COUNTY OF RAMSEY
SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA, by Hubert Humphrey, III, Its Attorney General, and BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILLIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES P.L.C., BRITISH-AMERICAN TOBACCO COPMANY LIMITED, BAT (U.K. & EXPORT) LIMITED, LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGET GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND THE TOBACCO INSTITUTE, INC.,
Defendants.

Case Type: Other Civil
COURT FILE NO. C1-94-8565

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' APRIL 8, 1997 MEMORANDUM CONCERNING PRIVILEGE ISSUES

INTRODUCTION

This Court has established a framework for resolving issues relating to privilege claims in this case. On March 25, 1997, the Court appointed a Special Master to address three critical questions:

> (a) whether the information contained in the parties' privilege logs is sufficient to make a reasoned decision whether or not to challenge the claim of privilege and, if not, directing the party asserting the privilege to correct or supplement such information for specific documents;
>
> (b) establishing procedures for challenging claims of privilege asserted in the logs, and modifications of the logs, if any, for specific documents; and
>
> (c) 0528resolving claims of privilege asserted in the privilege logs for specific.

See March 25, 1997 Order, at ¶ 1 (appointing Mark W. Gehan as Special Master (Affidavit of Paul R. Dieseth in Support of Defendants' Memorandum in Response to Plaintiffs' April 8, 1997 Memorandum Concerning Privilege Issues, Exh. 1) (all subsequent references to Exhibits herein are to the exhibits to the Dieseth Affidavit). That Order expressly envisioned that the Special Master would resolve privilege claims as to "specific documents." In so doing, the Special Master was empowered to receive materials and conduct hearings *in camera* and *ex parte*. *Id.* at ¶ 2 (Exh. 1).

The Court's March 25, 1997 Order clearly contemplates a systematic "winnowing-down" of the documents at issue. Once the adequacy of the privilege logs is determined, the parties would identify any documents which they claim are not privileged and the Special Master would then review such privilege claims. If, as a result of that review, any documents were found to be not privileged, such documents would, of course, be produced (subject to any appeal of such a determination). Where, however, the Special Master has determined that a privilege *has* properly been asserted as to particular documents, the parties and the Special Master would then turn their attention to plaintiffs' claim that the privilege as to certain of those documents had been removed by the crime or fraud exception.

Plaintiffs' April 8, 1997 submission concerning privilege issues appears to disregard the Courts March 25, 1997 Order, for it suggests that the Court and Special Master should proceed in a very different way. Plaintiffs fail to address the process the Court has established, and they largely fail to discuss the law concerning privilege claims. Instead, plaintiffs jump to a lengthy recitation of factual allegations which they claim support a *prima facie* case that the crime or fraud exception to the work product, attorney-client, and joint defense privileges applies to *all* the defendants' privileged documents.[1]

Plaintiffs' submission appears to suggest that defendants have no privileged documents and that each and every document on each of the defendants' privilege logs, including the Liggett "Joint Defense"

[1] Plaintiffs recently expanded their blunderbuss crime/fraud allegations to include the Liggett documents. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Submission Regarding the Ligget Documents (filed April 11, 1997). Plaintiffs apparently intend their crime/fraud allegations to apply to *all* the Liggett documents, including the five new boxes scheduled to be submitted to the Court on April 11 - which defendants have neither seen nor had time to evaluate.

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logs, is now at issue. Further, plaintiffs seem to suggest that all determinations called for by the Court's March 25, 1997 Order -- adequacy of the logs, existence the privilege, and applicability of the crime fraud exception -- should be made in one compressed step and applied to all documents in one blanket ruling.

Plaintiffs' proposed approach is contrary to established law. Due process entitles the defendants to be given an adequate opportunity, with adequate notice, to address issues as to specific documents placed properly before the Court. *See e.g*., *Mathews v. Eldrige*, 424 U.S. 319, 333 91976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'") (citation omitted); *In re Henry Youth Hockey Ass'n*, 511 N.W.2d 452, 457 (Minn. Ct. App. 1994) (same). Indeed, in this very context, the Mississippi Supreme Court recently held that defendants must be given meaningful notice and an opportunity to present argument and evidence regarding privileged documents before any ruling may be made removing a privilege. *See* Order in *In re R.J. Reynolds Co., et al*., Case No. 97-M-00383 (Miss. April 11, 1997) (reversing production of 11 Liggett documents ordered by circuit court on Writ of Prohibition and/or Mandamus) (Exh. 2).

In every other court in which defendants' privilege claims have been litigated, specific documents have been at issues.[2] However, plaintiffs' approach in this case apparently contemplates an unfettered and free-ranging inquiry into all documents listed by each of the defendants, thus effectively obviating defendants' right to make rebuttal submissions demonstrating the privileged nature of those documents. Plaintiffs' approach simply makes no sense. Rather than "winnowing-down" the documents at issue to those which may legitimately be challenged, and for which plaintiffs have some litigation need, plaintiffs' approach compresses all the distinct phase of a normal privilege inquiry and all the defendants' documents into one sweeping challenge.

This memorandum focuses on two critical points. *First*, the law simply does not permit privilege determinations and crime/fraud determinations to be made in bulk. Plaintiffs must identify the specific documents they believe are not privileged. Where the plaintiffs claim the crime/fraud exception applies to certain documents, they first must make a *prima facie* showing of crime/fraud with respect to those documents, and defendants are then entitled to present rebuttal evidence *in camera* and *ex parte* with respect to the specific documents at issue.[3]

Second, as set forth in section IV, *infra*, plaintiffs' lengthy recitation of factual allegations cannot possibly amount to a *prima facie* case of crime/fraud. Plaintiffs' April 8 submission is not the kind of showing required by *Zolin* to trigger a crime/fraud inquiry. Nor does defendants' brief constitute the opportunity for rebuttal to which defendants are entitled under *Zolin*.[4] Defendants respond herein to plaintiffs' broad-brush charges as best they can, but defendants reserve their right to present their rebuttal to any purported *prima facie* case if and when that stage is ever properly reached -- namely, when defendants know what specific documents are at issue and when defendants have the opportunity to present information relating to those documents *in camera* and *ex parte*.

I. THE PROCESS FOR RESOLVING PRIVILEGE DISPUTES CANNOT BE CONDENSED INTO ONE OMNIBUS BRIEFING AND HEARING.

Plaintiffs appear to believe that the Court can properly resolve all claims of privilege in this case merely be reference to plaintiffs' omnibus April 8

[2] The number of defendants' documents at issue in the cases plaintiffs cite in support of their positions, Pl. Mem. At 28-34, has typically been quite small: *Burton* (D. Kan.) (33 RJR documents); *State of Florida* (20 Liggett documents; only13 contested); *Butler* (Miss.) (11 Liggett documents); *Sackman* (E.D.N.Y. (123 Liggett documents); *Haines* (D. N.J.) (1500 documents relating to CTR Special Projects); *Kueper* (Ill.) (one RJR document).

[3] *Prima facie* evidence is not merely material sufficient to support speculation as to a proposition. Instead, it must be "such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). *See also United States v. Zolin*, 491 U.S. 554, 572 (1989) (requiring "a factual basis adequate to support a good faith belief by a reasonable person").

[4] By way of example as to the proper rebuttal that is contemplated under *Zolin*, defendants have, in a separate filing with the Court today, submitted the brief, affidavits, and other evidence (including *in camera* and *ex parte* materials) that constituted defendants' crime/fraud rebuttal in Florida. It should be noted that this voluminous set of materials pertained to *forty-three (43)* Brown & Williamson documents at issue in Florida. These materials are also responsive to plaintiffs' sweeping crime/fraud allegations here.

No "Minnesota-specific rebuttal has been submitted to the Court for three reasons. *First*, no rebuttal is required at this time, as plaintiffs have not made a prima facie showing of crime/fraud which triggers the right to rebuttal. *Second*, no "Minnesota-specific" rebuttal is possible at this time because, unlike in Florida, plaintiffs have made no challenge to specific privleged documents. *Third*, no "Minnesota-specific" rebuttal is practically possible at this time because defendants have not been given sufficient time and opportunity to prepare such a rebuttal.

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privilege submission and a written response by defendants. That is not the case.

As set forth in greater detail in both Defendants' memorandum of Law Regarding Privileges and Authorities, filed April 7, 1997, and Defendants' Joint Submission Pursuant to Paragraph 2 of march 28, 1997 Order Relating to Liggett Documents,[5] determinations relating to privilege cannot be made without specific challenges. Instead, plaintiffs have offered general argument that entire categories of defendants' documents are *per se* not privileged and that, even if they are, many -- if not all -- of defendants' documents are subject to the crime/fraud exception to the privilege. Confronted with such vague assertions -- a truly "moving target" -- defendants cannot reasonably be expected to provide the kind of rebuttal to which they are entitled as a matter of due process. Accordingly, defendants reserve the right to present the Court and Special Master if and when the privilege and crime/fraud issues are presented properly to the Court and plaintiffs have met the threshold burden to support their challenges.

One thing is clear: determining whether a document is protected by a privilege is a separate and distinct inquiry from the multi-tiered process of determining whether that document is subject to a crime/fraud exception. Because plaintiffs' submission impermissibly mixes these two inquiries and glosses over distinct phases in the crime/fraud inquiry, defendants will again provide an abbreviated "road map" of necessary procedures, and will try to highlight where plaintiffs and defendants appear to disagree on what should occur.[6]

A. Determining the Existence of the Privilege

Plaintiffs do not dispute that the threshold matter in any privilege inquiry is a determination as to whether each challenged document is, in fact, privileged. However, the process plaintiffs have proposed to evaluate privilege claims undermines the process envisioned in the Court's March 25, 1997 Order and is both unmanageable and contrary to settled law.

Plaintiffs candidly admit that the review of documents they propose "presents a burden to the court," but maintain that his burden is much less than that required under defendants' proposals. Pl. Mem. At 58. That is incorrect. Plaintiffs' suggested "methods of streamlining the review" would not ease the burdens on the Court. Instead, plaintiffs' proposed procedures would require the defendants to engage in massive, time-consuming, and ultimately pointless exercise of comparing their privilege logs to each of the other defendants' privilege logs and "list[ing] the documents for which they claim privilege which also apear on the privilege log of another defedant." *Id*. Plaintiffs' proposal -- even if it marginally reduced the total volume of documents on the logs -- would not substitute for what the law requires plaintiffs to do: identify those documents on the defendants' privilege logs that they wish to challenge as nonprivileged in the first instance.[7] The real problem -- and the real burden to the Court -- is not that document-by-document review of challenged documents is necessary, as it plainly is. Rather, the burden arises from the fact that plaintiffs unreasonably want to challenge *each and every* document claimed as privileged by *each and every* defendant. This is a problem of plaintiffs' own making.

Plaintiffs' proposal that defendants "submit documents for *in camera* review according to categories" created by plaintiffs, Pl. Mem. At 58, is also unworkable. Plaintiffs' proposed categories of documents are too broad. The process will hardly be "streamlined" if defendants are to submit, for instance, "all documents written by scientists" or "all documents written by lawyers that discuss scientific research." Pl. Mem. at 58. Nor is there any legal basis for requiring such omnibus submissions to the Court for *in camera* review. As plaintiffs themselves recognize, Pl. Mem. at 57, a party may challenge privilege claims and request in camera review only if it has
"a reasonable, good faith belief that *in camera* inspection may reveal evidence that the information in the materials is not privileged." *In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992) (emphasis added) (recognizing that *in camera* review is

[5] In order to avoid burdening the Court with duplicative argument and citation regarding the nature and importance of the attorney-client, work product and joint defense privileges, and the processes for making a crime/fraud determination, defendants herein incorporate each of those prior filings by reference in their entirety.

[6] To a certain extent, this "road map" is duplicative of that set forth in Defendants' Joint Submission Pursuant to paragraph 2 of March 28, 1997 Order Relating to Liggett Documents. However, at the time that brief was submitted, defendants had not received plaintiffs' brief relating to privilege and were thus unaware of the positions plaintiffs would assert with regard to these procedures.

[7] As set forth in prior briefing, the whole purpose of a privilege log is to put the opposing party on notice as to what documents are being withheld so that the party opposing the privilege may make a determination of which documents, if any, to challenge. The Court has already denied plaintiffs' motion to waive privilege on the grounds that the entries on defendants' privilege logs were inadequate. Plaintiffs' current proposal is just a renewed effort to avoid doing the work logically implied by the Court's order: identifying specific privileged documents to be challenged.

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an intrusion that must be justified).[8] Plaintiffs' unsupported assertion that *all* the documents listed on defendants' privilege logs in each of the categories plaintiffs have identified are not privileged hardly qualifies as "reasonable" when there has been no preliminary finding that any of the documents listed on defendants' privilege logs are not privileged.

Moreover, a blanket privilege ruling as to each of the broad categories of documents plaintiffs have identified is impossible. As set forth more fully in section II, *infra*, even if the Court concluded that one or several employee-to-employee or scientist-to-scientist communications were not privileged, that determination would not "de-privilege" an entire category of documents. In other words, even if the Court at some point found that there was inadequate evidence that at particular document had been generated at the request of lawyers for anticipated litigation or reflected attorney-client communications, such a finding cou8ld not logically or legally support the "de-privileging" of *other* documents.[9] The inquiry is necessarily fact-specific and must proceed on a document-by-document basis.[10] Again, any burden resulting from this procedure stems not from the nature of the legally-mandated process but from plaintiffs' sweeping challenge to defendants' privilege claims.

B. the Crime or Fraud Exception to the Privilege

Because crime/fraud proceedings are completely unnecessary for any documents that are found to be privileged, it is only *after* a privilege determination has been made that the crime/fraud exception to the privilege becomes relevant. In this distinct second phase, the burden of proof is reversed: the party seeking to establish the applicability of the crime/fraud exception, not the privilege holder, must set forth specific facts in support of that claim. Again, because the legally-mandated procedures governing a crime/fraud inquiry -- and the proper sequence of those procedures -- are of such critical importance, defendants review them here with a focus upon those aspects of the process which plaintiffs have glossed over or misrepresented in their April 8 submission.

1. Step One: Plaintiffs Must Make a Sufficient Showing To Justify Any Further Proceedings

Plaintiffs acknowledge that they bear the initial burden of establishing a *prima facie* case of crime/fraud. *See Levin v. C.O.M.V., Co.*, 469 N.W.2d 512, 515 (Minn. Ct. App. 1991). Plaintiffs maintain, however, that their April 8, 1997 filing "creates a prima facie case of crime/fraud." Pl. Mem. at 47. As set forth below, *infra* section IV, plaintiffs' submission is *not* an adequate *prima facie* showing of crime/fraud. Even if it were, however, plaintiffs' submission would, at most, warrant *in camera* review of specific documents, thus triggering defendants' right to rebut through the submission of affidavits and evidence relating to the specific documents plaintiffs ultimately claim are subject to the crime/fraud exception.

Plaintiffs' submission does not constitute a *prima facie* showing of crime/fraud, because they have not provided "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *United States v. Zolin*, 491 U.S. 554, 572 (1989).[11] Unlike the situation in each of the other courts where some *in camera* review of defendants' documents has

[8] Many of the cases plaintiffs cite in support of their claim that in camera review is warranted on plaintiffs' bare challenge to the privilege did *not* order such review. *See, e.g., In re Grand Jury*, 974 F.2d at 1075 (affirming denial of in camera review upon both plaintiffs' bare privilege challenge and their crime/fraud challenge under *Zolin*). Indeed, in *Snowden v. Connaught Labs*, 137 F.R.D. 325 (D. Kan. 1991) - the case plaintiffs cite for the proposition that *in camera* review is necessary to prevent the fox from guarding the chicken house, Pl. Mem at 56 - the court denied plaintiffs' request for *in camera* review, even after recognizing that the plaintiffs in the case - unlike her - were not seeking the entire universe of privileged materials at issue.

[9] The existence of *one* privileged document among the thousands challenged by the plaintiffs rebuts plaintiffs' claim that all such documents cannot, as a matter of law, be privileged. This, of course, necessitates the document-by-document analysis that plaintiffs claim may be eliminated by their categorical approach.

[10] The authorities supporting document-by-document review of challenges to privilege claims have been exhaustively set forth in prior briefing. Defendants will not again burden the Court with these materials. Suffice it to say that specific privilege challenges to specific documents, if and when they occur, trigger a right on the part of the privilege-holder to make *in camera, ex parte* submissions in support of each and every challenge to the privileged documents. *See In re Grand Jury Subpoenas*, 959 F.2d 1158, 1162 (2d Cir. 1992) (allowing *in camera* affidavits to support claim of privilege) In re Application of Eisenberg, 654 F.2d 1107, 1112 (5th Cir. 1981) ("Privilege questions are determined on the basis of *in camera, ex parte* examination of the evidence").

[11] In making a threshold crime/fraud showing, plaintiffs may use only "nonprivileged evidence" that has been "lawfully obtained." Zolin, 491 U.S. at 574-75. Thus, plaintiffs may *not* rely on privileged documents, even if those materials have been made publicly available. *See United States v. de La Jara*, 973 F.2d 746, 748-49 (3d Cir. 1992) (threshold determination must be made solely on nonprivileged information even if court has been exposed to privileged information). Plaintiffs here do not appear to contest the rule requiring reliance solely on nonprivileged materials, as they boldly assert that their *prima facie* case is "easily established without resort to allegedly privileged documents." Pl. Mem. at 54.

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taken place, plaintiffs here have not even *identified* specific materials they want the Court to review.

Plaintiffs argue that they can make the requisite *prima facie* showing of crime/fraud as to *all* of defendants' privileged documents merely by pointing to documents which they argue support some inference of crime or fraud. But that is not the law. Mere allegations of fraud are insufficient. *Levin*, 469 N.W.2d at 515. Se also *United States v. Clark*, 289 U.S. 1, 15 (1933) ("it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud."). Furthermore, "the exception applies only when the court determines that the client communication or attorney work product was itself *in furtherance of* the crime or fraud." *In re Richard Roe*, 68 F.3d 38, 40 (2d Cir. 1995) (emphasis added). See also *United States v. White*, 887 f.2d 267 (D.C. Cir. 1989) (R.B. Ginsburg) ("To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act.").

Plaintiffs also misstate the threshold standard for a *prima facie* finding of crime/fraud. Thus, although plaintiffs argue otherwise, Pl. Mem. at 49, the rule is clear: plaintiffs must make a *prima facie* showing of all the elements of common law fraud. See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 n.6 (8th cir. 1984); *Motley v. Marathon Oil Co*., 71 F.3d 1547, 1552 (10th Cir. 1995) ("crime-fraud exception does not extend to tortious conduct generally, but is limited to attorney advice in furtherance of a crime or fraud"); *Milroy v. Hanson*, 902 F. Supp. 1029,1032 (D. Neb. 1995) (word "fraud" in this context "should be given its ordinary meaning of common-law civil fraud").

Contrary to established precedent, plaintiffs argue that the crime/fraud exception should apply to acts beyond those meeting "the technical definition of 'crime' or 'fraud.'" Pl. Mem. at 49. In *Laser Indus. , Ltd. V. Reliant Techs., Inc*., 167 F.R.D. 417 (N.D. Cal. 1996), the court was confronted with precisely this issue: whether a party may "penetrate the privilege" under the crime/fraud exception upon a showing of "inequitable conduct" or whether the showing must "satisfy the elements of common-law fraud." *Id*. at 422. After extensive analysis, the court concluded that "the most persuasively reasoned authorities" require a showing beyond mere inequitable conduct, pursuant to "the more demanding norm of common-law fraud." *Id*. at 423. Thus, each of the elements of fraud -- including reliance -- must be proved to satisfy the crime/fraud exception. *Id*.

Plaintiffs argue that the Laser Industries holding represents a minority view and is not the law in Minnesota." Pl. Mem. at 51. They are wrong both counts. The controlling Minnesota decision on crime/fraud -- *Levin v. C.O.M.B., Co*., 469 N.w.2d 512, 515 (Minn. Ct. App. 1991) -- does not, as plaintiffs argue, hold that plaintiffs are relieved of the burden of establishing each and every element of fraud in making out a *prima facie* case.[12] Nor do the decisions from other states that plaintiffs cite support their argument on this point.[13] While plaintiffs need only make a prima facie showing of crime/fraud -- a somewhat lesser standard than that required to "prove" crime/fraud -- they must make such a showing as to each and every element of the alleged crime/fraud. *See e.g., Monon Corp. v. Stoughton Trailers, Inc*., 169 F.R.D. 99, 101-102 9N.D. Ill. 1996) (to pierce the attorney-client privilege, it is necessary to prove a prima facie case of common law fraud).[14]

Thus, at this initial stage, plaintiffs must demonstrate that *every* element of common-law fraud has been satisfied:

> (1) a false representation pertaining to material past of present fact susceptible of knowledge,
>
> (2) knowledge by the person making the representation of its falsity or assertion of it without knowledge of its truth or falsity,
>
> (3) an intention that the other person act on it, or circumstances justifying the other person in so acting,

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[12] While *Levin* acknowledges that the *standard* of proof in a *prima facie* case is less that that required for a final ruling on the underlying fraud/crime, this does not mean that the privilege-challenger is relieved from the obligation to submit proof with regard to each and every element of the claim.

[13] Plaintiffs cite *BP Alaska Exploration v. Superior Court*, 245 Cal Rptr. 682 (Cal. App. 1988), but that case specifically states that the proponent of the exception must prove the elements of fraud, including reliance. *Id*. at 697. Plaintiffs also cite *In re Grand Jury Proceedings,* 87 F.3f 377 (9th Cir. 1996), but there the court merely held that the proponent of the crime/fraud exception is not required to "establish the essential elements of a crime or fraud *beyond a reasonable doubt*." *Id*. at 381 (emphasis added).

[14] *See also United Services Automobile Assoc. v. Werley*, 526 P.2d 28, 32 (Alaska 1974) (stating not only the general rule "that there must be a *prima facie* showing of fraud before the attorney-client privilege is deemed defeated," but also that the requirement of *prima facie* evidence is "particularly meritorious in the circumstances where a party is seeking to discover all the attorney-client communications relating to the defense" of a claim); *Cunningham v. Connecticut Mutual Life Ins*., 845 F. Supp. 1403, 1412 (S.D. Cal. 1994) (under California law, "the elements of fraud necessary to establish the exception are: (1) a misrepresentation of material fact, (2) knowledge of the representation's falsity, (3) intent to deceive, and (4) the right to rely on the representation").

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and

> (4) the other person being in fact reasonably induced to act upon the representation, relying upon it and suffering damage attributable to the misrepresentation.

In re Disciplinary Action Against Strid, 487 N.W.2d 891, 893-94 (Minn. 1992). *See also Florenzano v. Olson*, 387 N.W.2d 168, 174 n.4 (Minn. 1986).

Notably, even where such a threshold showing is made, *in camera* review is not automatic. As the Supreme Court held in *Zolin*, once a *prima facie* showing of crime/fraud has been made, it still remains within the discretion of the district court to decide whether to conduct an *in camera* review:

> 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 district 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.

Zolin, 491 U.S. at 572 (emphasis added). Thus, under *Zolin*, the Court and the Special Master need only conduct further proceedings if a showing has been made that: (1) there is "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies," *and* (2) *the practical considerations of the case justify the expense and delay occasioned by conducting a full-blown crime-fraud hearing. Id*. at 572, 574-75 (emphasis added). While plaintiffs conveniently omit reference to the "practical considerations" prong of the analysis in *Zolin*, Pl. Mem. at 57 (claiming that *in camera* review is appropriate wherever the first prong of *Zolin* has been satisfied), such considerations are particularly relevant under the circumstances presented here -- where plaintiffs are attempting to challenge literally millions of documents with blunderbuss crime/fraud allegations.

2. Step Two: Defendants' Right to Rebut

Assuming *arguendo* that plaintiffs could satisfy their threshold burden of demonstrating crime/fraud, then defendants, as the holders of the privilege, would have an absolute right to rebut plaintiffs' showing. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) ("fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."). Because no finding of crime/fraud has yet been made in this case, defendants' right to rebut has not yet been triggered.

Plaintiffs summarily dismiss defendants' right to rebut their *prima facie* case of crime/fraud, claiming that defendants "are not . . . legally entitled to such excessive process." Pl. Mem. at 59. Citing only *In Re A.H. Robins*, 107 F.R.D. 2 (D. Kan. 1985), plaintiffs maintain that defendants are not entitled to an evidentiary hearing or ex parte submission of materials rebutting the alleged crime/fraud.[15]

Plaintiffs are wrong. The United States Supreme Court has recognized not merely the right to make rebuttal submissions following a prima facie showing of crime/fraud, but also the possibility -- indeed, the likelihood -- that such submissions will often occur on an *ex parte* basis because of the privileged nature of the material required to make such a rebuttal. See *Zolin*, 491 U.S. at 571 (anticipating that trial courts would be "required to evaluate large evidentiary records without open adversarial guidance by the parties"). In such a hearing, the party challenging the privilege has not right to be present.

Moreover, during this rebuttal phase of the crime/fraud proceeding, the Court must subject plaintiffs' evidence to a more stringent standard than the "threshold," *prima facie* showing required at the initial phase of the proceeding. *See Zolin*, 491 U.S. at 572 (" a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege."). Thus. Although "probable cause" or "a reasonable basis" for a finding or crime fraud may be sufficient to justify an *in camera* proceeding, a greater showing would ultimately be required before the crime/fraud exception could be found to apply. *See Laser Indus., Ltd. v. Reliant Techs.*, Inc., 167 F.R.D. 417, 436-38 (N.D. Cal. 1996)

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[15] Even the *A.H. Robins* case does not support plaintiffs' expansive claim that no opportunity for rebuttal is required. To the contrary, in that case, the court reviewed *five* documents *in camera* and found that they were subject to the crime/fraud exception. The court stated that, with regard to future claims of crime/fraud as to particular documents "Robins shall be given (the opportunity to rebut) *in each instance in which the question arises*." 107 F.R.D. at 15 (emphasis added). Notably, the court adopted such procedures at least in part "to prevent wholesale production of Robins' files," *id*., the very result which plaintiffs seek here.

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(preponderance of the evidence standard applies); *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997) (same).

3. Step Three: Determining The Scope of the Crime/Fraud Exception

Only *after* (1) a *prima facie* showing of crime/fraud has been made, (2) the proponent of the privilege has had a full and fair opportunity to present rebuttal evidence, and (3) the court has actually made a finding of crime/fraud based on all the evidence submitted is it possible to make a determination as to the scope and application of the crime/fraud exception necessary. Thus, plaintiffs' breezy assertion that, upon a *prima facie* showing of crime/fraud, "the next step in the analysis is a determination of the extent to which the privileges are vitiated," Pl. Mem. at 55, misses several critical procedural steps.

If and when a court has actually made a crime/fraud finding, it may thereafter remove the privilege only with respect to those documents with a close nexus to the crime or fraud. *See Levin*, 469 N.W.2d at 515 ("evidence was insufficient to show a close relationship between the alleged fraud and the communication"); *In re Int'l Sys. & Controls Corp. Sec. Litig*., 693 F.2d 1235, 1243 (5th Cir. 1982) (need "reasonable relation" between the challenged communication and the fraud). A "wholesale" ruling as to all the challenged documents is inappropriate, as "[t]he inroads upon the attorney-client privilege is limited to matters falling within the crime or fraud exception, and does not constitute a carte blanche waiver of the entire attorney-client privilege." *Finley Assoc.. v. Sea & Pines Consolidated Corp*., 714 F. Supp. 110, 118 (D. Del. 1989).

Thus, the Court must proceed on a *document-by-document* basis and determine, as to *each* document, whether plaintiffs have carried the requisite burden of proving that the privileged communication was *prepared in furtherance* of a crime or fraud. *See United States v. White*, 887 f.2d 267, 271 (D.C. Cir. 1989) (each communication "must actually have been made with an intent to further an unlawful act."); *In re Richard Roe*, 68 F.3d 38, 40 (2d Cir. 1995) ("crime-fraud exception applies only where there is probable cause to believe that the particular communication with counsel of attorney work product was intended in some way to facilitate or to conceal the criminal activity.")[16]

[16] As plaintiffs' own cases make clear, it must be established that the crime/fraud exception applies to each document before that document is stripped of its privilege. *Caldwell v. District Court*, 644 P.2d 26, 32 (Colo. 1992) (Pl. Mem. at 50).

The process cannot be accelerated through the issuance of a blanket order setting aside the privileges as to all, most, or some category of the defendants' documents. As the United States Supreme Court of Appeals for the Sixth Circuit admonished, "[o]rdering production en masse creates the potential that some material not within the scope of the crime-fraud exception could be ordered produced." *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986). *See also Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 811 (7th Cir. 1987). Thus, to ensure that no privileged documents are disclosed inadvertently under an overly broad finding of crime/fraud, a document-by-document analysis is essential to preserve the integrity of the important privileges at issue.

II. PLAINTIFFS HAVE NOT SHOWN THAT DEFENDANTS' ASSERTIONS OF PRIVIELGE AS TO VARIOUS CATEGORIES OF DOCUMENTS ARE PER SE OVERBROAD OR IMPROPER.

Before the crime/fraud issue is ever reached, the Court must first deal with plaintiffs' sweeping challenge to *all* of defendants' claims of privilege. That challenge rests on the fundamentally erroneous assumption that communications relating to a scientific or technical subject are *per se* unprotected by either the attorney-client privilege or the work product doctrine. This assertion is nonsensical, and it is at odds with both the law of privilege and the facts.

First, plaintiffs ask this Court to ignore the practical consequences that flow from the fact that tobacco companies and their lawyers have faced continuous litigation, legislative hearings, and regulatory proceedings for over four decades. One or more of the tobacco companies has been named as a defendant in product liability litigation since 1954, when the first such actions were filed. *See* Defendants' Joint Submission Pursuant to Paragraph 2 of March 28, 1997 Order Relating to Liggett Documents, at 7-9 (attaching affidavits reciting history of tobacco litigation). The companies have faced various challenges ranging from product liability litigation, to FTC regulation, to Congressional hearings, to antitrust litigation. *Id*.

Many of these proceedings have involved highly complex scientific and technical issues. Smoking and health cases obviously focus o numerous medical and scientific issues, ranging from epidemiology, toxicology, and pathology, to complex questions or microbiology and chemistry, and such cases frequently require the assistance of sophisticated scientific consultants. In order to represent their clients in such matters, tobacco

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industry lawyers -- *like the plaintiffs' lawyers who have sued them* -- obviously have needed to become intimately familiar with and actively involved in a broad range of scientific issues. Inevitably -- and quite properly -- many of the attorneys' privileged communications will relate to such subjects.

Second, plaintiffs ask this Court to ignore well-settled law. In cases that involve technical or scientific subject matter, "the [attorney-client] privilege would be largely meaningless if such matter could not be a proper subject of a confidential communication." *Research Inst. For Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Fund*, 114 F.R.D. 672, 676 (W.D. Wis. 1987). Likewise, where scientific research is carried out or reported upon at the request of lawyers in order to assist in preparation for litigation, a work product privilege exists. *See Procter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1192-93 & n.4 (Fla. 1st DCA 1985); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964) (communications between attorney and client concerning scientific tests conducted in connection with litigation were not discoverable). Indeed, as the Special Master found in *Haines* -- a case upon which plaintiffs themselves rely, Pl. Mem. at 32 -- "there is ample recent precedent to support a finding of work product privilege where scientific data or investigation results were generated to assist a party's counsel in assessing the legal options in defense of anticipated litigation." *See* Report of Joel Pisano, in *Haines v. Liggett Group, Inc.*, (D. NJ. 1992), at 9 (citing cases) (Exh. 3).

In an effort to overcome these straightforward propositions, plaintiffs erect a series of straw men. For example, plaintiffs assert that "only legal advice, not scientific information, can be subject to the attorney-client privilege." Pl. Mem. at 36. This assertion, however, simply begs the question. As the cases cited above make clear, legal advice concerning scientific information is just as entitled to the protection of the privilege as any other kind of legal advice, and plaintiffs do not cite any authority to the contrary. Similarly, plaintiffs argue that "scientific information simply transferred to attorneys is not privileged." Pl. Mem. at 38. But this, too, begs the question. Plaintiffs do not deny -- as they could not -- that an otherwise privileged communication does not lose its protection merely because it relates to a "scientific " subject.[17] Despite plaintiffs' rhetoric, there is simply no question that documents sent from one employee to another can quite properly fall within the attorney-client and work product privileges. For example, documents may contain discussions of legal advice received from attorneys, or they may contain information provided, or to be provided, to attorneys in connection with the rendering of legal advice. Or, such documents may reflect analysis undertaken at the direction of counsel to assist in preparation for litigation.

Likewise, plaintiffs' melodramatic complaint that the sheer *number* of documents listed on defendants' privilege logs demonstrates that these documents were improperly withheld is self-serving. A stunningly large number of documents has been produced in this case. Thus, it is not surprising that large numbers of documents have also been withheld as privileged, particularly given the defendants' decades-long involvement in litigation and other lawyer-intensive proceedings. Again, the number of documents at issue remains large because plaintiffs have failed to identify which documents they claim are nonprivileged. Plaintiffs should not be allowed to use their failure to do their job as a sword.

In particular, plaintiffs focus on "scientific documents" that they believe . . . [have been] withheld behind improper claims of privilege." Pl. Mem. at 23. Again, they point to the sheer numbers of documents withheld as "evidence" that such documents are not privileged. But the actual numbers belie this claim. For example, plaintiffs complain that Philip Morris has listed over 5,000 documents on its privilege logs that were either "authored or received by [seven] top-level scientists." *Id*. at 24. What plaintiffs do not mention is that Philip Morris has *produced*, without any claim of privilege, approximately 130,000 documents fitting these same criteria. Affidavit of William Allinder ("Allinder Aff.") at ¶ 6 (Exh. 4). Thus, the percentage of privilege claims in this allegedly incriminating area of documents authored or received by these top-level scientists -- approximately 4% -- is in line with the overall percentage of documents claimed to be privileged by Philip Morris. *Id*. at ¶ 8 (Exh. 4). Again, given the central role scientific issues have played in the litigation and other proceedings confronting the defendants, the fact that 5,000 documents written by company scientists relate to legal matters and are privileged is hardly evidence of wrongdoing.

---

[17] Plaintiffs assert that (1) all documents relating to scientific subjects are only protected as "fact" work product, which is subject to the "substantial need" exception, and (2) that they have a "substantial need" for such materials. Plaintiffs are incorrect that it is only "fact" work product that is at issue. Moreover, even if it were, plaintiffs' bare assertion of need is insufficient. *See Swilley*, 462 So. 2d at 1194 ("unsworn analysis of a party's attorney and/or a bare assertion of need and undue hardship to obtain the substantial equivalent insufficient to satisfy showing"). This is particularly true where, as here, plaintiffs have noticed the depositions of most of the scientists that authored the documents at issue and may explore relevant issues relating to such research thoroughly in those depositions.

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In sum, plaintiffs' entire discussion of the subject of privilege as it relates to scientific and technical issues simply proves what defendants have been saying -- challenges to claims of privilege cannot be dealt with en masse or by means of conclusory assertions or by means of statistical analysis or a few out-of-context quotations from a tiny fraction of the documents at issue in this case. *See In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) (rejecting concept of "production en masse"). Plaintiffs must identify the *particular* document which they are challenging as nonprivileged, and those challenges must be addressed and resolved on a document-by-document basis. This Court has already established procedures and appointed a Special Master to do just that, and those procedures should now be allowed to proceed.

III. PLAINTIFFS' ATTEMPT TO INVOKE THE CRIME/FRAUD EXCEPTION TO DEFENDANTS' PRIVILEGE CLAIMS IS PREMATURE

As set forth above, *supra* section I, defendants are neither logically not procedurally required to respond to plaintiffs sweeping allegations of crime or fraud at this point. Indeed, defendants *cannot* adequately respond to those charges, because no specific documents have yet been placed at issue.

Defendants do not believe that the crime/fraud issue is properly before the Court at this time. Threshold determinations regarding the adequacy of the privilege logs and the validity of defendants' claims of privilege as to specific documents remain to be resolved, and both the law and common sense require that these issues be resolved prior to any crime/fraud inquiry. However, because plaintiffs have seized this opportunity to place a highly prejudicial and highly misleading story of defendants' supposed "decades-long" fraudulent activities before the Court, defendants cannot allow plaintiffs' allegations to go unchallenged, even at this preliminary stage.

Accordingly, defendants have included herein a summary response to the overall factual allegations plaintiffs have made. This summary does not purport to address each and every one of plaintiffs' scattershot allegations or each and every one of plaintiffs' scattershot allegations or each and every one of the documents plaintiffs cite.[18] That is neither necessary nor possible in just one week's briefing time. Nor does this summary take the place of a rebuttal submission of privileged materials *in camera* and *ex parte* that will be necessary if the Court or Special Master finds that a sufficient *prima facie* showing of crime/fraud has been made as to specific documents.

Defendants' summary provides the Court with some basic information demonstrating the misleading and incomplete tale plaintiffs have spun from carefully selected snippets of a few of the millions of documents that have been produced in this case. In so doing, defendants demonstrate below that plaintiffs have not and cannot establish even a prima facie showing of crime or fraud warranting *in camera* review under *Zolin*.

One additional point is necessary. Plaintiffs misleadingly cite "findings" by six courts in other cases which they argue that support their claim that *all* the defendants' privileged documents are subject to the crime/fraud exception. Pl. Mem. at 28-35. They do not. First, in a number of these cases, initial findings of crime/fraud were ultimately overturned by higher courts.[19] Second, in most of these cases, a relatively small number of documents were at issue, and in *all* of these cases there was at least some clearly-defined group of documents at issue.[20] In any event, "one court's finding of a *prima facie* case does not automatically make another court's rejection of the same finding an abuse of discretion." *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996) (affirming finding that plaintiffs in tobacco litigation failed to make *prima facie* case of crime/fraud). *See also Brown v. Satin Paul City Ry.*, 62 N.W.2d 688, 701 (1954) ("Whether a particular document is privileged is a question of fact."). *No* court has ever made the sweeping and generalized finding of crime/fraud without regard to specific documents that plaintiffs appear to be urging here.

On the contrary, the cases plaintiffs cite

[18] As noted previously, defendants have separately submitted the materials constituting their rebuttal to the crime/fraud allegations made in Florida. While these materials relate to some of the allegations that plaintiffs have made here, no full-scale "Minnesota-specific" rebuttal can occur until specific documents are placed at issue.

[19] For instance, plaintiffs' reliance on *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D. N.J. 1992) is particularly egregious. That opinion was vacated by the Third Circuit. *See Haines v. Liggett Group*, 975 F.2d 98 (3d Cir. 1992). Likewise, the finding of crime/fraud relating to 123 CTE documents in *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357 (E.D.N.Y. 1996) was also vacated. *See Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6 (E.D.N.Y. 1996).

[20] The number of documents at issue in each case was typically quite small: *Burton* (D. Dan.) (33 CTE documents); *State of Florida* (20 Liggett documents; only 13 contested); *Butler* (Miss.) (11 Liggett documents); *Sackman* (E.D.N.Y.) (123 CTE documents); *Haines* (D. N.J.) (1500 documents relating to CTE); *Kueper* (Ill.) (one RJR document).

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emphasize the need for orderly briefing, hearings, opportunities for *ex parte* and *in camera* submissions, and argument on *all* privilege issues as well as the need for document-by-document analysis of the specific documents allegedly subject to the crime/fraud exception. If anything, these cases demonstrate that the summary and abbreviated procedures for making privilege determinations that plaintiffs have proposed here are unacceptable and unprecedented.

For instance, in Florida, the Court first began considering allegations of crime/fraud in December 1996 with regard to forty-three privileged Brown & Williamson documents. Upon a *prima facie* finding of crime/fraud by the Special Master -- limited solely to those forty-three documents -- defendants were given an opportunity to make extensive *in camera* and *ex parte* rebuttal submissions, which they did in February 1997. *See* Report and Recommendation of Special Master Rutter, at 3, in *State of Florida v. American Tobacco Co. et al*., Case No. CL 95-1466 (Fla. April 9, 1997) (summarizing procedural history) (Exh. 5). As to the Liggett documents, the plaintiffs in Florida selected twenty documents for expedited review. Thirteen of these were protected by the joint defense/common interest privilege. The Special Master reviewed the thirteen documents at issue and reported that eight were subject to the crime/fraud exception and five were not, *id*. at 45, thus underscoring the necessity for document-by-document analysis.

Likewise, in the *Butler* case in Mississippi -- also cited by plaintiffs, Pl. Mem. at 34-35 -- a crime/fraud inquiry into certain documents relating to CTR Special Projects first began in March *1996*. The Special Master held extensive *ex parte* hearings and reviewed numerous submissions *in camera*. However, no ruling on these documents has yet been made. Plaintiffs cite the *Butler* case for a separate order on March 26, 1997 by the circuit court judge directing the production of eleven Liggett documents. Pl. Mem. at 34. However, that decision was recently overturned by the Mississippi Supreme Court on a Writ of Prohibition and/or Mandamus. See Order in *In re R.J. Reynolds Co., et al*., Case No. 97-M-00383 (Miss. April 11, 1997) (Exh. 2). In reversing the lower court, the Mississippi Supreme Court specifically found that the privilege proceedings in the lower court were "conducted without adequate or proper notice to all parties and without an opportunity for the petitioners to present argument and evidence regarding the delivery of the documents identified in such privilege log, other discovery issues, and/or matters, if any, considered at the hearing." *Id*.

In sum, far from supporting plaintiffs' effort to establish a blanket prima facie case of crime/fraud applicable to *all* of the defendants' privileged documents, the cases plaintiffs cite only underscore the impropriety of the compressed procedures for resolving privilege issues that plaintiffs have proposed.

IV. PLAINTIFFS HAVE NOT SET FORTH ANY FACTS THAT SUPPORT A PRIMA FACIE SHOWING OF CRIME OR FRAUD WARRANTING *IN CAMERA* REVIEW OF DOCUMENTS

At the heart of plaintiffs' submission is the sweeping charge that "defendants have engaged in a decades-long fraudulent public relations campaign to misrepresent and suppress damaging evidence on the health hazards and addictiveness of smoking." Pl. Mem. at 7. This supposed "fraud" rests on a series of unsupported -- and unsupportable -- claims. According to plaintiffs:

- defendants allegedly believed that cigarette smoking causes cancer and other diseases and that nicotine is addictive;

- defendants allegedly made knowingly false statements about the health risks and addictiveness of cigarettes with the intent that others rely on them; and

- the State of Minnesota and Minnesota residents allegedly relied on this failure to disclose and these Minnesotans were injured as a result of the defendants' failure to disclose such information.

Plaintiffs have not set forth facts sufficient to support a prima facie finding as to *any* of these claims. In the summary discussion that follows, defendants demonstrate that plaintiffs' selective quotations from a handful of documents generated by various people over the span of more than four decades do not even come close to establishing a prima facie case of crime or fraud.

A. Plaintiffs Cannot Show the Reliance Element Essential to Support a Prima Facie Finding of Crime/Fraud Because the State of Minnesota and the Public Have Long been Aware of the Health Risks Associated with Smoking and of Claims that Nicotine is "Addictive."

It is black letter law in Minnesota that reliance by the supposedly defrauded party is an essential element of fraud. *In re Disciplinary Action Against*

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Strid, 487 N.W.2d 891, 893-94 (Minn. 1992). *See also Florenzano v. Olson*, 387 N.W.2d 168, 174 n.4 (Minn. 1986). However, plaintiffs' submission is silent on this subject. Plaintiffs do not even attempt to demonstrate that the State of Minnesota or its citizens relied on the statements of which they complain. This failure to demonstrate reliance is -- *by itself* -- sufficient to defeat plaintiffs' purported *prima facie* showing of fraud.

Plaintiffs have not cited a single document indicating that the State of Minnesota or its citizens relied upon defendants' statements concerning the health risks of smoking or the alleged "addictiveness" of nicotine. That is not surprising. The possible adverse health effects of tobacco have been the subject of public discussion since the sixteenth century. Minnesota Department of Health, Smoking: Health Risks, a Report on Smoking As A Behavioral Risk to Good Health (Feb. 1983) at 1 ("Smoking: Health Risks") (Exh. 6). In fact, in 1979, the U.S. Surgeon General acknowledged that "almost from the moment of its introduction into Europe in 1558, [tobacco] prompted serious concern over the effects which uses of this leaf had on human health." *1979 Report of the Surgeon General* at 1-5 ("1979 SG's Report") (Exh. 7). Anti-smoking crusades during the first half of this century produced widespread awareness of various health risks associated with smoking. Affidavit of Michael E. Parrish at 2-5 ("Parrish Aff.") (Exh. 8). As the scientific and medical community focused increased attention on the health risks of tobacco in the 1950s, many popular journals and newspapers carried detailed reports on this scientific research into the link between smoking and lung cancer. *See 1979 SGs Report* at 5-9 ("[t]he public was informed of the results of these studies. . . . ") (Exh. 7).

The *1964 Report of the Surgeon General* ("1964 SG's Report") on smoking and health received enormous publicity: "For several days, the [1964] Report furnished newspaper headlines across the country and lead stories in television newscasts. Later it was ranked among the top news stories of 1964." *1989 Report of the Surgeon General* at (iii) ("1989 SG's Report) (Exh. 9). In 1979, the Surgeon General concluded that, "[I]n the past 15 years the public has been exposed to ample warnings about the dangers of smoking . . ." *1979 SG's Report* at 29 (Exh. 7). In 1981, the Surgeon General noted that "Government agency activities In recent decades have led to widespread public recognition of the health hazards of smoking cigarettes." *1981 Report of the Surgeon General* at 200 ("1981 SG's Report) (Exh. 10). Given this enormous level of public attention focused on smoking and health, it is inconceivable that anything defendants said -- or did not say -- altered in any material way the State of Minnesota's awareness of the health risks associated with smoking, or caused the State to take or refrain from taking any specific actions concerning smoking.

Indeed, just a few examples demonstrate that Minnesotans and the state of Minnesota itself have long been aware of the risks of smoking:

> 1893 -- As early as 1893, Minnesota public schools were warning students about the health risks of tobacco. Parrish Aff. At ¶ 10 (Exh. 8).
>
> 1895 -- The Minnesota Legislature made it a misdemeanor, punishable by fine, to supply cigarettes or tobacco of any kind to any person under the age of 16. Parrish Aff. At ¶ 8 (Exh. 8).
>
> 1952 -- Both the *Minneapolis Morning Tribune and the St. Paul Pioneer Press* carried the Associated Press Story reporting that British Research Council members Doll & Hill had concluded that there was an association between cigarette smoking and lung cancer. Parrish Aff. At ¶ 14 (Exh. 8).
>
> 1965 -- In its Guide for Instruction in Health and Safety, the Minnesota Department of Education encouraged teachers to instruct students that tobacco was the primary cause of laryngeal cancer and heart disease. Parrish Aff. At ¶ 21 (Exh. 8).
>
> 1975 -- Minnesota passed its Clean Indoor air act, the toughest in the nation at the time, prohibiting smoking in any public area that had not been designated a smoking area. Parrish Aff. At ¶ 9 (Exh. 8).
>
> 1984 -- A task force established by the Minnesota Department of Health concluded that "smoking-related deaths from heart disease, cancers, and respiratory disease represent a high proportion of *premature* deaths" in Minnesota. Minnesota Department of Health, The Minnesota Plan for Nonsmoking and Health at 67 *Sept. 1984) (the "Plan") (Exh. 11).
>
> 1984 -- A task force established by the Minnesota Department of Health

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> concluded that "cigarette smoking is strongly and causally related to cardiovascular diseases," Plan at 59, "cigarette smoking is the primary cause of cancers of the lung, trachea, and bronchus; cancers of the oral cavity; laryngeal cancer; and esophageal cancer," Plan at 63, and "cigarette smoking is strongly implicated in deaths from chronic obstructive lung disease," Plan at 64 (Exh. 11).

> 1988 -- Major Minnesota newspapers covered the Report issued by the Surgeon General that year, declaring that nicotine in cigarettes is an addictive drug. Parrish Aff. At ¶¶ 16-17. (Exh. 8).

Furthermore, Minnesota newspapers have published articles discussing the risks of smoking for decades. See Parrish Aff. At 13-17 (Exh. 8). And, since 1967, every package of cigarettes sold in Minnesota has carried the Surgeon General's health warning. Federal Cigarette Labeling and Advertising act, 15 U.S.C.A. §§ 1331-1340 (1982: Supp. 1995) (Exh. 12). Since 1971, every cigarette advertisement has likewise displayed these warnings. 15 U.S.C. § 1335.

Likewise, the testimony of the thirteen Minnesota Medicaid recipients deposed in this case demonstrates that each was aware of the risks of smoking and that none relied upon or were misled by the tobacco industry. For instance, all testified that they had not relied upon the statements of the defendants in deciding to begin or continue smoking, most had never heard of the Frank Statement, and none had ever heard of the Council for Tobacco Research. Several of them further testified that the decision to smoke should be a matter of personal choice. See Exh. 13 (Transcripts of depositions of Medicaid recipients).

Similarly, claims that cigarette smoking or nicotine are "addictive" have been made for centuries by doctors, health organizations, politicians, and academics. *See generally* Parrish Aff. (Exh. 8). As the Surgeon General stated in 1979, "Nicotine has long been considered as habitual at least and, by some persons, as addictive." *See, e.g., 1979 SG's Report* at 14-97 (Exh. 7). For plaintiffs to argue now that the State and Minnesotans relied upon statements by defendants to the contrary is preposterous.

For instance, the federal government has long been aware of claims that nicotine-containing cigarettes are "addictive." The issue was raised in Congress as far back as 1929 and has been the subject of Congressional testimony and debate for over six decades. For example, in 1962, Senator Neuberger placed before Congress an article quoting an American Cancer Society official's statement: "Because smoking is *'truly and in all respects an addiction*,' help is needed to 'prevent new recruitment to smoking among the young.'" Congressional Record, Proceedings and Debates of the 87th Congress, Second Session, Vol. 108-Part 7, May 17 to June 8, 1962 at 10053 (Exh. 14). Similarly, during the 1969 hearings on the Federal Cigarette Labeling and Advertising Act, one Member of the House of Representatives stated,

> Mr. Chairman, there is a strong body of medical opinion which believes that cigarette smoking is not only psychologically but physiologically addictive, comparable to heroin addiction.

Harings Before the Committee on Interstate and Foreign Commerce on H.R. 643, H.R. 1237, H.R. 6543, 91st Cong. 47 (1969) (Exh. 15). Anti-smoking advocate John Banzhaf also testified before Congress in 1969 on "nicotine addiction":

> Another point which has been largely overlooked is that in addition to being deadly *smoking to many people can be as addicting in the physical and medical sense as heroin or other drugs*, so that once begun untold numbers of smokers cannot stop even under the very greatest compulsion, including death, amputation, blindness. This position is supported by substantial medical evidence in the form of cell-controlled scientific studies as well as the opinions of many of the leading researchers in the field. . . . *I am bringing to the attention of Congress the fact that to some people smoking is addicting, in exactly the same type and medical sense that heroin and other dangerous drugs are . . .*

Id. at 288 (emphasis added).

There is also ample evidence that Minnesotans and the State of Minnesota were fully aware of claims that cigarettes are "addictive" For instance:

> 1909 -- The *Minneapolis Journal* supported a new Minnesota law banning the manufacture or sale of cigarettes, declaring its benefit in preventing "the spread of the habit among the young."

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Parrish Aff. At ¶ 9 (Exh. 8).

> 1909 -- A health education textbook used in the Minnesota public schools described tobacco as a "narcotic," and stated that "the use of the cigarette makes one more a slave to the drug . . . ." Parrish Aff. At ¶ 11 (Exh. 8).

> 1984 -- A task force established by the Minnesota Department of Health concluded that "nicotine is a powerful stimulant drug in the same pharmacological class as amphetamine and cocaine," and that "in the United States, there may be as many as 45 million addicted smokers." Plan at 94 (Exh. 11).

> 1989 -- The Minnesota Department of Health reported to the Legislature that cigarettes are addicting and compared that addiction to that of heroin or cocaine. Minnesota Department of Health, The Minnesota Tobacco-Use Prevention Initiative, Jan. 1982 - Dec. 1988, A Report to the 1989 Legislature (1989) (Exh. 16).

In short, plaintiffs have provided this Court with *no* evidence that Minnesotans or the State of Minnesota relied on the supposed "fraud" of which it complains. Without such reliance, plaintiffs cannot make the kind of *prima facie* showing required to trigger *in camera* proceedings on crime/fraud.

B. Plaintiffs' Claim that Defendants Made False Statements About Smoking and Health Is Unfounded and Cannot Support a Claim of Crime or Fraud.

1. Defendants' Statements Relating to Whether Smoking Causes Disease Do Not Constitute Fraud.

Plaintiffs base their claim of fraud on various documents in which defendants have stated that it has not bee scientifically proven that smoking caused specific diseases. Pl. Mem. at 10-11. Such statements cannot, of course, be fraudulent unless they were false, and were known to be false, at the time they were made. *In re Disciplinary Action Against Strid*, 487 N.W.2d 891, 893-94 (Minn. 1992) (one element of fraud is "knowledge by the person making the representation of its falsity"). Plaintiffs' submission does not come close to establishing a prima facie case of fraud with respect to such statements. On the contrary, the evidence demonstrates that these statements were in no sense "fraudulent."

a. Historical Background on the "Causation" Issue.

Though there has long been a belief that smoking could be harmful to health, prior to the 1950s there was little scientific evidence associating smoking with lung cancer and other diseases. Affidavit of Kenneth Ludmerer, M.D., at ¶ 6 ("Ludmerer Aff.") (Exh. 17). In the early 1950s, a number of retrospective epidemiological studies were published that reported a statistical association between cigarette smoking and lung cancer. *Id*. at ¶ 8. These studies were not, however, considered to be proof that smoking caused lung cancer. Id. at ¶ 9. Rather, as the authors of those studies themselves were careful to not, the studies indicated only a statistical association warranting further review in larger, better controlled epidemiological studies and in biological experiments. *Id*.

Also in the early 1950s, researchers reported that they had induced cancerous tumors on the backs of mice by painting their skin with a tobacco smoke condensate. Id. at ¶ 11. Again, these researchers did not conclude that their research proved that smoking caused lung cancer. *Id*.

In response to these and other studies, certain domestic tobacco companies in January 1954 issued a public statement -- "A Frank Statement to Cigarette Smokers" (the "Frank Statement") -- which announced the formation of the Tobacco Industry Research Committee ("TIRC") and addressed the state of scientific knowledge regarding smoking and lung cancer. (Exh. 18). The Statement noted that experiments "conducted by doctors of professional standing" had raised a question about smoking and lung cancer, but that the studies were not "regarded as conclusive in the field of cancer research." *Id*. The Frank Statement further stated:

> "That medical research of recent years indicates many possible causes of lung cancer."

> "That there is no agreement among the authorities regarding what the cause is."

> "That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous

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scientists."

Despite plaintiffs' rhetoric, the fact remains that each of these statements was *true*. In the Frank Statement and elsewhere, defendants expressed opinions about an evolving scientific issue -- opinions that were shared by numerous scientists outside of the industry. *See* Ludmerer Aff. At ¶ ¶ 15-18 (Exh. 17) . *See also 1964 Surgeon General's Report* at v ("few medical questions have stirred such public interest or created more scientific debate than the tobacco-health controversy") (Exh. 19); *1971 Report of the Surgeon General* at 3 ("although some epidemiologists were satisfied that the answer [to the question whether smoking caused lung cancer] was in the affirmative, others turned for confirmation to prospective studies…") ("1971 SG's Report") (Exh. 20).

The defendants have for many years acknowledged that there is a statistical association between cigarette smoking and certain diseases, including lung cancer. *See, e.g.*, Affidavit of Cathy L. Ellis, Ph.D., at ¶ 6 ("Ellis Aff.") (Exh. 21); Affidavit of Alexander W. Spears, Ph.D., at ¶ 15 ("Spears Aff.") (Exh. 22); Affidavit of William S. Simmons, Ph.D., at ¶ 6 ("Simmons Aff.") (Exh. 23). The defendants have similarly acknowledged that smoking is a risk factor for lung cancer and other diseases. *Id*. That judgment is scientifically sound. A risk factor is something "in the environment or, chemical, physiological, psychological, or genetic elements that [is] thought to predispose an individual to the development of a disease." *See Taber's Cyclopedia Medical Dictionary* at 1730 (17th ed. 1993) (Exh. 24).

Science distinguishes, however, between activities or substances which are, on the one hand, "risk factors" for a disease or which are statistically associated with a disease, and, on the other hand, those which have been proven to *cause* a disease.[21] In other words, the fact that smoking is a risk factor for lung cancer does not mean that smoking is a **proven cause** of lung cancer. Testimony of Dr. Walter Barker, at 8247-48, in *Kueper v. R.J. Reynolds*, (Ill. Cir. Ct. Jan. 1993) (Exh. 25). Defendants believe that it has not yet been proven that smoking causes lung cancer and other diseases. Ellis Aff. At ¶¶ 6, 8 (Exh. 21); Spears Aff. At ¶¶ 15, 17 (Exh. 22); Simmons Aff. At ¶¶ 6, 7 (Exh. 23). Although public health officials and others may disagree with this position, defendants' statements were not, and are not, false or fraudulent as a matter either of science or of law.

Given the questions that existed in 1954 and that remain today regarding the relationship between smoking and health, defendants' *judgment* on this issue cannot, as a matter of law, support a claim of fraud.[22]

b. The Company Document To Which Plaintiffs Cite are Consistent With Defendants' Publicly-Stated Views.

Of the millions of documents produced in this case, plaintiffs have cited only a handful which they claim "prove" that defendants "knew" that smoking causes lung cancer and other diseases despite public statements to the contrary. Not one of the documents identified by plaintiffs comes close to supporting their position. Plaintiffs' purported *prima facie* case of fraud rests on:

- A 1959 memorandum noting that, while "[t]here is no evidence that any of these compounds will produce cancer in man," there is a "*distinct possibility*" that some substances in

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[21] As the Surgeon General's reports themselves acknowledge, a statistical association does not establish causation:

- "Statistical methods *cannot* establish proof of a causal relationship in an association.." *1964 SG's Report* at 20 (emphasis added) (Exh. 19).

- "[D]emonstrating an association by statistical probability *is not enough to establish the causal nature of a relationship*." *1975 Report of the Surgeon General* at 3 (emphasis added) ("1975 SG's report") (Exh. 26). This principle is echoed in a 1976 BATCo memo, Pl. Exhibit 39, which plaintiffs illogically point to as proof of the "extent to which legal considerations dominated scientific research." Pl. Mem. at 20.

- A statistical "correlation is not synonymous with causation. *It is important for the public to understand the nature or character of the associations that have been found*." 1979 SG's Report at 4 (emphasis added) (Exh. 7).

[22] In the words of the Surgeon General, "[d]etermining that the association between smoking and excess death rates is cause and effect *was a judgment* made after a number of criteria had been met, no one of which by itself is sufficient to *make this judgment*." 1975 Sg's Report at 3 (emphasis added) (Exh. 26) *See also 1982 Report of Surgeon General Report* at 20 ("The causal significance of an association is a matter of judgment") ("1982 SG's Report") (exh. 27).

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cigarette smoke could have a 'carcinogenic effect," Pl. Exhibit 21;

- A 1962 memorandum discussing the public debate on the possible health hazards of smoking and noting the "amount of evidence" relating to the health hazards posed by cigarette smoke, Pl. Exhibit 22;

- Two memoranda from 1964 discussing the recently issued Surgeon General's Report, Pl. Exhibits 24, 25;

- A 1967 letter noting that the Tobacco research Council's research "is based on the *working hypothesis* that [smoking has been proved to cause lung cancer] has been sufficiently proved *for research purposes*" and that senior scientists "accept the causation *theory*. . . ." Pl. Exhibit 26 (emphasis supplied);

- A memorandum criticizing inconsistencies in the 1979 Surgeon General's Report on the issue of "causation," Pl. Exhibit 28;

- The preface to a 1979 Tobacco Institute publication which accurately states that "there is much that is unknown" about smoking and health, Pl. Exhibit 29;

- A BATCo 1980 public affairs memorandum discussing the perceived effect of the industry's position on "causation" on BATCo's international standing, and attaching a with a proposal that the company adopt a position that we now "accept that the smoking of tobacco products, *combined with* other factors . . . can be a cause of lung cancer . . ..," Pl. Exhibit 30 (emphasis supplied); and

- A critique of a draft book on smoking and health prepared by an outside scientist which, *inter alia*, suggests that the author remove a statement that "there is a raging worldwide controversy about the causal link between smoking and certain diseases." Pl. Exhibit 31.

This is the sum and substance of plaintiffs' alleged *prima facie* case that the tobacco industry "knew" that it was scientifically proven that smoking *causes* lung cancer and other diseases and fraudulently failed to disclose that knowledge. Not one of the internal industry documents cited by plaintiffs contains any statement establishing that any public statement by the tobacco industry was not true. Nor have plaintiffs pointed to any statement that was allegedly withheld from the public that would have had a material effect if published. In sum, plaintiffs' so-called evidence is totally insufficient to support a *prima facie* finding of crime/fraud.

2. Defendants' Statements Relating to the Alleged "Addictiveness" of Nicotine Do Not Constitute Fraud.

Plaintiffs also allege that defendants have misrepresented or hidden the so-called "addictive" nature of nicotine and smoking generally. Again, plaintiffs have not come close to establishing a *prima facie* case of fraud.

Out of a total production of millions of documents, plaintiffs cite to only a handful of documents which even discuss the issue of addiction or habituation in association with nicotine. These include:

- The statements of tobacco company executives before Congress in 1994 that they believed that nicotine is not "addictive" as that term classically has been defined. Pl. Exhibit 19;

- Certain defendants' responses to Requests for Admission in this case denying that smoking is addictive, Pl. Exhibit 20;

- A 1962 tobacco company memorandum referring to the public perception of smoking as "a habit of addiction that is pleasurable," as a result of which "many people . . . find themselves subconsciously prepared to believe that it must be wrong." Pl. Exhibit 23; and

- A 1980 tobacco company public affairs memorandum referring to smoking as "addictive/habituative." Pl. Exhibit 30.

Not one of these documents supports plaintiffs' claim that the defendants knew that cigarette smoking or nicotine was "addictive" but fraudulently withheld that information from the public.

Plaintiffs' entire argument that the defendants have defrauded the public by denying the "addictive"

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nature of nicotine turns on the changing scientific *definition* of "addiction," which has affected the medical community's view of whether cigarette smoking can be classified as "addictive." *See* Comments of Brown & Williamson Tobacco Corporation, Liggett Group Inc., Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Tobacco Institute Inc. Submitted to the United States Food and Drug Administration (hereinafter "FDA Submission"), Vol. III at 9-15 (Exh. 28).

Until very recently, the majority of scientists and physicians expressed the opinion that nicotine was *not* addictive. Thus, in 1962, Professor Maurice H. Seevers, who later became a member of the Surgeon General's Advisory Committee with responsibility for pharmacological questions, including habituation and addiction, recognized the views of those who claimed that nicotine was "addictive," but stated that such a classification had no basis in "scientific fact." Maurice H. Seevers, Ph.D., *Medical Perspectives on Habituation and Addiction*, 181 Journal of the Am. Med. Ass'n 92 (1962) (Exh. 29). Professor Seevers stated that "by no stretch of the imagination" could nicotine "conform to any accepted definition of addiction." *Id*. at 97.

In 1964, the Surgeon General's Report, which defined an "addiction" as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug (natural or synthetic)," concluded that smoking should be classified as a "habituation" -- but *not* an "addiction."[23] *1964 Report of the Surgeon General* at 37 (Exh. 19). Likewise, in 1971, the Surgeon General, testifying before Congress, stated that smoking was a "habituation rather than addiction, I think, *in the usual way that we define addiction in terms of narcotics*, certainly." Hearings Before a Subcommittee on the Committee on Appropriations, House of Representatives, 92 Cong. 30, 63 (1971) (Exh. 30).

Over the years, the medical definition of "addiction" has been broadened to include a broad range of activities that were not previously considered addictive. In 1980, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM") was revised to classify cigarette smoking as a "substance dependence."[24] The 1988 Surgeon General made an even more dramatic change. Applying new and expansive criteria for "addiction," that Report concluded that nicotine was "addictive."[25] 1988 Report of the Surgeon General ("1988 SG Report) (Exh. 33).

As a result of this expanding definition, in one study or another scientists have now labeled caffeine, chocolate, carrots, shopping, sex, and the Internet, among other things, as "addictive." FDA Submission at III-6, and sources cited therein (Exh. 28).

Defendants are not alone in disagreeing with the current loose use of the term "addiction." The Director General of the Drugs Directorate of Canada stated in 1986 that "[t]he term 'addiction' is currently bereft of accepted technical or medical-scientific meaning." Memorandum from Denys Cook, Director General, Drugs Directorate to Dr. A.J. Liston, Assistant Deputy Minister, Health Protection Branch (may 1986) at 1 (Exh. 34). Likewise, John Hughes, an anti-tobacco advocate and a longtime expert for plaintiffs in tobacco litigation, testified that the term "addiction" is unscientific, pejorative, ill-defined, misused, and misunderstood. Deposition of John R. Hughes, M.D., *Castano v. American Tobacco Co*., No. 94-1044 (E.D. La.), Sept. 30, 1994 at 321-22 (Exh. 35).

It is defendants' position that, while nicotine does have pharmacological effects, it does not meet the objective, pharmacological criteria of "addiction" (*e.g*., intoxication, tolerance to intoxication effects, and

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[23] Notably, the 1964 SG's Report made many of the claims about smoking behavior and nicotine pharmacology that the FDA and others today rely upon to argue that nicotine is "addictive." *See* FDA Submission at III-66-67 (Exh. 28).

[24] To make this change, the DSM-III had to redefine "dependence" to include unprecedented criteria. Kirk, S.A., Kutchins, H. *The Selling of DSM: The Rhetoric of Science in Psychiatry* (1992) 1-16 (Exh. 31). As one contemporary report noted: "DSM-III has stirred a furious debate by adding tobacco dependency to a chapter on drug addiction." *Newsweek*, Jan. 8, 1979, at 68 (Exh. 32). Even the chief draftsman of DSM-III, Robert L. Spitzer, acknowledged that many psychiatrists though inclusion of the provisions on tobacco use was "a big mistake, and even dangerous . . . The main argument is that there are a lot of things people want to give up but are unable to - golf, butter, and chocolate, for example." *Id*.

[25] The changes in the definition and its application to nicotine were summarized by Dr. Jaffe in 1990: "In light of current views about tobacco dependence, it is reasonable to ask how it was possible to consider the behavior as anything other than a form of drug dependence. Two major beliefs about addiction or drug dependence seem to have played a role. Firstly, marked drug tolerance and dramatic, *obvious, and severe withdrawal* phenomena were considered inherent aspects of the "true addictions." Secondly, addictions (morbid cravings for drugs) were associated primarily, if not exclusively, with drugs which at some stage in their use induce states of *intoxication*, therby affecting the users' judgment, personality, and will-power. *It is not difficult to see in the writings of respected scholars and researchers of the not to distant past how these belief could lead to a sharp distinction between tobacco use and other patterns of drug taking that were readily categorized as addictions*." Jaffe, J.H., *Tobacco Smoking and Nicotine Dependence*, in: Wonnacott, S. et al. (eds.) *Nicotine Pharmacology* (1st ed. 1990) at 1-2 (emphasis added) (Exh. 36).

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significant withdrawal).[26] Ellis Aff. At ¶ 9 (Exh. 21); Affidavit of John H. Robinson, Ph.D. ("Robinson Aff.") at ¶ 9 (Exh. 37). Defendants are not alone in expressing the view that nicotine is not "addictive." Respected scientists outside of the tobacco companies share this view. For instance, in 1994 the FDA convened its Drug Abuse Advisory Committee to consider the question "Are cigarettes and other forms of tobacco addicting?"[27] One member of the Committee appointed by FDA, Dr. Lawrence Brown (the Senior Vice President at the Addiction Research and Treatment Corporation and assistant clinical professor of medicine at Harlem and Columbia College of Physicians and Surgeons) concluded that he could not find that nicotine was "addictive." *See* Testimony of Dr. Brown ("I must confess . . . that I find the data [on whether nicotine causes "addiction"] still wanting in many respects."). *See* FDA Submission at III-53-56 (Exh. 28).

The view that nicotine is not addictive has also been expressed recently by the Chair of the British Medical Association, Dr. Sandy Macara. Dr. Macara stated in 1996 that he did not "accept that smokers are truly addicted to tobacco. I think they have a habit [that they could stop tomorrow -- no, today -- if they really wanted to." Western Daily Press, Sept. 3, 1996 (Statement of Dr. Macara) (Exh. 39). Defendants have submitted testimony and affidavits of many other scientists and clinicians that agree with their position. *See* Statement of P. Caren Phelan, Ph.D., July 26, 1994 (Exh. 40); Statement of Rubin Bressler, M.D. (Exh. 41); statement of Robert Cancro, M.D. (Exh. 42); Testimony of Dominicle Ciraulo, M.D. before the Drug Abuse Advisory Committee, Meeting #27, *Issues Concerning Nicotine-Containing Cigarettes and Other Tobacco Products*, Vol. II, Aug. 2, 1994, at 177-97 (Exh. 43); Statement of C. Robert Cloninger, M.D. (Exh. 44); Testimony of James Giannini, M.D., in *Rogers v. R.J. Reynolds Tobacco Co.*, No. 49D02-9301-CT-0008, August 20, 1996 at 2095-122, 2131-34, 2183-86 (Exh. 45).

The fundamental point here is that the "addictiveness" of nicotine depends largely on the definition of "addiction" that is being used. In 1990, Dr. Jerome H. Jaffe, then Director of the Addiction Research Center of the National Institute of Drug Abuse (who had been plaintiff's expert in the Cipollone case) made precisely this point in discussing whether smokers are dependent on nicotine: "obviously, much depends on how dependence is defined." Jaffe, J.H., *Tobacco Smoking and Nicotine Dependence*, *supra*, at 1-2 (Exh. 36). *See also* FDA Submission at III-8-10 and sources cited therein (Exh. 28). Thus, "which substances are considered [addictive] drugs is a function of linguistically determined, but usually implicit, mores and values. . . ." Neuhas, C., The Disease Controversy Revisited: An Ontologic Perspective. J. of Drug Issues 23(3): 463-478, 470 (1993) (Exh. 46) [cited at III-9 of FDA Submission].

Though plaintiffs cite to the Congressional testimony of tobacco company executives in 1994 as evidence of the defendant' purported fraud concerning "nicotine addiction," Pl. Mem. at 12, plaintiffs fail to inform this Court that the executives tried to explain their responses based on their beliefs of the proper definition of "addiction." As Mr. Johnston of R.J. Reynolds stated, "cigarettes and nicotine clearly do not meet the classic definition of addiction. There is no intoxication." *Id*. The Congressional testimony simply cannot be seen as misleading or fraudulent. Similarly, defendants' answers to Request for Admissions in this case set forth the definitional basis for the defendants' denials that nicotine is addictive. *See* Pl. Exh. 20.

Finally, the defendants' "internal" documents cited by plaintiffs are consistent with the companies' publicly-stated views on addiction. None of these documents states that nicotine satisfies the objective, pharmacological criteria of "addiction" or that tobacco companies' research established the "addictiveness" of nicotine according to those criteria.[28]

In sum, defendants' statements with respect to the alleged "addictiveness" of nicotine cannot serve as the basis for a fraud claim. The question of whether any substance or activity is "addictive" is necessarily a matter of opinion and semantics. There is simply no basis for plaintiffs' assertions that defendants' statements on this subject were fraudulent.

C. Plaintiffs' Allegations Concerning "Lawyer Involvement" with Scientific Research Do Not Support a Claim of Crime or Fraud.

In support of their charges of fraud, plaintiffs

[26] Cigarette smoking is widely known to be a pleasurable activity that, regardless of how characterized, may be difficult to stop for some people. However, smokers can and do quit smoking. In fact, today, there are over 46 million ex-smokers in the United States and over 90% quit on their own, without counseling or nicotine substitutes. *See* Centers for Disease Control, 43 (50) *Morbidity and Mortality Weekly Report* at ii, 928 (Dec. 23, 1994) (Exh. 38).

[27] Of course, the very fact that the FDA felt it necessary to convene an expert inquiry into this issue in 1994 suggests that the issue remained a subject of scientific debate.

[28] None of this means that nicotine has no pharmacological effects. Indeed, defendants have long recognized the pharmacological effects of nicotine - as has the public literature. *See* FDA Submission at Iii-56-60 (Exh. 28). But "pharmacological effects" do not mean the same thing as "addiction." Many products have pharmacological effects including chocolate, sugar and hot chili peppers. *Id*.

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make several misleading references to The Council for Tobacco-U.S.A., Inc. ("CTR"). Plaintiffs assert that CTR's "actual purpose" was to generate scientific evidence that would rebut allegations that smoking causes disease, Pl. Mem. at 56, and that tobacco industry lawyers "controlled the so-called 'independent' research conducted through CTR." *Id*. at 12. Plaintiffs fail to provide any facts in support of these assertions. Moreover, their discussion of CTR ignores the basic facts about CTR. Those basic *facts* are inconsistent with any allegation of fraud involving CTR.

1. The Structure and Purpose of CTR.

In 1954, most of the major U.S. tobacco companies announced the formation of the Tobacco Industry Research Committee ("TIRC"), the predecessor of CTR.[29] The formation of the TIRC was announced in a January 4, 1954 newspaper advertisement entitled "A Frank Statement to Cigarette Smokers." Pl. Exh. 2. That "Frank Statement" said three things about TIRC: (1) it would be a "joint industry group" of the signatory companies, (2) its research activities would be headed by a prominent scientist, and (3) an advisory board of non-tobacco industry scientists would advise TIRC on its research activities. There was nothing false about any of these three statements -- and plaintiffs do not even point to any alleged falsehood in any of them.

CTR itself has never conducted any scientific research. Since 1954, CTR's principal function has been to award grants-in-aid for scientific research into matters pertaining to tobacco use and health. Affidavit of Dr. James F. Glenn, at ¶¶ 9, 16 (Exh. 47). CTR grants-in-aid totaling over $202 million have been awarded to more than 1,100 researchers at distinguished universities, medical schools, hospitals and other research centers such as Harvard Medical School, Stanford University, the University of California, the Mayo Clinic, Yale School of Medicine, the University of Chicago Medical Center, and Johns Hopkins School of Medicine. The 1,100 grantees have included a number of very distinguished and award-winning scientists, three of whom went on to win Nobel Prizes. *Id*. at ¶ 10. Many of these researchers have also received research funding from organizations such as the National Cancer Institute, the American Cancer Society and the American Heart Association. Glenn Aff. At ¶ 11. CTR grantees are free to publish their findings, and have, in fact, published over 6,100 articles in medical journals such as *The Journal of the National Cancer Institute*, *The New England Journal of Medicine*, *Cancer*, *Nature*, *Cell* and *Science*. Glenn Aff. At ¶¶ 14, 16 & Exh. E. Since 1956, CTR has published annual reports listing these grant-in-aid researchers and their research topics, with summaries of their published scientific articles. *Id*. at ¶ 15.

Plaintiffs do not assert that a single one of these more than 6,100 scientific articles was fraudulent or "lawyer-controlled." Dr. Emanuel Rubin, a scientist who has reviewed CTR's research program, has stated, "CTR funded excellent research by well-qualified scientists that was relevant to the scientific issues associated with tobacco use and health. Several of CTR's grants resulted in benchmark, ground breaking research that significantly advanced the state of scientific knowledge." Affidavit of Emanuel Rubin, M.D., at ¶ 6 (Exh. 48). Dr. Rubin added, "[n]umerous publications from CTR-funded research provide important information indicating adverse effects of cigarette smoking." *Id. See* also McAllister Aff at ¶ 22.

2. The SAB Was Independent of the Tobacco Industry.

The Frank Statement declared that a board of distinguished scientists "will advise [CTR] on its research activities," and in 1954 the Scientific Advisory Board ("SAB") of CTR was created. It was the SAB -- not the entire CTR - that consisted of independent scientists. Since its inception, the SAB has been composed of eminent physicians and scientists with outstanding research achievements. Rubin Aff. At ¶ 8; Affidavit of Harmon C. McAllister, Ph.D. at ¶ 15 (Exh. 49). The members of the SAB have not been employees of CTR or of tobacco companies. Glenn Aff. At ¶ 12 (Exh. 47).[30]

The SAB's members' principal role was and is to evaluate applications to CTR for funding and advise CTR about which grant applications should be funded, thereby defining the nature and scope of CTR's grant-in-aid program. McAllister Aff. At ¶ 11-13 (Exh. 49). That program has been CTR's primary research activity. The use of an advisory panel, such as the SAB, is common practice for public and private research organizations. Rubin Aff. At ¶ 7 (Exh. 48).

Since its inception, the SAB has been composed of seven to fifteen eminent physicians and scientists. Rubin Aff. At ¶ 15 (Exh. 48). Glenn Aff. At ¶12 (Exh. 47). Many of the scientists who have served

[29] In this memorandum, "CTR" refers both to the TIRC, an unincorporated association, and to CTR itself, which was incorporated in 1971 and took over the unnicorporated association's functions.

[30] The only exception is CTR's Scientific Director, who has been (and is) both a member of the SAB and an employee of CTR.

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on the SAB were leading researchers in their fields. Rubin Aff. At ¶ 8 (Exh. 48). SAB members have been affiliated with numerous respected academic and government institutions, including Harvard University, the University of Chicago, Johns Hopkins University and the National Cancer Institute.[31] *See* Glenn Aff., Exh. D (Exh. 47).

Since 1954, the principal function of CTR has been to fund a grant-in-aid research program into matters pertaining to tobacco use and health.. The research projects to be funded have been selected on the basis of evaluation by the SAB. Neither the tobacco companies nor their lawyers controlled that selection process, and plaintiffs have cited no evidence to the contrary. *See* Glen Aff. At ¶¶ 12, 20-21 (Exh. 47); McAllister Aff. At ¶ 14 (Exh. 49); Spears Aff. At ¶ 14 (Exh. 22).

3. CTR-Funded Research Was Published, Not Suppressed.

Plaintiffs' blanket assertion that CTR was a fraudulent organization whose research was controlled and suppressed by the companies and their lawyers is contradicted by the fact that research sponsored by CTR has been very widely published.[32] As noted above, over 6,100 articles have been published by CTR grantees in scientific journals. Furthermore, CTR-funded research has resulted in published findings that could be interpreted as "adverse" to the tobacco industry. Dr. McAllister testified that CTR-funded researchers have published "hundreds if not thousands of articles" that contain such findings. McAlllister Aff. At ¶ 22 (Exh. 49). *See also* Rubin Aff. At ¶ 6 ("Numerous publications from CTR-funded research provide important information indicating adverse effects of cigarette smoking.") (Exh. 48); Ludmerer Aff. At ¶ 11(c) (Exh. 17). These research findings were reported in CTR's Annual Reports. Council of Tobacco Research, Annual Reports, 1956 to 1995 (Exh. 50). Moreover, since 1964, more than 250 CTR grant publications have been cited in the Surgeons' General Reports. McAllister Aff. At ¶ 24 (Exh. 49).[33] Publications of these research findings is flatly inconsistent with plaintiffs' suppression allegations.

4. The Public Relations Benefit of CTR Was Not Improper.

Plaintiffs have also quoted from several informal documents discussing the public relations benefits to the companies from funding research through CTR.[34] There is nothing surprising -- or improper -- about these statements. The public relations "benefit" of CTR was not only incidental to, but was based on, the fact that CTR has sponsored high quality research.[35] The desire to accept credit for this research is not wrong -- and it certainly is not fraudulent. W.C. Trotter, plaintiffs' expert in the Mississippi Attorney General's case, has candidly acknowledged that there was "nothing wrong with doing research and taking credit for it." Testimony of W.C. Trotter (Exh. 51). Indeed, "[v]irtually all funding organizations, including the NIH and the American Cancer Society, have a public relations function." Affidavit of Kevin Wildes at ¶ 42 (Exh. 52). "Public relations is a normal aspect of science." Rubin Aff. At ¶ 17 (Exh. 48).

The bottom line is that, as shown above, the research funded by CTR was of the highest quality and was relevant to smoking and health. Any public relations benefit that accrued was merely tangential to those facts. Spears Aff. At ¶ 36 (Exh. 22). Addison Yeaman, then the Chairman of CTR, made this point in

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[31] For example, Dr. Robert Huebner, an international authority on oral viral carcinogenesis, was a member of the SAB and, at the same time, was the Chief of Viral Carcinogenesis Branch of the National Cancer Institute ("NCI"). Rubin Aff. At ¶ 8 (Exh. 48).

[32] Plaintiffs cite to handwritten notes from 1978 which they claim establish that "the control by attorneys was exclusive." Pl. Mem. at 18, Pl. exhibit 35. This memorandum, entitled "Scientific Research Liaison Committee", indicates that that committee should "reconvene" because, in the author's words: "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," and goes on to express other dissatisfactions with joint industry efforts. It hardly supports the conclusion plaintiffs draw from it: that "CTR has been a crucial element of defendants' ongoing fraud to misrepresent and withhold from the public the dangers of smoking." Pl. Mem. at 19.

[33] All the articles published by CTR grantees are listed and summarized in CTR's annual reports, which have been published every year since 1956. See Council for Tobacco Research, Annual Reports, 1956 to 1995 (Exh. 50).

[34] Plaintiffs selectively quote a 1974 memorandum from Alexander Spears, a Lorillard scientist, to create the impression that CTR research was solely for public relations or litigation purposes and that this research must have therefore been illegitimate. Pl. Exhibit 34. The memorandum at issue surveys the broad array of smoking and health research programs being pursued by various organizations, including CTR and the federal government, and calls for coordinating CTR research with that of these other groups so as to avoid duplication and waste and to "produce significant results." Nothing in the memorandum suggests that CTR was engaged in the production of "false" science of suppression of good science relating to smoking and health.

[35] Plaintiffs point to notes of a 1961 CTR meeting, Pl. Mem. at 19, as evidence of CTR's supposedly illicit public relations benefit. These notes state that discuss various CTR research projects and remark on the improved quality of CTR investigators and research. Recognizing CTR's public relations benefit it not a crime or fraud.

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a presentation in 1977:

> The work of the Council is of value only to the degree that its scientific integrity is unimpeachable. That it is blessed with that integrity is vouched for by the eminence of the members of the Scientific Advisory Board and their dedicated hard work in the service of the Council's purposes.

Remark of Addison Yeaman of Maxwell Associates Biannual Tobacco Seminar (1977) at 6 (Exh. 53) (emphasis added).

5. Limited Lawyer Involvement in CTR's Activities Was Necessary Because of Antirust Considerations.

The only evidence plaintiffs have provided that suggests any "lawyer involvement" in the CTR grant-in-aid process involves the funding of research on the effects of nicotine on the central nervous system ("CNS"). This "lawyer involvement" was limited to CTR's lawyers giving legal advice to CTR. The unique and limited legal role of CTR's lawyers in certain of these funding decisions for several years in the late 1970s and early 1980s was appropriate because of the legal limits placed on CTR at its creation.

CTR was created in the mid-1950s with full knowledge by the member companies of the antitrust risks facing such joint activity by competitors in a highly concentrated industry such as the tobacco industry. *See* the Federal Antitrust Laws with Summary of Cases Instituted by the United States (CCH) (identifying ten antitrust actions against the tobacco industry) (Exh. 54). The tobacco industry had been the subject of numerous high-profile antitrust actions as recently as the 1940s. *See, e.g*., The Federal Antitrust Laws (Exh. 54); *United States v. American Tobacco Company*, 55 L.Ed. 663 (1911) (Exh. 55); Tobacco Companies Accused As Trust, New York Times, July 25, 1940 (Exh. 56). Indeed, many of the founding members of CTR had been criminally prosecuted and convicted for violations of the Sherman Antitrust Act in the prior decade. *Id*.

When CTR was created, therefore, the tobacco companies were careful to notify the Department of Justice ("DOJ") and provided the DOJ with a copy of CTR's "Statement of Purpose." Affidavit of Irwin Tucker ("Irwin Aff.") at ¶ 4; (Exh. 57); Letter from Paul M. Hahn to The Honorable Stanley N. Barnes, Jan. 26, 1954, attaching Tobacco Industry Research Committee and Its Proposed Functions, January 25, 1954 (Exh. 59). By providing the Statement, the companies assured the DOJ that CTR would not "participate in any activity, or give consideration to any matters affecting the business conduct or activities of its members." Letter from Paul M. Hahn (Exh. 58). To that end, the companies advised the Department of Justice that "the Committee is proceeding under the advice of legal counsel. . . ." *Id*. Thus, it was not surprising that CTR might required legal advise as to the proper scope of CTR funded research.[36] This concern with antitrust issues is substantiated by one of the documents plaintiffs use to argue that lawyers improperly interfered with "the so-called 'independent' research conducted through CTR." Pl. Mem. at 12; Pl. Exhibit 33 (CONFIDENTIAL).

A. Plaintiffs' Allegations Concerning Lawyer Representation of Defendants Do Not Support A Claim of Fraud.

In addition to plaintiffs' allegations of lawyer involvement in scientific research, plaintiffs argue that industry engaged in fraud in their representation of industry clients. Plaintiffs' sweeping allegations are not borne out by the documents to which they cite.

As set forth above, *supra* section III, the tobacco industry has been subjected to legislative, regulatory and litigation scrutiny to an unprecedented degree over the past fifty years. It is not surprising, therefore, that the industry has sought and received advice from lawyers on the myriad legal issues that have confronted it. What is surprising is the lengths to which plaintiffs go to make so much of so little. Thus, plaintiffs cite to a 1983 report by Brown & Williamson to the Batus board of directors on smoking and health which, in the context discussing legislative, regulatory and product liability issues confronting the industry, refers to the "high priority of control of statements by the manufacturers on the issues" as "[a]n unfortunate statement could bring the house down." Pl. Exh. 41 (CONFIDENTIAL). This observation -- which plaintiffs argue demonstrates the "paramount importance of legal considerations," and thus of lawyer control of the industry -- is both true and hardly shocking. It provides no evidence of a crime or fraud.[37]

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[36] Plaintiffs point to cryptic notes of a BATCo internal meeting which report, third-hand, that outside counsel for one of the tobacco companies against conducting research on the "pharmacology of smoking and the benefits conferred by smoking" because of antitrust, litigation and regulatory concerns. Pl. Exhibit 40. Such legal advice about the regulatory and litigation implications of proposed research certainly does not evidence fraud.

[37] Plaintiffs also point to a 1964 report summarizing the impressions of British tobacco industry representatives about the legislative and litigation environments in America on tobacco issues in support of their claim of "lawyer control." Pl. Mem. at 19-20. As the report itself emphasizes, there are vast

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differences between the English and American litigation and legislative environments. In light of those differences, and the narrow, legal focus of the memorandum, it is not surprising that the memorandum fails to reflect a full comprehension of the legal issues confronting the tobacco industry in America and the role American lawyers played in representing their industry clients.

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More importantly, plaintiffs point to no

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statement or omission in these -- or any other -- documents that is fraudulent. Whatever involvement lawyers may have had in advising the industry on legislative, regulatory and litigation matters, there is no evidence that such lawyer advice was in *furtherance* of a crime or fraud.

Plaintiffs point to a November 1979 memorandum written by Kendrick Wells, in-house counsel at Brown & Williamson ("B&W"), in which Wells considers possible theories of privilege that might be claimed as to certain collections of scientific documents, to support their claim that B&W lawyers shielded internal scientific research from discovery.[38] Yet plaintiffs have not identified a single pleading or document in which B&W ever made an improper assertion of privilege to scientific research. In fact, B&W has consistently disclosed in its discovery responses the existence of its library and its R&D reports related to smoking and health. *See* B&W Responses Nos. 47, 48, 62 in *Monroe v. Brown & Williamson*; B&W Supplemental Responses Nos. 18, 39, 40, 83, 84 in *Hurley v. Combustion Engineering*; B&W Supplemental Responses Nos. 36, 37 in *Green v. USX Corp*. (Exh. 60).

Plaintiffs also assert that another memorandum written by Wells six years later shows that B&W improperly removed certain research reports from their files. But even the document itself fails to support plaintiffs' allegations. Wells proposes simply that in connection with a move to a new facility, old or "deadwood" documents be boxed up and stored. Nowhere does Wells suggest that those documents be destroyed or withheld from litigation. IN fact, the underlying "deadwood" documents have been and continue to remain available for discovery. See B&W Supplemental Responses to Certain of Plaintiffs' Interrogatories at 17 (filed 2/12/97) (Exh. 61).

Plaintiffs have reviewed millions of documents in this case. Their citation to a few documents, written by different people employed by different companies, at different times, on different subjects -- none of which constitutes a crime or fraud under any legal standard -- does not establish lawyer "control" over an entire industry, the commission of a crime or fraud by that industry, or the participation of lawyers in furtherance of any supposed industry crime or fraud. As such, plaintiffs have failed to establish even a *prima facie* case of crime/fraud as to any documents.

CONCLUSION

For the foregoing reasons, plaintiffs' premature effort to leapfrog over the privilege procedures established by this Court and jump directly into a crime/fraud inquiry without first resolving critical threshold privilege issues must be rejected. The large number of privileged documents potentially at issue in this case provides no basis for ignoring fundamental rules relating to privilege determinations. In any event, plaintiffs have not set forth facts sufficient to create even a *prima facie* showing of crime/fraud warranting *in camera* review of documents. Thus, plaintiffs' request for this Court to make a preliminary finding of crime/fraud and begin reviewing *all* of the defendants' documents in camera -- whether by categories or not -- must be denied.

Dated: April 15, 1997

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On Behalf of PHILIP MORRIS INCORPORATED AND Counsel For the Other Defendants Except For Liggett Group, Inc.
(See Appendix of Counsel)

[38] B&W notes that this document is privileged and objects to plaintiffs' use of it in their memorandum. Plaintiffs' claim that the document was produced by Philip Morris is misleading. Counsel for Philip Morris informed plaintiffs' counsel before their memorandum was filed that the document was inadvertently produced and requested that it be returned. Plaintiffs' use of a privileged document in disregard of this request is a violation of the Court's order regarding inadvertently produced privileged material.

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