STATE OF MINNESOTA **SECOND JUDICIAL DISTRICT**

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

THE STATE OF MINNESOTA,

COURT FILE NO. C1-94-8565

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

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R. J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDA IN OPPOSITION TO PLAINTIFFS' SECOND ROUND OF MOTIONS TO COMPEL

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. SCIENTIFIC RESEARCH SENT TO ATTORNEYS 4

A. The Proposals Before The Court 6

B. The Requested Information Is Relevant 8

C. The Work Product Doctrine Does Not Preclude The Production Of A Log 11

III. PRIVILEGE LOGS PREPARED FOR OTHER LITIGATION 15

IV. B&W'S TRANSFER OF DOCUMENTS TO THIRD PARTIES 17

V. DOCUMENTS RELATING TO "YOUNG ADULTS" 19

VI. PHILIP MORRIS DOCUMENTS RELATING TO NICOTINE REPLACEMENT DEVICES 23

VII. DISCLOSURE OF TOBACCO INSTITUTE AGENTS IN MINNESOTA . . 24

VIII. DEFENDANTS' FAILURE TO RESPOND TO INTERROGATORIES IN A TIMELY FASHION 25

A. American And Liggett Interrogatories 25

B. Interrogatories Relating To The LRD Division Of CTR 27

IX. CONCLUSION 28

I. **INTRODUCTION**

Plaintiffs respectfully submit this memorandum in reply to defendants' joint Memorandum in Opposition to Plaintiffs' Second Round of Motions to Compel, as well as the various memoranda submitted by individual defendants relating to this round of motions.

1. SCIENTIFIC RESEARCH SENT TO ATTORNEYS: At this time, plaintiffs request only the rudimentary relief of the logging of allegedly privileged/work product information relating to scientific research sent to attorneys. Defendants respond with the absurd contention that this information lacks relevancy. Defendants also contend that the mere listing of this information would somehow intrude upon their work product privilege, despite the fact that privilege logs are routine in all litigation, and, indeed, many courts hold that the production of a log is a necessary predicate for any claim of privilege or work product.

Such a log is essential in this case given the extraordinary -- perhaps unprecedented -- involvement of defendants' attorneys in scientific issues over the course of the last four decades. xxxx xxxx

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other pending State actions). Thus, plaintiffs seek an order that defendants respond to this discovery request, as the request was modified by letter of May 13, 1996. See Exhibit 2 to Memorandum In Support Of Plaintiffs' Second Round Of Motions To Compel ("Plaintiffs' Opening Memorandum").

2. PRIVILEGE LOGS PREPARED FOR OTHER LITIGATION: Plaintiffs believe that the production of privilege logs already prepared for prior litigation will be of invaluable assistance in expediting the analysis and resolution of privilege/work product issues in this case. The discovery of these existing logs is particularly important at the present time since the creation of privilege logs by certain defendants in this case has not kept pace with the rolling production of documents, notwithstanding this Court's order of March 20, 1996, ¶ A.5.

3. B&W'S TRANSFER OF DOCUMENTS TO THIRD PARTIES: Brown & Williamson Tobacco Corporation (B&W) should be required to respond to interrogatories on the transfer of documents not just to corporate affiliates but also to third parties, as has every other defendant in this litigation.

4. DOCUMENTS RELATING TO "YOUNG ADULTS": The critical nature of documents relating to "young adults" is underscored by a document produced within the past few weeks by R.J. Reynolds Tobacco Company ("RJR"). This remarkable document, authored in 1984, traces 50 years of marketing history and

concludes that "younger adults" -- the majority of whom appear to be under age 18 -- have been responsible for the success of every leading cigarette brand since at least the 1940's. The report concludes:

> If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.

Exhibit 3, p. 2.

Euphemistically, defendants refer to their underage customers as "young adults" in a desperate attempt to deny the grim reality of their business -- and to preclude relevant discovery in this case.

5. PHILIP MORRIS DOCUMENTS RELATING TO NICOTINE REPLACEMENT DEVICES: Philip Morris Incorporated ("Philip Morris") suggests that this document request is similar to plaintiffs' requests relating to Project Table and Marlboro Express. Plaintiffs agree, and request an order similar to this Court's order of June 28, 1996, ¶ 5, which would require Philip Morris to produce these documents in accordance with the responses of all other defendants.

6. DISCLOSURE OF TOBACCO INSTITUTE AGENTS IN MINNESOTA: The Tobacco Institute, Inc. ("Tobacco Institute") offers no legitimate justification for refusing to answer this basic interrogatory.

7. DEFENDANTS FAILURE TO RESPOND TO INTERROGATORIES IN A TIMELY FASHION: There is simply no excuse for the continuing

refusal of certain defendants to respond to interrogatories in a timely fashion.

II. SCIENTIFIC RESEARCH SENT TO ATTORNEYS

Plaintiffs request only modest relief in this motion. All evidence points to the fact that defendants have lodged with their attorneys categories of scientific documents well beyond that which qualifies for privilege or work product protection. Plaintiffs request only that the responsive documents be listed on a log to facilitate a meaningful challenge to any overly broad assertion of protection. As shown in plaintiffs' moving memorandum, a plethora of courts require such a log as a first step to any assertion of privilege or work product protection. Plaintiffs' Opening Memorandum, pp. 15-19.

In this case, such discovery is essential. Defendants do not, indeed cannot, dispute that tobacco industry lawyers have asserted extensive control over scientific research. xxxxxxxxxxxxx

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against discovery." Memorandum of November 9, 1979 from Kendrick Wells, a B&W in-house counsel, to Ernest Pepples, also in-house counsel, cited in Glantz, et al., The Cigarette Papers, p. 242 (1996), Exhibit 4. This motive was cynically pursued even though the lawyers knew that the purpose of the BAT-B&W research was non-legal in nature and that, in fact, the cost-sharing agreement under which the research was conducted "would probably contradict the position that you [B&W] were acquiring the reports for purposes of litigation. . . ." Id.

Given this undisputed evidence, plaintiffs have no alternative than to seek documents about scientific research from the files of the industry's counsel. That is where, in the words of the defendants, for "forty years" the research documents have been placed. Defendants' Memorandum, p. 10.

A. The Proposals Before The Court

Plaintiffs originally served this document request on October 18, 1995. When defendants raised objections, plaintiffs requested that defendants respond with a counter-proposal. Defendants, however, failed to respond with a written proposal for almost seven months, until May 8, 1996. See Exhibit 4 to Plaintiffs' Opening Memorandum. Despite the long delay, and the approaching deadline for this motion, plaintiffs responded by letter of May 13, 1996 with a proposal

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to refer to B.A.T. Industries plc and/or British-American Tobacco Company Ltd ("BATCo").

aimed at modifying their request to address defendants' concerns. See Exhibit 2 to Plaintiffs' Opening Memorandum.

Defendants have conceded that "original research" in attorney files will be produced or (if there is a claim of privilege or work product) described on a privilege log. See Exhibit 4 to Plaintiffs' Opening Memorandum. However, defendants exclude from their concept of "original research" 1) analyses or summaries based upon "publicly available data," and 2) what defendants vaguely describe as "expert work product prepared in the ordinary course for use in specific identifiable litigation," an exception which could swallow the whole. Id. Defendants resolutely refuse to even log any of the information they intend to exclude. Defendants' Memorandum, p. 10.

Plaintiffs' position is that "documents" on scientific research as well as "reports" are relevant to this case. See Exhibit 2 to Plaintiffs' Opening Memorandum. [4] Other courts have found that relevant information is also located in correspondence, agendas, and executive and/or attorney communications about research. For that reason, plaintiffs request that documents containing information beyond the scientific "reports" themselves, and those discussing "Special

[4] Plaintiffs' request for "documents" on scientific research rather than "reports" is an attempt to avoid the defendants' semantic word games. Two defendants objected to plaintiffs' original request on the grounds that they believed the word "report" to be vague and ambiguous. Exhibit 1 to Plaintiffs' Opening Memorandum.

Projects" and "Special Accounts" of the Council for Tobacco Research - U.S.A. Inc. ("CTR"), be produced or listed on a log. Id. [5]

Plaintiffs also seek a log listing analyses of publicly available data. After defendants raised a concern about the burdensomeness of this aspect of the request, plaintiffs agreed to limit this to analyses that can be located with little burden, i.e. those listed on indices. Id. Finally, plaintiffs seek a log identifying all responsive documents that defendants plan to withhold under a claim of work product, even if prepared for, in defendants' words, "specific identifiable litigation." Id. Plaintiffs have accommodated concerns voiced by defendants by agreeing that documents created after the filing of the complaint in this action may be excluded. Id. Thus, defendants need not produce, or log, any documents prepared specifically for this case (or other pending State litigation). This limitation is more in line with the true scope of the protection than defendants' hyperbolic, overly broad claim that work product protection removes from discovery 40 years of scientific study on relevant issues.

B. The Requested Information Is Relevant

Defendants' legal arguments zig-zag from the shrill

[5] "Special Projects" and "Special Accounts" appear to be the designations used for at least some of the attorney-sponsored research at CTR.

contention that the information requested is not relevant ("The issue presented is relevance", Defendants' Memorandum, p. 10) to exaggerated claims of work product protection. The relevancy objection can be quickly dismissed: plaintiffs, in a case seeking damages for health costs caused by smoking, seek "information on scientific research relating to smoking and health." Exhibit 2 to Plaintiffs' Opening Memorandum. Defendants seek to avoid the common sense relevancy of the request by arguing that the requested information must be relevant to one narrow issue, whether research has been hidden from the public. Defendants' Memorandum, pp. 6, 9. This misconstrues the relevancy standard. Discovery is allowed of any information "which is relevant to the subject matter involved in the pending action. . . ." Minn.R.Civ.Proc. 26.02(a) (emphasis added). Relevancy for discovery purposes is not judged by recourse to a single claim or argument asserted in a case. 8 Wright, Miller & Marcus, Federal Practice and Procedure, § 2008, p. 99 (1994) (argument that information sought must be relevant to a particular issue in a case is "clearly wrong").

Thus, the specific information which plaintiffs seek is relevant. Defendants' pledge to produce CTR Special Projects "research" does not, as they claim, remove the CTR Special Projects as an issue. Defendants' Memorandum, p. 4.[6] More

[6] Defendants' Memorandum first claims that defendants have never claimed that the Special Projects research is

probative information may be found in the company correspondence about the research, agendas of meetings regarding research, and communication about the projects between counsel for the different companies. Two courts, for example, recently found that such documents regarding CTR Special Projects may reveal an ongoing fraud by the industry. Sackman v. The Liggett Group, 920 F.Supp. 357, 368 (E.D.N.Y. 1996), vacated, 1996 WL 284887 (E.D. N.Y. 1996); Burton v. R.J. Reynolds Co., __F.R.D.__, 1996 WL 303557, * 6-7 (D. Kan. 1996), reconsideration denied; but cf. Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 169, 172 (6th Cir. 1996) (no abuse of discretion for district court to decline to automatically rely on finding of another district court of prima facie evidence of crime/fraud for "Special Projects" documents).[7]

Summaries or analyses of publicly available information

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privileged, but then recites a willingness "to produce, or log, special projects research," regardless of where it is found. Defendants' Memorandum, p. 4 (emphasis added). If there is no privilege, why the reference to logging, rather than producing, the information?

[7] The district judge in Sackman vacated the magistrate's order when the judge granted partial summary judgment in this personal injury case. The judge explained that the purpose of vacating the order was "so that the court may consider the effect of the court's summary judgment decision on the various discovery issues." Sackman, 1996 WL 284887 (E.D.N.Y. 1996), at * 15. No criticism was made of the magistrate's findings that 1) attorney and executive documents about CTR Special Projects were not privileged nor protected by work product, and 2) a fraudulent purpose existed in the use of the documents.

are relevant as well. To this date, the industry, both publicly and in litigation, has steadfastly denied that smoking causes lung cancer (or any other disease). Obviously, to maintain such a stance in the face of overwhelming epidemiological evidence establishing medical causation, defendants must necessarily either blind themselves to much "publicly available data," screen certain industry officials from the information, or analyze the information in a manner (perhaps lacking in merit scientifically) that supports their desired conclusion. Thus, the analyses of publicly available information will allow meaningful comparison of what was accepted within certain segments of the industry with its public stance. The extent to which a party knows or understands information in the public domain is discoverable. Herr & Haydock, Discovery Practice, § 1.4, pp. 17-18 (1988), Exhibit 2.

C. The Work Product Doctrine Does Not Preclude The Production Of A Log

Defendants make selective use of the work product doctrine. First, they seek to avoid invoking this area of law, claiming that "the issue is relevance...the issue for decision now is not adjudication of the privilege." Defendants' Memorandum, p. 10. The strategy is obvious: defendants must downplay their reliance on the work product rule because of the limited scope of plaintiffs' requested relief. The case law is clear that the necessary first step

to the assertion of work product protection is to list the alleged work product on a log so as to allow meaningful challenge to the assertion. See Plaintiffs' Opening Memorandum, pp. 15-19.[8]

Defendants' allegation that a log requiring disclosure of the identity of non-testifying experts would somehow work an "astonishing disclosure" is obvious exaggeration. Minnesota Rule of Civil Procedure 26.02(d)(2) protects against discovery (absent "exceptional circumstances") of the "facts known or opinions held" by a consulting expert who will not testify at trial.[9] Defendants' attempt to transpose this same

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[8] Defendants rely on unpublished cases that have little relevance to the issue before the Court. See Defendants' Memorandum, p. 9. Edward Lowe Indus. Inc. v. Oil-Dry Corp of Am., 1995 WL 399712 (N.D. Ill 1995) stands simply for the proposition that a report written by an expert for a particular lawsuit may not be discoverable if the expert is not going to testify in that lawsuit. Eliasen v. Hamilton, 1986 WL 7654 (N.D. Ill 1986) is particularly irrelevant in that it deals with the scope of discovery allowed for the purpose of cross-examining a testifying expert witness. Eliasen and Edward Lowe thus do not implicate the issue here: whether the plaintiffs can obtain the information necessary to challenge defendants' unilateral assertion that 40 years of scientific research is off limits to discovery.

[9] Rule 26.02(d)(2) states:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exception circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

restriction on the type of information needed for a competent log -- including as the mere identity of the expert -- is misplaced. An "opposing party can obtain the names of experts specially retained or employed." 2 Herr & Haydock, Minnesota Practice, p. 27 (1985, Supp. 1995), Exhibit 5. The policy behind protecting the "opinions held" by non-testifying experts is to prevent one party from taking a "free ride" on the other side's expert. This policy is not served by barring the discovery of consultant identities because "the name of an expert will reveal nothing more than the name itself." Id.; see also, Herr & Haydock, Discovery Practice, §1.7.3, p. 54 (1988, Supp. 1995), Exhibit 2 (noting some authorities requiring a showing of "exceptional circumstances" but describing how "the best answer to this apparent conflict is that the identity of the non-testifying retained or specially employed experts is usually discoverable"). Disclosure is favored because courts are reluctant "to protect the identity of an expert merely because that expert was retained and gave an opinion . . . unfavorable to the party retaining him, which opinion that party now seeks to protect by deciding not to call the expert." Id.

Moreover, the identity of non-testifying experts is indisputably discoverable upon a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Ager v. Jane C. Stormont Hospital,

622 F.2d 496, 502 (10th Cir. 1980); Kuster v. Harner, 109 F.R.D. 372, 373-74 (D.Minn. 1986). That standard is met here.[10]

A party selling a product has the duty of an expert to keep abreast of the hazards posed by that product. Jenkins v. Raymark Industries, Inc., 109 F.R.D. 269, 278 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986). Part of this obligation is that cigarette manufacturers havexxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx x xxxxxxxx Exhibit 6, p. 2 (confidential). Normally, it is to this body of in-house knowledge (developed in furtherance of a business duty rather than for the purposes of litigation) that a plaintiff would turn to show a manufacturer's underlying knowledge of its product. But the cigarette industry, in its own words, xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

[10] Even if this Court were to require "exceptional circumstances" and plaintiffs failed to meet that showing, defendants would not be excused from the requirement of making a privilege log. This precise issue was addressed in Queen's University at Kingston v. Kinedyne Corp., 161 F.R.D. 443 (D. Kan. 1995), where the court found that, while the identity of the expert may be protected, a privilege log must be prepared which discloses the relationship with the expert and the existence of any reports. Accord Bergeson v. Dilworth, 749 F. Supp. 1555 (D. Kan. 1990) (imposing Rule 11 sanction for failure to disclose, in response to an interrogatory, the existence of a report prepared by a non-testifying expert). Thus, contrary to their hyperbole, defendants may not make a blanket claim of privilege in the absence of a privilege log.

xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx[11] Thus, the scientific research is unavailable elsewhere and "exceptional circumstances" exist.

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

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

Roesberg, 85 F.R.D. at 299 (emphasis added). Thus, Roesberg authorizes discovery of the actual non-testifying expert information, not just identifying privilege log information sought by plaintiffs in this motion.

In obvious recognition that established case law

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[11] B&W, for example, viewed CTR and its lawyer-controlled projects as the answer to "the research dilemma" facing "a responsible manufacturer of cigarettes, which on one hand needs to know the state of the art and on the other hand cannot afford the risk of having in-house research turn sour." Memorandum of September 29, 1978 from B&W attorney Ernest Pepples to B&W chairman C.I. McCarthy, cited in Glantz, et. al, pp. 44-45, Exhibit 4.

repudiates their position, defendants make a "public policy" argument based on wholly inapplicable precedent. Defendants' Memorandum, p. 9, citing, Estate of Hoyle v. American Red Cross, 149 F.R.D. 215, 216 (D.Utah 1993)(need to encourage blood donations counsels against allowing discovery of blood donor identity); Northeast Women's Center v. McMonagle, 1986 WL 46 (E.D. 1986)(right to privacy weighs against discovery of names of patients of abortion clinic). Given the unrefuted evidence regarding defendants' intention to thwart discovery through use of its counsel, public policy is well-served by requiring defendants to disclose relevant information found in the files of their counsel. Indeed, the function of work-product protection is "to promote the adversary process, not to pervert it." American Bar Ass'n Litigation Section, The Attorney-Client Privilege and the Work Product Doctrine 2d, p. 151 (1989).

III. PRIVILEGE LOGS PREPARED FOR OTHER LITIGATION

This Court's order of March 20, 1996 provides at paragraph A.5 that "[p]rivilege logs shall be produced on a rolling basis with respect to those documents produced; the logs shall not be delayed or withheld until all production is complete." However, one year into the discovery process, certain defendants have yet to produce any privilege logs to plaintiffs, while others have produced logs which clearly describe only a small subset of the documents for which

privilege will be claimed. [12]

Thus, plaintiffs have an increasing concern that massive numbers of privileged documents will be listed in the closing days of document discovery, providing little opportunity for plaintiffs to analyze defendants' claims of privilege and, if necessary, move for appropriate relief. Plaintiffs believe that the prompt production of already-existing privilege logs from prior litigation will expedite the analysis of privilege issues so that their resolution will not be unnecessarily delayed. (This, of course, will not relieve defendants of their obligations to produce privilege logs in the present litigation.)

Given the comprehensiveness of the discovery in this case, plaintiffs believe that privilege logs from prior smoking and health litigation will prove highly relevant to this action. In addition, plaintiffs do not believe that the production of privilege logs from prior litigation is unduly burdensome for defendants. Defendants state in their memorandum that they have been involved in "hundreds of cases over more than forty years." Defendants' Memorandum, p. 11.

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[12] Four defendants -- RJR, B&W, American Tobacco Company, and Liggett Group, Inc. -- have yet to produce any privilege logs to plaintiffs, although they have promised to deliver the first installments in the near future. Philip Morris produced its first privilege log two weeks ago; this first log, however, appears to primarily cover documents peripheral or irrelevant to this litigation, for example, documents relating to environmental audits, disposal of hazardous waste, and wastewater treatment.

However, defendants fail to state or estimate the number of prior cases in which privilege logs were produced. See Roesberg, 85 F.R.D. at 296-97 (general statement of burdensomeness, without information revealing nature of burden, is not a credible objection to discovery). Plaintiffs believe that many of these prior cases did not proceed to document discovery and that fewer still involved the production of privilege logs. In any event, defendants already are searching their prior pleadings in response to other requests in this litigation, and plaintiffs also believe that at least certain defendants would be able to locate such privilege logs through the use of indices to their pleadings.

IV. B&W'S TRANSFER OF DOCUMENTS TO THIRD PARTIES

B&W provides no basis whatsoever for its refusal to answer plaintiffs' interrogatories seeking a description of the transfer of documents to third parties. Rather, B&W seeks to shift the burden, arguing simply that there is "no reason" for further answers. B&W Memorandum, p. 6.

One reason for further answers is the language of Minn. R. Civ. P. 26.02(a), which expressly authorizes discovery into the "location of any . . . documents." A second reason, though not required to make the plaintiffs' request proper, is B&W's history of playing, or contemplating, shell games with respect to discoverable evidence. See, Hanauer, et al. "Lawyer Control of Internal Scientific Research to Protect

Against Product Liability Lawsuits," JAMA, July 19, 1995, Exhibit 6 to Plaintiffs' Opening Memorandum. B&W prefers to produce creatively-placed evidence only after it is caught hiding the ball. See B&W Memorandum, p. 6, n.3 (offering to produce documents diverted to the law firm of Wyatt & Tarrant).[13] Plaintiffs submit that the more fair (and efficient) resolution would be to compel an answer to an interrogatory that is clearly authorized by Rule 26.02(a).

B&W's offer to describe only those transfers of documents done intentionally to "hold the documents beyond the reach of discovery" is insufficient. B&W Memorandum, p. 6. The location of documents is a routine target of discovery. Plaintiffs should not be forced to limit such a request based upon the intent of the person transferring documents. B&W's offer does, however, undercut its argument that it would require a burdensome interrogation of every B&W employee. Obviously, if the intent behind specific document transfers can be discerned by B&W, the fact of the transfers themselves can be as well. Thus, B&W does not argue unfair burden in its responsive brief. In any event, any burden created by the method in which a party chooses to handle its own documents is no excuse to discovery. Snowden v. Connaught Lab, 137 F.R.D.

[13] In its memorandum, B&W states that it will obtain from Wyatt & Tarrant documents from BATCo, BAT Industries, or B&W. However, plaintiffs had previously understood -- and continue to believe -- that B&W has committed to obtain all relevant documents from Wyatt, Tarrant.

325, 333 (D. Kan. 1991).

B&W tries to shift the focus from its refusal to answer by claiming that the plaintiffs' "root" concern is the transfer of documents to corporate affiliates, for which B&W has provided an answer. B&W Memorandum, p. 5.[14] Answering one request is not, however, an excuse for not answering a different, proper request. Plaintiffs are entitled to discover the location of relevant B&W documents, whether they have been transferred to corporate affiliates or to third parties.

V. DOCUMENTS RELATING TO "YOUNG ADULTS"

In their responsive memorandum, defendants attempt to deny the obvious: 1) that documents relating to 18-year-olds necessarily implicate the illegal children's market which lies at the cusp, and 2) that defendants' own documents demonstrate that the term "young adults" is used to include children, on whom the cigarette industry overwhelmingly relies to sustain its sales.

Indeed, a remarkable document just produced by RJR confirms the indispensability of young adults -- and children -- to the very survival of the cigarette industry. This RJR

[14] In fact, B&W has provided a only a tentative answer to the interrogatory on corporate transfers. B&W's statement that it has not yet located any documents transferred to affiliates will, of course, have to be supplemented in the future. See B&W Memorandum, pp. 3-5.

report is titled, "Younger Adult Smokers: Strategies and Opportunities." Exhibit 3. The report was written in 1984 by Diane Burrows, a RJR employee who appears to have played an integral role in the creation of the controversial Joe Camel cartoon campaign.[15] Repeatedly, the report refers to "younger adult" smokers, which is defined to be ages 18 to 24. Id., p. i. However, there can be no doubt that the report uses the term "younger adults" as a euphemism to describe underage smokers.

For example, a key chart in the report is titled, "YOUNGER ADULTS' IMPORTANCE AS REPLACEMENT SMOKERS." Id., at Appendix B (p. 501928526). Yet the chart begins with smokers age 13. Id. In fact, the report notes that two-thirds of male smokers start by age 18, as follows:

- 9.9% by age 12;
- 13.4% by age 13;
- 20.8% by age 14;
- 30.3% by age 15;
- 42.9% by age 16;
- 53.6% by age 17; and
- 68.7% by age 18.

Id. Thus, regardless of the term used -- i.e., "young adults" or any other euphemism -- there is no disputing the fact that

[15] At the specific request of plaintiffs, RJR has agreed to produce all Diane Burrows documents relating to young adults, but not young adult documents written by other RJR employees.

beginning smokers are predominantly children who have not yet reached the age of 18. [16]

The report documents how this young market -- "young adults" in the euphemism of the industry; children in hard reality -- has been responsible for the success of every major cigarette brand for at least the past 50 years. Moreover, the report repeatedly notes that "younger adults" are the only source of "replacement" smokers. ("Replacements," of course, are needed for older smokers who quit or who die from cigarette-caused illness.) To quote the report:

> Younger adult smokers have been the critical factor in the growth and decline of every major brand and company over the last 50 years. They will continue to be just as important to brands/companies in the future. . . .
>
> . . .
>
> Younger adult smokers are the only source of replacement smokers. . . . Less than one-third of smokers (31%) start after age 18. . . . If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.

Id., pp. i and 2 (emphasis added).

In great detail, the RJR report traces every major cigarette brand since the 1940's and concludes that their sales were driven by "younger adults":

- "Pall Mall: The Brand of the 1940's and 1950's":

[16] Other reports indicate that the percentage of smokers who begin before age 18 is even higher. See, e.g., Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, U.S. Food and Drug Administration, Vol. 60 Fed. Reg., at 41314 (August 11, 1995) (82% of adults who ever smoked had their first cigarette before age 18).

> "ATC's [American Tobacco Company] leading position among younger adult smokers, first with Lucky Strike and then Pall Mall, pushed it to #1 in the industry in 1940, when it passed RJR. However, since Pall Mall was ATC's last successful younger adult entry, the brand's downturn signalled the future performance of ATC as a company." Id., pp. 8, 10.
>
> • "Winston: The Hit of the 1950's and 1960's": "Winston let Kent and Viceroy sell the benefits of filters and, perhaps, make themselves look like 'sissy brands' to younger adult smokers seeking maturity. . . . As Winston lost its hold on the 18-year-old smoker market of the mid-1960's, its younger adult smokers dispersed to Salem and Kool as well as to Marlboro." Id., pp. 12, 14.
>
> • "Marlboro: The 'Baby Bubble' Brand": "Marlboro's positioning was in tune with younger adult smokers' enduring want to express their maturity and independence through smoking. . . . Marlboro acquired younger adult smokers than Winston and, by the late 1960's, this meant the Baby Bubble, the largest cohort of people, and smokers, in history." Id., p. 16.

The report makes it clear that the "younger adult" market for Marlboro -- the current number one selling brand which is marketed by Philip Morris -- is, in fact, driven primarily by children:

> Marlboro and Newport, the only true younger adult growth brands in the market, have no need for switching gains. All of their volume can be traced to younger adult smokers and the movement of the 18-year-olds which they have previously attracted into older age brackets, where they pay a consumption dividend of up to 30%. A strategy which appealed to older smokers would not pay this dividend.
>
> . . .
>
> [E]ntering 18-year-old smokers account for all of Marlboro's strength among total 18-24.
>
> . . .
>
> Incoming 18-year-old smokers and the movement of its existing franchise into older age brackets can explain all of Marlboro's smoker share gains in the past four years. Among smokers 25+, all of Marlboro's gains are attributable to this aging

> movement -- switching appears to have had no net long term effect.

Id., pp. i, 3, and 4 (emphasis added).

Instead of denouncing this disgraceful history of exploiting children, and the phenomenal success of Marlboro in this respect, this report focuses on how RJR can also take advantage of "younger adults" to reap increased profits. The report states:

> Younger adult smokers are critical to RJR's long term performance and profitability. Therefore, RJR should make a substantial long term commitment of manpower and money dedicated to younger adult smoker programs. An unusually strong commitment from Executive Management will be necessary. . . .

Id., p. iii.

Hence, the Joe Camel cartoon campaign, which began several years after the issuance of this report. As further proof of the realities of the "young adult" market, and the relevance of this category of documents to this litigation, the Joe Camel campaign -- allegedly aimed at "young adults" -- has had striking success among children under age 18. Exhibit 7.[17]

VI. PHILIP MORRIS DOCUMENTS RELATING TO NICOTINE REPLACEMENT DEVICES

[17] Defendants also raise objections of "overbreadth" and "vagueness" with respect to "young adult" documents. However, plaintiffs have not requested all documents which reference 18-year-olds or young adults, but rather all such documents which are responsive to specific topics. See Document Request Nos. 91, 93-99, and 101.

Philip Morris asserts that its position with respect to nicotine replacement treatments and devices is the same position it took with respect to Project Table and Marlboro Express. Plaintiffs agree, and respectfully urge the Court to apply the same analysis and ruling. See Order With Respect to Plaintiffs' Motion to Compel Discovery (First Round), June 28, 1996, at ¶ 5 (requiring production).

Plaintiffs anticipate that Philip Morris documents covered by this request would fall into two broad categories: documents assessing the scientific and technological bases of nicotine replacement devices, and documents analyzing the impact on Philip Morris' cigarette sales as a result of the marketing of any such devices. In either case, it is difficult to imagine the existence of documents that could not be potentially relevant.[18]

In the case of the science of nicotine replacement devices, research would necessarily shed light on the pharmacological effects of nicotine and the efficacies of various delivery methods. This, in turn, is virtually certain to involve issues relating to addiction. With respect to marketing, any analysis of impact on sales would give insight into Philip Morris' true understanding of the role nicotine addiction plays in its cigarette business, as opposed to the

[18] To plaintiffs' knowledge, Philip Morris has never marketed a nicotine replacement device and, indeed, it would appear anathema to Philip Morris to ever do so.

"official" company position.

Accordingly, documents related to nicotine replacement devices are clearly discoverable, and Philip Morris should be ordered to respond to this request in full -- as all other defendants have already agreed to do.

VII. DISCLOSURE OF TOBACCO INSTITUTE AGENTS IN MINNESOTA

Plaintiffs' Interrogatory No. 34 requests basic information regarding entities or individuals acting on behalf of the Tobacco Institute in Minnesota. The provision of such information is a rudimentary step in investigation of the Tobacco Institute's activities in Minnesota as related to plaintiffs' claims, and the tobacco industry's defenses, in this litigation. It is beyond question that this information is relevant to the instant action.

As for the Tobacco Institute's assertion that the interrogatory is overbroad, the Tobacco Institute's own responses for the years for which it has agreed to provide information -- 1990 to 1995 -- belie this claim. The Tobacco Institute's responses primarily consists of the identities of lobbyists, public opinion surveyors, persons providing "legislative support," and the like. See Exhibit 27 to Plaintiffs' Opening Memorandum. There is not a "plumber or painter," see Tobacco Institute Memorandum, p. 1, on the list, nor is this the type of information sought by plaintiffs.

In its responsive papers, the Tobacco Institute admits

that responsive information can be ascertained for the years 1979 to 1989 and seems to indicate that at least partial information is available for the years prior to 1958. All information that is reasonably available should be provided to plaintiffs.[19]

VIII. DEFENDANTS' FAILURE TO RESPOND TO INTERROGATORIES IN A TIMELY FASHION

A. American And Liggett Interrogatories

American contends that it would be "pointless" and "counterproductive" for this Court to order a timely response to Interrogatory Nos. 18-21. Savell Affidavit, ¶ 9. Plaintiffs served these interrogatories more than one year ago. For more than eleven months, American failed to provide plaintiffs with any information regarding the annual expenditures for smoking and health research, safer cigarette research, discouraging youth from smoking, and the advertising, marketing and promotion of cigarettes. Only after plaintiffs filed this motion did American partially supplement its answer to Interrogatory No. 21 to provide

[19] Finally, the Tobacco Institute's preoccupation with the issue of personal jurisdiction, and its relation to this motion, is misplaced. Plaintiffs stated early in the meet-and-confer process that the Tobacco Institute's refusal to fully answer Interrogatory 34 was "unacceptable, particularly given" the Tobacco Institute's jurisdictional defense. See Exhibit 1, p. 3, to Shillingstad Affidavit. The relevance of this interrogatory is not changed by the fact that the Tobacco Institute abandoned its jurisdiction defense.

incomplete information, from 1979 forward only, regarding American's annual advertising expenditures -- even though this information is readily accessible since American reports this data to the Federal Trade Commission ("FTC") each year. See Exhibit 4 to Savell Affidavit.

American excuses its delay by arguing that answering these interrogatories -- which seek the most basic information -- would endanger their "document production pipeline" and, therefore, would be too burdensome. This argument must be juxtaposed with American's mediocre efforts to produce documents thus far. In addition, American argues that it cannot answer these interrogatories until a document-by-document review of its entire universe of documents has been completed. It is simply inconceivable that American -- in light of the numerous smoking and health cases where it has been a party -- has never organized, reviewed, or indexed documents which contain any of this information.

Plaintiffs' motion is not "premature." Savell Affidavit, ¶ 8. Plaintiffs have patiently waited for more than one year for answer to these interrogatories. Accordingly, plaintiffs respectfully request that American be ordered to provide responses within 21 days. To the extent that full and complete answers cannot be provided until all documents are reviewed, plaintiffs request that American be ordered to provide supplemental answers on or before December 31, 1996.

Plaintiffs also have moved for an order compelling

complete information from Liggett in response to Interrogatory Nos. 17 and 21. This motion is apparently unopposed since Liggett has not filed a responsive brief. Accordingly, plaintiffs move for an order compelling Liggett to answer -- within 21 days -- Interrogatory Nos. 17 and 21.

B. Interrogatories Relating To The LRD Division Of CTR

Despite defendants' repeated promises, and plaintiffs' agreement to therefore remove this issue from the first round of motions to compel, certain defendants have failed to appropriately supplement their responses to interrogatories relating to the Literature Retrieval Division ("LRD") of CTR, later known as LS, Inc. Two defendants -- Liggett and the Tobacco Institute -- have failed to provide any supplemental responses.

A third defendant -- Lorillard -- provided supplemental responses after the filing of this motion, but inexplicably qualified one of its pleadings by stating that it was "for the sole purpose of presenting the LS/LRD issue to the court for ruling." Exhibit 8, p. 2. Since plaintiffs served these interrogatories for a number of reasons, Lorillard's peculiar attempt to limit its response should be rejected. See Minn.R.Civ.P. 33.02 ("the answers may be used to the extent permitted by the Minnesota Rules of Evidence.") [20]

[20] In its responsive memorandum, Lorillard claims that it is premature to raise the issue of the adequacy of its responses "since it was not raised in plaintiffs' motion to compel. . . ." See Lorillard Memorandum. This is but one

In sum, plaintiffs request that Liggett and the Tobacco Institute be ordered to supplement their responses to these interrogatories within 21 days, and that Lorillard be ordered to supplement its responses, also within 21 days, without the limitation noted above.[21]

IX. CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court grant plaintiffs' second round of motions to compel.

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small example of the petty games played by defendants. The interrogatories at issue were the subject of extensive meet-and-confers between plaintiffs and defendants. On the eve of the deadline before the first round of motions to compel, defendants agreed to respond to these interrogatories in a specific manner, as detailed by extended correspondence. See, e.g., Exhibit 1 to Plaintiffs' Opening Memorandum. When certain defendants, however, failed to serve their amended responses, plaintiffs were forced to move in the second round of motions to compel. Only after plaintiffs filed this motion, did Lorillard serve its amended responses. Exhibit 8. Substantively, Lorillard's responses were in accordance with the agreement reached between plaintiffs and defendants. However, Lorillard attempted to limit its responses, as noted above, "for presenting the . . . issue to the court for ruling. . . ." Id. Now Lorillard argues that plaintiffs must bring yet another motion in order to strike its obstructionist limitation.

[21] Since the filing of this motion, RJR has served supplemental responses and BAT has indicated that it has no further responsive information. Accordingly, the responses of these two defendants with respect to the LRD/LS, Inc. interrogatories are no longer at issue.

Dated this 9th day of July, 1996.

ROBINS, KAPLAN, MILLER & CIRESI

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