
LG 2018629/8660

(F) Those documents to which Liggett has waived its privilege and to which the Non-Settling Defendants assert no Joint Defense/Common Interest Privilege (see Defendants' Objections to Disclosure of Documents Identified on Liggett Privilege Log - Joint Defense Documents - Box D, filed April 28, 1997 (CLAD A01 905) - Exhibit LL), to wit:

LG 2018494
LG 2018559/8562

(5) All other Liggett documents not otherwise listed herein, excepting only those listed on the Order Requiring Legible Copies of Certain Documents of Liggett Group, Inc., filed May 9, 1997, by this Court.

B. The Special Master is ordered to review the following documents, those for which the Non-Settling Defendants claim a joint

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defense/common interest privilege not claimed by Liggett, and determine whether the joint defense/common interest privilege asserted by the Non-Settling Defendants is valid:

(1) Of the five boxes of Liggett documents filed with the Court, under seal, on March 28, 1997:

(A) Those documents designated by Liggett as Liggett-only privileged documents, listed in paragraph 1 of this Court's Order Unsealing Certain Documents of Liggett Group, Inc., dated April 15, 1997 (CLAD A01 873); to wit:

LG 2002496
LG 2008179/8181
LG 2008291/8294
LG 2000027
LG 2000028/0029
LG 2000419
LG 2000431
LG 2000432/0433
LG 2000633
LG 2001184
LG 2003688/3706
LG 2004116
LG 2004128
LG 2004179
LG 2004270
LG 2004294
LG 2004310
LG 2004511
LG 2004714
LG 2005780
LG 2005869
LG 2006013/6014
LG 2006217/6219
LG 2006226
LG 2006426/6429
LG 2006430/6451
LG 2006452/6473
LG 2006474/6477
LG 2006518/6551
LG 2006558/6561
LG 2007170/7175
LG 2007279/7281
LG 2007311/7341
LG 2007990/7991
LG 2008038/8039

(2) Of the two boxes of Liggett documents received by Defendants on April 8, 1997:

(A) Those documents to which Liggett does not assert any privilege or protection, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 23, 1997 (CLAD A01 893) - Exhibit G, to wit:

LG 0303238/3239
LG 0303274
LG 0303275
LG 0303277/3279
LG 0303836/3837
LG 0303881/3884
LG 0303891/3899
LG 0303907
LG 0303944/3954
LG 0304047
LG 0304750/4760
LG 0308285
LG 0308286/8287

[Copies filed with the court, under seal for *in camera* review, by Liggett on April 30, 1997. See Letter to Hon. Kenneth J. Fitzpatrick, filed April 30, 1997 (CLAD A01 911).]

(3) Of the one box of Liggett documents received by Defendants on April 10, 1997:

(A) Those documents to which Liggett does not assert any privilege or protection, listed by the Non-Settling Defendants in Defendants in Defendants' Objections to Disclosure, filed April 23, 1997 (CLAD A01 893) - Exhibit K, to wit:

LG 0308468
LG 0309952/9957
LG 0310739
LG 0310807/0808
LG 0310827/0846

[Copies filed with the court, under seal for *in camera* review, by Liggett on April 30, 1997. See Letter to Hon. Kenneth J. Fitzpatrick, filed April 30, 1997 (CLAD A01 911).]

(4) Of the eight boxes of Liggett documents filed with the Court, under seal, on April 10, 1997:

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(A) Those documents identified on Liggett Privilege Log - Non-Joint Defense Documents - Box G, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit TT, to wit:

LG 2008684/8757
LG 2013254/3264
LG 2013641/3643
LG 2013775/3785
LG 2013786/3789
LG 2013793/3807
LG 2013879/3880
LG 2013955/3965

(B) Those documents identified on Liggett Privilege Log - Non - Joint Defense Documents - Box H, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit WW, to wit:

LG 2019783/9794
LG 2019979/9991
LG 2020166
LG 2020191
LG 2020280/0286
LG 2020395/0401
LG 2020518/0526
LG 2020615
LG 2020616/0617
LG 2020618/0619
LG 2020668/0669
LG 2020670/0672
LG 2023712
LG 2023762/3764
LG 2023766/3772

C. As to the balance of the Liggett documents, those listed below and those which the Special Master has found, pursuant to paragraph B above, to be within the joint defense/common interest privilege, the Defendants shall divide the documents into categories according to the type of privilege claimed. The Defendants shall have the opportunity to rebut the *prima facie* showing made by Plaintiffs that the privilege should be lost under the crime-fraud exception. The Special Master shall set forth the schedule for briefing and argument of said rebuttal. Said documents include:

(1) Of the five boxes of Liggett documents filed with the Court, under seal, on March 28, 1997:

(A) Those documents identified on Liggett's Privilege Log - Joint Defense Documents - 1, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 15, 1997 (CLAD A01 872) - Exhibit A.

(B) Those documents identified on Liggett's Privilege Log -Joint Defense Documents -2, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 15, 1997 (CLAD A01 872) - Exhibit C.

(C) Those documents identified on Liggett's Privilege Log - Joint Defense Documents - 2, listed by the Non-Settling Defendants in Defendants' Amended Objections to Disclosure, filed May 2, 1997 (CLAD A01 915) - Exhibit C1.

(2) Of the eight boxes of Liggett documents filed with the Court, under seal, on April 10, 1997:

(A) Those documents identified on Liggett Privilege Log -Joint Defense Documents - Box A, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit W.

(B) Those documents identified on Liggett Privilege Log - Joint Defense Documents - Box B, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit BB.

(C) Those documents identified on Liggett Privilege Log - Joint Defense Documents - Box C, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit GG).

(D) Those documents identified on

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Liggett Privilege Log - Joint Defense Documents - Box D, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit JJ.

(E) Those documents identified on Liggett Privilege Log - Joint Defense Documents - Box E, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 28, 1997 (CLAD A01 905) - Exhibit NN.

(F) Those documents identified on Liggett Privilege Log - Joint Defense Documents - Box F, listed by the Non-Settling Defendants in Defendants' Objections to Disclosure, filed April 8, 1997 (CLAD A01 905) - Exhibit QQ.

4. This process shall then be applied to the documents for which privilege is claimed by the remaining parties according to the schedule set forth by the Special Master.

May 9, 1997

Kenneth J. Fitzpatrick
Judge of District Court

MEMORANDUM

Background

Throughout the more than two and one-half years since this action was filed, the parties have expended an unprecedented amount of time and money in the discovery phase. Millions of pages of documents have been produced to date and deposited in the Minneapolis Depository for review by the parties. Of the millions of pages found to be responsive to discovery requests, the parties have claimed privilege with respect to approximately 150,000 documents. Pursuant to the Case Management Order,[2] as amended, the parties have prepared "privilege logs" which contain objective information with respect to each document for which privilege is claimed. The parties have exchanged privilege logs. Based upon their review of the logs and the documents which have been produced to date, the Plaintiffs contend that the Defendants have improperly asserted privilege with respect to certain categories of documents, such as scientific studies. Whether privilege has been properly asserted is now ripe for consideration.[3]

On March 25, 1997, the Court appointed a Special Master to establish procedures for determining issues with respect to claims of privilege.[4] In determining such procedures, the Special Master and the Court note that privilege is claimed for a least 150,000 documents. An *in camera* review of each and every of the 150,000 documents is a stupendous, if not impossible, undertaking. Arbitrarily assuming that it would take only five minutes to retrieve a documents, check it against the privilege log, read it quickly, and assign it to a "privilege category" (such as ordinary work product or attorney-client communication), it would take the Special Master 750,000 minutes, or 12,5000 hours, to review all the privileged documents. This is roughly 6.25 years of a lawyer's working career. To complete the task in two months, in order that documents found to be non-privileged would be available during the deposition period, it would take more than 30 people working 200 hours per month. Thus, an *in camera* review of each and every individual document, not to mention briefing and arguments with respect to such documents, is not feasible. An efficient procedure by which groups of documents can be examined and dealt with, while preserving due process, must be created and implemented.

The Court and the Special Master have considered the procedures and processes suggested by the parties. Some of the suggested procedures, indeed, would serve the cause of expediency and judicial efficiency. Others would provide extensive protection of due process rights. However, no one proposal appears to sufficiently balance the rights of the parties with the real problem of the sheer volume of documents for which privilege is claimed.

However, pursuant to Liggett's settlement with certain Attorneys General and this Court's order, Liggett has deposited its allegedly privileged documents along with privilege logs, with the Court. Liggett waived its claims of privilege with respect to

[2] See Case Management Order, dated March 29, 1995.

[3] Seven months ago, Plaintiffs brought a motion to compel discovery of allegedly privileged documents, urging the Court that Defendants had waived their right to claim privilege by failing to adequately describe documents on the privilege logs properly invoking claims of privilege. The Court determined that such relief was not then appropriate. See Plaintiffs' Memo to Waive Privilege for Documents Inadequately Described on Defendants' Privilege Logs, ..., dated September 16, 1996, and Court's Order Denying Plaintiffs' Motion to Waive Privilege, dated November 8, 1996.

[4] See Order Referring Certain Matters to a Special Master, dated March 25, 1997.

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these documents. The parties agreed, however, that these documents would not be disseminated until the non-settling Defendants had an opportunity to review the privilege logs and assert any joint defense or common interest privileges. Those documents for which the non-settling Defendants claimed no joint defense privileges have been released to the parties.[5] The remaining Liggett documents constitute a much smaller population than the 150,000 total estimated documents for which the parties claim privilege. Their review for claims of privilege and exceptions thereto shall commence according to the procedures established herein.

We have a unique opportunity to construct a process for determining privilege, a process that can be applied first to the Liggett documents, and later to the allegedly privileged documents of each of the other parties to this action. The process is as follows. As the preliminary step in the process, each party shall divide the documents for which it claims privilege into privilege classes or "categories" such as attorney-client, work product, and joint defense and deposit the documents with the Special Master. Once all the documents area assigned to the appropriate categories, the Special Master will apply the law with respect to that category to the documents in the category. On a schedule established by the Special Master, each party would have the opportunity to present arguments with respect to its categorized documents. Based on his review, the parties' arguments, and a random review or "spot check" of documents produced in each category, the Special Master will make his determination as to whether such documents are, indeed, entitle to the protection of privilege. The Court will then make the appropriate rulings.

By categorizing the documents and dealing with them in batches,[6] we can reduce repetitious briefing and argument without sacrificing due process to the need for an expeditious determination in order to maintain a reasonable pretrial schedule.

Analysis

The relationship between an attorney and his or her client is unique. The attorney is the advocate of the client and his or her rights. In order to provide the best representation, communications between client and attorney must be uninhibited by fears that information shared might be disseminated to others. In order that the fullest communication can take place between client and attorney, the law has provided protection for these communications - the attorney-client privilege:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minn. Stat. § 595.02(b).

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. V. United States*, 449 U.S. 383, 389 (1981). The party asserting the privilege has the burden of establishing the privilege. The elements of the attorney-client privilege are well established: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived. *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 62 N.W.2d 688 (1954) (citing 8 Wigmore, Evidence (3d ed.) §2324).

The attorney-client privilege is nearly absolute. Such communications cannot be disseminated by the attorney, as the privilege belongs to the client. Only the client may waive the privilege. The privilege may be waived expressly or by disclosure of the information to a third party. Either the client or the client's attorney, on the client's behalf, can assert the privilege.

Similarly, protection from disclosure is provided to the work product of the attorney. Attorney work product is divided into two categories - opinion work product and ordinary work product. Again, the party asserting the privilege has the burden of establishing that the privilege applies. Opinion work product is that consisting of an attorney's opinions, impressions, and theories: "[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Minn R. Civ. P. 26.02(c). Opinion work product is absolutely privileged from disclosure.

[5] See Order Unsealing Certain Documents of Liggett Group, Inc., filed April 15, 1997; Or sealing a Second Group of Certain Documents of Liggett Group, Inc., filed April 28, 1997; or subsequent Orders.

[6] The review of 'batches' of documents as opposed to a document-by-document review specifically envisioned by the U.S. District Court, District of Kansas. *In Re A.H. Robing Co., In* F.R.D. 2, 15 (1985).

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Brown v. Saint Paul City Ry., 241 Minn. 15, 35, 62 N.W.2d 688, 701 (1954) ("[t]he immunity of the so-called 'work product of the lawyer[]'…was made absolute in our rule."); but *c.f. Haines v. Liggett Group, Inc.*, 975 F.2d. 81, 94 ("[t]his court has accorded an attorney's work product *almost absolute* protection from discovery…" (emphasis addedd)).

Ordinary work product does not enjoy the same protection; the privilege is not absolute. "[D]ocuments and tangible things…prepared in anticipation of litigation or for trial by or for another party or by or for another party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case 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). Thus, ordinary work product is protected, but the protection will be withdrawn if the party seeking discovery of the ordinary work product can demonstrate substantial need for the information and is unable to obtain the information by other means.

Another privilege is the joint defense or "common interest" privilege. It is an extension of the attorney-client privilege. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). It is invoked to protect communications between different persons or entities "when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'" *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. Denied*, 474 U.S. 946 (1985). Defendants in this action claim that certain of the Liggett documents should not be disclosed because they are covered by the joint defense privilege. To establish this privilege, the Defendants "must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort and (3) the privilege has not been waived." *Matter of Bevill, Bresler & Schulman Asset Management*, 805 F.2d 120, 126 (3d Cir. 1986). "[T]he joint defense privilege cannot be waived without the consent of all parties to the defense." *John Morrell & Co. V. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 556 (8th Cir. 1990) (citations omitted). Defendants assert, correctly, that Liggett cannot waive the joint defense privilege; all parties must agree to do so. The non-settling Defendants, of course, have not. Thus, the Liggett documents over which Defendants claim a joint defense privilege must be examined. Defendants bear the burden of establishing the three elements listed above apply to the documents since they seek to apply the privilege to bar discovery.

Assuming that the party asserting the privilege can demonstrate the necessary elements for privilege to attach, the information may yet be discoverable. The privileges are not absolute. "[S]ince the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 84 (3rd Cir. 1992) (citing with approval *Fisher v. United States*, 425 U.S. 391, 403 (1976)). In this matter, Plaintiffs argue that the privilege asserted by the Defendants is lost by application of the crime-fraud exception and, therefore, the documents should be made available.

The purpose of the crime-fraud exception to documents otherwise protected by the attorney-client privilege is "to ensure that the 'seal of secrecy' between lawyer and client does not extend to communications from the *lawyer* to the client made by the *lawyer* for the purpose of giving advice for the commission of a fraud or crime." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992) (emphasis in the original). "The advice must relate to future illicit conduct by the client…" *Id*. This is exactly what the Plaintiffs argue - that counsel for the tobacco industry advised the industry to conceal documents and research harmful to the industry by depositing the documents with counsel, by routing correspondence through the industry counsel, by naming damning research projects as "special projects" purportedly ordered by counsel, etc., to cover potentially dangerous materials under a blanket of attorney-client privilege protection, and Plaintiffs wish to tear this blanket away. The Court, however, does not determine whether the crime or fraud averred has in fact occurred; it does not opine about the merits of the assertions of crime or fraud. It merely examines known facts to determine whether or not the party seeking disclosure has made a *prima facie* showing of crime or fraud. *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2,9 (1985). The privilege blanket is torn away if the court finds that the documents in question "bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *Robins*, 107 F.R.D. at 15, citing *In Re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977).

In considering whether the crime-fraud exception may be applied to the facts of this case, this Court has made several findings relating to statements made by the Defendants to the public. Collectively, these statements could be characterized as assurances by the industry that it would make an honest attempt to learn whether the smoking of cigarettes created health hazards. The Court also concludes that the Defendants had an independent obligation to conduct research into the safety of its product, and to warn the product's consumers if the research results supported

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negative conclusions. *A manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products. See Jenkins v. Raymark Indus. 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") and No. 119 (duty to warn). The cigarette industry itself has recognized this duty. PM 1000335622.* Plaintiffs have presented evidence, and the Court has found, however, that the Defendants have claimed that safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege.

At the same time, it is indisputable that the Defendants have made public statements intended to minimize or reduce fears that smoking is dangerous to one's health. This Court does not believe that Defendants should be permitted to use in its advertising and public relations campaigns, health-related research which supports their economic interests, and to claim privilege for research which may lead to the opposite conclusion. See *Laughlin v. A.H. Robins*, Minn. Dist. Ct. No. 776-868 (March 21, 1984). If the Defendants had an obligation to disclose the hazards of tobacco products, and this Court concludes that they did, their obligation to disclose cannot be eliminated by the assertion of attorney-client privilege.

A two-part test is necessary in determining whether the crime-fraud exception applies to the privileged material.

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992) (citing *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987)(citations omitted)), order vacated on other grounds, 975 F.2d 81 (3rd Cir. 1992).

The burden of establishing that the crime-fraud exception should apply now falls on the Plaintiffs. The Plaintiffs "bear[] the burden of presenting a *prima facie* case that the crime-fraud exception applies. *Levin v. C.O.M.B. Co.*, 469 N.W. 2D 512, 515 (Minn. Ct. App. 1991). Just what constitutes a *prima facie* case has been expressed by the courts in different words, yet the evidentiary standard is fundamentally the same. The Supreme Court used these words: "To drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that it has some foundation in fact.' When the evidence is supplied, the seal of secrecy is broken." *Clark v. United States*, 289 U.S. 1, 14-15 (1933) (citations and footnote omitted). The Second Circuit phrased it a little differently; "[The tests] require that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984).

The evidentiary burden is lessened when disclosure is initially made only to the Court or Special Master for an *in camera* review, because such an inspection is a lesser intrusion into the attorney-client communications than full public disclosure. *United States v. Zolin*, 491 U.S. 554, 572 (1989).

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

Id.

Thus, the Court or Special Master may examine the submission of the Plaintiffs and decide whether there is enough factual evidence "to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 96 (3rd cir. 1992). This is only a preliminary step, however. It can result, at best, in an *in camera* review of the challenged document. To determine whether or not the exception applies, the Defendants must "be given an opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." *Id*. at 97. This

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evidentiary hearing must provide due process, i.e. "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2, 6(1985) (citing In *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)). The fact finder then will apply the crime-fraud exception only when it "determines that the client communication or attorney work-product in question was *itself* in furtherance of the crime or fraud." *In re Richard Roe*, 68 F.3d 38, 40 (2nd Cir. 1995).

The court has the discretion whether or not to engage in an *in camera* review and the extent of that *in camera* review.

> [T] decision whether to engage in *in camera* review [should] rest [] in the sound discretion of the [trial] court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the *volume of materials* the [] court has been asked to review, the relative importance to the case of the alleged privileged information, and the *likelihood* that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

United States v. Zolin, 491 U.S. 554, 572 (1989). It follows, then, that the court must exercise its discretion in light of the factors set forth in *Zolin* to create a process that balances the need for judicial efficiency with the parties' due process rights. The process set forth herein, *infra*, has been designed to do just that.

While other courts have mentioned examination of up to 15,000 pages of documents, this suit involves ten times that amount. An *in camera* review of each and every individual document for which a privilege is asserted, followed by rebuttal arguments and submissions, would take years. The court will not countenance such a delay. Accordingly it incorporates the "categories" system, similar to the "batches of documents" system set forth in the *Robins* case.

Conclusion

Pursuant to the Attorneys General Settlement Agreement dated 3/20/97, Liggett has produced documents for which it claimed privilege. Liggett has waived its privilege with respect to certain of those documents, and such documents have been ordered produced to the Plaintiffs herein. Defendants claim a joint defense privilege with respect to the remaining documents produced by Liggett. Plaintiffs, however, have made a *prima facie* case to invoke the crime-fraud exception. Thus, further review of the remaining Liggett documents by the Special Master is warranted. Such review shall proceed according to the procedures established herein by the Special Master and approved by this Court, which procedures shall apply to all parties' allegedly privileged documents unless otherwise ordered.

K.J.F.

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