STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL
Court File No. C1-94-8565

The State of Minnesota,
By Hubert H. Humphrey, III,
Its Attorney General
and
Blue Cross and Blue Shield of Minnesota,
Plaintiffs,
vs
Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
B.A.T. Industries, p.l.c.,
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.

REPORT OF SPECIAL MASTER: FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS REGARDING NON-LIGGETT PRIVILEGE CLAIMS

Hearings on the above-named matter took place on October 15, 1997 through October 18, 1997, before Special Master Mark W. Gehan. Roberta Walburn, Esq., Michael Ciresi, Esq., and Corey Gordon, Esq., appeared and argued on behalf of Plaintiffs. Noel Clinard, Esq., William Allinder, Esq., William Plesec, Esq., James Goold, Esq., George Anhang, Esq., Leslie Wharton, Esq. Craig Proctor, Esq., Philip Cohen, Esq., John Getsinger, Esq., Tom McCormack, Esq., David Martin, Esq., Steve Klugman, Esq., Michael Corrigan, Esq., Ann Walker, Esq., Cheryl Ragsdale, Esq., Cynthia Cecil, Esq. and James Munson, Esq. appeared and argued on behalf of their respective clients, Defendants herein, with the exception of Liggett Group, Inc.
Members of the public and media also attended and observed the proceedings.
The hearings of October 15th t 1. Product liability litigation involving more than one of the major cigarette manufacturers began in March, 1954 when the smoking and health lawsuit, Lowe v. R.J. Reynolds, et al., was filed. See Affidavits of James W. Dobbins, ¶ 8 (6/20/96). The defendants have engaged in a joint defense effort and share information in furtherance of common legal interests since at least 1954. See Affidavits of James W. Dobbins, ¶ 15 (6/20/96); Denise F. Keane, ¶ 6 (6/20/96); Ronald F. Bianchi, ¶ 15 (4/7/97); Arthur J. Stevens, ¶ 14 (4/7/97); Lawrence E. Savell, ¶ 14 (6/20/96); Susan B. Saunders, ¶ 10 (6/19/96); William Adams, ¶ 9 (6/19/96); and Declaration of Alexander Holtzman, ¶ 4 (5/15/96). The defendants' coordinated defense efforts have included meetings among counsel, exchanging materials prepared in anticipation of litigation, and identifying and consulting with potential expert witnesses. Id. In 1964, the first smoking and

health lawsuit involving the Council for Tobacco Research - U.S.A., Inc. ("CTR") and the Tobacco Institute, Inc. ("TI") as co-defendants, Fine v. Philip Morris Inc., et al., was filed. See Affidavit of Lawrence E. Savell, ¶ 13 (6/20/96). Since 1954, smoking and health litigation has been pending continuously against one or more of the major cigarette manufacturers, CTR and TI. Id. at ¶ 9; Affidavits of James W. Dobbins, ¶ 8 (6/20/96); Ronald F. Bianchi, ¶ 8 (4/7/97); and Arthur J. Stevens, ¶ 8 (4/30/96). Such litigation has raised recurring factual and legal issues common to the defendants, including allegations of injury from smoking and the use of false statements in cigarette advertising, among others. See Declaration of Alexander Holtzman, ¶ 5 April, 1997 and Declaration of Philip H. Cohen, Liggett Exhibits A, B and M, May 23, 1997.

1. In the 1950's, regulatory activities (apart from continuing antitrust scrutiny) affecting the cigarette industry as a whole began to accelerate. Such activities have continued unabated from the 1950's to the present and have occurred on a federal, state, local and international level. These activities have involved a wide variety of federal regulatory agencies including the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") among others. See, e.g., Defendants' Liggett Exhibit 37. The activities have covered a wide range of issues, including cigarette advertising; placement and use of health warning notices on cigarette packages and in cigarette advertising; placement and use of tar and nicotine yields on cigarette packages and in cigarette advertising; restriction and prohibition of broadcast cigarette advertising; testing of cigarettes for tar, nicotine and carbon monoxide yields; excise taxes; reporting of ingredients used in cigarette manufacturing; restriction and prohibition of smoking aboard commercial aircraft, interstate buses and interstate trains; and, smoking in public place, among others.
2. A review of the documents at issue and exhibits submitted by defendant establishes that federal regulatory activities since the 1950's involving the cigarette industry have included disputes between federal regulatory agencies (predominantly the FTC) and the major cigarette manufacturers. These disputes have involved a variety of issues such as cigarette advertising content and placement, broadcast cigarette advertising, the authority of the FTC to issue orders to file special reports and authority of the FTC to promulgate regulations.
3. Legislative activities on the federal level affecting the cigarette industry began in at least 1957 with the "Blatnik hearings," which addressed the disclosure of tar and nicotine yields in advertising. Since 1965, the defendants have monitored proposed legislation raising issues of common interest to the industry and have attended and testified at hearings regarding a wide variety of proposed and existing legislation. See, e.g., Defendants' Liggett Exhibit 38.
4. Plaintiffs' request that I find Defendants to have waived their joint defense/common interest claims to their documents because Plaintiffs claimed Defendants have violated my orders requiring the production of joint defense agreements upon which Defendants rely or which are relevant to the documents at issue. On October 27, 1997, I filed an Order with Judge Fitzpatrick (CLAD 1588) in which I recommended that he consider the imposition of sanctions, and in the absence of judicial direction, I do not consider it appropriate at this time to impose the remedy which Plaintiffs have requested.

5. Defendants are not relying on their written joint defense agreements as support for the assertion of their joint defense/common interest claims.
6. The joint defense/common interest privilege does not require a written agreement. As long as parties are "allied in a common legal cause," shared communications and work product are protected by the privilege. In re Regents of the University of California, 101 F.3d 1386, 1389, 1390-91 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 1484 (1997). The joint defense/common interest privilege also covers legal advice and strategy relating to regulatory or legislative proceedings. See In Re Sealed Case, 107 F.3d 46 (D.C. Cir. 1997). When, as in this case, joint defense efforts have been undertaken by the parties and their respective counsel, work product exchanged between counsel and confidential communications related to that common interest are protected from disclosure by the privilege. E.g., United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989), on remand, 738 F.Supp. 654 (E.D.N.Y. 1980), aff'd, 924 F.2d 443 (2d Cir. 1991), cert. denied, 502 U.S. 810 (1991). This presupposes, of course, that the communications and work product are privileged in the first place.
7. By an order dated May 9, 1997, Judge Fitzpatrick of the Ramsey County Minnesota District Court concluded that plaintiffs had established a prima facie case of crime-fraud in this case, sufficient to permit an in camera inspection of documents and to create the need for additional proceedings to permit the defendants an opportunity to rebut plaintiffs' evidence. At hearings which occurred on October 15 through October 18, 1997, the defendants offered evidence to respond to plaintiffs' prima facie showing. During these hearings, some evidence and argument was offered on an in camera basis, i.e., plaintiffs and other defendants were excluded from the proceedings.
8. In the early 1950's, several researchers reported the results of laboratory and epidemiological studies that, they claimed, linked smoking to disease. See Affidavit of Kenneth M. Ludmerer, M.D., February 12, 1997.
9. On January 4, 1954, in response to widespread publicity generated by these studies, the major cigarette manufacturers (except Liggett) and other tobacco-related organizations caused "A Frank Statement to Cigarette Smokers" to be published in numerous newspapers. The "Frank Statement" stated that these companies were forming a "joint industry group," to be known as the Tobacco Industry Research Committee ("TIRC"), 1954 Frank Statement, Pl. Ex. 2(1).
10. Because of concerns relating to a long history of antitrust difficulties and litigation dating back to at least 1911, representatives of the tobacco industry invited the United States Department of Justice ("DOJ") to meet with them to discuss the formation of TIRC. Although DOJ declined to attend this meeting, the tobacco companies kept DOJ advised as to the industry's joint research efforts through CTR and in January 1954 provided DOJ with a copy of CTR's "Statement of Purpose." See Affidavit of Irwin Tucker, January 28, 1997 ¶ 4; In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 48-51. (2/15/97)
11. In 1964, TIRC changed its name to The Council for Tobacco Research -- U.S.A. In 1971, The Council for Tobacco Research -- U.S.A., Inc. was incorporated. See Affidavit of Glenn, ¶ 6. These organizations collectively are referred to herein as "CTR."
12. The uncontroverted evidence before the Court establishes that: (1) the major U.S. tobacco companies, other than Liggett, have been members of CTR since 1954, See Affidavit of Glenn, ¶¶ 6, 8.

13. Continuously since 1954, CTR has acted as a joint industry group for the tobacco companies that are its members. (CTR's principal function throughout that time has been to fund scientific research by receiving monies from the tobacco companies and providing them to scientific investigators.) See Affidavit of Glenn, ¶¶ 6-9; See Affidavit of McAllister, ¶ 7.
14. Plaintiffs have produced evidence that the defendants have acted in concert for their mutual benefit and defense, at least since 1954, when each of the defendants with the exception of Liggett (the "defendants" or the "non-settling defendants"), published a document under the name Tobacco Industry Research Committee, now the defendant The Counsel for Tobacco Research - U.S.A., Inc. ("CTR"). This document, entitled "A Frank Statement to Cigarette Smokers" ("Frank Statement"), challenged the "theory that cigarette smoking is in some way linked with lung cancer in human beings." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1) (CTR MN 11309817).
15. In the "Frank Statement," the non-settling defendants made the following statements, among others:
    - 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.

The "Frank Statement" also made three specific promises:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in additional to what is already being contributed by individual companies.

2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

1. In December 1970, the Tobacco Institute ran a statement declaring that "[f]rom the beginning, the tobacco industry has believed that the American people deserve objective scientific answers." Plaintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMN 0081352. The statement also represented that "in the interest of absolute objectivity, the tobacco industry has supported totally independent research with completely non-restricted funding" and that "the findings are not secret." Id.
2. In 1971, the Tobacco Institute in a press release stated, in reference to finding the "keys" which might unlock the door between statistical evidence and causation:

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.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 4, Plaintiffs' Ex. 6(1), LG 0069275 at 0069279.

1. In a 1972 Wall Street Journal article, James Bowling, a Vice President of Defendant Philip Morris, Inc., ("PM") was quoted as saying:

If our product is harmful. . . we'll stop making it. We now know enough that we can take anything out of our product, but we don't know what ingredients to take out.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 5, Plaintiffs' Ex. 7(1), RJR 500324162 at 500342163.

1. In 1982, the Tobacco Institute published a pamphlet in which it wrote:

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.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 49, Plaintiffs' Ex. 8(1), B&W 670500617.

1. In 1990, a public relations employee of Defendant R.J. Reynolds Tobacco Company ("RJR") wrote a letter to a person by the name of Rook in Minnesota, apparently in response to a letter from Rook. The public relations employee asserted in that letter that ". . . scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking." The letter went on:

Our company intends, therefore, to continue to support [research] in a continuing search for answers.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 9(1), RJR 507703861-03862.

1. One way in which the industry publicly stated that it would fulfill this promise to conduct and disclose objective research was through the auspices of the CTR (originally named the Tobacco Industry Research Council, or TIRC). Internal documents, however, imply that top officials from the tobacco industry privately acknowledged that, contrary to the public representations, CTR was meant to serve primarily a public relations function and that CTR scientific research was of little value in addressing issues relating to the causal link between smoking and health. For example:
2. In May 1958, a BAT scientist (and others from the British tobacco industry) visited representatives of the U.S. industry and found that:

Liggett & Meyers stayed out of T.I.R.C. originally because they doubted the sincerity of T.I.R.C.'s motives and believed that the organization was too unwieldy to work efficiently. They remain convinced that their misgivings were justified. In their opinion T.I.R.C. has done little if anything constructive, the constantly reiterated "not proven" statements in the face of mounting contrary evidence has thoroughly discredited T.I.R.C., and the S.A.B. of T.I.R.C. is supporting almost without exception projects that are not related directly to smoking and lung cancer.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 5, BAT 105408490 at 8494.

- In another trip report written in 1964 by British scientists, it was stated:

[B]oth L&M and Lorillard scientists told us quite bluntly that they considered TRC [the British trade group] research was on the correct basis and CTR largely without value.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 17, PM 1003119099 at 9115.

- In 1967, W.W. Bates, Jr., Liggett's director of research, wrote to the president of the Tobacco Institute that the smoking and health problem "is basically a scientific one." Plaintiffs' Tab 12, Plaintiffs' Ex. 12(3), LG 0208295. Bates stated, however, that "So far...the major efforts of the industry have been other than scientific." Id. Bates further stated that:

The CTR and AMA programs suffer from almost the same fault. Most of their projects have only a peripheral connection to tobacco use.

Id. at LG 0209296.

- In 1970, Helmut Wakeham, head of research and development of Philip Morris, wrote a memorandum to the president of Philip Morris, Joseph Cullman. In this memorandum, Wakeham discussed the raison d'etr of CTR. Wakeham wrote:

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 allegations that cigarette smoking causes disease.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 14, Plaintiffs' Ex. 14(3) (PM 2022200161, 2022200162).

- A 1970 document discloses that another top Philip Morris scientist also questioned the worth of CTR research:

Osdene's view (Philip Morris' view?) was that C.T.R. did apparently no useful work and cost a vast amount of money.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 13, Plaintiffs' Ex. 13(3), p. 2, BAT 110316203 at 204. (Thomas Osdene was a senior research and development scientist at Philip Morris.)

- After a 1973 trip to the U.S., scientists from England wrote that:

It is difficult to avoid the sad conclusion that C.T.R. has become a backwater of little significance in the world of smoking and health.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 15, Plaintiffs' Ex. 15(3), p. 28, BAT 100226995 at 7022.

- Alexander Spears, research director at Lorillard Tobacco Company ("Lorillard"), explained to Curtis H. Judge, the chief executive officer, in a 1974 memorandum:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for purposes such as public relations, political relations, position for litigation, etc....In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 16, Plaintiffs' Ex. 34(1), p. 3, Lor 01421596 at 598.

- A memorandum written in November 1978 from Philip Morris executive Robert Seligman contained the following historical account showing that CTR was not set up to conduct objective research:

...Bill Shinn [attorney at Shook, Hardy] described the history, particularly in relation to the CTR. CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry "shield" in 1954....CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the

industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses.

. . .

Getting away from the historical story, Bill Shinn mentioned that the "public relations" value of CTR must be considered and continued.... A very interesting point, made by Bill Shinn, is the opposition's, "the case is closed with regard to smoking and disease."...It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed....There is a 'CTR' basket that must be maintained for PR purposes.

- One handwritten note, believed to be written by Addison Yeaman, the chairman of CTR, summed up the fact that CTR was created to protect the industry, not the public health. These notes, entitled "CTR Meeting," state:

CTR is best and cheapest insurance the tobacco industry can buy, and without it the industry would have to invent CTR or would be dead.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 17, Plaintiffs' Ex. 16(3), Lor 03539541.

- There also is evidence that for years the industry acted in concert to suppress or eliminate internal research on smoking and health, notwithstanding the industry's public representations to conduct research into "all phases of tobacco use and health" and report all facts to the public. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1), CTR MN 11309817.
- In 1968, Philip Morris director of research Wakeham described a "gentlemans agreement" under which the companies had agreed to refrain from conducting in-house biological experiments on tobacco smoke. Wakeham stated:

We have reason to believe that in spite of gentlemans agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 18, Plaintiffs' Ex. G(2), p. 4, PM 1001607055 at 058.

- A 1970 memo by D.G. Felton, a BAT senior scientist, also referenced this "tacit agreement" not to conduct in-house biological research. Plaintiffs' Tab 19, Plaintiffs' Ex. 24(3), p. 2, BAT 110315968 at 969. This memo further described how this "tacit agreement" led one company -- Philip Morris -- to direct another company -- RJR -- to shut down its in-house biological work. After learning that RJR was conducting biological studies, Philip Morris president Cullman lodged a complaint with RJR president Galloway. The result was a "sudden reorganization at Reynolds, resulting in the closure of the biological section." Id., pp. 2-3. This later became known as the "mouse house" incident.
- An April 1980 letter from Robert Seligman, a top executive in research and development at Philip Morris, to Alexander Spears, a senior scientist at Lorillard, listed potential areas of scientific research for the industry. Seligman included a list of "subjects which I feel should be avoided." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 20, Plaintiffs' Ex. 20(3), p. 1, Lor 01347175. The list entitled "Subjects To Be Avoided" included:

1. Developing new tests for carcinogenicity.
2. Attempt to relate human disease to smoking.

Id., p. 3 (emphasis added).

- Plaintiffs have presented substantial evidence showing involvement in scientific research and other scientific matters by attorneys for the tobacco industry, and that industry attorneys were a driving force behind the direction of and the suppression of scientific research. For example:
- In 1978, Sheldon Sommers, M.D., who was then Chairman of the CTR Scientific Advisory Board, complained to William Gardner, who was then the Scientific Director for CTR, that he [Sommers] was unable to understand the legal counsel he was being given. The import of Sommers' letter was that the CTR lawyers were controlling tobacco research by CTR based upon legal considerations. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 27, Plaintiffs' Ex. 33(1), CTR SF 0800031. Sommers also stated:

I think CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short.

Id.

- A hand-written memorandum dated April 21, 1978, produced from the files of defendant Lorillard, complains that:

We have again abdicated the scientific research directional management of the Industry to the "Lawyers" with virtually no involvement on the part of the scientific or business management side of the business.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 28, Plaintiffs' Ex. 25(3), LOR 01346204.

1. A 1976 internal memo by a 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.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), BAT 109938433.

1. A 1964 trip report by English scientists described how a powerful committee of U.S. lawyers was dominant in the smoking and health arena:

This Committee is extremely powerful; it determines the high policy of the industry on all smoking and health matters - research and public relations matters, for example, as well as legal matters - and it reports directly to the presidents.

. . .

The lawyers are thus the most powerful group in the smoking and health situation.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 7, PM 1003119099 at 105, 106. This Committee, later known as the Committee of Counsel, also was involved in "clearing papers (e.g. Dr. Little's annual report)." Id. Dr. Little was the first director of CTR; thus, a powerful committee of lawyers was involved in "clearing" CTR's annual reports on scientific research.

1. In his in camera and ex parte affidavit, Edwin Jacob, long-time counsel for CTR writes:

The decision to fund research created the related questions of whether that research should be performed internally or by outside researchers and, if the research was to be performed by outside researchers, whether the companies should direct the research or have it directed by others. The companies concluded that internal research or research conducted by outside researchers under industry contracts would not be given proper credit if, as they expected, it supported their belief regarding causation. Conversely, if the results were equivocal, the parts suggesting causal possibilities would be exaggerated. Further, the companies were concerned that, if the companies conducted research only internally, some would claim that they were pursuing the research half-heartedly, pursuing it improperly, or suppressing the results. Accordingly, the companies determined that the most effective and efficient way for the companies to conduct this research was to fund outside researchers selected by a board of eminent, independent scientists.

42. It appears that one method by which attorneys may have controlled research is through maneuvers intended to "create" privileges. In November, 1979, the corporate counsel for B&W, Kendrick Wells, wrote a memorandum to Ernest Pepples, B&W's vice president of law. Plaintiffs' Ex. 43(1), PM 2048322229. In this memorandum, Wells outlined a plan to wrap scientific information in attorney-client privilege. Mr. Wells' proposal specifically provided that ". . . in the operational context BAT would send documents without attempting to distinguish which were and which were not litigation documents." PM 20483222230.

1. Defendants also presented evidence at the three days of Liggett hearings showing that scientific research is directed into different classifications, with some scientific research being withheld on the basis of privilege. Defendants' Liggett Exhibit 41 depicts how "Industry Counsel" directed three categories of research: "Special Account Recipients (Confidential Consultants)," "Special Account Recipients" and "Special Projects Recipients."
2. The defendants and their representatives have, in fact, been aware that cigarette smoking is probably hazardous to the health of the smoker. A statistical association between smoking and illness has been conceded by the defendants, but there has been a long-standing scientific and public relations dispute as to whether one can infer "causation" from such an association.
3. For example, in April and May of 1958, three British scientists (including at least one from BAT, D.G. Felton) visited top officials and scientists in the U.S. tobacco industry, including those at TIRC, Liggett, Philip Morris and the American Tobacco Company. Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 1, BAT 105408490. One object of the visit was to find out "the extent in which it is accepted that cigarette smoke 'causes' lung cancer." Id., p. 2. The British scientists reported widespread acceptance of causation:

With one exception (H.S.N. Greene) [not formally affiliated with any tobacco company] the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is prepared now to doubt the statistical evidence and his reasoning is nowhere thought to be sound.

Id., p. 2. The authors concluded that there was no serious dispute that the statistical associations constituted a "cause and effect" phenomenon:

Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, scientific opinion in the U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship.

Id., p. 8.

- In 1959, an RJR scientist, Alan Rodgman, concluded that there is a "distinct possibility" that substances in cigarette smoke could have a carcinogenic effect. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 21(1), RJR 500945942.
- In 1962, Rodgman wrote:

The amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming, [while] the evidence challenging the indictment is scant.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 32, Plaintiffs' Ex. 22(1), p. 4, RJR 504822847 at 504822850.

- In 1964, Philip Morris scientist Wakeham examined the first Surgeon General's Report -- which found that smoking was causally related to lung cancer in men -- and found that "little basis for disputing the findings at this time has appeared." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 33, Plaintiffs' Ex. 24(1), p. 1, PM 1000335612. Wakeham commented on "[t]he professional approach" of the Surgeon General's committee. Id., p. 2.
- In 1967, G.F. Todd of the Tobacco Research Council [the British counterpart to TIRC/CTR] wrote a letter to Mr. Addison Yeaman, the vice president and general counsel of Brown & Williamson Tobacco Corporation. In his letter, Todd observed:

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 program 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.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 34, Plaintiffs' Ex. 26(1), LG 298942 at 298943.

- In October 1976, BAT scientist S.J. Green criticized the industry's public position on causation:

The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for 'scientific proof' whereas such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), p. 1, BAT 109938433. Dr. Green concluded that "It may therefore be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be." Id., p. 4.

- In 1979, P.N. Lee of BAT expressed his impressions of a 1979 Surgeon General's report dated January 11, 1979. In this memorandum, Lee considered at length the Tobacco Institute publication entitled "The Continuing Controversy," also identified as TA73. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), BAT 100214029, beginning at 100214045. That document itself is identified as TIMN 84430. Lee characterized the report as "misleading." He wrote that the report did not appear to understand what causation is. Lee wrote:

Discussion of the role of other factors can be particularly misleading when no discussion is made of relative magnitudes of effects. For example, heavy smokers are observed to have 20 or more times the lung cancer rates of non-smokers. Sure, this does not prove smoking causes lung

cancer, but what it does mean, and TA73 never considers this, is that for any other factor to explain this association, it must have at least as strong an association with lung cancer as the observed association for smoking (and be highly correlated with the smoking habit).

. . .

TA73 seems ready to accept evidence implicating factors other than smoking in the aetiology of smoking associated disease without requiring the same stringent standards of proof that it requires to accept evidence implicating smoking. This is blatantly unscientific.

BAT 100204046.

1. In fact, in 1980 BAT considered breaking ranks with the industry and admitting that smoking causes disease because BAT acknowledged that the "no causation" position was not credible:

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 the arguments eventually lead back to the primary issue of causation, and on this point, our position is unacceptable.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 36, Plaintiffs' Ex. 30(1), p. 2, BAT 109881322 at 323. The countervailing interest to this break from the industry's public dogma was the "severe constraint of the American legal position." Id., p. 10.

- In 1982, a BAT consultant, Francis Roe, found the industry position on causation "short of credibility," noting that "[i]t is not really true, as the American Tobacco industry would like to believe, that there is a raging worldwide controversy about the causal link between smoking and certain disease." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 37, Plaintiffs' Ex. 79(3), BAT 100432193.
- Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive.
- Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness. For example:
- In 1962, the Tobacco Institute issued a press release stating that:

The causes of cancer are not now known to science. Many factors are being studied along with tobacco. The case against tobacco is based largely on statistical associations, the meanings of which are in dispute.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 2, Plaintiffs' Ex. 4(1), PM 1005136953.

- In 1969, a CTR press release stated:

There 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.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 40, Plaintiffs' Ex. 12(1), B&W 670307882.

- In 1970, a CTR press release said:

The deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 41, Plaintiffs' Ex. 13(1), RJR 50001 5901.

- In 1970, a Tobacco Institute advertisement stated:

After millions of dollars and over 20 years of research: The question about smoking and health is still a question.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMN 0081352.

- In 1972, a Tobacco Institute press release, stated:

The 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."

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TIMN 012062.

61. In 1977, a Tobacco Institute pamphlet stated:

Has the Surgeon General's report established that smoking causes cancer or other disease? No.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 45, Plaintiffs' Ex. 25(1), TIMN 0055129.

1. In 1978, a Tobacco Institute pamphlet stated:

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.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TI 120602.

- In 1979, the Tobacco Institute circulated a report entitled "Smoking and Health 1964-1979: The Continuing Controversy." This report, which followed the 1979 Surgeon General's Report, stated that:

The American public would be better served if high government health officials and private interest groups which encourage them abandoned the myth of waging war against diseases and their alleged causes.... Indeed, many scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous. Unfounded because evidence on many critical points is conflicting. Dangerous because it diverts attention from other suspected hazards.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 47, Plaintiffs' Ex. 29(1), TIMN 0084430. (Internally, however, the tobacco industry acknowledged that the 1979 Surgeon General's report was "no doubt...an impressive document" and that "[t]he way in which the information was presented was on the whole sound, scientific and emotive." Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), at 2, BAT 100214029 at 030.)

- In 1983, an RJR advertisement said:

It has been stated so often that smoking causes cancer, it's 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.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 16(1), RJR 504638051.

- On February 2, 1984, the chairman of the board of RJR made the following comments as part of a panel discussion on the Nightline television program:

It is not known whether cigarettes cause cancer. RJR 502371216.

Despite all the research to date, there has been no causal link established [between smoking and emphysema]. RJR 502371217.

...as a matter of fact, there are studies that while we are accused of being associated with heart disease, there have been studies conducted over ten years that would say, again, that science is still puzzled over these forces. RJR 502371217.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 50, Plaintiffs' Ex. 17(1), RJR 502371216.

- These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking also were published in Minnesota. For example, the St. Paul Pioneer Press published the following articles:
- On October 13, 1954, the Pioneer Press quoted Timothy Hartness, chairman of TIRC, as stating that "no clinical evidence has yet established tobacco to be the cause of human cancer." Plaintiffs' Ex. 395.
- On November 24, 1954, the Pioneer Press quoted E. A. Darr, president of RJR, as stating that "there still isn't a single shred of substantial evidence to link cigarette smoking and lung cancer directly." Id.
- On April 19, 1963, the Pioneer Press quoted the director of the CTR scientific advisory board, C.C. Little, as stating:

It is at present scientifically unwise and indeed may be harmful to attribute a simple definitive causative role to any one of them or to attempt to assign them relative degrees of importance. Id.

- On February 7, 1965, the Pioneer Press quoted a tobacco industry spokesman saying that the link between smoking and disease is still unproved despite the Surgeon General's report. Id.
- On August 17, 1968, the Pioneer Press quoted the Tobacco Institute as attacking a Surgeon General's task force for a "shockingly intemperate defamation of an industry which has led the way in medical research to seek answers in the cigarette controversy." Id.
- On January 4, 1971, the Pioneer press quoted Joseph Cullman III, the CEO of Philip Morris, as reiterating the industry position that cigarettes" have not been proved to be unsafe" to human health. Id.
- On January 11, 1979, the Pioneer Press quoted the Tobacco Institute as stating that the "preoccupation with smoking may be both unfounded and dangerous. . . because evidence on many critical points is conflicting. . . (and it) diverts attention from other suspected hazards." Id.
- Since 1954, one of CTR's principal activities has been to fund scientific research by independent scientists through its grant-in-aid program, under the supervision of its Scientific Advisory Board (SAB) supplemented on occasion by research contracts. See Affidavit of Glenn, ¶ 7; Affidavit of McAllister, ¶ 7. CTR itself has not conducted any scientific research. See Affidavit of Glenn, ¶ 9. Through this research program, from 1954 through 1996 CTR has provided approximately $282 million to fund over 1,500 research projects by approximately 1,100 independent scientists. See Id., ¶ 16; 1996 Report of The Council for Tobacco Research -- U.S.A., Inc. p. 5.
- The researchers who have received CTR grant funding have been affiliated with approximately 300 medical schools, universities, hospitals and other research institutions, including such prestigious institutions as Harvard Medical School, Yale School of Medicine, Stanford University, numerous institutions in the University of California system, Johns Hopkins School of Medicine, the University of Chicago Medical Center, the Scripps Research Institute, the Mayo Clinic and the Salk Institute. See Affidavit of Glenn, ¶ 9& Ex. B. The researchers who have received this funding have not been

employees of the tobacco companies or CTR. The researchers who have received this funding have not been employees of the tobacco companies or CTR. CTR's grantees have included many distinguished scientists, three of whom have won Nobel Prizes. See Id., ¶ 10; See Affidavit of Rubin, ¶ 8 (4/25/96).

- The evidence presented included an affidavit by Dr. Emanuel Rubin, the Chairman of the Department of Pathology at Jefferson Medical College, who has reviewed CTR's grant-in-aid program. Dr. Rubin concluded that "CTR funded excellent research by well-qualified scientists that was relevant to the scientific issues associated with tobacco use and health." See Affidavit of Rubin, ¶ 6 (2/10/97).
- CTR's written policy provides that SAB grant-in-aid recipients are to "work with the greatest freedom," and are allowed to publish their results in scientific journals. See Affidavit of McAllister, ¶ 16 & Ex. A. CTR encourages such publication. See Affidavit of Glenn, ¶ 14. Since 1956, research projects funded by CTR grants and contracts have resulted in approximately 6,100 scientific publications, many of which have been in highly respected, peer-reviewed scientific journals that are frequently cited in the scientific literature. See Affidavit of Glenn, ¶ 16; 1996 Report of the Council for Tobacco Research -- U.S.A., Inc. p. 5; See Affidavit of McAllister, ¶¶ 19-21.
- Each year since 1956, CTR has made available to the scientific community an Annual Report containing abstracts of reports of research by CTR grant-in-aid requests that have been published in scientific journals, and a list of the research projects being funded by CTR SAB grantees. Report of the Council for Tobacco Research -- U.S.A., Inc. (1956-1996); See Affidavit of Glenn, ¶ 15; See Affidavit of McAllister; ¶ 8; Sommers Cipollone Tr. 8587-88; See Affidavit of Rubin, ¶ 7 (4/25/96). In this way, the research results from CTR's SAB grant-in-aid program have been shared with the scientific community.
- There is no evidence in the record before the Court that, over the course of CTR's 43 years, CTR has prevented any of its over 1,100 SAB grantees from publishing their research findings. See Affidavit of McAllister, ¶ 18.
- There is no evidence in the record before the Court that, over the course of CTR's 43 years, any scientific research by CTR SAB grantees has been tainted by scientific impropriety, such as the falsification of data or improper reporting of research results.
- Some of the research funded through CTR grants has led to reported findings that have linked smoking with diseases including lung cancer and emphysema, and that have supported the view that cigarettes are addictive. The evidence presented included the affidavits of Dr. Rubin, who stated that "[n]umerous publications from CTR-funded research provide important information indicating adverse effects of cigarette smoking." See Affidavit of Rubin, ¶ 6 (2/10/97). Some of these research findings have been reported in the general media. See Affidavit of McAllister, ¶ 22 & Ex. O; 10/22/66 Article of the N.Y. Times (Ex. 46). Over 250 of the scientific articles published by CTR grantees have been cited in reports relating to smoking and health of the U.S. Surgeon General (or his advisory committee), and 75 were cited in the 1996 report by the Food and Drug Administration on nicotine. See Affidavit of McAllister, ¶¶ 19, 23, 24.
- Many of the researchers who have received CTR SAB grants have also received co-funding for their research from organizations such as the American Cancer Society, the

National Cancer Institute and the National Institutes of Health. See Affidavit of Glenn, ¶¶ 11.

- The research conducted by CTR SAB grantees has been directed to matters concerning tobacco use and health, and in particular to the causation of diseases associated with smoking. See Affidavit Rubin, ¶ 6 (2/20/97); See Affidavit of Glenn, ¶¶ 17, 19; See Affidavit of McAllister, ¶¶ 26-28; See Affidavit of Lisanti ¶ 22 (4/11/97). The focus of that research has shifted over the years, since 1954, in accord with changes in scientific research generally. See Affidavit of Rubin, ¶¶ 14-15 (2/10/97); See Affidavit of Glenn, ¶¶ 18, 19; See Affidavit of McAllister, ¶¶ of McAllister, ¶¶ 27, 28.
- In 1954, CTR appointed as its Scientific Director Dr. Clarence Cooke Little, a nationally known scientist. See Affidavit of Glenn, ¶ 8. Dr. Little was the founder and director of the Jackson Memorial Laboratory in Bar Harbor, Maine. He had been the President of the University of Michigan and the University of Maine, and had been the managing director of the forerunner of the American Cancer Society. See Affidavit of Glenn, ¶ 8. As Scientific Director of CTR, Dr. Little was responsible for CTR's scientific program. See Affidavit of Lisanti, ¶ 7 (4/11/97). Dr. Little served as CTR's Scientific Director from 1954 until 1971. See Affidavit of Glenn, ¶ 8. He was succeeded as Scientific Director of CTR by other prominent scientists. See Affidavit of Lisanti, ¶ 9 (4/11/97).
- The appointment of Dr. Little as the Scientific Director of CTR was consistent with the statement in the 1954 Frank Statement that a scientist of "unimpeachable integrity and national repute" would be in charge of CTR's research activities.
- In 1954, CTR formed a Scientific Advisory Board ("SAB") to guide its grant-in-aid program by evaluating applications for funding received by CTR. See Affidavit of Glenn, ¶ 12; In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 27-29. The SAB originally consisted of seven members, and that number has gradually increased to 15. See Affidavit of Glenn, ¶ 12; See Affidavit of McAllister, ¶ 15; 1996 Report of the Council for Tobacco Research -- U.S.A., Inc.
- The members of the SAB have not been CTR employees (except for CTR's Scientific Director, who has been both a CTR employee and a member of the SAB). See Affidavit of Glenn, ¶ 12. The members of the SAB have been employees of universities, medical schools and research institutions such as Harvard, the University of Chicago, Stanford, Johns Hopkins, the University of Southern California and Duke. See Affidavit of McAllister, ¶ 15; Report of the Council for Tobacco Research -- U.S.A., Inc. (1956-1996). Several current SAB members are also members of the National Academy of Science. See Affidavit of McAllister, ¶ 15. The members of the SAB have been, and are, outstanding scientists in a number of fields, including cancer research, cardiology, pulmonology, immunology and pathology. See Affidavit of Glenn, 12; Affidavit of McAllister, ¶ 15; Affidavit of Rubin, ¶ 8 (2/10/97).
- Since 1954, the SAB has advised CTR on the awarding of research grants-in-aid. The SAB reviews and evaluates grant proposals by a peer review process that is standard in the scientific community. See Affidavit of Glenn, ¶ 13. Grants that are approved by the SAB are evaluated and given a numerical score by each SAB member; the scores are compiled and the applications are ranked. See Affidavit of Lisanti, ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13; Sommers Cipollone Tr. 8580-83. CTR's scientific

staff has the actual decision-making authority to award CTR grants-in-aid. Sommers Cipollone Tr. 8583; See Affidavit of Lisanti, ¶¶ 4-6 (7/11/97); Affidavit of McAllister ¶ 13. These decisions about the award of grants have adhered closely to the SAB's ranking of grant applications. See Affidavit of Lisanti ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13.

- CTR's procedure for evaluating and awarding research grants is similar to the procedures used by organizations that fund scientific research. Sommers Cipollone Tr. 8589; See Affidavit of Lisanti, ¶ 13 (4/11/97); Affidavit of McAllister, ¶ **11.**
- The tobacco company representatives constitute CTR's Board of Directors. See Affidavit of Glenn, ¶ 20; Sommers Cipollone Tr. 8594; Affidavit of Lisanti, ¶¶ 17, 18 (4/11/97). However, the tobacco companies deny that they have participated in or controlled the SAB's evaluations of grant proposals, or that they have participated in or controlled CTR's decisions to award research grants-in-aid. See Affidavit of Glenn, ¶¶ 20, 23; Sommers Cipollone Tr. 8595; Affidavit of Lisanti, ¶ 19 (4/11/97); Affidavit of McAllister, ¶ 14.
- The evidence in the record before the Court included the affidavit of Dr. Vincent F. Lisanti, a scientist who was employed by CTR from 1964 until 1994 and attended over 90 SAB meetings. See Affidavit of Lisanti, ¶¶ 15 (4/11/97). Dr. Lisanti stated:

I do not believe that the SAB ever rejected a grant application because it proposed research the results of which might be detrimental to the tobacco industry. The SAB members cared about promoting science and making a contribution to scientific knowledge, not about the potential impact of any scientific research on the interests of the tobacco companies.... [M]embers of the SAB were scientists and persons of great integrity. Any statement or suggestion that the evaluations and recommendations of the SAB were controlled or influenced by tobacco company lawyers is simply false.

See Affidavit of Lisanti, ¶¶ 15016 (¶¶ 4/11/97)

1. The evidence in the record before the Court also included the affidavit of Dr. James F. Glenn, CTR's Chairman and CEO (and formerly the Scientific Director of CTR), who is a professor of surgery and a former medical school dean. Dr. Glenn stated:

I am not aware of any instance during the ten years in which I have been affiliated with CTR in which any of the member companies, or any of their attorneys, have attempted in any way to influence decisions on what research will be funded as part of CTR's grant-in-aid program. The fact is that CTR, continuously from the time that I became affiliated with it in 1987 through today, has maintained a thoroughly independent SAB and grant-in-aid program. While our members may have opinions regarding CTR's research program and are certainly entitled to express them if they wish, I can say categorically that throughout my [ten year] tenure at CTR, the grant-in-aid program has been operated independently of industry influence.

See Affidavit of Glenn, ¶¶ 23, 25 (2/12/97).

1. The evidence in the record before the Court also included an affidavit from Dr. Harmon C. McAllister, the Scientific Director and Vice President for Research of CTR, in which Dr. McAllister stated:

In my 14 years of experience with CTR, I have attended 28 SAB meetings at which grants were evaluated, at which more than three thousand grant-in-aid proposals have been considered. I have also attended dozens of meetings of CTR's scientific staff where grants were awarded. Throughout that time, neither the SAB nor the scientific staff of CTR has ever considered in evaluating grant applications whether the proposed research would be likely to establish

connections between smoking and disease or whether the proposed research will be favored or disfavored by the tobacco industry. Throughout that time, to the best of my knowledge there has been no participation by the tobacco companies, their employees, or their lawyers in any decisions to grant or deny funding to any investigator, to any institution, or to any research area. See Affidavit of McAllister, ¶ 14 (2/12/97).

- The evidence in the record before the Court also included testimony at a 1988 trial by former Scientific Director of CTR, Sheldon C. Sommers, who testified as follows about how he would have reacted to the tobacco companies' playing a role in the SAB grant approval process: "[I]f it had happened at the time I was invited to join [the SAB] I would certainly not have joined and if I saw it happen or knew it was happening I would resign [from the SAB]." Sommers Cipollone Tr. 8595. Dr. Sommers was a member of the SAB for 23 years, from 1966 until 1989. See Affidavit of Glenn, Ex. D.
- With the exception of certain legal advice, and the evidence offered by Defendants as referred to below, the record does not contain evidence that lawyers determined what research would be funded by the CTR SAB grant program. See Affidavit of Lisanti, ¶¶ 77 (2/14/97); In Camera and Ex Parte Affidavit of Edwin J. Jacob.,¶ 41.
- From 1978 until 1982, lawyers for CTR reviewed grant proposals to CTR that related to the effects of nicotine on the central nervous system. See Affidavit of Lisanti, ¶ 27, 29 (2/14/97); In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶ 41. During that period, CTR's lawyers provided legal advice about the funding by CTR of those proposals. The Court has reviewed in camera privileged information about the substance of that legal advice. See Affidavit of Lisanti, ¶¶ 29-31 (2/14/97); In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 41, 53-63.
- The Jacob and Lisanti affidavits state that the advice given to CTR by its lawyers related to the antitrust laws. Concern about a possible violation of the antitrust laws by this "joint industry group" had existed since the formation of TIRC in 1954. See Affidavit of Tucker, ¶ 4. In 1954, TIRC advised DOJ in writing that it would conform to the requirements of the antitrust laws and the consent decrees affecting the tobacco industry, that it would not "give consideration to any matters affecting the business conduct or activities of its members," and that it would be "proceeding under the advice of legal counsel selected from among the counsel or nominees of its members." See Affidavit of Jacob, Ex. B. The Court has reviewed in camera privileged information about this antitrust concern on the part of counsel. See Affidavit of Jacob, ¶¶ 43-54.
- Other than providing the legal advice referred to above, there is no evidence in the record before this Court that lawyers influenced the selection of research to be funded through CTR's SAB grant-in-aid program.
- Defendants contend that it has long been a matter of common knowledge that there are health risks associated with smoking. Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (quoting Roysdon v. R.J. Reynolds Tobacco Co., 623 F.Supp. 1189, 1192 (E.D. Tenn. 1985), aff'd, 849 F.2d 230 (6th Cir. 1988), remanded in part on other grounds); see also Cameron v. American Legion Post 435, 281 N.W.2d 720, 722 (Minn. 1979); Paugh v. R.J. Reynolds Tobacco Co., 834 F.Supp. 228, 231 (N.D. Ohio 1993); Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996), cert. denied, 117 S. Ct 599 (1996); Lonkowski v. R.J. Reynolds Tobacco Co., No. 96-1192, 1996 WL 888182, at *7 (W.D. La. Dec. 10, 1996); American Tobacco Co. v. Grinnell, No. 94-

1227, 1997 WL 33658, at *5-6 (Tex. June 20, 1997); Consumers of Ohio v. Brown & Williamson Tobacco Corp., No. 94-3574, 1995 WL 234620, at *1 (6th Cir. Apr. 19, 1995); Varga v. Brown & Williamson Tobacco Corp., No. G88-568 CA6, 1988 WL 288977, at *3 (W.D. Mich. Nov. 7, 1988); Austin v. State, 48 S.W. 305, 306 (Tenn. 1898), Aff'd as modified sub nom., Austin v. Tennessee, 179 U.S. 343 (1900).

- The Surgeon General issued its first smoking and health report in 1964. The Surgeon General has subsequently issued 22 additional reports on smoking and health which discuss tens of thousands of publications in the smoking and health field.
- Defendants also contend that Minnesotans and the State of Minnesota itself have long been aware of the risks of smoking. (See Affidavit of Michael E. Parrish, ¶¶ 8 and 9, April 14, 1997 (awareness of Minnesota Legislature), ¶¶ 9 - 11 and 20-24 (awareness of Minnesota's education leaders), and ¶¶ 13-17 (Minnesota newspaper articles) and Berman Expert Report, ¶ 23 ("The State of Minnesota has been aware of the health risks associated with cigarettes and smoking as early as the 1800's. . . Over the last century and a half, the State of Minnesota has claimed leadership in smoking prevention and control.")
- I have previously found that there was no evidence that "defendants companies conducted significant independent research, i.e., that which was not jointly sponsored through CTR." Special Master Report, at ¶ 140. I also concluded that the "failure on the part of defendants individually to investigate the safety of their product, coupled with their ongoing assurances that causation of illnesses was unproved and speculative, necessarily implicates the holding of Levin v. C.O.M.B., 469 N.W.2d 512, 515 (Minn. App. 1991). . . ." Id. at ¶ 146. Defendants have appealed these findings to Judge Fitzpatrick.
- In their written submissions and presentations during the four days of hearings, defendants submitted evidence of scientific research conducted or sponsored by the industry, apart from CTR. Plaintiffs, in turn, submitted additional evidence of suppression of in-house smoking and health research.
- Plaintiffs have presented additional substantial evidence showing that, for many years, the U.S. manufacturing defendants failed to perform in-house smoking and health research, including biological research. Biological research is research "relating to biology or to life and living processes." Webster's New Collegiate Dictionary 152 (1990). Thus, biological research is the type of research a company would undertake to examine the safety of its products with respect to humans and, in this case, to determine whether smoking causes disease. Helmut Wakeham, a senior research official at Philip Morris, defined the type of research prohibited at the tobacco companies: "[s]tudying a relationship which might exist between smoking and diseases such as were tabulated in the Surgeon General's report." Plaintiffs' Tab 3, Wakeham Depo., p. 91.
- Plaintiffs also presented additional substantial evidence that for years the industry acted in concert to suppress in-house biological research on smoking and health, notwithstanding the industry's public promise in the Frank Statement to conduct research into "all phases of tobacco use and health" and report all facts to the public. CTR MN 11309817. Moreover, the Frank Statement promised that joint research would be "in addition to what is already being contributed by individual companies." Id.

SUPPRESSION OF RESEARCH

- American counsel represented to Judge Fitzpatrick, during a hearing on American's failure to produce scientific research in the possession of its affiliates, that American did not perform in-house smoking and health research:

> [I]t was the policy of The American Tobacco Company not to itself conduct smoking and health research, instead it relied on CTR and the Scientific Advisory Board. So that is an explanation for why the documents they are finding from the American Tobacco Company are what they are.

Plaintiffs' Tab 1, Transcript of June 17, 1997 Hearing, p. 23.

- American's Rule 30.02(f) designee on scientific research, Byron F. Pryce, testified during his deposition that American failed to conduct in-house biological research:
  Q. During the time period that you have had a biological division, do you know what kind of work was done in that biological division?
  A. Reading literature.
  Q. Is that it?
  A. That's about all I remember.
  Q. So, it would be your testimony that at no time during your tenure from 1965 to 1994 did American Tobacco Company or its parent, American Brands, ever undertake biological research in the United States; correct?
  A. We did not have any inhouse biological research program at the American Tobacco research facility.
  · · ·
  Q. Actually, my question is: Did you do inhouse research on the health aspects of tobacco?
  A. No, sir.

Plaintiffs' Tab 5, Pryce Depo., pp. 45, 164.

1. Mr. Pryce, American's 30.02(f) designee on research, did not know whether any of the research sponsored by American at the Medical College of Virginia related to smoking and health:

Q. As best you recall, the Medical College of Virginia Research did not involve specific research concerning whether cigarette smoke caused cancer?
A. I don't know specifically whether it had a direct link to the direct work on cancer causation. Some of the research may have been, but it was a wide spectrum of work. All has been published, to my knowledge.
Q. Did American ask the Medical College of Virginia to look specifically at the issue of whether cigarette smoking causes emphysema?
A. I don't know that.
Q. Did American as the Medical College of Virginia to determine whether or not cigarette smoking causes heart disease?
A. I don't believe -- I don't know that for sure.

Plaintiffs' Tab 6, Pryce Depo., p. 166-167.

1. On December 17, 1997, Plaintiffs took the deposition of Dr. Frank Colby. Colby has a PhD in Chemistry. (Colby Depo. Trans. p. 8). Colby began working at Defendant RJR in 1951. (Colby Depo. Trans. p. 15). Colby continues to consult on the subjects of smoking and health for RJR and its law firms as the sole shareholder of Frank G. Colby & Associates. (Colby Depo. Trans. pp. 9-13).

2. In 1964 or 1965, Colby assumed responsibility at Defendant RJR for analyzing smoking and health research. (Colby Depo. Trans. pp. 56-57). Prior to Dr. Colby, this function was performed by Allen Rodgman, another long-time RJR scientist whose name also appears on thousands of privileged documents.
3. On direct examination by RJR, Dr. Colby testified that he kept his facilities relating to smoking and health from the lawyers separate from the rest of the research department. (Colby Depo. p. 236).
4. On cross examination, however, Dr. Colby testified that the literature analyses which he conducted were widely available to non-lawyers of RJR but were only "channeled through the lawyers.":

Q: Now I believe you agreed with me earlier that a company such as R.J. Reynolds has a duty to understand any dangers associated with its products; correct?

. . .

A: Understand, yes.

Q: They need to have people such as yourself analyze that literature; correct?

A: Correct.

Q: And that's a duty the company has in order to adequately warn the public of any dangers associated with its products; correct?

. . .

A: I would say inform.

Q: Right. And you would also agree with me, would you not, that when you conducted your analyses of this literature after 1964, that your analysis was really done for the entire company of R.J. Reynolds, not just for the lawyers; correct?

A: <u>It was channeled through the lawyers. The smoking and health analysis was channeled through the lawyers mostly</u>.

Q: Okay. It was channeled through the lawyers, but your analysis was widely available to management and research scientists; --

A: Correct.

. . .

Q: So in other words, even though you channeled your research through the lawyers, that - that analysis of research that you did was widely available to the other scientists in R.J. Reynolds; correct?

. . .

A: Yes.

Q: It was available to the public affairs department, correct?

. . .

A: Yes.

Q: And it was available to top management; correct?

. . .

A: Yes.

Q: And the same was true for Dr. Rodgman's analysis of the literature when he did it; correct?

A: Yes.

. . .

Q: ...So the lawyers basically were used to funnel and shield this analysis you did of the research, but it was widely spread throughout the company; correct?

. . .

A: I wouldn't - I don't - I think I don't like the - the term "shield." It was simply a distribution system...."Shield" implies something which I don't think is correct.

Q: Okay. So it was a distribution system that started with the lawyers but eventually went throughout the company.

. . .

A: Was available. Was also of interest, yes.

PP. 242-45 (emphasis added).

1. Defendant RJR argues in correspondence dated December 31, 1997, (CLAD 1919) that Colby and Rodgman generated and received thousands of documents and that most of these documents have been produced to Plaintiffs during discovery. The language quoted above from Colby's deposition, pp. 242-245, however, leads to precisely the inference which Plaintiffs urge the Court to make: smoking and health analysis was channeled through the lawyers, although it was also available to management and scientists.
2. During the 1950's, Reynolds scientists tried to convince Reynolds management to conduct in-house biological testing. In 1967, some 14 years after the Frank Statement, Reynolds opened the Biological Research Division, the BRD, also known as "The Mouse House." The BRD was a sophisticated in-house lab for conducting biological research, including inhalation tests, on animals, including rats, rabbits, mice and gerbils. Alan Rodgman, senior Reynolds scientists from the early 1950s, testified in his deposition:

Q. . . . . this is a recommendation to do internal research; correct?

A. Uh-huh.

Q. You said this recommendation has been made previously by Teague in 1953, by yourself in 1954, by yourself in 1955, by yourself in 1956, by yourself in 1957 -- '59 and by yourself and Dr. Nielson in 1962; correct?

A. Yes.

Q. Each of those times R.J. Reynolds turned down your request; correct?

A. That's right, then did accede to eventually.

Q. Are you talking now about that three-year period in '67 to '70 when they had the Mouse House?

A. Yeah. Well it took a little while to get the staff. That's I guess when the actual research was done, but it started before then.

Q. And then they terminated that abruptly in 1970; correct?

A. Yeah, but there were reasons for that.

Plaintiffs' Tab 17, Rodgman Depo., p. 335.

- After only three years of operation, Reynolds shut down the BRD. Preliminary results from mouse inhalation tests demonstrated emphysema. This information on emphysema was shared with Philip Morris (see paragraph below). There is no evidence, however, that this information was disclosed to the public.
- A 1969 memorandum written by a Philip Morris scientist, and copied to senior Philip Morris scientists, Tom Osdene and Helmut Wakeham, entitled "R.J. Reynolds Biological Research Program" states:

I met Dr. Price from R.J. Reynolds at the CTR-USA meeting of December 11 and 12, 1969. He mentioned doing chronic cigarette smoke exposure studies with rats. The animals received up to 500 cigarettes and emphysema was produced.

Plaintiffs' Tab 17, PM 1001882748 (emphasis added).

- Similarly, a 1968 Reynolds research report, from the director of the mouse house, to the Murray Senkus, Reynolds' research director, states:

  Smoking Rats

  The chronic exposure of rats to smoke is continuing. The number of exposures was increased to two a day on July 16, 1968. Three rats were lost after bleeding tissues were taken for histology. No gross pathology was noted.

  The histology of the tissues from the rat which had smoked TEMPO cigarettes via an indwelling tracheal cannula has been completed with the results given on the following page.

  A diffuse, marked emphysema throughout the lungs. . .

Plaintiffs' Tab 18, Reynolds 515596269 (emphasis added).

1. A deposition of Reynolds' Rule 30.02(f) designee on research revealed that these test results showing emphysema were never followed up by Reynolds:

Q. The fact is, though, you never followed up on this study, did you?

A. We did not do inhalation ex -- chronic inhalation exposures in these animals, no.

Plaintiffs' Tab 19, Simmons depo., p. 163.

1. Rather than conduct further in-house inhalation tests, Reynolds, in 1970, shut down the Biological Research Division and fired 26 scientists. A presentation on the closing of the BRD states:

We are here today to inform you about a significant reorganization of the Research Department and a reorientation of research programs. . . .

In-house biological testing in the smoking health area such as work we have been doing for the Scientific Advisory Board of the Council for Tobacco Research has been terminated. Any further biological testing that may be needed in further developing smoking machines, etc. will be referred to qualified independent research organizations. . . .

The Biological division is being dissolved. . . .

· · ·

Altogether, 26 staff people are being terminated.

Plaintiffs' Tab 20, Reynolds 503950745.

1. In his deposition, Reynolds' research director, Murray Senkus, confirmed the abruptness of the closing of the mouse house:

Q. Okay. So you basically called the people together that were in your biological testing program and said, "This is it, we're shutting it down"; correct?

A. That's what we did.

· · ·

Q. At this meeting you told your employees that all your in-house biological testing in the smoking-and-health area was being terminated; correct?

A. That's what the report says.

Q. And that's your recollection; correct?

A. Yes.

Plaintiffs' Tab 21, Senkus Depo., pp. 138-139.

1. An employee of Reynolds' Biological Research Division testified in his deposition that he was "shocked" by the abrupt closure of the BRD:

Q. That research was suddenly terminated in 1970, was it not?

A. In March of 1970, the -- the division, the biological research division, was dissolved, yes.

Q. And I believe you've testified in previous depositions that you were rather shocked by that; it came as a surprise.

A. It came as -- "shocked" is a good -- is a good expression. I was all of a sudden with three young children and no job. Right, I was quite shocked.

Plaintiffs' Tab 22, Simmons Depo., p. 149.

1. A 1970 memo by D.G. Felton, a BATCo senior scientist, described how the shutdown of the BRD was related to the industry's "tacit agreement" not to conduct in-house biological research. This agreement led one company, Philip Morris, to request that another company, Reynolds, shut down the Biological Research Division. Plaintiffs' Tab 23, BAT 110315968 at 969. After learning that Reynolds was conducting biological studies, Philip Morris president Cullman lodged a complaint with Reynolds president Galloway. The result was a "sudden reorganization at Reynolds, resulting in the closure of the biological section." Id., pp. 2-3.
2. The above conversation, Philip Morris CEO to Reynolds CEO, was described by Helmut Wakeham, a senior Philip Morris research official, to Felton. Id. Felton is now deceased. Wakeham, in his deposition in this action, stated that he had met with Felton but that he did not remember the conversation described in the BATCo document. Plaintiffs' Tab 24, Wakeham Depo., pp. 113-16. Wakeham, however, did not deny the conversation. Id., p. 116. In addition, as noted below, Wakeham also confirmed in his deposition that there was an agreement among the tobacco companies not to conduct in-house research on smoking and health.
3. Reynolds contended during the hearings that the BRD was closed because of reasons relating to, inter alia, the company's decision not to enter the pharmaceutical or starch business. This does not explain, however, why Reynolds would terminate research specifically relating to the health effects of cigarettes, including inhalation tests on rats, which were demonstrating emphysema, or why the BRD was shut down literally overnight, with no warning to the scientists who worked there.
4. Reynolds commissioned a third-party report on the closing of the BRD. This report is known as the Brubaker Report and is being withheld on a claim of privilege. RJR 515597275.
5. I have reviewed the Brubaker report, Bates No. 5072 8500-8691. This report was commissioned by the law firm of Jones, Day, Reavis & Pogue in 1985. Paul Brubaker, PhD, was a consultant retained to report to Jones, Day on the goals and objectives of the RJR Biological Research Division (BRD). At section 10.0 of that report, a description of the operations of the division, including Brubaker's rather brief explanation of why the division was closed. Brubaker writes:

   > We are also not convinced after all of the research we reviewed in the Smoking and Health area that BRD was closed because of unfavorable results from their Smoking and Health research activities. Simply stated, the Smoking and Health research program had not fully matured and was only in its infancy when the doors closed.

At 50792 8507.

Brubaker also writes:

> A further review of other BRD's research program [sic], especially its' [sic] Smoking and Health research effort, its' [sic] planning documents, there was no

> substantial evidence that the research results carried sufficient weight to warrant closing down operations, as stated earlier.
>
> We are not convinced that the BRD research program, however, was a well managed and administered program, based upon the planning documents reviewed to date. This could have been a signal relative to the collapse of the program in 1970. A $1 million capital expenditure could have been the straw that broke the camel's back. We remain convinced that the BRD research program was closed for economic reasons rather than for any scientific discoveries of [sic] findings.

At 50792 8655.

Brubaker's report does not contain a direct statement of his methodology in compiling the report. Specifically, there is no indication that Brubaker actually interviewed scientists involved in the BRD operations.

1. The closing of the BRD was described by the attorney for RJR during the hearings which began on October 17, 1997. Transcript pp. 569-577. RJR's explanatory narrative during the hearing is neither entirely consistent nor entirely inconsistent with that of Dr. Brubaker. This is perhaps not surprising, considering the difficulty in explaining events which occurred 27 years earlier. However, this explanation did not suggest that the BRD was badly managed, or that its research was suspect.
2. I cannot conclude that the BRD facility was closed down simply for business reasons. It seems to me unlikely that a facility employing so many persons would simply shut down without warning in the fashion which Plaintiffs have demonstrated. The inference of a "gentlemen's agreement" has been fairly presented and not rebutted.
3. Murray Senkus, former research director at Reynolds, testified that in his 28 years with the company Reynolds, performed in-house biological testing for only three years:

Q. From the time that the Mouse House was shut down in 1970 until the time you left RJR in 1979, did RJR undertake any biological work in-house?

A. Not that I can recall.

Q. So from 1951 to 1979, a period of approximately 28 years, RJR only did in-house biological testing for 3 of those 28 years; correct?

A. Yes.

Plaintiffs' Tab 2, Senkus depo., pp. 179-180.

1. Helmut Wakeham, senior Philip Morris research official, testified during his deposition that there was an agreement that the tobacco manufacturers would not conduct smoking and health research:

Q. What's the type of research that you understood that there was an understanding that the cigarette companies would not be doing in-house?

A. Studying a relationship which might exist between smoking and diseases such as were tabulated in the Surgeon General's report.

Plaintiffs' Tab 3, Wakeham depo., p. 91.

1. Within Philip Morris, Wakeham advocated that the company abandon its refusal to conduct in-house biological research. In 1964, in response to the Surgeon General's report, Wakeham wrote a report stating that "Competitive pressures suggest a breakup of the common front approach of the industry through the Tobacco Institute and TIRC." Wakeham also recommended that "[t]he industry should abandon its past reticence with

respect to medical research," noting that "failure to do such research could give rise to negligence charges." Plaintiffs' Tab 25, PM 1000335612 at 622.

2. In a 1968 memorandum, Wakeham again advocated establishment of in-house biological research facilities at Philip Morris:

> We have reason to believe while this proposal to carry out biological research and testing may seem a radical departure from previous policy and practice, we are in fact only advocating that which our competitors are also doing.

Plaintiffs' Tab 26, PM 100039670 at 671. In an earlier draft of this memorandum, Wakeham described the existence of a "gentleman's agreement" prohibiting biological research:

> We have reason to believe that in spite of the gentleman's agreement from the tobacco industry in previous years, that at least some of the major companies have been increasing biological studies within their own facilities.

Plaintiffs' Tab 27, PM 1001607055 at 058. (The "increasing biological studies" referenced by Wakeham included the Reynolds BRD.)

1. Wakeham confirmed that a "gentlemans agreement" existed during his deposition:

> I may have coined the word "gentlemans agreement" in writing this document. But it, in my mind, was a term I used to express this understanding between the companies that the company laboratories in general were not qualified or capable of carrying out research of the kind that was necessary to address the question of smoking and health, and that the industry had set up the Tobacco Research Council to bring together experts who would address this question and who would be supported by the industry for whatever researches they deemed desirable to do in this field.

Plaintiffs' Tab 28, Wakeham Depo., pp. 89-90.

1. Wakeham also confirmed that, as of 1968, 14 years after the Frank Statement, Philip Morris was not conducting any in-house biological research related to smoking and health:

Q. Philip Morris wasn't doing any animal testing as of 1968.

A. Absolutely not. Not in house. We were -- we were doing tests on some animals, again related to the irritation problem, not regarding -- not relating to cancer or anything else of that nature.

Plaintiffs' Tab 29, Wakeham Depo., p. 86.

1. In a 1969 memo, Wakeham acknowledged the scientific expertise of the tobacco industry to conduct smoking and health research and lamented the fact that this expertise was not being utilized because of the legal situation:

> Unfortunately. . . the scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem, a contribution which I believe was and is vital. . . .

Plaintiffs' Tab 30, PM 1001609594. This contemporaneous memorandum contradicts Wakeham's deposition statement (years later) that the tobacco companies were not "qualified or capable" of conducting in-house research on smoking and health. See ¶ 52, above.

1. Plaintiffs presented evidence that Philip Morris turned to Europe for smoking and health research. A 1970 memorandum from Joseph Cullman, the president of Philip Morris, discusses the benefits of conducting research overseas:

> The possibility of getting answers to certain problems on a contractual basis in Europe appeals to me and I feel presents an opportunity that is relatively lacking in risk and unattractive repercussions in this country.

Plaintiffs' Tab 31, PM 1000216742.

1. In 1970, Philip Morris purchased a research facility in Cologne known as INBIFO. A 1970 memo from Wakeham states:

   > Since we have a major program at INBIFO, and since this is a locale where we might do some of the things which we are reluctant to do in this country, I recommend that we acquire INBIFO either in toto or to the extent of controlling interest.

Plaintiffs' Tab 32, PM 2022244451.

1. One perceived value of INBIFO was that Philip Morris could control the results:

   > Experiments can be terminated at will as required without delay.

Plaintiffs' Tab 33, PM 1003123058.

1. After Philip Morris acquired INBIFO, there is evidence that Philip Morris tried to avoid any direct contact with the research results that emanated from INBIFO.
2. A 1977 memorandum from a Philip Morris research official, Robert Seligman, describes the elimination of written contact between INBIFO and Philip Morris:

   > We have gone to great pains to eliminate any written contact with INBIFO, and I would like to maintain this structure.

Plaintiffs' Tab 34, PM 2000512794.

1. Handwritten notes from Thomas Osdene, another Philip Morris scientist, describes methods for handling documentation concerning INBIFO:

1. Ship all documents to Cologne. . .
2. Keep in Cologne
3. OK to phone & telex (these will be destroyed)
4. Please make available file cabinet. Jim will put into shape by end of August or beginning Sept.
5. We will monitor in person every 2-3 months.
6. If important letters have to be sent please send to home - I will act on them & destroy.

Plaintiffs' Tab 35, PM 1000130803.

1. The "Jim" referenced in the above document was James Charles, another Philip Morris scientist. Plaintiffs' Tab 36, Charles Depo., p. 48. Charles confirmed in his deposition that Philip Morris did not retain in its files INBIFO research results:

Q. Philip Morris didn't retain its own study -- retain its own copies of the INBIFO studies?
· · ·
A. Philip Morris U.S.A. would receive from INBIFO reports of work they conducted for us at our direction. We -- we have them guidance with what -- respect to what kind of a study we wanted hem to do. They conducted the studies. They would send us the results. We evaluated the results and return the document to INBIFO.
· · ·
Q. Wouldn't it have been easier to just simply keep the documents in a file cabinet in an office -- in a room in Richmond, Virginia, instead of sending them back to Cologne?
A. Yes, it probably would have been easier.

Q. Did you ever express that to anyone?
A. I don't remember.

Plaintiffs' Tab 37, Charles Depo., pp. 50, 59.

- These unusual arrangements for handling scientific research at INBIFO have had an effect in thwarting the discovery proceedings in this case. Judge Fitzpatrick concluded that Philip Morris's failure to search the files of Philip Morris International, Inc. and other subsidiaries (which include INBIFO) in this action was "an egregious attempt to hide information relevant to this action. . . . ." Order Granting Plaintiffs' Motion to Compel Regarding Philip Morris International, March 25, 1997, p. 9 (CLAD #826). Judge Fitzpatrick further stated that Philip Morris's "attempts at hiding documents in the morass of interlocking related organizations shall not be tolerated by this Court. Nor will the Court countenance Philip Morris's self-selected and voluntarily provided set of documents from selected sources." Id., p. 16.
- Although Lorillard implied in Defendants' Joint Brief that it had conducted significant smoking and health research, Lorillard subsequently stated that that was not exactly the case. In a subsequent letter, Lorillard stated, "[A] large proportion of the internal research projects listed in our brief represented product design or product development research as opposed to research into the physiological or psychological effects of cigarette smoking or nicotine." In other words, a "large proportion of the internal research" was not related to smoking and health. Plaintiffs' Tab 9, CLAD # 1497.
- A 1978 memo written by Curtis Judge, former CEO of Lorillard, indicates that scientific research was controlled by attorneys:

  We have again "abdicated" the scientific research directional management of the Industry to the "Lawyers" with virtually no involvement on the part of scientific or business management side of the business.

Plaintiffs' Tab 11, Lor 01346204.

- Brown & Williamson's former research director, Robert Sanford, admitted that B&W did not conduct any in-house biological research:
  Q. Brown & Williamson did not do any biological testing in-house, did it, sir?
  A. Correct.

Plaintiffs' Tab 12, Sanford Depo., p. 112.

1. Another former Brown & Williamson research director, Earl Kohnhorst, also admitted that B&W did not conduct any in-house smoking and health research:

   Brown & Williamson did not have information that was being developed on -- on smoking and -- and health and disease in-house. It was being executed through The Council for Tobacco Research, through this independent scientific group that I have mentioned.

Plaintiffs' Tab 13, Kohnhorst Depo., p. 350.

1. Brown & Williamson did co-sponsor research through the BAT Group in England. In 1985, however, the BAT Group terminated in-house biological research:

Biological Research

All animal work to be terminated a.s.a.p. Finish current work on animal tissues (inc. tissues from animals just killed) and report within 3 months.

Plaintiffs' Tab 14, BATCo 100593368.

- At the same time the BAT Group terminated all in-house biological research, the BAT Group increased research into product modification, in particular nicotine manipulation:

  > All in-house animal work will cease and future studies involving animals will be done externally under contract. . . . More resources will be provided for research into means of enhancing nicotine transfer to smoke and experimental combustion research, including cigarette paper effects.

Plaintiffs' Tab 15, BAT 301122597 at 607.

- This failure to conduct in-house biological research was not restricted to one tobacco company. As detailed above, this failure was industry-wide. I find this fact significant, as the members of this industry have portrayed the companies as being fiercely competitive.
- Defendants directed my attention to research sponsored by defendants at Harvard University. The funding of this research was controlled by the Committee of Counsel and executives of the companies. A 1976 letter from senior industry counsel, David Hardy, states that:

  > In Bill Shinn's letter to you of May 21, he solicited at my request, any observations or comments that you may have with regard to the renewal of the Harvard University project. This project has been handled in the past by the Committee of Counsel and the executives of the companies, but I wanted to find out if any member of the Research Liaison Committee had any observations.

Plaintiffs' Tab 44, Lor 03748208.

- The defendants terminated sponsorship of the Harvard University research in 1979. The chief scientist on the project, Gary Huber, in a letter to Shook, Hardy & Bacon, stated his disagreement with the termination decision:

  > How can a research program that has been productive of good research in an important area where good research is vitally needed now be terminated? How can four major NIH research grants on smoking and health that were awarded under the most competitive of circumstance in areas of crucial national importance now be terminated? How can a program that again has been favorably reviewed by an advisory committee of Harvard Professors now be terminated?

Plaintiffs' Tab 46, LG 0194500 at 01.

- On January 19, 1998, Plaintiffs' counsel sent me correspondence (CLAD 2087) in which they asked me to consider a deposition taken of Dr. Gary Huber on September 20, 1997. This deposition was taken in the case of <u>The State of Texas v. American Tobacco Company, et. al.</u>, US District Court, Eastern District of Texas.
- Dr. Huber was the principal investigator in charge of the research program at Harvard University relating to smoking and health. The program was funded in part by a five-year grant, and a three-year extension of that grant, from the tobacco industry.
- Plaintiffs direct my attention to the following excerpts from the Huber transcript:
  Q. Were the [Harvard] studies important information, in your opinion, when you reported those findings to scientists?
  A. Yes.
  Q. An did you stress their importance to industry officials?
  A. Very much so.
  Q. And did you want to go forward and do further studies with animals?

A. Absolutely.
Q. Why?
A. Well, we found -- we found very important results and we felt that they should be pursued and they had impact on a number of very serious and important considerations that deserved answers.
Q. Was money forthcoming from the cigarette company sponsors later for you to complete your animal studies after Harvard?
A. It was promised, but it never came.
Q. Were you, in fact, ever able to finish your experiments?
A. No.

Transcript, pp. 40-41.

Q. Did you ever have a meeting in a hotel in Boston with industry officials who expressed concern that your research was, quote, "getting too close to some things, end of quote?
A. Yes.
Q. And who was that, sir?
A. It was with industry attorneys.
* * *
Q. Can you tell us approximately when that happened, Doctor?
A. I would anticipate it was in 1980. But I would have to check the records to be sure.

Transcript, pp. 46-47.

Q. Were the implications of your work at Harvard on human subjects with nicotine, with respect to such issues as whether or not nicotine may be a dependent-producing substance or addictive substance?
A. It would support -- it would support the concept that it was a dependent-producing substance.
Q. Did you tell officials of the cigarette companies that, the implications of what you had proved?
A. We presented it to them in great detail.
Q. And was your funding reviewed to continue that study?
A. No.

Transcript p. 56.

Q. Doctor, with respect to your study of nicotine titration or compensation, did your results provide any insight into the question of whether low tar, low nicotine cigarettes were healthier or safer than high tar cigarettes like Marlboro?
A. It raised, I think, extremely important questions and issues that we never got a chance to answer.

Transcript, p. 57.

Q. Now, Dr. Huber, do you believe, sir, that if you had been able to continue your experiments with rats with respect to the rats breathing smoke and developing emphysema, do you believe that you would have been able many years ago to have found the exact way that cigarette smoke causes emphysema?
A. Yes.
Q. Why do you say that sir?
A. We had important information on -- that was advancing science on the mechanisms by which these processes could occur.
Q. And you requested funding from the cigarette companies to continue it?

A. Yes.
Q. It was not forthcoming?
A. Correct.

Transcript, p. 97.

1. In a responsive letter, CLAD 2098, Defendants direct my attention to portions of the Huber deposition which reflect the following testimony by Huber:

   The responsibility to design and conduct the research program was the exclusive province of Dr. Huber; there was no research product suppressed.

(Huber Dep. at 139:11-16.)

1. Defendants have also directed my attention to the following testimony:

Q. Okay. And all of the funding and the related research was actually carefully reviewed by an elite Harvard advisory committee, wasn't that correct? Didn't they review what you did?
A. Most of it, not all of it.
Q. Okay. And did the committee ever find any suggestion of any Tobacco Industry influence on any of your research or any of your publications?
A. No.
(Id. at 138:15-23)
***
Q. Now, was your research done at Harvard, though paid for by the cigarette companies, was it a policy of full and open disclosure; that is, were you free to publish your findings?
A. Yes, we had what we called an open door policy: people could at any time, see what research work we were doing, and we were free to pursue any direction or publish any results.

(Huber Dep. at 22: 16-22)
***
Q. Was there any publication that you wanted to make that you were not allowed to make while you were at Harvard, by the Tobacco Industry?
A. No, sir.

(Id. at 139: 17-20)
***
Q. Now did you publish your findings about nicotine compensation?
A. Some yes. Or we presented them -- presented and/or published them.
Q. And were you free to publish?
A. Yes.

(Id. at 17:10-15)
***
Q. Dr. Huber, were your findings regarding -- some of your findings regarding nicotine titration or compensation reported to scientific peers of yours?
A. Yes.
Q. And was it also reported in the newspaper article, in the Boston Globe.
A. Probably.

(Id. at 19: 15-21)
***
Q. Did you publish, in any fashion, to scientists your findings about the rats and emphysema?
A. Yes.

(Huber Dep. at 17: 16-18)

***

Q. Did you personally, also, present these emphysema findings to a group of scientists in an audience?

A. Yes, on several different occasions.

(Huber Dep. at 17: 24-25, 18:1)

- Plaintiffs urge that I infer that the funding of the Harvard Research Program directed by Dr. Huber was discontinued because his research was reaching "dangerous" conclusions. Defendants in their submissions contend that the research was discontinued because of an attitude by Harvard University that was antagonistic to the tobacco industry. In support of this contention, Defendants submitted as attachments to CLAD 2098, tabs D, E, and F. Tab D is a memorandum by Dr. Huber dated May 24, 1979 which fairly could be characterized as a contemporaneous account of a meeting between Dr. Huber and Dean Daniel Tosteson of the Harvard Medical School. Huber is evidentially frustrated that Harvard University did not display an appropriately conciliatory and grateful attitude toward the tobacco industry, and that this perceived deficiency had jeopardized the funding of Huber's program.
- The attachment at Tab E is a second memorandum by Dr. Huber dated May 11, 1979 in which Huber describes a meeting involving himself, a Dr. First, Dean Meadow, and a Ms. Joyce Brinton. In this memorandum, it is apparent that Huber knows that the funding by the tobacco industry for his research program is in great peril. Huber learns at the meeting from Dean Meadow that the tobacco industry, and presumably its money, are not welcome at Harvard University.
- The attachment at Tab F is correspondence from William Shinn of the law firm of Shook, Hardy & Bacon, which firm has historically represented the tobacco industry. The date of the letter is June 8, 1978, approximately one year before the memoranda attached at Tabs D and E. Shinn's letter is written to Henry Meadow, Dean for Planning and Special Projects at the Harvard Medical School. In his letter, Shinn writes:

  > The companies' obligation to continue funding under the project is contingent under Harvard's performance under the contract and no obligation should be inferred subsequent to the time that the facility became inadequate for the needs of the project. I am not, however, recommending a legalistic approach to the problem with which we are confronted. I do want to be candid in stating my opinion that the companies have no contractual responsibility to continue funding the project.

- It is uncontested that the tobacco industry terminated its funding of the Harvard Research Program directed by Dr. Huber at a time when, by his deposition testimony, he was making significant progress on research relating to smoking and health. The correspondence from William Shinn, Tab F and the contemporaneous memoranda from Huber, Tabs D and E, support the inference that Harvard was hostile to the tobacco industry.
- It is not possible to ignore Huber's deposition statement that in approximately 1980, he met with tobacco industry lawyers in a hotel in Boston who told him that his research was "getting too close to some things." Huber identified these attorneys as counsel from the Shook, Hardy firm, representing the industry, and from Defendants Lorillard and Brown & Williamson. (Huber Dep. at 46).

- If Huber's assertion regarding the meeting in Boston is true, it is direct evidence of tobacco industry attorneys attempting to manipulate the direction or outcome of research relating to smoking and health.
- By correspondence dated January 21, 1998, CLAD 2102(c), Defendants argued that the Texas deposition of Dr. Huber was in effect an "ambush" because Huber had for a period of years been a paid consultant to the tobacco industry, and that they were unaware that he had been in communication prior to his deposition with counsel for Plaintiffs.
- In support of this argument, Defendants submitted the Affidavit of Thomas F. Gardner, attorney at law, CLAD 2102(b), dated January 21, 1998. Gardner is a member of the law firm of Jones, Day, Reavis & Pogue, and has been a lawyer since 1969. In his Affidavit, Gardner asserts that Huber had been a confidential consultant with the tobacco industry even while at Harvard University. Gardner Depo. ¶ 5. Assuming Gardner's statement is true, Dr. Huber was considered a paid consultant to the tobacco industry <u>at the same time he was directing the research project at Harvard University</u>. (This fact would belie the assertion that the Harvard research was independent.) Huber left Harvard after the tobacco industry discontinued funding his research project there and went to the University of Kentucky. Huber Depo. p. 44.
- The Gardner Affidavit also suggests that Dr. Huber's recent hostility to the tobacco industry may be the result of a financial investigation conducted by Texas officials. Gardner Affidavit ¶8. In any event, it is obvious that Gardner considers Huber to be a "turned" witness.
- I do not conclude that Huber's deposition testimony is objectively "true." I do conclude, however, that it crosses the threshold of probable cause for crime fraud purposes, and I am unable to conclude that the evidence has been rebutted by Defendants.
- The Defendants collectively have directed my attention to substantial amounts of research, conducted in house and by third parties, which research, they argue, blunts or negates the findings above. Phillip Morris, for example, as part of its filings prior to these hearings, delivered its Exhibit 1 consisting of 88 volumes, each of which contains roughly 300 pages, each page of which is a log entry representing in-house or sponsored research.
- With respect to the research done by Defendants, Plaintiffs urge that I conclude that it focused "on product design and development, rather than smoking and health (or biological research)." See Plaintiff's Proposed Finding 74.
- It is not within my ability to evaluate the research to which the Defendants have directed my attention. I am persuaded that Plaintiffs have established to a degree of probability that Defendants collectively agreed not to conduct, or to eliminate or reduce, scientific research which related to issues of smoking and health. This evidence has not been rebutted.
- Pursuant to the Fifth Order Establishing Procedures, plaintiffs were permitted to introduce additional evidence of crime-fraud. <u>See</u> Fifth Order, at ¶ 4. As a result, plaintiffs made lengthy written submissions and presented argument regarding defendants' public denials of addiction, defendants' internal knowledge regarding the addictive nature of nicotine and defendants' intentional manipulation of nicotine.
- Defendants argue that this evidence was not properly before the Special Master during these proceedings and that the plaintiffs should submit this evidence for a ruling before Judge Fitzpatrick on crime-fraud.

- I conclude that, pursuant to the Fifth Order, defendants had adequate notice that plaintiffs would present additional crime-fraud evidence and had an adequate opportunity to respond to such allegations. Moreover, I find that the issues of addiction and nicotine manipulation are encompassed within Judge Fitzpatrick's crime-fraud findings of May 9. Specifically, I find that such evidence is closely-related to Judge Fitzpatrick's findings regarding defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance. . . ."; defendants' assurance "that the tobacco industry was committed to providing safe products," and defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues." See Order of May 9, pp. 5, 9. In addition, contrary to defendants' contention, Judge Fitzpatrick referred in his Order of May 9 to an internal document concerning the addictive effects of nicotine. See Order of May 9, p. 7 (citing BATCo 1005003495).
- Based upon a review of the evidence and presentations by plaintiffs and defendants on the issues of nicotine manipulation and addiction, I make the following findings of fact:
- Plaintiffs have presented evidence that defendants, in their public statements, have repeatedly denied that cigarettes and/or nicotine are addictive and minimized the difficulties of quitting smoking. For example, in a 1988 press release, the Tobacco Institute stated:

  Claims that cigarettes are addictive contradict common sense. . . . The claim that cigarette smoking causes physical dependence is simply an unproven attempt to find some way to differentiate smoking from other behaviors. . . . The claims that smokers are 'addicts' defy common sense and contradict the fact that people quit smoking every day.

Plaintiffs' Ex. 21(1), TI 0019963, p. 963.

- In another 1988 press release, the Tobacco Institute stated that the Surgeon General's declaration that smoking is an addiction was: "[A]n escalation of antismoking rhetoric . . . without medical or scientific foundation." Plaintiffs' Ex. 22(1), TI 00125189, p. 189.
- In a 1989 interview on ABC's Good Morning America, the Tobacco Institute spokesperson stated: "I can't allow the claim that smoking is addictive to go unchallenged...." Plaintiffs' Ex. 23(1), TI 339671, p. 673.
- In a 1990 interview on CNN Larry King live, the Tobacco Institute spokesperson stated:

  [A]bout 95 percent of those people have quit cold turkey. They've walked away from cigarettes and they've not gone through formal treatment centers or anything else. It's not like alcoholism or drug abuse. It's not an addiction.

Plaintiffs' Ex. 24(1), TI 00341405, p. 420 (emphasis added).

- In a 1992 pamphlet, Philip Morris stated: "Those who term smoking an addiction do so for ideological -- not scientific -- reasons." Plaintiffs' Ex. 25(1), PM 2023916742, p. 745.
- In a 1994 published statement, Philip Morris stated: "Philip Morris does not believe cigarette smoking is addictive." Plaintiffs' Ex. 26(1), PM 2023011263, p. 263.
- Finally, in congressional testimony in 1994, the chief executive officers of the tobacco companies each testified under oath that cigarettes are not addictive:
  · William Campbell, Philip Morris: "I believe that 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."

Plaintiffs' Ex. 27(1).

1. Defendants' public statements regarding addiction are now contradicted by most of the scientific community. For instance, in 1988, the Surgeon General concluded that:

1. Cigarettes and other forms of tobacco are addicting.
2. Nicotine is the drug in tobacco that causes addiction.
3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

Plaintiffs' Ex. 28(1), The Health Consequences of Smoking: Nicotine Addiction, A Report of the Surgeon General, 1988, p. 9. The U.S. Food & Drug Administration (Plaintiffs' Ex. 20(1)), the American Psychiatric Association (Plaintiffs' Ex. 29(1)), the World Health Organization (Plaintiffs' Ex. 30(1)) and the American Medical Association (Plaintiffs' Ex. 31(1)) also have concluded that nicotine causes addiction and/or dependence. (According, to the 1988 Surgeon General's Report, p. 28, the terms "addiction" and "dependence" are "scientifically equivalent.").

1. In their proposed Findings 97 and 98, Defendants ask that I find as follows:

97. Documents cited by Plaintiffs (Plaintiff Memorandum at 41-42) indicate Defendants' awareness of the well known fact that nicotine has measurable pharmacological effects on the central, peripheral, and sensory nervous systems and can be, for some smokers, a difficult habit to break.

98. No documents cited by the Plaintiffs indicate that Defendants knew or believed that nicotine met the objective criteria of addiction. Defendants' awareness has not been kept secret as researchers in the scientific community have investigated and published extensively on both the nature and sites of nicotine's pharmacological effects on the central nervous system, the cardiovascular system, and other aspects of human and animal physiology. See, e.g., J.B. Exhs. 2, 7, 8, 34, 53, 107, 120.

I understand the distinction urged by Defendants: "addiction" has a specific scientific meaning, and a logically defensible argument can be made that cigarette smoking is not encompassed by that meaning.

1. A similar discussion occurred during the Liggett hearings as part of the discussion of "causation" of illness. See my report, September 10, 1997, Findings 121 through 128. Defendants concede that there is a statistical association between smoking and serious illness, but they insist that the final "causal" link is unestablished.
2. What the Defendants have conceded is nevertheless remarkable: nicotine has measurable pharmacological effects on the central, peripheral and sensory nervous systems and can be, for some smokers, a difficult habit to break. The habit in question is strongly associated with several illnesses which can be fatal.
3. In addition to defendants' public denials that cigarettes are addictive, defendants also publicly deny that they intentionally manipulate nicotine in cigarettes. For instance, the Tobacco Institute stated in a 1994 press release:

   Cigarette manufacturers do not 'manipulate' the level of nicotine in various brands. Nicotine levels follow 'tar' levels -- as manufacturers have reduced 'tar' levels and yields over the years to satisfy changing consumer tastes, nicotine levels and yields have fallen correspondingly.

Plaintiffs' Ex. 32(1), TI 0328214, p. 214 (emphasis added).

- In a 1994 advertisement, Philip Morris stated: "Philip Morris does not 'manipulate' nicotine levels." Plaintiffs' Ex. 26(1), PM 2023011263, p. 263.
- In a published statement in 1994, the chief executive officer of RJR stated: "[W]e do not increase the level of nicotine in any of our products to 'addict' smokers." Plaintiffs' Ex. 33(1), RJR 513193867, p. 867.
- In 1994, B&W issued a press release which stated:

  > . . . B&W does nothing in the manufacture of its tobacco products that increases the level of nicotine above that which is naturally found in the tobacco plant, nor does it artificially increase nicotine.

Plaintiffs' Ex. 34(1), BAT IND 202337394, p. 394.

- The 1994 congressional hearings also contained numerous statements by defendants' top officials regarding nicotine manipulation:
  · William Campbell, Philip Morris: "Philip Morris does not manipulate nor independently control the level of nicotine in our products."
  · James Johnston, Reynolds: "We do not add or otherwise manipulate nicotine to addict smokers....[W]e do not do anything to hook smokers or to keep them hooked."
  · Andrew Tisch, Lorillard: "Lorillard does not take any steps to assure minimum level of nicotine in our products. Lorillard does not add nicotine to cigarette tobacco for the purpose of manipulating or spiking the amount of nicotine received by the smoker."
  · Donald Johnston, American: "American has no desire or intent to manipulate nicotine."
  · Thomas Sandefur, B&W: "[W]e do not spike our products, nor do we manipulate the nicotine in our cigarettes to keep people hooked as the FDA alleges."

Plaintiffs' Ex. 35(1), pp. 542, 558, 593, 595; Ex. 36(1), p. 139.

1. Notwithstanding the above public statements, the tobacco industry has recognized internally that nicotine is an addictive drug and that cigarettes are drug delivery or nicotine delivery devices. For example, a report of discussions with industry research directors in the 1950s as the industry prepared to publish the Frank Statement, recorded among their conclusions "it's fortunate for us that cigarettes are a habit they can't break." Plaintiffs' Ex. 37(1), Hill-JH 493, p. 494.
2. A 1961 document by Sir Charles Ellis, a top BATCo scientist, stated ". . . smokers are nicotine addicts." Plaintiffs' Ex. 38(1), BATCo 301083862, p. 863.
3. From the Merrell Williams series of BAT/B&W documents is a 1963 document over which privilege is claimed in this case. In this document, Addison Yeaman, counsel for B&W and later president of CTR, admitted that nicotine is addictive:

   > [N]icotine is addictive. We [B&W] are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.

B&W Priv. 689033412.

194. An undated BATCo document, written by S.J. Green, one of the company's top scientists, stated: "Smoking is fairly irrational like other drug dependencies." Plaintiffs' Ex. 39(1), BATCo 110069983, p. 985. In another document, Green referenced "members of the nicotine dependent majority." Plaintiffs' Ex. 40(1), BATCo 110069974, p. 977.

1. A 1969 document by Philip Morris scientist William Dunn (known in the company as "the Nicotine Kid") stated: "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 conceptualizations go beyond these walls." Plaintiffs' Ex. 41(1), PM 1003289921, p. 921.

2. A 1972 document by Philip Morris' Dunn stated that the majority of conferees at a recent CTR conference "accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking." Plaintiffs' Ex. 42(1), PM 2024273959, p. 962. Dunn continued: "The cigarette should be conceived not as a product but as a package. The product is nicotine....Think of the cigarette pack as a storage for a day's supply of nicotine. Think of the cigarettes the dispenser for a dose unit of nicotine." Id., p. 963.
3. A 1972 document by Claude Teague, a R.J. Reynolds senior scientist, stated that ". . . the tobacco industry may be thought of as being a specialized, highly ritualized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiologic effects." Plaintiffs' Ex. 43(1), RJR 500915683, p. 684.
4. A 1978 B&W document stated "very few consumers are aware of the effects of nicotine, i.e. its addictive nature and that nicotine is a poison." Plaintiffs' Ex. 45(1), B&W 665043966, p. 966 (Confidential).
5. A 1979 document by BATCo research executive L.C.F.B. Blackman considered the hypothesis that "high profits . . . associated with the tobacco industry are directly related to the fact that the consumer is dependent upon the product." Plaintiffs' Ex. 46(1), BATCo 109872505, p. 508.
6. A 1980 BATCo document stated that "BAT should learn to look at itself as a drug company rather than as a tobacco company." Plaintiffs' Ex. 47(1), BATCo 109884190, p. 190 (Confidential).
7. An undated BATCo document by scientist C. Greig termed cigarettes a "'drug' administration system for public use" with significant advantages, one being that "...nicotine is the lowest dose 'common' drug available." Plaintiffs' Ex. 48(1), BATCo 100503495, pp. 495-497 (Confidential).
8. A 1980 document by Philip Morris scientist Osdene stated, "the thing we sell most is nicotine." Plaintiffs' Ex. 49(1), PM 1000125871, p. 871.
9. A 1983 document by RJR scientist Teague stated that "in essence, a cigarette is a system for the delivery of nicotine to the smoker in an attractive, useful form." Plaintiffs' Ex. 50(1), RJR 511223463, p. 466.
10. A 1991 RJR report stated, "We are basically in the nicotine business." Plaintiffs' Ex. 51(1), RJR 509479574, p. 584 (Confidential).
11. Thus, defendants have been aware of the fact that nicotine is a dependency - creating substance since at least the early 1960's.
12. While nicotine itself is a naturally occurring component of the tobacco plant, the modern cigarette is a highly engineered and sophisticated product in both manufacture and design. Specifically, the defendants control and manipulate the level and form of nicotine in the commercial product. The tobacco industry has admitted in requests for admissions filed in this litigation that they have the technological capability of removing most of the nicotine from cigarettes during the manufacturing process. Plaintiffs' Ex. 52(1).
13. Despite this technological feasibility, the tobacco industry does not currently sell cigarettes with most nicotine removed. Instead, plaintiffs presented evidence that the

tobacco industry intentionally maintains nicotine at certain levels because the defendants have long been aware that there is an optimum dose of nicotine needed for its pharmacological and addictive qualities to have their intended effect:

14. As early as 1959, BATCo noted the need to find the "optimum offer" of nicotine to consumers. Plaintiffs' Ex. 53(1), BATCo 100099115. The company recognized that to lower nicotine too much "might end in destroying the nicotine habit in a large number of consumers and prevent it ever being acquired by new smokers." Id.
15. A 1961 document by Sir Charles of BATCo noted the increased use of tranquilizers and "pep pills" as potentially "very serious competitors to smoking," and stated: "If the competition is to be met successfully it must be important to know how the tranquilizing and stimulating effects of nicotine are produced, and the relation of addiction to the daily nicotine intake." Plaintiffs' Ex. 54(1), BATCo 301083862, p. 863.
16. A 1961 Philip Morris document by Helmut Wakeham, a senior scientist, stated: "Even though nicotine is believed essential to cigarette acceptability, a reduction in level may be desirable for medical reasons. . . . How much nicotine reduction will be acceptable to the smoker?" Plaintiffs' Ex. 55(1), PM 1000277423, p. 441.
17. A 1963 letter from B&W to BATCo discussed "optimum levels" for nicotine and correlated the nicotine level in cigarettes with consumer acceptance. Plaintiffs' Ex. 56(1), BATCo 102630333, p. 336. The letter stated, "Certainly, the nicotine level of B&W cigarettes . . . was not obtained by accident" and that "even now . . . we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require." Id.
18. A 1964 Philip Morris research document stated that "nicotine delivery level should be 0.7 mg minimum." Plaintiffs' Ex. 57(1), PM 1001896774, p. 774.
19. A 1971 Reynolds document referred to the "habituating level of nicotine" and asked "how low can we go?" Plaintiffs' Ex. 58(1), RJR 504210018, p. 018 (emphasis added).
20. That same year, Reynolds' scientist Teague wrote: "If, as proposed above, nicotine is the sine qua non of smoking, and if we meekly accept the allegations of our critics and move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business. If we intend to remain in business and our business is the manufacture and sale of dosage forms of nicotine, then at some point we must make a stand." Plaintiffs' Ex. 43(1), RJR 500915683, p. 688.
21. A 1972 BATCo document recognized that if a cigarette's nicotine level ". . . is so low that the nicotine is below the threshold of pharmacological activity then it is possible that the smoking habit would be rejected by a large number of smokers." Plaintiffs' Ex. 59(1), B&W 660913609, p. 620 (Confidential).
22. In 1973, Reynolds' Teague wrote: "Nicotine should be delivered at about 1.0-1.3 mg/cigarette, the minimum for confirmed smokers." Plaintiffs' Ex. 60(1), RJR 502987357, p. 361.
23. A scientific report from Philip Morris in 1975 stated, "Apparently there is an optimal dose of nicotine; too little or too much is rejected by tobacco smokers." Plaintiffs' Ex. 61(1), PM 1003294245, p. 246.
24. In 1976, BATCo senior scientist Green wrote: "Taking a long-term view, there is a danger in the current trend of lower and lower cigarette delivers - i.e. the smoker will be weaned away from the habit. . . . Nicotine is an important aspect of 'satisfaction', and if the nicotine delivery is reduced below a threshold 'satisfaction' level, then surely smokers

will question more readily why they are indulging in an expensive habit." Plaintiffs' Ex. 40(1), BATCo 110069974, p. 975.

25. An undated BATCo document stated: "High on the list of product requirements is an adequate level of nicotine to sustain the smoking habit. Smokers have a nicotine threshold below which it is ineffective." Plaintiffs' Ex. 62(1), BATCo 102690336, p. 342.
26. Another undated BAT documents stated: "It is therefore realistic to assume that a product targeted at .8 mg will satisfy the consumers pharmacological requirements for nicotine." Plaintiffs' Ex. 63(1), BATCo 400452855, p. 856.
27. A monthly status report from a Reynolds scientist in 1978 noted that for Winston filters there is "an optimum 'nicotine strength' rating in an area near pH 6.2-6.3 and 0.12-0.13 mg/puff nicotine." Plaintiffs' Ex. 64(1), RJR 504462513, p. 513.
28. A 1979 report from the same Reynolds scientist noted, for Winston King Size: "Maximum satisfaction indicated at 1.0 mg/cigt nicotine." Plaintiffs' Ex. 65(1), RJR 503851759, p. 759.
29. A 1980 report from Reynolds scientist Rodgman stated: "Further analysis of data from fuller-flavor low tar consumer satisfaction study has revealed both an optimum and minimum nicotine level required to maximum smoking satisfaction. Camel Lights is in the optimum range. Merit 85 is just above the minimum." Plaintiffs' Ex. 66(1), RJR 500250599, p. 599.
30. A 1980 Reynolds competitive brand analysis, which included analysis of the Twin Cities market, found that, "In its full-flavor brands, the nicotine level [in Philip Morris products] was close to 1.0 mg/cigt., which approximates the optimum nicotine level in that 'tar' range as indicated by recent Research studies." Plaintiffs' Ex. 67(1), RJR 504675253, p. 257.
31. A 1980 Lorillard memorandum, to the highest levels of the company, set a research goal, as follows: "Determine the minimum level of nicotine that will allow continued smoking. We hypothesize that below some very low nicotine level, diminished physiological satisfaction cannot be compensated for by psychological satisfaction. At this point smokers will quit, or return to higher T&N brands." Plaintiffs' Ex. 68(1), LOR 01394380, p. 380 (Confidential).
32. A 1984 agenda for a BAT Group (including B&W) "nicotine conference," listed the first session of the conference as "nicotine dose requirements" and the second session as "nicotine dose estimation." Plaintiffs' Ex. 69(1), B&W 512106427, p. 428 (Confidential). Other sessions included "effects of nicotine - interaction with the brain ('pharmacology')" and "product modification for maximal nicotine effects." Id., p. 435.
33. A 1987 note from a Philip Morris research scientist noted "a minimum amount of nicotine is needed for the smoker's satisfaction (0.8 mg/cig)...." Plaintiffs' Ex. 70(1), PM 2023186690, p. 690 (Confidential).
34. A 1989 Reynolds document noted that the company had a "nicotine optimization" program, from 1978 to 1984. Plaintiffs' Ex. 71(1), RJR 507028876, p. 876.
35. In a 1990 document, three Philip Morris scientists stated that "we have shown that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses." Plaintiffs' Ex. 72(1), PM 2028813366, p. 366 (Confidential).
36. Plaintiffs presented evidence that the tobacco industry has for decades secretly searched for method to manipulate nicotine. Some of the methods researched by the tobacco industry included the direct addition of nicotine.

37. As early as 1956, Reynolds experimented by adding nicotine to tobacco stem. Plaintiffs' Ex. 73(1), RJR 501052852, p. 852.
38. In 1960, Philip Morris was studying the effect of adding nicotine -- in the form of nicotine maleate -- to blended leaf tobacco to increase the nicotine content of cigarettes. Plaintiffs' Ex. 74(1), PM 1001919941, p 941.
39. In 1963, American Tobacco experimented by adding commercial nicotine to its reconstituted tobacco. Plaintiffs' Ex. 75(1), AM 00316688, p. 688 (Confidential).
40. In 1964 Philip Morris was "investigat[ing] purchasing nicotine." Plaintiffs' Ex. 76(1), PM 1001896774, p. 774.
41. In 1967, American Tobacco investigated the production of nicotine from "n rustica," a plant with almost double the concentration of nicotine. Plaintiffs' Ex. 77(1), AM 00881318, p. 318 (Confidential).
42. In 1969, American Tobacco began to refer to nicotine in its experimental work as "Compound W," apparently out of concerns for secrecy. Plaintiffs' Ex. 78(1), AM 00533224, p. 224 (Confidential).
43. In 1973, Lorillard investigated trapping and collecting nicotine from the exhaust gases of its drying operations and calculated the total pounds needed for production cigarettes. Plaintiffs' Ex. 79(1), LOR 81082148, p. 148 (Confidential).
44. However, the tobacco industry learned that the direct addition of nicotine was not a desirable route. Among other reasons, the industry learned that cigarettes with added nicotine had "poor taste." Plaintiffs' Ex. 80(1), BATCo 402390265, pp. 279-80. In addition, nicotine's hazardous nature made experimentation and manufacture with nicotine extremely difficult. Plaintiffs' Ex. 80(1), BATCo 402390265, p. 280. One BATCo document noted that the addition of nicotine solutions to tobacco sheet led to the evacuation of a plant at LeMans. Plaintiffs' Ex. 81(1), BATCo 110088143, p. 151. Significantly, nicotine also was suspected of being a co-carcinogen. Id.
45. Accordingly, the tobacco industry researched more sophisticated methods of manipulating the addictive potential of cigarettes. In 1977, BATCo scientists discussed the drug etorphine, noting that it "is 10,000 times as effective an analgesic as morphine and has addictive characteristics." Plaintiffs' Ex. 82(1), BATCo 107467542, p. 542 (Confidential). BATCo further noted that "[p]erhaps a regular dose of 0.2 ug/day would generate an addictive craving for the source. If so, 6 ug in, say, 30 cigarettes would provide such a dose. . . . Do you think the possibility that competitors might use such a route to create brand allegiance for low delivery cigarettes ought to be discussed at the Research Managers Conference?" Id.
46. The tobacco companies extensively researched nicotine analogues, compounds similar to nicotine which might produce the same effects. Plaintiffs' Ex. 83(1), BATCo 105494689, p. 689; Plaintiffs' Ex. 84(1), LOR 00110371, p. 371 (Confidential). By 1988, Reynolds was studying hundreds of analogues for their pharmacological effects, including their effect on the same receptors in the brain which are affected by nicotine. Plaintiffs' Ex. 85(1), RJR 514894567, p. 583 (Confidential).
47. The tobacco companies also investigated stereoisomers of nicotine -- which have the same chemical formula as nicotine, with the molecules arranged in a different fashion -- for their pharmacological activity. Plaintiffs' Ex. 86(1), BATCo 101117452, p. 452; Plaintiffs' Ex. 87(1), RJR 508880478, p. 478; Plaintiffs' Ex. 88(1), PM 2025986606, p. 606 (Confidential).

48. In the 1980s, Philip Morris studied the compound acetaldehyde. In 1982, a Philip Morris scientist wrote that "acetaldehyde readily penetrates the blood-brain barrier...." Plaintiffs' Ex. 89(1), PM 1003198459, p. 461. In 1983, Philip Morris determined that acetaldehyde could enhance the positive reinforcing effect of nicotine, and Philip Morris set as a goal finding the ratio of acetaldehyde to nicotine that would have "optimal reinforcing effects." Plaintiffs' Ex. 90(1), PM 1000413881, p. 889. Philip Morris scientists even charted the effect of the presence of acetaldehyde upon sales. Plaintiffs' Ex. 91(1), PM 2022261214 (Confidential). The U.S. tobacco industry used acetaldehyde in commercial cigarettes. Plaintiffs' Ex. 92(1), LOR 89257690, p. 690 (Confidential/Category 1).
49. Reynolds found, by 1988, that levulinic acid "can enhance the binding of nicotine to nicotinic receptors in rat brain membrane preparations (unpublished observations). This appears to be a pharmacologically specific effect since it occurred at very low concentrations of levulinate." Plaintiffs' Ex. 85(1), RJR 514894567, p. 567. Plaintiffs' also presented evidence that the U.S. tobacco industry used levulinic acid in commercial cigarettes. Plaintiffs' Ex. 93(1), B&W 606000841, p. 867.
50. In the 1980's, the BAT Group and B&W developed "Y-1," a "genetically engineered tobacco" at an experimental farm in North Carolina and used seeds from the strain to grow artificially high nicotine tobacco in Brazil. Plaintiffs' Ex. 94(1), B&W 510003880, p. 880 (Confidential). The nicotine content of Y-1 tobacco was approximately twice the nicotine content of conventional tobacco. Plaintiffs' Ex. 95(1), B&W 661071395A, p. 395A (Confidential). This nicotine-enhanced tobacco was used to alter tar/nicotine ratios in commercial cigarettes sold in the United States. Id.
51. One process for secretly manipulating nicotine has become the standard in the tobacco industry for cigarettes marketed throughout the United States, including Minnesota. This involves manipulating the form of nicotine in cigarettes by controlling the pH of cigarette smoke through the use of ammonia compounds.
52. Plaintiffs presented evidence that the introduction of ammonia or ammonia compounds into the cigarette manufacturing process raises the pH of tobacco. See Plaintiffs' Ex. 50(1), RJR 511223463, pp. 466, 468; Plaintiffs' Ex. 96(1), RJR 500606138, p. 141 (Confidential).
53. As the pH rises, the tobacco smoke becomes more "basic" and results in an increase in the amount of "free" nicotine, also known as "free base" nicotine (as opposed to "bound" nicotine). See Plaintiffs' Ex. 50(1), RJR 511223463, p. 466; Plaintiffs' Ex. 97(1), LOR 00776238, p. 239 (Confidential).
54. Free nicotine is more volatile and physiologically active than bound nicotine. As one Reynolds document explained:

    > In essence, a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form. At "normal" smoke pH, at or below about 6.0, essentially all of the smoke nicotine is chemically combined with acidic substances, hence is non-volatile and relatively slowly absorbed by the smoker. As the smoke pH increases above about 6.0, an increasing proportion of the total smoke nicotine occurs in "free" form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine "kick."

Plaintiffs' Ex. 50(1), RJR 511223463, p. 466.

1. BAT scientists also understood that "free base nicotine is the most chemically and physiologically active form because it is most rapidly absorbed." Plaintiffs' Ex. 98(1), BATCo 500104402, p. 408.
2. Plaintiffs presented evidence that Philip Morris was the first tobacco manufacturer to use the ammonia process in the United States, beginning in 1964 or 1965, on the heels of the first Surgeon General's report. Plaintiffs' Ex. 99(1), RJR 500990999, p. 1002 (Confidential). At the time, Philip Morris ranked far behind Reynolds in domestic cigarette sales. Plaintiffs' Ex. 100(1) (Confidential/Category 1).
3. Simultaneously with the use of ammonia in its cigarettes, sales of Philip Morris products began to rise dramatically. Id.
4. In 1973, Reynolds conducted an extensive study of the design of Philip Morris Marlboro cigarettes in attempt to discover the reason for its competitor's sharp increase in sales. A "secret" Reynolds report disclosed that:

· Reynolds undertook "an intensive study of the physical and chemical properties" of competitive brands which were showing "vigorous sales growth." Plaintiffs' Ex. 50(1), RJR 511223463, p. 465.
· Reynolds discovered that the pH of Marlboro was consistently and significantly higher than Reynolds' brands and, accordingly, Marlboro contained more free nicotine and "would be expected to show more instantaneous nicotine 'kick' than our brands." Id. The amount of free nicotine in Marlboro was almost three times that found in the smoke of Reynolds' Winston brand. Id., p. 466.
· Reynolds also concluded that other well selling brands -- for example B&W's Kool -- also had increased smoke pH and increased amounts of "free nicotine." Id.
· Reynolds concluded that the high smoke pH attained by Philip Morris and B&W was "deliberate and controlled." Id., p. 465.
· Reynolds also found, using mathematical regression models, that the amount of free nicotine in a particular brand correlated positively to that brand's market share. Id., p. 490.

1. While Reynolds and the rest of the tobacco industry soon learned the reasons behind the success of Marlboro, the public -- and smokers -- were not informed. For example, a senior Philip Morris executive was interviewed in 1973 by Mike Wallace on "60 Minutes," as follows:

   WALLACE: [W]hy is Philip Morris apparently doing so much better than the industry as a whole?

   PHILIP MORRIS: I wish I knew the answer to that. . . . It is difficult explain why.

Plaintiffs' Ex. 101(1), RJR 503665743, p. 744.

- Reynolds soon moved its cigarette design in the same direction as Philip Morris. In 1973, Reynolds discussed using pH manipulation "to assure RJR a larger segment of the youth market." Plaintiffs' Ex. 102(1), RJR 501166152, p. 152.
- By 1974, Reynolds had "introduced ammoniated sheet filler in the Camel filter cigarette. . . . Better market performance was indicated in the subsequent years." Plaintiffs' Ex. 103(1), RJR 509018864, p. 864 (Confidential).
- Eventually, the use of ammonia -- resulting in increased levels of pH and "free nicotine" -- was the norm of the industry. As B&W reported in a 1989 document, "all U.S. manufacturers except Liggett use some form of AT [ammonia technology] in some

cigarettes products...." Plaintiffs' Ex. 104(1), B&W 508104012, p. 016 (Confidential). Liggett then also began to use ammonia technology. Plaintiffs' Ex. 105(1), LG 2018563, p. 563 (Confidential/Category 1).

- Ammonia compounds became the top additives by volume in the industry. Plaintiffs' Ex. 106(1), B&W 566408585, p. 585 (Confidential).
- As another B&W document stated: "RJR alone has ammonia emissions of 900,000 lbs./year in North Carolina," "the U.S. industry uses about ten million pounds of ammonia compounds a year," and industry ammonia usage "corresponds to about 10 mg. of ammonia compounds per cigarette produced." Plaintiffs' Ex. 104(1), B&W 508104012, p. 016 (Confidential).
- Plaintiffs presented evidence of lawyer involvement in nicotine addiction and manipulation issues. The tobacco industry recognized that the issues of nicotine addiction were potentially explosive in smoking and health litigation. As a 1980 Tobacco Institute document stated:

  > Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as "free choice" if a person was "addicted."

Plaintiffs' Ex. 107(1), TI 0107822, p. 823 (Confidential).

- At a 1983 meeting of research directors, BAT and Philip Morris (and several foreign tobacco companies) noted "possible legal implications" of certain research. Plaintiffs' Ex. 108(1), BATCo 109840698, p. 698 (Confidential). A document memorializing the meeting stated:

  > "[T]he role of nicotine, at the relevant lower range of nicotine dosage, in perpetuating the smoking habit [was] a particularly sensitive area for the industry. . . . If any study showed that nicotine was, or was not, associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!).

Id., p. 700 (Confidential).

1. Edwin Jacob, long-time tobacco industry counsel, "advised a total embargo on all work associated with the pharmacology of nicotine" in a meeting with the European tobacco industry. Plaintiffs' Ex. 109(1), BATCo 110083647, p. 649. Jacob's advice was based in part on: "The pending Californian lawsuit which indicted nicotine as an addictive substance." Id., p. 650.
2. In the present proceedings, there are a large number of documents relating to addiction and nicotine manipulation for which the tobacco companies are asserting privilege. For example, Philip Morris's scientist William Dunn, appears on the Philip Morris logs. One such privileged document is from Dunn to Robert Seligman, vice president for research and development, and is logged as, "Memorandum from Philip Morris employee to Philip Morris employee containing legal advice regarding nicotine research." PM 2022249518.
3. Other documents authored by Dunn and withheld by Philip Morris include:

· "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding neuroscience research." PM 1003289971. See also PM 1003724292 (ibid.).
· "Memorandum ... memorializing conversations with D. Hoel and E. Jacobs regarding nicotine research program." PM 2046754714.

· "Report from Philip Morris employee to Philip Morris counsel ... regarding neurosciences and research." PM 2046754716.

1. The Philip Morris privilege logs also list a series of documents authored by senior scientist Helmut Wakeham, who was head of research and development, relating to nicotine. For example:

· A 1963 document from Wakeham to another Philip Morris scientist is listed as, "memorandum ... memorializing conversation with Philip Morris counsel regarding nicotine research." PM 1001936577.
· A 1968 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... regarding nicotine manuscript." PM 1000322221.
· A 1971 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking behavior." PM 1005108606.
· A 1973 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... regarding tar and nicotine deliveries." PM 1000218906.
· A 1975 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking and human behavior." PM 1000209435.
· A 1977 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking behavior." PM 1000212791.
· A 1976 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... seeking advice regarding tar and nicotine intake." PM 1000215306.

1. Other Philip Morris privilege log entries relating to nicotine and addiction include:

· "Memorandum from Philip Morris employee to Philip Morris counsel regarding nicotine content." PM 1005068816.
· "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding research on physiological effects of tobacco." PM 1000245054.
· "Memorandum from Philip Morris employee to Philip Morris counsel regarding nicotine research." PM 1003717684.
· "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding research on nicotine delivery." PM 2023095464.
· "Memorandum ... prepared at the direction of Philip Morris counsel regarding nicotine." PM 2050878696.
· "Letter .. sent at the direction of Philip Morris counsel regarding pharmacology of nicotine." PM 2029266161.
· "Memorandum sent at the direction of counsel ... regarding the pharmacology of nicotine. PM 2029266156. See also PM 2029266155 (ibid.)
· "Report analyzing claims regarding nicotine prepared by Philip Morris consultant and sent to Philip Morris counsel...." PM 2023196038.

1. Plaintiffs presented evidence of other defendants' claims of privilege over documents relating to addiction. Examples from the privilege logs include:

· B&W is withholding a document addressed to "members of the addiction committee" and titled "confidential communication from outside counsel for B&W to an industry committee . . . providing information to facilitate the rendition of legal advice regarding smoking cessation." B&W 682012003.

· Reynolds is withholding a 1957 document authored by scientist Rodgman titled, according to the 4A index, "Cigarette Smoking Termed Lethal Habit With Some Addiction Involved." RJR 503270819.
· Reynolds is withholding a 1983 document from one scientist, R.H. Steele, to another scientist, C.W.Nystrom, entitled, according to the 4A index, "EEG Power Spectral Effects of Intravenous Nicotine Administration in Humans." RJR 502526580. (EEG, also known as electroencephalography, measures brain activity.)
· BATCo is withholding a 1975 document from senior scientists S.J. Green and D.G. Felton described on the privilege logs as "request for legal advice re smoking habit experiments." BATCO 100430150.
· BATCo is withholding another document to Green and Felton, as well as senior executive I.W. Hughes, dated 1961 and titled "advice re comparison of methods for nicotine assay." BATCO 105397865.

1. Plaintiffs also presented evidence that a number of defendants are withholding documents directly related to nicotine manipulation -- including documents relating to ammonia (or ammonia compounds, such as diammonium phosphate) and acetaldehyde and nicotine levulinate. For example:

· Philip Morris is withholding a series of documents relating to an "ammonia white paper." See PM 2050872144; PM 2050872011; PM 2050872012; PM 2050871955; PM 2050871956; PM 2050872038; PM 2050872055.
· Philip Morris is withholding a series of charts and graphs "regarding ammonia and nicotine." See PM 2051994843; PM 2050871668; PM 2050871699; PM 2050871701; PM 2050871721; PM 2050871725; PM 2050871760; PM 2050871792; PM 2050871795.
· Philip Morris is withholding a "memorandum from Philip Morris employee to Philip Morris counsel ... regarding casing and acetaldehyde delivery." PM 2050802978.
· B&W is withholding a letter prepared by in-house counsel "regarding consumer awareness of the effect of ammonia on nicotine." B&W 690850007.
· B&W is withholding a report by its in-house counsel Wells "relating to ammonia use in cigarettes...." B&W 536470451.
· Reynolds is withholding a "list" and a "report" by scientist Colby and outside consultant Frederick Giller entitled, according to the 4A index, "Acetaldehyde." RJR 500270284; RJR 500549524.
· Reynolds is withholding documents, as described in the 4A index, on "use of diammonium phosphate", see RJR 510603906; RJR 507866200; "ammonia in cigarette smoke" see RJR 502857019; RJR 503260109; RJR 504834095; "use of reconstituted tobaccos containing ammonia," RJR 506209147; "ammonia," RJR 504212337.
· Reynolds is withholding a series of documents, as described in the 4A index, on levulinic acid and nicotine levulinate. See RJR 506235259 ("scientific affairs evaluation of nicotine levulinate as a cigarette tobacco ingredient"); RJR 507955418 ("levulinic acid . . . has the structure CH3CO(CH2)2COOH").

1. In response to the evidence of defendants' internal knowledge that nicotine is an addictive drug, defendants argue that plaintiffs have "cherry picked" from defendants' documents. Transcript, p. 143. I conclude, however, that this response does not adequately account for the more than 80 documents, spanning more than 40 years, presented by plaintiffs. I also note that defendants have not disputed the content of these documents. It is also noteworthy that these documents were written primarily by senior scientists and research

officials at defendant companies. Finally, defendants have failed to present evidence from their own internal files to support their allegation that plaintiffs' selection is unrepresentative of defendants' actual knowledge regarding addiction.

2. In fact, the evidence from defendants' internal files indicates that there has been no serious debate for years that smoking is addictive, or habituating. For example, a 1975 BAT document by A. Comer, a BATCo scientist, concluded that: "In summary, it appears that most workers who are not directly concerned with the tobacco industry use the terms addiction or dependence rather than habituation and can be considered quite correct in doing so. If cigarette smoking is as addictive as the evidence suggests, it is not surprising that antismoking campaigns are so ineffective....." Plaintiffs' Ex. 44(1), BATCo 105392361, p. 366 (emphasis added).
3. In addition to these internal company documents, defendants' own experts contradict defendants' position on addiction. For example, defendants' experts in this litigation, Dr. Peter M. Rowell and Dr. Zalman Amit, have conceded that smoking is addicting and/or a drug of dependence at one time or another. In his deposition, Dr. Rowell admitted that nicotine in cigarettes is dependence producing and that the terms "addiction" and "dependence" are used synonymously. Plaintiffs' Ex. 2(2), Rowell Depo., pp. 134-135. (Dr. Rowell stated that in his view, however, nicotine caused only mild dependence and that only severe dependence was an addiction.). Dr. Amit had no difficulty comparing cigarette smoking to other drugs widely acknowledged to be addictive in his earlier writings. In a book he wrote in 1976 entitled "Stop Smoking for Good", Dr. Amit admitted that nicotine is similar in its actions to cocaine and the amphetamines. Plaintiffs' Ex. 3(2), p. 6; Ex. 4(2), Amit Depo., p. 102. Dr. Amit also wrote that "[s]topping smoking, all the research indicates, is quite as difficult as giving up alcohol or even heroin. Plaintiffs' Ex. 3(2), p. 207; Ex. 4(2), Amit Depo., p. 138. At his recent deposition, Dr. Amit agreed that both cocaine and cigarette smoking are "dependence-producing." Plaintiffs' Ex. 4(2), Amit Depo., pp. 107-108, 110.
4. In response to plaintiffs' evidence of nicotine manipulation, defendants argue that they have conducted research and manufactured and sold cigarettes with reduced tar and nicotine levels as measured by the FTC. However, this ignores the substantial evidence presented by plaintiffs regarding compensation for reduced levels of nicotine. In addition, there is evidence of nicotine manipulation in low tar cigarettes manufactured by defendants, which would lead to a cigarette with higher addictive potential than indicated by the FTC rating. For example, a Reynolds documents states that "low 'tar' products at RJR were designed with ammoniated sheet material beginning in 1974." Tab 51, Reynolds 509018864. 272. Defendants also argue that the pH of cigarette smoke has no effect on the overall level of nicotine absorbed by the smoker. Documents from defendants' internal files, however, describe how increasing the pH level has the effect of increasing the amount of "free" or "free base" nicotine, as opposed to "bound" nicotine. Free nicotine, defendants' documents reveal, is absorbed more rapidly by the smoker than bound nicotine. For example, a Reynolds document states that '[a]s the smoke pH increases above about 6.0, an increasing proportion of the total smoke nicotine occurs in "free" form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine 'kick.'" Plaintiffs' Ex. 50(1), RJR 511223463, p. 466 (emphasis added). A BATCo document states that "free base nicotine" is the "most chemically and physiologically active form" of nicotine. Plaintiffs' Ex. 98(1), BATCo

500104402 (emphasis added). According to plaintiffs' expert on addiction, by increasing the amount of free nicotine, the "addictive potential of nicotine is increased." See Expert Report of Dr. Richard Hurt. Thus, I find that defendants' arguments discounting the impact on the smoker of increasing pH are not persuasive.

5. Defendants, through the affidavit of former Philip Morris employee, John D. Hind, argue that the use of ammonia products in manufacturing reconstituted sheet was not developed in order to affect nicotine delivery. Similarly, Reynolds introduced a 1996 document apparently prepared for "legal and regulatory responses" stating that Reynolds' decades of research on pH manipulation was wrong. I do not find this evidence persuasive. Numerous contemporaneous documents from the internal files of defendants are more persuasive evidence than isolated documents created by defendants for litigation purposes. In addition, Mr. Hinds' affidavit does not address whether his invention was ever used by Philip Morris for the purpose of increasing pH and the amount of free nicotine in cigarette smoke. Similarly, the 1996 Reynolds document is directly contradicted by previous internal memoranda from Reynolds' files, which were written prior to nicotine manipulation surfacing as an issue in tobacco litigation. See, e.g. Plaintiffs' Ex. 50(1), RJR 511223463, p. 465 (attributing the rise in sales of Marlboro to its higher pH and hence free nicotine).
6. The law provides certain protection against the discovery of communications between an attorney and his/her client:

   > 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).

1. The party asserting the attorney client has the burden of establishing the privilege. Brown v. St. Paul City Ry. Co., 241 Minn. 15, 62 N.W.2d 688, 701 (1954). 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, 62 N.W.2d at 700.
2. Similarly, protection from disclosure is provided to work product. Work product is divided into two categories -- opinion work product and ordinary (or fact) work product. Again, the party asserting the privilege has the burden of establishing that protection applies. The protection for ordinary work product is qualified. It is discoverable 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). Opinion work product -- the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation -- is more fully privileged from disclosure. Brown, 241 Minn. at 35, 62 N.W.2d at 701.
3. Both the attorney-client privilege and the work product doctrine protect communications whose predominate purpose is legal in nature. The attorney-client privilege protects confidential communications between an attorney and a client "where legal advice is

sought." Burton v. R.J. Reynolds Tobacco, 170 F.R.D. 481, 484 (D. Kan. 1997) (32 of 33 tobacco industry documents reviewed found not privileged). The work product doctrine protects only information "primarily concerned with legal assistance." In re Air Crash Disaster at Sioux City Iowa, 133 F.R.D. 515, 519 (N.D. Ill. 1990).

4. 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). Whether the party asserting privilege has satisfied its burden is a question vested in the discretion of the trial court. Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. 1987). Likewise, it lies within the court's discretion to determine whether particular information is protected work product, and whether that protection has been overcome. In re Indenture of Trust March 1, 1982, 437 N.W.2d 430, 437 (Minn. App. 1989).
5. I find that defendants' claims of privilege are overly-broad. Defendants have asserted privilege over thousands of communications that constitute or concern scientific research. As Judge Fitzpatrick concluded, however, defendants had an independent obligation to conduct research into the safety of their products, and to warn consumers if the research results supported negative conclusions. That obligation to disclose cannot be eliminated by the assertion of attorney-client privilege. Order of May 9, p. 28. Nor does scientific information become privileged merely because it is incorporated into a communication between an attorney and client. Upjohn Co. v. United States, 449 U.S. 383, 395-96, 101 S.Ct. 677, 685-86. Legal departments simply "are not citadels in which public, business or technical information may be placed to defeat discovery. . . ." Simon v. G.D. Searle, 816 F.2d 397, 403 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987).
6. Nor does defendants' claim that much of the research is public justify their claim of privilege over other research. As Judge Fitzpatrick found, defendants cannot publicly use research which supports their economic interests, but claim privilege for research which may not. Order of May 9, p. 28 (citing Laughlin v. A.H. Robins, Minn. Dist. Ct. No.776-868 (March 21, 1984).
7. I specifically find that defendants have asserted claims of privilege over information generated by counsel acting in scientific, administrative or public relations capacities, but not in a legal capacity. That information is not privileged. See Burton, 170 F.R.D. at 484 (D. Kan. 1997).
8. I find that plaintiffs have demonstrated substantial need for documents concerning scientific research that have been designated by defendants as fact work product, and that plaintiffs are unable to obtain the substantial equivalent of the withheld fact work product without undue hardship. See Rule 26.02, Minn.R.Civ.P. Defendants in this action contest that smoking causes disease and nicotine is addictive, yet seek to place certain research and/or scientific analysis that may prove otherwise beyond discovery. Thus, plaintiffs have a substantial need for fact work product documents which demonstrate defendants' knowledge and internal views concerning the health hazards of smoking, including nicotine addiction. In similar circumstances, where manufacturers deny knowledge of the health hazards of their products, courts have found that information revealing such knowledge is discoverable. See Laughlin v. A.H. Robins, D.C. File No. 776868 (Minn. Dist. Ct., March 21, 1984) (J. Lebedoff) (plaintiffs established need for work product tests regarding dangers of Dalkon Shield IUD); Loenen v. Johns Manville, 135 F.R.D. 94, 99-100 (D.N.J. 1990) (plaintiffs met showing of need for otherwise privileged

information establishing defendants' awareness of dangers of asbestos). See also Judge Fitzpatrick Order of November 1, 1995 (CLAD #278) (finding plaintiffs had made showing of substantial need for production of defendants' fact work product document indices); Judge Fitzpatrick Order of September 4, 1997, p. 3 (CLAD # 1300) (finding plaintiffs had made showing of substantial need for production of defendants' fact work product formula documents).

9. Plaintiffs' showing of substantial need is further strengthened by evidence in the record demonstrating that defendants have selectively employed claims of privilege in order to shield certain information from discovery while certain other information was produced by defendants. In addition, defendants have not clearly articulated how they have drawn the distinction between scientific documents produced to plaintiffs and scientific documents withheld on claims of privilege.
10. One example of defendants' selective use of privilege is the 1996 document introduced by Reynolds in these proceedings on the issue of nicotine manipulation. RJR 516763508-548. This document is identified as relating to "legal and regulatory responses." Id., p. 508. Reynolds, however, has produced this memo, since it provides a more favorable interpretation of previous (contemporaneous) internal memoranda. Reynolds has not, however, produced other memoranda from 1996 (post-litigation) which relate to this memoranda, including any drafts of this memo or any memos directing the review contained in this memorandum.
11. Defendants also may not justify their claims of privilege over scientific research and information by arguing that it was authored by in-house scientists acting as non-testifying experts. 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 and a leading commentator. See Virginia Elec. Pow. Co. v. Sun Shipbuilding, 68 F.R.D. 397, 405 (E.D.Va. 1975) ("[W]ork performed and the reports made by in-house experts was not the work product of lawyers."); Union Carbide Corp. v. Down Chemical Corp., 619 F. Supp. 1036, 1051 (D. Del. 1985) ("[F]actual 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. . .'"); 8 Wright, Miller & Marcus, Federal Practice and Procedure § 2033, at 466 (2d ed. 1994) (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."). Thus, I reject defendants' argument that scientific research documents prepared by defendants' employees are protected by privilege. But for defendants selective designation of employees as "experts," this information would have been discoverable by plaintiffs. Plaintiffs' discovery of scientific information is an appropriate inquiry in this case and should not be defeated by defendants' attempts to deputize members of their scientific staff as consultants to the legal department.
12. Defendants argue that analyses prepared by company scientists of published scientific literature are privileged. I find, however, that such analyses -- even if prepared by a scientist assisting the legal department -- are not privileged. These documents demonstrate the contemporaneous corporate knowledge of the defendants as to the safety of their products and thus are an appropriate area of discovery by plaintiffs. See Special Master Liggett Report, p. 48; see also Burton v. R.J. Reynolds Tobacco Co, 170 F.R.D.

481, 488 (D. Kan. 1997)("Preparation of a review of scientific literature by a scientist assisting the legal department. . . does not cloak the document with work product immunity.").

13. Even if privileged, scientific research and information prepared by non-testifying experts is discoverable upon a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Ager v. Jane C. Stormont Hosp., 622 F.2d 496, 502 (10th Cir. 1980); see also Minn.R.Civ.P. 26.02(d)(2). I find that standard is met here. As recognized by Judge Fitzpatrick, a party selling a product has a duty to keep abreast of the hazards posed by its product. See Order of May 9, p. 28. Normally, it is to this body of in-house knowledge (developed in furtherance of a business duty rather than for the purposes of litigation) that a plaintiff would turn to show a manufacturer's underlying knowledge of its product. In similar circumstances in the asbestos litigation, the court in Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 299 (E.D. Pa. 1980), required the defendant to produce information -- in the hands of non-testifying consultants -- concerning the manufacturer's knowledge of the health hazards of asbestos. Thus, I find that plaintiffs have demonstrated that "exceptional circumstances" exist for production of scientific research and information prepared by defendants' non-testifying experts. This is especially evident in this case, given the extensive record of defendants utilizing third parties -- as opposed to in-house scientists -- to perform sensitive research.
14. In his order of May 9, 1997 Judge Fitzpatrick found that plaintiffs had made a prima facie showing of crime-fraud with respect to:

· Defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance...." Order of May 9, p. 5.
· Defendants' assurances "that the tobacco industry was committed to providing safe products." Id., p. 5.
· Defendants' "intentionally den[ying] or minimiz[ing] known health risks...." Id., p. 7.
· Defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues." Id., p. 9.
· Defendants' attempts "to create doubt as to a connection between smoking and illness" and "to create doubt that cigarette smoking causes illness." Id., pp. 9, 10.
· Defendants' "safety-related" or "health-related" research...." Id., p. 28.

- Following the opportunity of the claimant of the privilege to present rebuttal evidence, it is not clear what the standard of review is to be. In Levin v. C.O.M.B. Co., 469 N.W.2d 512 (Minn. App. 1991), Judge Short wrote:

  > Yet the record before us shows the trial court did not abuse its discretion by implicitly finding Levin failed to make a prima facie case of fraud at the motion hearing. Id. at 469 N.W.2d 515, 516.

Judge Short made this observation in reference to the trial court's consideration of affidavits submitted by the plaintiff and testimony submitted by the defendant. Thus, the trial court was making a final determination as to admissability, and not a threshold determination whether an in camera inspection should occur. Thus, the C.O.M.B. decision stands for the proposition that if there is still a prima facie case after defendants have been provided an opportunity to rebut the threshold evidence, the privilege is lost.

- This does not resolve the problem, however. What is the quantum of proof sufficient to rebut? The C.O.M.B. opinion does not address this question. In their written submissions, Defendants argue that the plaintiffs must carry the burden of proof by a preponderance of the evidence. I accept this proposition. Laser Indus. v. Reliant Technologies, 167 F.R.D. 417, 438 (N. D. Cal. 1996); The American Tobacco Co. et. al. v. The State of Florida, Case No. 97-1405 at p. 6. (Florida 4th District Court of Appeals, July 23, 1997).
- In Judge Fitzpatrick's Order of May 9, 1997, he set forth the analytical method to be used in this case:

  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 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 to lead 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 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.

- In their submissions, defendants have urged that I accept a common law definition of "fraud" and require a demonstration by the defendants that each of the elements of common law fraud have been demonstrated and not rebutted. I decline to do so. First, such a requirement would be inconsistent with Judge Fitzpatrick's Order of May 9, 1997. Second, the particular facts and allegations of this case cause me to believe that the issue of "fraud" rests at least in part in Minn. Stat. § 325F.69 which makes it unlawful, at subd. 1 to use "...any fraud, false pretense, false promise, misrepresentation, misleading statement or deception practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has, in fact, been mislead, deceived or damaged thereby..." Thus, the element of actual reliance is eliminated by statute.
- Additionally, Levin v. C.O.M.B., Co., 469 N.W.2d 512, 515 (Minn. App. 1991) does not, to my reading, specify that all elements of commons law fraud be demonstrated. Rather, the opinion observes that application of the crime-fraud exception should not be based on a rigid analysis. Instead, the focus should be on whether the detriment to justice from

foreclosing inquiry into pertinent facts is outweighed by the benefits to justice from a franker disclosure in the lawyer's office. Id. at 469 N.W.2d 515.

- The defendants in this case, whether through a voluntary undertaking embodied by the Frank Statement, or whether by operation of law, were obliged to conduct research into the safety of their products and to warn the product's consumers if the research supported negative conclusions. See Fitzpatrick Order dated May 9, 1997.
- Accordingly, my inquiry in this case is this:

  Am I satisfied by a preponderance of the evidence offered by both plaintiffs and defendants that the defendants were engaged in criminal or fraudulent conduct? Included within "criminal or fraudulent conduct" are a failure to conduct appropriate research into the safety of their products and a failure to warn their products' consumers if the research supported negative conclusions.

  Second, has it been demonstrated by a preponderance of the evidence that the involvement of defendants' attorneys was in furtherance of the conduct or was closely related to it?

- In the Special Master Report of September 10, 1997, I found that the above findings had not been rebutted by defendants, with one exception. That exception related to one aspect of CTR: grant research approved by the CTR Scientific Advisory Board. Special Master Report, at ¶ 138.
- The agreement on the part of all of the U.S. tobacco manufacturers individually to limit or avoid biological research into whether their product causes disease, coupled with defendants ongoing assurances that causation of illness was unproved and speculative, "necessarily implicates the holding of Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991): Is the detriment to justice from foreclosing inquiry into pertinent facts outweighed by the benefits to justice from a franker disclosure in the lawyer's office?" See Special Master Report, at ¶ 146.
- On the facts of this case, I conclude that further inquiry must be permitted and that plaintiffs in this case must be permitted to inspect documents withheld on claims of privilege which relate to research of the defendants.
- The defendants in this case, whether through a voluntary undertaking embodied by the Frank Statement, or whether by operation of law, were obliged to conduct research into the safety of their products and to warn the product's consumers if the research supported negative conclusions. Included within 'criminal or fraudulent conduct' are a failure to conduct appropriate research into the safety of their products and a failure to warn their products' consumers if the research supported negative conclusions.
- In this round of proceedings, both plaintiffs and defendants proffered evidence regarding nicotine addiction and nicotine manipulation. This evidence included defendants' public statements concerning addiction, as well as defendants' internal knowledge of the properties of nicotine and defendants' conduct with respect to the design of cigarettes.
- Regardless of whether nicotine is "addictive" or "habit forming," the overwhelming evidence supports the fact that the nicotine in cigarettes makes it more difficult for many people to quit smoking. Given the health risks of continued smoking, at least amounting to strong statistical correlation, this clearly links nicotine to health and safety issues in this case.

- Thus, I conclude that this evidence concerning nicotine and addiction is related to Judge Fitzpatrick's findings regarding defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance. . . ."; defendants' assurances "that the tobacco industry was committed to providing safe products"; defendants' "intentionally den[ying] or minimiz[ing] known health risks. . . ."; defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues;" defendants' attempts "to create doubt as to a connection between smoking and illness," and defendants' "health-related" research. Order of May 9, pp. 5, 9, 10 and 28.
- With respect to tobacco industry public statements denying that smoking or nicotine is addictive, defendants argue that the industry was merely participating in the public scientific debate over the definition of addiction. Accordingly, defendants maintain, since scientific opinion regarding addiction has evolved over the past decades, defendants' public statements cannot be the basis of a crime-fraud finding.
- I find that, for the purposes of the crime-fraud exception, the issue is not the public debate over the definition of addiction, but rather the internal knowledge of the defendants regarding this issue. I find that the foregoing documents reasonably lead to the conclusion that the defendants internally discussed the addictive qualities (or arguably addictive qualities) of smoking while at the same they intentionally denied or minimized this health risk to the public.
- In addition, for purposes of the crime-fraud exception, the issue is not the definition of the term "addiction." Instead, the issue is the difficulty of quitting smoking. As the federal magistrate stated in Burton v. R.J. Reynolds Tobacco Co., No. 94-2202-JWL (Aug. 14, 1997), in denying Reynolds' motion for reconsideration of a prior order overruling Reynolds' claims of privilege:

  > The court also notes RJR's argument that the minutes make reference to "habituation" rather than "addiction" and, therefore, concludes the court erred in its finding that the document may provide evidence of knowledge that nicotine may be addictive. . . . The court believes that the dispute concerning the use of these terms is not a controlling issue for discovery purposes. Practically, the terms "habituation" and "addiction" are similar concepts. The use of the term "habituation" may be evidence of knowledge of "addiction," dependent upon the context and the protocols of RJR.

Id., at 9.

- The failure of defendants to report their internal research on addiction (or habituation) and nicotine manipulation to the public, coupled with their ongoing assurances that addiction was unproved and speculative, necessarily implicates the holding of Levin, supra. On the facts of this case, I conclude that further inquiry must be permitted and that plaintiffs in this case must be permitted to inspect documents withheld on claims of privilege which relate nicotine addiction and manipulation (even if such documents are privileged in the first instance.)
- I note that many of the defendants have withdrawn claims of privilege over documents randomly selected by me and/or selected by plaintiffs for in camera review. For example, Philip Morris has withdrawn claims of privilege for 38 documents selected by me and/or plaintiffs. See CLAD #1569. Reynolds, CTR, BAT Industries, BATCo and TI have made

similar withdrawals of claims of privilege. In light the number of privilege claims withdrawn, I am concerned that defendants have over-designated documents as privileged. Moreover, if I were to remove these documents from the in camera review process, the integrity of the entire category procedure could be undermined. As a result, I have considered these documents in the category-by-category determination of privilege.

- In the Findings above, I have commented upon the Defendants' claims of joint privilege and joint defense. The extensive evidence I have reviewed persuades me that the attorneys for the Defendants, whether representing individual manufacturers or industry representatives, acted jointly in defense of the entire industry. I am unaware of any industry which has faced such continuing legal pressures on so many fronts, and it is understandable that the tobacco industries attorneys would unite against common external threats. It is also my conclusion that this union resulted in the attorneys' control over the aspects of the tobacco business which might be the subjects of litigation. The presentation of the parties, and the documents I have reviewed, cause me to conclude that the attorneys directed the acquisition and control of information relating to smoking and health.
- Based upon the above findings of fact and conclusions of law, review of the submissions of the parties, and the extensive hearings and proceedings, I am making a number of recommendations. These recommendations also are based upon my extensive in camera review of the documents themselves.
- In my review of documents, I have determined that the documents share sufficient common characteristics and criteria to allow determination of privilege on the basis of categories and/or characteristics. The categories and/or characteristics of the documents, as described below, warrant production to plaintiffs as follows:

CATEGORY I

- Category 1 consists of two types of documents: those for which any previous claim of privilege by defendants has been denied by other courts, and documents specifically selected by plaintiffs in this action.

- Defendants were required to designate into Category 1 all documents found by other courts to lack privilege. Every court 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. Courts have denied defendants' claims of privilege over the following types of documents:
  · Attorney communications regarding scientific research.
  · Documents regarding defendants' knowledge of the addictiveness or habituating nature of nicotine.
  · Documents regarding suppression of the true health risks of cigarettes.
  · B&W's so-called "Merrell Williams" documents.
  · Documents regarding the tobacco industry's "youth programs."
  · A document regarding Reynolds' abrupt termination of its smoking and health research.

1. During the Liggett round, I made the following findings regarding the Liggett documents for which a claim of privilege had been previously denied by another court:

· "To the extent that these documents reflect attorneys selecting and directing research projects, and to the extent that the documents represent information as to the 'corporate knowledge' of the defendants at relevant times, I am of the opinion that the

documents should not be privileged in the first place. If corporate research directors had selected and directed research on safety issues, the documents generated during the decision making process would have been discoverable." Special Master Report, at pp. 48-49 (emphasis added).

· 'These documents are subject to the crime-fraud exception because they demonstrate the actual involvement of the attorneys for the defendant companies in the selection, funding, and funding continuation for CTR Special Projects, and because these documents provide relevant evidence of the response by the defendants to allegations from external sources to the effect that the defendants' products were unsafe." Id., p. 49 (emphasis added).

1. As with the Liggett documents, I find that documents placed in category 1 by the non-Liggett defendants are not privileged and/or closely-related to the crime/fraud findings in this litigation.
2. There are three documents from Category 1 which were selected at random, and which strongly reinforce my factual conclusion that Defendants have failed to rebut the prima facia case of crime fraud.
    a. BAT Industries Document 202221955-1961. This is a letter dated August 20, 1970 from David Hardy of the Shook Hardy law firm to DeBaun Bryant, general counsel for Brown & Williamson Tobacco Corporation. In this letter, Mr. Hardy discusses the legal relationship between the British-American Tobacco Company and Brown & Williamson and the recent dismissal of BAT from an Illinois case.

This correspondence is plainly a warning letter to Mr. Bryant in which Mr. Hardy, an attorney for the entire industry, alerts Mr. Bryant, general counsel for an individual tobacco company, to the dangers of the open discussion by scientists of possible health risks caused by smoking. Mr. Hardy writes:

> It is our opinion that statements such as the above [i.e., statements discussing smoking risks] constitute a real threat to the continued success in the defense of smoking and health litigation. Of course, we would make every effort to "explain" such statements if we were to be confronted with them during a trial, but I seriously doubt that the average juror would follow or accept the subtle distinctions and explanations that we would be forced to urge.

In this correspondence, Mr. Hardy is warning against any such suggestions by industry researchers that cigarettes might cause adverse health effects. This inference is consistent with the proposition that industry attorneys manipulated or attempted to manipulate industry science.

- BAT Industries Document 202347085-086. This document, from the privilege log, was prepared by N. Cannar, counsel for BAT Co. relates to document retention and research. The document itself reflects that it is an agenda, presumably for a meeting. The document raises several troubling points of discussion:

  Information Required.

  1. Identification of documents currently sent off-shore by Group companies with research centers.

  ***

  2. Identification of each company's "research mission." Should this be defined by reference to its current research programme? How can this be defined to include research material from overseas which is useful and uncontroversial whilst

excluding material which is irrelevant to the receiving company's research activity and may have health sensitivity.

***

Issues/Proposals.

1. Restrict current flow of research related documents by:

***

2. Improve quality of documents by

***

b. Regular lawyer reviews and audits of scientific documents produced in each company.

- BAT Co. Document 503100993-997. This document is not identified as to author or recipient. It is identified as a draft of March 24, 1986, and entitled "Note for the Tobacco Strategy Review Team, Tobacco Research in the B.A.T. Industries Group." The document appears to reflect a consensus of the members of the group, whether reached at a meeting, or through other communication.

· Among the observations in the document are:

Brown & Williamson now believe that for legal reasons, parts of the Group Research Programme are not acceptable. On the other hand, BAT Co. believe that the Programme reflects a responsible commercial attitude which takes due account of legal obligations. BAT Industries as been asked for a ruling.

· Brown & Williamson's position with respect to product research is said to be:

Product modification work where there is no current identified consumer demand or regularatory requirement is not desirable, i.e., there should be no anticipation of future trends in these areas. This would rule out e.g. Project Rio...which involves researching products with lower levels of biological activity...

· On the subject of smoking and health, the document states:

Brown & Williamson are opposed to any research which has any relevance to the smoking and health issue other than providing financial support if this is thought necessary to broadly based external research programmes...

- Each of the documents discussed in the previous Findings goes directly to the control or suppression of research, and the creation of privilege shields to conceal possession of dangerous information. BAT Industries Document 202221955 is particularly disturbing because it was written by a member of the firm which has for decades represented the tobacco industry.
- Pursuant to the Order Setting Forth Document Categories for Determination of Privilege Claims, plaintiffs had the option of designating documents for consideration in subject matter Category 1. See Order of May 22 at ¶ 1 ("all documents specifically designated by plaintiffs by Bates numbers"). Accordingly, plaintiffs designated 365 privilege documents -- which are identified in Plaintiffs' Memorandum of Law in Opposition to the Non-Liggett Defendants' Claims of Privilege, dated September 29, 1997, and listed in their Appendix A thereto -- as category 1 documents. I reviewed in camera each document designated by plaintiffs. I find that the documents selected by plaintiffs are (1) not privileged because they involve safety-related scientific research and/or (2) are closely related to the areas of crime-fraud set forth in Judge Fitzpatrick's May 9 Order. See Order of May 9, pp. 5, 7, 9, 10 and 28; see also Special Master Report, pp. 39-48.

CATEGORY II

- The documents contained in Category 2 address a wide variety of subject matters. However, the documents within Category 2 demonstrate that although these documents do not show any evidence, on their face, that they were written or received by an attorney, they are primarily legal in nature.

- When individual documents are analyzed for their content, it is clear that they contain confidential communications and legal advice, including mental impressions and legal conclusions by counsel. In many instances, documents falling within Category 2 contain legal advice that is recorded in a document authored by non-attorneys that may remain in his own files or that may be sent, on a confidential basis, to other non-attorneys. (See, e.g., Philip Morris document 2021644413, a memorandum from a Philip Morris employee to a Philip Morris employee recording and relaying a privileged attorney-client communication between the employee and two Philip Morris counsel, Holtzman and Katz, containing protected opinion work product of counsel.)
- 319. When individual documents are analyzed in conjunction with other surrounding or contemporaneous documents, it is apparent that Category 2 documents are a part of a series of privileged communications, making all documents within the series privileged. (See, e.g., Lorillard document 03748448, a draft position paper authored by Shinn, counsel for certain members of the joint defense, sent via a separate privileged cover memorandum, 03748745/8746, to general counsel for review and comment).
- Many documents falling within Category 2 contain information that is scientific in nature. (See Philip Morris document 2021644413.) However, when individual documents are analyzed for content and in conjunction with surrounding, contemporaneous documents, it is clear that many of these documents were authored by non-attorneys at the request of attorneys in order to furnish the attorneys with the technical, scientific information necessary to provide legal advice concerning litigation, regulatory and legislative proceedings. As such, these documents contain privileged communications protected from disclosure by attorney-client privilege and work product and joint defense/common interest doctrines.
- A document need not be authored by or received by an attorney to be protected from disclosure by the attorney-client privilege and/or the work product and joint defense/common interest doctrines. Documents prepared by non-attorneys at the direction of or request of counsel are protected from disclosure by the work product doctrine. Documents that are not authored by or received by attorneys that nonetheless record or confidentially transmit attorney-client communications for the purpose of obtaining or relaying legal advice are protected from disclosure by the attorney-client privilege, or the work product and/or joint defense/common interest doctrines. Carter v. Cornell Univ., 183 F.R.D. 92, 94 (S.D. N.Y. 1997); Ford Motor Co. v. Leggat, 904 S.W.2d 643, 648 (Tex. 1995); United States v. Nobles, 422 U.S. 225, 238-39 (1975); United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988); Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D. N.Y. 1990).
- Documents that, on their face, show no evidence that they were authored by or received by attorneys are nonetheless protected from disclosure by the attorney-client privilege and the joint defense/common interest and work product doctrines when analyzed for their content, which reflects mental impressions, advice and opinions of counsel and when analyzed in conjunction with surrounding, contemporaneous documents, which

clearly demonstrate attorney-involvement in the preparation of the document. See e.g., Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 388 (D. Minn. 1992).

- The documents within this category which were reviewed, although they do not identify an attorney as the author or recipient, are primarily legal in nature, and it is a reasonable inference that they constitute legal advice or legal work product.
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 2. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 2 contain any evidence of criminal or fraudulent behavior on the part of defendants or that the documents designated to Category 2 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 2 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 2. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").
- Plaintiffs have failed to demonstrate that the documents falling within Category 2 were created in furtherance of a crime or fraud and are closely related to a crime or fraud. Levin v. C.O.M.B. Co.,, 469 N.W. 2d 512, 515 (Minn. App. 1991); In re Richard Roe, 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to the documents designated to Category 2.

CATEGORY III

- My previous report concluded that category 3 documents, scientific research on smoking and health, are discoverable:

[The category 3 documents] do not demonstrate a process of a client seeking advice or an attorney providing advice. On the contrary [the documents] reflect the involvement of the Liggett attorneys in the monitoring of that company's research function.

Special Master Report, p. 51.

1. The determination that scientific research or information on smoking and health is not privileged is mandated by Judge Fitzpatrick's May 9, 1997 order:

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 negative conclusions. [citing Jenkins v. Raymark Indus. Inc., 109 F.R.D. 269, 278 (E.D. Tex.), aff'd, 782 F.2d 468 (5th Cir. 1986) and Minnesota Civil Jury Instruction Guides, No. 117 and 119].

. . .

Plaintiffs have presented evidence, and this Court has found, however, that the Defendants have claimed safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege.

[T]his 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.

Order of May 9, p. 28.

1. Accordingly, these previous orders and my findings herein require that the non-Liggett defendants' category 3 documents be produced.
2. Category 3 documents randomly selected and reviewed by me reveal that defendants are claiming privilege over scientific research and information:

· "Confidential report prepared by American researcher. . . regarding University of Kentucky - Tobacco and Health Workshop." AM 00024684(*).

· "Draft report summarizing information re tobacco leaf composition." BATCO 400863213-31(*).

· "Confidential communication from B&W Management to B&W counsel. . . regarding industry-funded research." B&W 680144627(*).

· "Transmittal letter with draft description by E.J. Jacob of animal genetics study at Boulder Colorado for review and comment." CTRZN 33612-648(*).

· "Proposed special project funding for J. Szepenwol." CTR 1137181(*).

· "Memorandum. . . regarding funding of research project." PM 1002905373(*).

· "Memorandum from Philip Morris employee to Philip Morris counsel . . . regarding tar content in cigarettes." PM 2024978290(*).

· "Memorandum concerning scientific research from RJR scientist to RJR in-house counsel. . . ." RJR 500020982(*).

· "Memorandum concerning scientific research from RJR scientist. . . ." RJR 500020982(*).

· "Report prepared by RJR scientists. . . concerning smoking and health issues. . . ." RJR 500887529-3(*).

· "Memorandum concerning smoking and health issues prepared by RJR scientist. . . ." RJR 500284651(*).

· "Handwritten notes concerning scientific research prepared by RJR scientists. . . . " RJR 500295065(*).

· "Memorandum concerning scientists and scientific research prepared by RJR scientist. . . . ." RJR 500949347-50(*).
· "Letter. . . regarding actions to be taken and legal advice to be sought on carbon monoxide issues." TI 0136314(*).

1. In addition, plaintiffs have presented evidence that Reynolds has claimed privilege in category 3 over cancer research documents, routine reports of Reynolds R&D department, smoke-inhalation studies, and reports on the health effects of cigarette ingredients:

Privilege Document Number	**Reynolds 4A Index Description of Research**
500070739	Smoking & Health - Lung Cancer
500951825	Inhalation Bioassay of Cigarette Smoke in Rats
502815280(*)	Lung Cancer - Smoking Studies
506553251(*)	Analysis of Asbestiform Fiber Mainstream Smoke of Camel 70 Cigarettes by Structure Probe of Westchester PA: Summary File
500923202	Effect of Pyridine Compounds on the Biological Activity of Nitrosamines
500284456	Regarding NO: Varying Quantities of NO were detected in the Smoke of Cigarettes, partially independent of the Nitrate Content of the Tobacco
500287132	Annual Activity Report [of Reynolds' R&D Department] for Year 1968
501868278	Smoking Studies Using Dogs - Conducted by Battelle - Columbus Laboratories
500885717	Quarterly [R&D] Research Report. Science Information Division
500515664	A Case Control Study of Cancer of the Pancreas
500548873	Report on Cancerogenic Substances
500967147	Comparison of the Total Solids and Nicotine Content in Cigarette Smoke of Company and Competitive Brand Cigarettes
501624990	Question: Is There A Toxic Material Added to a Cigarette?
501857531	Free Radicals and Health by H.V. Boeing of Spindletop Research, Lexington, Kentucky
500500718	Critiques on Smoking and Health
504177489	Nitrosamine Content of Smoke Condensate from Winston Cigarettes
507915907	Smoke Inhalation Studies
508722588	90-Day Inhalation Study in Rats, Using Test and Reference Cigarettes. Study Protocol

502818338	Comparison of Acrolein Levels in Smoker's Lungs to Levels in Animal Cigarettes
500873262	Significance of Report of Carcinogenic Activity of Dimethyl Terephthalate

1. Similarly, plaintiffs presented evidence that Philip Morris listed health-related research performed by some of its key scientists in category 3. Examples include documents written by Helmut Wakeham, director of research and development, and Thomas Osdene, senior scientist:

· 1960 Wakeham "memorandum . . . regarding funding of scientific proposal on composition of tobacco smoke." PM 1000328598.
· 1963 Wakeham "memorandum . . . regarding phenol and ciliastasis." PM 1005068824.
· 1963 Wakeham "memorandum . . . regarding experimental data concerning phenol." PM 1005068837.
· 1965 Wakeham "memorandum . . . regarding benzopyrene." PM 1005069160.
· 1965 Wakeham "memorandum . . .discussing smoking and health research strategy." PM 1000321857.
· 1968 Wakeham "memorandum . . . regarding pesticide research." PM 1000705999.
· 1969 Wakeham "memorandum. . . regarding smoking behavior research." PM 2022244070.
· 1970 Wakeham "memorandum [to the President of PM]. . . discussing smoking and heart disease research." PM 1000321079.
· 1972 Wakeham "memorandum [to the President of PM]. . . regarding smoke inhalation." PM 1005109006.
· 1967 Osdene "memorandum . . .regarding chemical toxicity." PM 1000024441.
· 1979 Osdene "memorandum . . . regarding less hazardous cigarettes." PM 1000122545.
· 1982 Osdene "memorandum . . . regarding cigarette additives testing." PM 1000124752.
· 1982 Osdene "memorandum . . . regarding polonium 210." PM 1000083302.
· 1983 Osdene "memorandum . . . regarding tobacco pesticides." PM 1000082472.

- As with the Liggett documents, all category 3 documents in this round should be produced on the basis that they are not privileged in the first instance, are discoverable under the crime-fraud exception, or are discoverable fact-work product under the necessity exception. At the heart of this lawsuit is the issue of what the Defendants knew and when they knew it. To the extent that fact-work product reflects the state of that knowledge, I conclude it must be disclosed.
- I also recommend that those documents relating to nicotine identified in Findings 262 through 267 above should be disclosed to Plaintiffs on the basis that they implicate science and health and are not attorney-client privileged in the first instance. If they represent fact work product, Plaintiffs have demonstrated a compelling need for access to them. Plaintiffs have also demonstrated to a degree of unrebutted probability that Defendants were aware of the addictive or habit forming nature of nicotine, that the Defendants experimented with "dosages" of nicotine, and that Defendants did not reveal to the consumers the extent of their knowledge. If there is any privilege to be invoked

with respect to these documents, I recommend that it be over-ridden by the crime-fraud exception.

CATEGORY IVa

- With respect to Category 4a, I previously concluded that the Committee of Counsel -- the primary subject of this category -- controlled industry scientific research and that documents which reveal this control are subject to disclosure under the crime-fraud exception:

  It is my conclusion, therefore, that with the exception of that research funded by the Scientific Advisory Board, industry research was effectively controlled by the Committee of Counsel. . . . I also conclude that this attorney-directed control of an industry's research does, in fact, fall within the confines of the crime-fraud exception to the attorney-client privilege. . . . I conclude that plaintiffs in this case must be permitted to inspect the documents which reveal the control exerted by the tobacco industry attorneys over the research conducted by that industry.

Special Master Report, pp. 47-48.

- Notwithstanding the finding that Committee of Counsel controlled industry scientific research, the Liggett documents reviewed in category 4a did not "represent additional evidence supporting an inference of crime-fraud," and were found privileged because they "represent[ed] communication among lawyers as part of a joint defense in response to existing litigation, regulatory action, etc." Id., p. 52.
- A review of the 4a documents identified in the non-Liggett hearings does not cause me to conclude that the documents in that category are evidence of crime-fraud. As communications of counsel, I recommend that the claim of privilege be sustained.

CATEGORY IVb

- During the Liggett round, I recommended production of all documents in category 4b. I found that CTR Special Projects "functioned entirely under the direction of the Committee of Counsel" and that they "were selected for their favorable prospects." Special Master Report, p. 47. Thus, the documents in this category were found discoverable under the crime-fraud exception to privilege:

Because of my determination that the crime-fraud exception applies with respect to the attorneys' direction of research, I conclude that the documents in Category 4b, if they are attorney-client privileged at all, are subject to the crime-fraud exception.

Id., p. 53.

- During the Liggett round, I also found that CTR Special Projects were selected by industry lawyers to provide research favorable to the industry for purposes including litigation and public relations:

  With respect to the CTR special projects, I conclude that they functioned entirely under the direction of the Committee of Counsel. . . . I note that the projects were selected for funding by the attorneys on the basis of utility in litigation, congressional testimony, administrative proceedings and for public relation purposes. There is no evidence before me which would cause me to conclude that the CTR special projects were intended to provide research product which might be unfavorable to the tobacco industry. Rather, the projects were selected for their favorable prospects.

Special Master Report, at ¶ 142 (emphasis added).

- I also concluded that the public was not aware of this purpose:

Many of the researchers who worked on CTR special projects published their research. Although these researchers were informed that their publications should bear an acknowledgement that the research was a "Special Project of the Counsel for Tobacco Research," it is unlikely, in my opinion, that any reader other than an industry insider would understand that the research was not, in fact, sponsored by the Scientific Advisory Board. This would result in confusion and a perception that the favorable research was sponsored by the supposedly neutral SAB.

> It is my conclusion, therefore, that with the exception of that research funded by the Scientific Advisory Board, industry research was effectively controlled by the Committee of Counsel. It is my further conclusion that the research directed by the attorneys was not intended to be independent; rather, it was intended to be used in opposition to unfavorable research, whether in litigation, legislation, administrative forums, or public relations.

Special Master Report, at ¶¶ 144-45.

1. Defendants contend during this round that these earlier findings on Special Projects were incorrect, insofar as these findings relate to "acknowledgement fraud." Specifically, defendants argue that no fraud occurred because of defendants' failure to distinguish Special Projects research from SAB-funded research. In support of this argument, however, defendants relied on the same affidavits presented during the Liggett round. Moreover, defendants failed to present any evidence to rebut the conclusion that Special Projects were selected by industry lawyers for their favorable prospects, for purposes including public relations. Finally, defendants failed to provide any evidence that -- with the exception of an "acknowledgment" on some Special Projects research publications -- that the public was ever informed about the true purpose of this research. Thus, even if the public was aware that this research was not conducted under the auspices of the SAB grant program, the public was never informed that this research was specifically selected by tobacco company attorneys to provide information favorable to the industry's litigation and public relations positions -- i.e., denying or creating doubt about a causal link between smoking and disease. Accordingly, I find the findings from the Liggett proceedings regarding CTR Special Projects stand unrebutted. Furthermore, the additional documents reviewed cause me to reaffirm my previous findings.
2. As with the Liggett documents, the non-Liggett defendants have grouped in this category documents evidencing lawyer involvement in the selection and funding of special projects:

· "Confidential communication from American in-house counsel to RJR outside counsel. . . <u>regarding proposed Special Project research</u>." AM 00024148(*).
· "Confidential communication from B&W outside counsel. . . <u>regarding funding of CTR special project research</u>." B&W 293001439(*).
· Letter from Committee of Counsel member regarding "<u>proposed special project funding for J. Szepenwol</u>." CTR 11327181(*).
· "Letter from counsel to counsel. . . <u>regarding funding of CTR Special Projects research</u>." LOR 01242547(*).
· "Report between Philip Morris counsel and joint defense members <u>regarding funding of CTR Special Project research</u>." PM 2024671237(*).
· "Memorandum from RJR scientist to RJR in-house counsel. . . <u>regarding a smoking and health issue</u>." RJR 500881605(*).

· "Report prepared by joint industry consultant [Wisconsin Alumni Research Foundation] and sent to joint defense counsel regarding CTR Special Project." PM 1005109186.

- There is an additional type of document in category 4b. In addition to documents reflecting attorney involvement in CTR Special Projects, the non-Liggett defendants have included documents concerning Lawyers Special Projects or, as it is also known, Special Accounts. See LOR 94347346(*) ("Report from joint industry consultant [Domingo Aviado] to Lorillard counsel regarding joint-industry funded research concerning a literature review pertaining to nicotine.").
- Defendants claim that research reports classified as Special Accounts or Lawyers Special Projects are privileged in their entirety. Transcript, p. 220-224.
- Production of Lawyers Special Projects research reports is mandated under my finding that "documents represent[ing] information as to the corporate knowledge of the defendants at the relevant times. . . should not be privileged." Special Master Report, p. 48. This finding is consistent with Judge Fitzpatrick's May 9 order that defendants may not selectively claim privilege over safety-related scientific research. Order of May 9, p. 28. Accordingly, all documents grouped in category 4b should be produced.

CATEGORY IVc

- Category 4c consists of documents relating to LS, Inc. and its predecessors.
- From about 1971 until 1983, CTR had a Literature Retrieval Division ("LRD"). See Affidavit of Gertenbach ¶ 8, August 8, 1986. LRD, like its predecessor, International Information Incorporated ("3i"), which was not affiliated with CTR, was a computerized information storage and retrieval system. In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997." Recommendations of the Special Master ¶ 112.
- "The principal purpose of LRD was to assist outside litigation counsel for the cigarette manufacturers by coding, analyzing and retrieving publicly available, published medical literature, dealing with medical-legal issues arising in cases brought against the tobacco companies, and for use in preparing to represent their clients in regulatory proceedings and before Congress. Outside litigation counsel specified the materials to be identified, acquired, stored and retrieved, and they directed the manner in which this work was performed. See In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997." Recommendations of the Special Master ¶ 113.
- "In 1983, the functions LRD served were moved to a separate corporation (called LS, Inc.) at another location, where it remains to this day. In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997. LS. Inc. and CTR are unrelated." Recommendations of the Special Master ¶ 116.
- Philip Morris' Category 4c documents are indistinguishable from the Liggett joint defense documents designated to Category, and as such, represent communications to and/or from lawyers on the subject of work product. See Recommendations of the Special Master at 47.
- Work product protection applies to documents and other tangible things "prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative (including the other party's ... consultant ... or agent." Minn. R. Civ. P. 26.02(c); see also Schmitt v. Emery, 2 N.W.2d 413, 416 (Minn. 1942) (work product protection extends to materials prepared by any representative of a party).

CATEGORY V

- I found, with regard to the Liggett documents, that communications by attorneys made to formulate or control public statements "do not represent communications made or received as part of the process of seeking or providing legal advice." Special Master Report, pp. 54-55.
- In the Liggett findings of fact, I also made the following findings regarding defendants' public statements:
  · "Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive." Special Master Report, at ¶ 36.
  · "Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness." Id., at ¶ 47.
  · "These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking were published in Minnesota." Id., at ¶ 58.
  · Defendants did not acknowledge "that there was a statistical association between smoking and disease except as part of a denial of causation." Defendants' public statements "are plainly intended to create doubt as to causation, rather than function as an 'admission.'" Id., at ¶ 127.
- Judge Fitzpatrick has previously found that industry public statements on smoking and health constituted crime-fraud because they were "intended to create doubt as to a connection between smoking and illness." Order of May 9, pp. 9-10.
- I find that the non-Liggett defendants have not presented evidence rebutting these earlier findings by me and Judge Fitzpatrick.
- As they did in the Liggett round of proceedings, defendants argue that defendants' public statements minimizing or denying the health risks of smoking are protected by the First Amendment. The First Amendment, however, does not protect false, deceptive or misleading statements. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976). In addition, defendants' public statements -- including TI's statements -- are commercial speech. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977) (trade association advertisements denying existence of relationship between eggs and heart disease were commercial speech not protected by the First Amendment where false and misleading). Finally, under defendants' theory of the First Amendment, the consumer protection statutes of Minnesota would be rendered useless. In Kociemba v. G.D. Searle Co., 707 F. Supp. 1517 (D. Minn. 1979), Judge Renner rejected a similar argument by a pharmaceutical company that public statements regarding the safety of IUD's could not be the basis for liability under Minnesota consumer protection statutes:

[P]harmaceutical salesmen should not have as much leeway in 'puffing' their wares as would a used care salesman.

Id. Thus, I conclude that the First Amendment is not a bar to disclosure of the documents relating to defendants public statements.

- Based on an in camera review of the documents randomly selected in this category, I find that many of the documents chronicle attorney involvement in formulation of public

statements -- including advertisements, press releases, pamphlets, and publications -- on smoking and health:

· "Draft prepared by counsel of statement to be submitted to Surgeon General re: Cigarette Ingredients." TI 0056810(*).

· "Legal advice. . . regarding response to questions on cigarette advertising." TI 0326842(*).

· "Confidential draft letter prepared by B&W in-house counsel regarding response to a consumer inquiry." B&W 785012135-136(*).

· "Confidential memorandum from B&W outside counsel. . . regarding a draft BAT report." BATCO 680584000(*).

· "Report of legal advice from J K Wells re policy statement." BATCO 105363578(*).

· "Draft of statement prepared by Philip Morris counsel regarding Surgeon General's Advisory Committee." PM 1005106190-200(*).

· "Draft report prepared by counsel setting forth company's position on smoking and health issues and new product development." PM 2021367041(*).

· "Confidential draft press release prepared by industry counsel reflecting industry counsel's opinions and advice regarding smoking and health research." AM 00038853(*).

· "Confidential report prepared by B&W in-house counsel. . . regarding industry response to smoking and health controversy." B&W 170042567(*).

· "Draft statement on proposed cigarette smoke component regulation, prepared with assistance of CTR's counsel." CTR 1280061(*).

- As with the Liggett documents, category 5 documents in this round of privilege determinations are not privileged and -- to the extent they detail formulation of public statements aimed at minimizing or creating doubt about the risks of smoking -- they are subject to discovery pursuant to the crime-fraud exception.

CATEGORY VI

- Documents designated to Category 6 include several types of documents, including:

a. Documents authored by counsel (outside and in-house) containing legal advice discussing ingredients or additives issues related to ongoing or anticipated litigation, legislative and regulatory proceedings.

b. Documents authored by internal company scientists in response to legal questions posed by counsel on issues regarding ingredients or additives in the context of ongoing or anticipated litigation, legislative and regulatory proceedings.

c. Documents containing legal advice, the request therefor or information to aid in the rendition of legal advice regarding patent issues and in the context of ongoing or anticipated litigation.

- In the September 10, 1997 Report, I sustained Defendants' privilege claims regarding the Liggett Category 6 documents concluding that the Category 6 documents collectively reflect the involvement by attorneys in responses to regulatory initiatives which relate to cigarette components. I conclude that many of the randomly selected Category 6 documents under consideration in this proceeding similarly reflect confidential legal advice concerning cigarette ingredients issues that arise in litigation, legislative and regulatory proceedings.

- The documents in Category 6 relating to patent matters contain confidential legal communications between patent counsel and the Defendants' employees or counsel during the process of seeking or enforcing patents.
- After reviewing the randomly selected documents designated to Category 6, and the Category 6 documents cited in Plaintiffs' brief, and after considering the materials in the record and the arguments of counsel, I conclude that the Category 6 documents are protected by the attorney-client privilege. Defendants have for many years been subject to regulatory, legislative, and even litigation proceedings concerning the ingredients or additives used in their products. The ingredients documents reviewed in Category 6 reflect legal advice, or information supplied to counsel to assist in the rendition of legal advice.
- Many documents reviewed in Category 6 contain confidential legal advice relating to joint defense efforts in responding to Congress, the Federal Trade Commission, and the Department of Health and Human Services regarding cigarette ingredients or constituents in cigarette smoke. These documents are protected by the joint defense/common interest privilege.
- Many documents reviewed in Category 6 also reflect the work product of attorneys, and work product generated at the direction of attorneys, in response to ongoing or anticipated litigation, legislative and regulatory proceedings. These documents are protected work product. Minn.R.Civ.P. Rule 26.02(c).
- The patent documents reviewed in Category 6 contain confidential legal advice in connection with seeking or defending patents related to, for example, the manufacture of cigarettes or cigarette components. The confidential legal advice within these communications is protected by the attorney-client privilege.
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that Defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 6. In addition, Plaintiffs have failed to demonstrate that Defendants' documents falling within Category 6 contain any evidence of criminal or fraudulent behavior on the part of Defendants' employees or Defendants' counsel, or that Defendants' documents designated to Category 6 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Defendants' Category 6 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to Defendants regarding the documents in Category 6. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY VII

- Documents designated to Category 7 primarily contain information relating to industry efforts to discourage underage smoking and to educate cigarette retailers about programs designed to ensure that cigarettes are not sold to underage smokers. Such programs and/or industry efforts include, among others, the Industry Cigarette Advertising Code, the Code of Cigarette Sampling Practices and Tobacco Institute programs "Helping Youth Decide", "Helping Youth Say No", "It's the Law" and "We Card". (See, e.g., Cigarette Advertising Code, PM 000248594-8602 (J.B. Exh. 256); Cigarette Advertising and Promotion Code, PM 2024331995-2004 (J.B. Exh.257); TIMN Exh. 356; TIMN Exh. 368.)
- Many documents designated to Category 7 reflect attorneys rendering confidential legal advice to their clients in many fields of law that govern or relate to advertising, marketing or promotion of cigarettes. These documents also contain protected fact and opinion work product. For example, documents in Category 7 address FTC cigarette advertising regulations, sampling regulations and state laws prohibiting sales to minors.
- Defendants have established that the cigarette market is a "mature" market, with advertising resulting in shifts of consumers among brands. (See, e.g., Lambin J.J. *Advertising, Competition, and Market Conduct*, Oligopoly Over Time, 33-34, 136-138 (1976) (J.B. App. Exh. 763).) Defendants have also presented evidence establishing that cigarette advertising does not entice young people or any other segment of the population to become smokers or to increase the level of consumption of current smokers. (See, e.g., Task Force on Smoking. Smoking and Health in Ontario: A Need for Balance 104 (1982) (J.B. App. Exh. 808); U.S. Department of Health and Human Services. Reducing the Health Consequences of Smoking: A Report of the Surgeon General 512 (1989) (J.B. Exh. 245).) Furthermore, defendants have presented evidence establishing that family and friends, not cigarette advertising, are the primary influences on smoking by underage people. (See, e.g., Resnick, M.D. *Protecting Adolescents from Harm* 278 JAMA 823-832 (1997); Advertising of Tobacco Products: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. 683 (1986) (J.B. App. 705.); Smoking Prevention Act: Hearings on H.R. 1824 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 53 (1983) (statement of Mortimer B. Lipsett, M.D.) (J.B. App. Exh. 844); U.S. Department of Health and Human Services, Public Health Service. Recent Trends in Adolescent Smoking, Smoking-Uptake Correlates, and Expectations About the Future 5 (1992) (J.B. App. Exh. 815.)

- The evidence presented by the plaintiffs to support their claim that defendants purposefully seek to market to underage smokers consists of nine documents from five defendants dating back to 1935.
- Plaintiffs acknowledged during the course of the hearing that they are not seeking a finding of crime or fraud regarding alleged youth marketing theories. (See Transcript of Hearing, October 15, 1997, p. 126.) Moreover, there is no evidence contained in the documents designated to Category 7 that demonstrates that the tobacco industry marketed to underage persons.
- Documents designated to Category 7 embody attorney-client communications made for the purpose of requesting or providing confidential legal advice regarding advertising, marketing or promotion issues. These documents also contain protected opinion and fact work product. Such communications are an appropriate function of counsel and are protected from disclosure by the attorney-client privilege. In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997); United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir. 1996). Legal advice and work product generated by attorneys while working on advertising legal issues are not suspect and are not subject to special, disfavored, or per se treatment under the law of privilege, as plaintiffs contend, merely because they "involv[e]" advertising. (See e.g., 8 Wigmore on Evidence § 2292, at 554 (McNaughton rev. ed. 1961.) There is nothing "non-legal" about lawyers giving legal advice in the context of their clients' advertising needs, even where the ultimate decisions by the clients are driven "principally by profit and loss, economics, marketing, public relations, or the like. . . ." In re Ford Motor Co., 110 F.3d 954, 966-968 (3d Cir. 1997).
- While plaintiffs have informed the defendants and the Court that they are not seeking a crime-fraud ruling with respect to marketing to children, nevertheless, the evidence cited by the plaintiffs is insufficient to establish by a preponderance of the evidence that defendants engaged in a marketing strategy to target underage smokers. Laser Indus. v. Reliant Technologies, 167 F.R.D. 417, 438 (N.D. Cal. 1996). Moreover, defendants have presented sufficient evidence to rebut plaintiffs' allegations that there is a causal connection between cigarette advertising and underage smoking. (See, e.g., 1994 Surgeon General's Report, p. 188, (J.B. Exh. 255.) Therefore, as a matter of law, the crime-fraud exception does not apply to documents designated to Category 7.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 11. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances

requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY VIII

- Documents designated to Category 8 include documents relating to the advertising, marketing or promotion of cigarettes and reflect attorney-client communications regarding responsible, legal advertising and compliance with labeling and health warning notice requirements. These documents also contain material protected by the work product and joint defense/common interest doctrines.

- Cigarette advertising and marketing are among the most regulated and scrutinized activities in the United States. By law, cigarette advertisements are greatly limited in their content, where they can appear, and what must appear on them. For example, cigarette ads have been banned from broadcast media for more that 25 years, and every cigarette advertisement for the past 25 years has included a health warning notice from the Surgeon General.
- The documents within Category 8 relate almost exclusively to the industry's response to initiatives by the Federal Trade Commission to create an advertising code and to require disclosures and/or warnings within that advertising. The documents represent the response of the industry lawyers to that FTC initiative.
- Plaintiffs allege that certain defendants' Category 8 documents constitute business rather than legal advice, because they reflect attorney involvement in advertising campaigns, marketing research and advertising practices and are therefore not privileged.
- Plaintiffs also allege that the documents designated to Category 8 reflect attorney involvement in advertisements or marketing campaigns regarding the safety of cigarettes.
- Neither of plaintiffs' allegations are supported by the evidence.
- The documents contained in Category 8 embody attorney-client communications for the purpose of requesting or providing confidential legal advice regarding advertising issues. Such communications are an appropriate function of counsel and are protected by the attorney-client privilege, the work product and joint defense/common interest doctrines. In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997); In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997).
- The test for determining the applicability of the attorney-client privilege is whether the attorney was employed with reference to his knowledge and discretion in the law in order to render confidential legal advice to the client. United States v. Chen, 99 F.3d 1495, 1501-1502 (9th Cir. 1996). The documents in Category 8 demonstrate that defendants solicited confidential legal advice from counsel based on counsel's knowledge of the law regarding cigarette advertising and marketing. Such confidential legal advice is particularly necessary in defending against legal issues because of the long history of legislation, regulation and ongoing litigation respecting cigarette advertising, marketing and promotion.
- I conclude that the sample of documents within Category 8 fairly falls within the attorney-client and joint defense privileges. The attorneys were responding to regulatory initiatives which affected the entire industry.

- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 8. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 8 contain any evidence of criminal or fraudulent behavior on the part of defendants or that the documents designated to Category 8 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to the Category 11 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to defendants regarding the documents in Category 8. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY IX

- Documents designated to Category 9 contain confidential legal communications concerning discovery issues, including document retention and storage, discussions or drafts of responses to discovery requests, and draft pleadings prepared by or at the direction of counsel for use in pending litigation, legislative and regulatory proceedings.
- In the September 10, 1997 Report regarding the Liggett documents, I concluded that the documents sampled represent attorneys' consideration of appropriate responses to discovery requests, or requests for information from regulatory agencies and that the documents are subject to the attorney-client and joint defense privileges. Report, September 10, 1997, p.52.
- After reviewing the randomly selected documents, as well as the documents cited in Plaintiffs' brief, I find no support for Plaintiffs' contention that documents in Category 9 contain any evidence of discovery abuses.

- Defendants' documents discussing document retention issues are entitled to attorney-client and work product protection. Ziemack v.Centel Corp., No. 92C314526, 1995 WL 314265 at *7 n.5 (N.D. Ill. May 19, 1995); In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 90 F.R.D. 613, 618 (N.D. Ill. 1991).
- Drafts of pleadings, discovery requests, and responses to discovery requests, and analyses of such legal documents, constitute protected work product. Accordingly, many of Defendants' Category 9 documents are protected by the work product and/or joint defense/common interest doctrines. Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp., 125 F.R.D. 578, 591 (N.D.N.Y. 1989); County of Suffolk v. Long Island Lighting Co., 122 F.R.D. 120, 123 (E.D.N.Y. 1988); Natta v. Zietz, 418 F.2d 633, 638 (7th Cir. 1969); Chan v. City of Chicago, 162 F.R.D. 344, 345-46 (N.D. Ill. 1995).
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that Defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 9. In addition, Plaintiffs have failed to demonstrate that Defendants' documents falling within Category 9 contain any evidence of criminal or fraudulent behavior on the part of Defendants' employees or Defendants' counsel, or that Defendants' documents designated to Category 9 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Defendants' Category 9 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to Defendants regarding the documents in Category 9. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY X

- Documents designated to Category 10 address a wide variety of regulatory topics including warning labels on cigarette packages and in advertising; tar and nicotine

content labels; regulation of smoking in public places; development of cigarettes with reduced ignition propensity; restrictions on and elimination of broadcast advertising; excise taxes; elimination of tax deductions for advertising expenses; vending machine regulations; and jurisdictional issues involving the Food and Drug Administration.

- The sample of documents from Category 10 represents responses by the attorneys for the industry to regulatory activity by the government. Many of the documents are minutes of the committee of counsel in which responses to the regulatory efforts are considered. Other documents reflect attorneys' involvement in "position papers." In the aggregate, the documents reflect attorney involvement in responding to regulatory activity.
- In the 1950's, regulatory activities (apart from continuing antitrust scrutiny) affecting the cigarette industry as a whole began to accelerate. Such activities have continued unabated from the 1950's to the present and have occurred on a federal, state, local and international level. These activities have involved a wide variety of federal regulatory agencies including the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") among others. (See, e.g., Defendants' Exhibit 37.)
- A review of the documents at issue and exhibits submitted by defendants establishes that federal regulatory activities since the 1950's involving the cigarette industry have included disputes between federal regulatory agencies (predominantly the FTC) and the major cigarette manufacturers. These disputes have involved a variety of issues such as cigarette advertising content and placement, broadcast cigarette advertising, the authority of the FTC to issue orders to file special reports and the authority of the FTC to promulgate regulations.
- Legislative activities on the federal level affecting the cigarette industry began in at least 1957 with the "Blatnik hearings"", which addressed the disclosure of tar and nicotine yields in cigarette advertising. Since 1965, the defendants have monitored proposed legislation raising issues of common interest to the industry and have attended and testified at hearings regarding a wide variety of proposed and existing legislation.
- Pursuant to their common interests, the defendants shared confidential legal information through counsel to address issues or develop positions in the face of threatened and actual litigation and legislative and regulatory proceedings. The documents show that counsel for the defendants often jointly conferred to analyze state and federal legislation, advised the industry of potential avenues of recourse to proposed legislation or regulatory initiatives, negotiated with agencies with respect to proposed regulations, reported information required by government bodies, ensured compliance with regulations and legislation, avoided or pursued litigation with government agencies, drafted pleadings, and engaged in other traditional lawyer activities on behalf of their clients.
- The Tobacco Institute often coordinated this joint industry effort. Since its incorporation in 1958, the Tobacco Institute, represented by the law firm of Covington and Burling, has gathered and disseminated statistical and other information concerning the tobacco industry, monitored and reported to the industry tobacco-related legislative and regulatory developments on state and federal levels, represented the industry in Congressional hearings, and lobbied on behalf of the industry. (See, Affidavit of Philip Cohen filed with Defendants' Joint Memorandum and Statements Supporting Joint Defense/Common Interest Privilege Over Liggett Documents, June 2, 1997; Defendants'

Open Court Exhibit 37 submitted during the Liggett privilege proceedings, July 15-17, 1997.) In-house and outside counsel for the tobacco companies also organized their efforts by participating in a number of committees including the Committee of Counsel, the Ad Hoc Committee, and various committees of "litigation" counsel. These committees monitored and evaluated legal issues of concern to the tobacco industry.

- In the aggregate, the documents reflect attorney involvement in responding to regulatory activity. I conclude that they are attorney-client and joint defense privileged.
- The documents falling within Category 10 contain privileged attorney-client communications, relate to the rendering of legal advice and constitute attorney work product in the context of litigation and regulatory and legislative proceedings. See, Robertson v. Yamaha Motor Corp., 143 F.R.D. 194, 198 (S.D. Ill. 1992); Kent Corp. v. National Labor Relations Bd., 530 F.2d 612, 615, 623 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976); Levin v. Lear Sieger Diversified Holdings Corp., No. 91 C 1029, 1992 WL 80513 at *2 (N.D. Ill., April 14, 1992).
- The attorney-client communications and work product embodied within the documents designated to Category 10 are protected by the joint defense/common interest privilege when shared among industry members for the purpose of engaging in a common response to and defense of such matters. In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992); In re Regents of Univ. of California, 101 F.3d 1386, 1389 (Fed. Cir. 1996); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).
- Lawyers are routinely consulted regarding legal issues that might arise during administrative proceedings, and the confidential legal advice given in this regard is protected by the attorney-client privilege. Robertson, 143 F.R.D. at 198. Similarly, materials prepared by lawyers and their agents in anticipation of a governmental agency proceeding qualify as protected work product. See, e.g., Kent Corp., 530 F.2d at 615, 623; United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973); Levin, 1992 WL 80513 at *2. The proceeding for which documents are prepared need not actually take place in a court of record, so long as the proceeding is in some sense adversarial. Edna S. Epstein, ABA Litig. Section, The Attorney-Client Privilege and the Work Product Doctrine, 313 (1977).
- Lobbying activities before governmental agencies and legislative bodies are protected by the First Amendment. Courts have held that under the Noerr-Pennington doctrine, liability cannot be imposed for "mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). The fact that many of these activities were handled through the Tobacco Institute does not demonstrate fraudulent behavior, as "there is nothing inherently wrong with forming an industry-wide trade association" to represent the views of the industry before a legislative body. Senart v. Mobay Chem. Corp., 597 F.Supp. 502, 506 (D. Minn. 1984). The focus must be narrowed to the purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery. In re Burlington Northern, Inc., 822 F.2d 518, 524 (5th Cir. 1987).
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 10. In addition, Plaintiffs have failed to demonstrate that the documents falling within

Category 10 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 10 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 10 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 10. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

Category XI

- Documents designated to Category 11 address Environmental Protection Agency ("EPA") regulations concerning environmental tobacco smoke ("ETS"), patent application and infringement issues and trademark application and infringement issues.

- In the 1970's interest developed in the scientific community and the general public regarding the alleged health hazards of ETS. Asserting that ETS posed risks to non-smokers' health, special interest groups lobbied legislators and regulatory agencies for increasingly severe restrictions on smoking in public and work places. The documents falling with Category 11 demonstrate that the tobacco industry relied upon its counsel to monitor legal developments regarding ETS, to provide confidential legal advice regarding the consequences of smoking restrictions and to represent the industry in hearings and regulatory proceedings.
- Many documents falling within Category 11 contain attorney-client privileged communications and protected attorney work product regarding litigation and regulatory and legislative proceedings. See, Robertson v. Yamaha Motor Corp., 143 F.R.D. 194, 198 (S.D. Ill. 1992); Kent Corp. v. National Labor Relations Bd., 530 F.2d 612, 615, 623 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976); Levin v. Lear Sieger Diversified Holdings Corp., No. 91 C 1029, 1992 WL 80513 at *2 (N.D. Ill., April 14, 1992). Documents

containing materials prepared by lawyers and their agents in anticipation of a governmental agency proceeding, such as proceedings before the EPA, are protected work product. See, e.g., Kent Corp. 530 F.2d at 615, 623, cert. denied, 429 U.S. 920 (1976); United States v. Brown, 478 F.2d at 1040; Levin, 1992 WL 80513 at *2.

- Lobbying activities before governmental agencies and legislative bodies are protected by the First Amendment. Courts have held that under the Noerr-Pennington doctrine, liability cannot be imposed for "mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). The fact that many of these activities were handled through the Tobacco Institute does not demonstrate fraudulent behavior, as "there is nothing inherently wrong with forming an industry-wide trade association" to represent the views of the industry before a legislative body. Senart v. Mobay Chem. Corp., 597 F.Supp. 502, 506 (D. Minn. 1984). The focus must be narrowed to the purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery. In re Burlington Northern, Inc., 822 F.2d 518, 524 (5th Cir. 1987).
- Other documents falling within Category 11 contain attorney-client privileged communications and protected attorney work product regarding patent and trademark issues, including patent and/or trademark infringement matters. See, e.g., Advanced Cardiovascular Systems v. C.R. Bard, 144 F.R.D. 372 (N.D. Cal. 1992); Rohm and Haas Co. v. Brotech Corp., 815 F.Supp. 793 (D. Del. 1993), aff'd, 19 F.3d 41 (Fed. Cir. 1994).
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 11. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 10 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 11 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 11 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 11. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only

upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY XII

- Documents designated to Category 12 address a wide variety of subject matters, including general litigation matters that do not fall within any other category, such as litigation updates, and legal matters pertaining to the personnel and operations of CTR and TI, such as ERISA, tax, leasing and insurance issues.
- Documents designated to Category 12 contain attorney-client privileged communications and are protected by the attorney work product and/or joint defense/common interest doctrines.
- After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 12. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 12 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 12 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 12 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.
- Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 12. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn.R.Civ.P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "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"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 681-82 (Minn. 1977); Minn.R.Civ.P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller, Federal Practice and Procedure: Federal Rules of Civil Procedure § 2032 n.18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number

of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

Dated: February 10, 1998. /s/ Mark W. Gehan
Special Master