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.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' SECOND ROUND OF MOTIONS TO COMPEL

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I. INTRODUCTION.

Plaintiffs respectfully submit this memorandum in support of their second round of motions to compel discovery. The following discovery is at issue:

- **Scientific Research Sent To Attorneys/Document Request No. 8**: Mounting evidence in the public domain, and in this litigation, discloses the extraordinary involvement of attorneys for defendants in scientific research activities. In addition, many documents explicitly discuss defendants' motive for this unusual attorney involvement: to shield scientific information on the harmful effects of cigarettes from discovery. Accordingly, plaintiffs have requested the production of all documents on scientific research relating to smoking and health which were sent to attorneys. In response, defendants have asserted that many of these documents are protected by the attorney-client and/or work product doctrines. At the same time, however, defendants are refusing to list all of these documents on privilege logs. In this motion, plaintiffs are not requesting the production of these documents, even though defendants' claim of privilege for scientific -- as opposed to legal -- information is, at best, dubious. Instead, plaintiffs are merely requesting that these documents be placed on a privilege log. The law is clear that a party claiming privilege or work product must provide such a log to allow its adversaries in litigation -- and eventually

the Court -- to properly evaluate claims of privilege.

- **Privilege Logs Prepared For Other Litigation/Request No. 122**: Many of the defendants have previously prepared privilege logs and produced them to plaintiffs' counsel in other smoking and health litigation. Plaintiffs request that these pre-existing logs be produced in this case (in addition to privilege logs being prepared for this case). There is no legitimate reason why this simple request cannot easily be met by defendants. Moreover, plaintiffs' need for these existing logs is heightened by the fact that defendants have produced only a tiny fraction of the privilege logs for documents in this case, and certain defendants -- including Philip Morris Incorporated ("Philip Morris") and R.J. Reynolds Tobacco Company ("RJR") -- have yet to produce any privilege logs in this case.

- **B&W's Transfer Of Documents To Third Parties/Interrogatory No. 9**: Plaintiffs seek a description of each instance in which documents relating to smoking and health were transferred from Brown & Williamson Tobacco Corporation ("B&W) to a third party, for reasons such as storage, warehousing, indexing or destruction. As this Court is aware, certain documents -- including the infamous "deadwood" memo -- raise questions regarding the B&W transfer of documents. Accordingly, a full response to this interrogatory is imperative. All defendants, except B&W, have

agreed to provide this information.

- **Documents Relating To "Young Adults"/Document Request Nos. 91, 93-99 and 101**: A number of plaintiffs' document requests are targeted at information relating to sales of cigarettes to children. Defendants have agreed to produce documents which explicitly refer to children -- but have refused to produce documents which reference "young adults." It is clear, however, that defendants' use the term "young adults" as a euphemism for children. XXXX

• **Defendants' Failure to Respond to Interrogatories In A Timely Fashion**: The American Tobacco Company ("American") and Liggett Group, Inc. ("Liggett") have failed to answer and/or supplement interrogatories served 11 months ago. Both defendants agree to answer -- but refuse to agree to any response date. American states that a deadline "would be a meaningless exercise." The rules of procedure state otherwise, i.e., 30 days. Similarly, a number of defendants have failed to appropriately respond to interrogatories relating to LS, Inc., a company which the cigarette manufacturers incorporated in 1983 and immediately transferred documents to.

II. SCIENTIFIC RESEARCH SENT TO ATTORNEYS.

Information in the public domain, as well as recent court decisions, establish that defendants have, for decades, attempted to filter scientific information through their attorneys to place it beyond the reach of discovery. As defendants' extensive use of this strategy came to light, plaintiffs requested the scientific information hidden behind the lawyers:

> Request No. 8: All reports on scientific research relating to smoking and health which were sent to attorneys (in-house or outside) working for or on behalf of any defendant in this case.

Exhibit 1.

This request was refined in several meet and confers. Plaintiffs now seek:

> All documents on scientific research relating to smoking and health which were sent to attorneys (in-house or outside) working for or on behalf of any defendant. For purposes of this request, "scientific research" shall exclude literature searches or analyses of wholly publicly available data, except to the extent such literature or analyses of wholly publicly available data are on any index or database (whether maintained by any defendants or any of their in-house or outside attorneys). Notwithstanding the foregoing sentence, all documents relating to "special projects" or "special accounts" are included in this request. Documents relating solely to an analysis of one individual person's medical records are not encompassed in this request. In addition, documents post-dating the filing of the complaint in this action are not encompassed in this request.

Exhibit 2, at p. 1. [1]

As shown below, the fact that scientific research is in the possession of counsel does not make it privileged. However, this Court need not address defendants' claims of privilege or work product in the present motion. Instead, plaintiffs merely seek an order requiring defendants to list all such documents for which they assert a claim of privilege on an appropriate privilege log.

The Case Management Order ("CMO"), of course, mandates

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[1] Defendants have raised a host of objections to this request, which has left some question as to their position on this issue. See Exhibits 1 and 3. Plaintiffs believe that defendants' objections relate primarily to documents in the possession of outside, as opposed to in-house, counsel. Defendants have offered to produce a subset of "original research" reports in the possession of outside counsel, reserving an exception for "expert work product prepared in the ordinary course for use in specific identifiable litigation." Exhibit 4. This exception, of course, could swallow the whole. In addition, defendants object to producing any documents relating to the analysis of scientific information in the public domain. Id.

the production of a privilege log for most documents. CMO, ¶ III.D.7. The CMO does excuse defendants from searching files of outside counsel in response to each document request by plaintiffs, but allows plaintiffs to serve discovery relating to "research on smoking and health" in the files of outside counsel:

> At such time, however, that plaintiffs request documents generated by or in the possession of outside counsel which relate to research on smoking and health where outside counsel acted as an agent for or on behalf of one or more of the parties, to the extent that such documents are not available from the parties' own files, the parties agree to promptly meet and confer, discuss the scope of the request and seek early resolution of any dispute which might arise as to the production of such documents or the identification of such documents on the privilege log.

Id.

Defendants, however, are resolute that they will not provide a privilege log for many of these documents. See Exhibit 5, at p. 98-100. Thus, once again in this litigation, defendants propose a procedure where they unilaterally decide what is produced. However, the law is clear that a party claiming privilege must provide a particularized listing of all such documents to enable the plaintiffs to challenge -- and the Court to rule upon -- objections to production.

A. Defendants Have A Long History Of Attempting To Shield Scientific Research By Placing It In The Possession of Counsel.

Increasing evidence points to the extraordinary degree of attorney involvement in scientific research. Much of this

evidence relates to defendant B.A.T. Industries plc ("BAT") and its corporate affiliates, including B&W.[2] Other evidence relates to industry-wide involvement of attorneys through the auspices of the Council for Tobacco Research - U.S.A., Inc. ("CTR"). The discussion below is merely illustrative of the examples of attorney involvement in scientific research which have been disclosed to date.

1. Strategies Adopted By BAT And B&W To Avoid Discovery.

BAT and B&W have, for decades, filtered routine scientific research through BAT Group attorneys in hopes of cloaking it in attorney-client and work product protection. Their motive is clear: B&W's lawyers recognized that the scientific research being conducted by company and BAT scientists would be damning evidence against them in litigation. An August 1970 letter from David Hardy of Shook, Hardy & Bacon to the general counsel of B&W outlined the risks posed by the research contained in BAT and B&W files:

> [I]n our opinion, the effect of testimony by employees or documentary evidence from the files of either BAT or B&W which seems to acknowledge or tacitly admit that cigarettes cause cancer or other disease would likely be fatal to the defense of either or both companies in a smoking and health case. . . . Clearly, the admission of such evidence would cause a plaintiff's case to attain a posture of strength and danger never before approached in cigarette litigation. It could even be the basis for an assessment of punitive damages if it were

[2] For purposes of this memorandum, the term "BAT" is used to refer to B.A.T. Industries plc or British-American Tobacco Company Ltd.

> deemed to indicate a reckless disregard for the health of the smoker.

Quoted in Peter Hanauer, et al., Lawyer Control of Internal Scientific Research to Protect Against Products Liability Lawsuits, Journal of the American Medical Association, July 19, 1995, at p. 235 (hereinafter JAMA)(emphasis added), Exhibit 6.[3]

Thus, B&W and BAT lawyers became heavily involved in the handling of BAT-B&W scientific research to shield it from discovery. A June 1979 memorandum from J. Kendrick Wells, B&W corporate counsel, to Ernest Pepples, vice president of law, details how scientific information B&W received from BAT should be treated:

> The material should come to you under a policy statement between you and Southampton which describes the purpose of developing the documents from B&W and sending them to you as use for defense of potential litigation. . . . Continued Law Department control is essential for the best argument for privilege. At the same time, control should be exercised with flexibility to allow access of the R&D staff to the documents. The general policy should be clearly stated that access to the documents and storage of the documents is under the control of the Law Department and access is granted only upon approval of request.

JAMA, Exhibit 6, at p. 237 (emphasis added).

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[3] This letter is one of the documents allegedly taken by B&W's former paralegal, Merrell Williams. Several courts have ruled that these documents are in the public domain and/or have rejected B&W's attempts to shield the documents from public review. See Exhibit 7. In fact, a Mississippi court has ruled that these documents are not privileged. See Butler v. Philip Morris, et al., No. 94-5-53 (Miss. Cir. Ct. 2d Dist. November 27, 1995), Exhibit 7.

Similarly, a June 1984 memorandum from Mr. Wells regarding a safer cigarette project, cautions that:

> . . . if Project Rio must continue, restructuring probably will be required to control the risk of generating adverse evidence admissible in U.S. lawsuits. . . . <u>Direct lawyer involvement is needed in all BAT activities pertaining to smoking and health from conception through every step of the activity</u>.

<u>JAMA</u>, Exhibit 6, at p. 236 (emphasis added).

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2. Lawyer Control Of CTR "Special Projects".

Outside counsel for the tobacco industry also had extensive involvement in scientific research known as the "Special Projects" that were conducted under the auspices of CTR. Earlier this year, a federal Magistrate Judge, in Sackman v. The Liggett Group, 920 F. Supp. 357 (E.D.N.Y. 1996), described the involvement of lawyers in this research:

> The CTR . . . had two methods of funding research: through [Scientific Advisory Board], and through Special Projects. The SAB was comprised of independent and unbiased scientists that would approve research funding for "grant in aid" projects. The CTR Special Projects, however, by-passed the independent board of unbiased scientists and funded projects to further the economic interest of CTR members as recommended and approved by the tobacco company executives and their lawyers.
>
> * * *
>
> The documents confirm that attorneys for the tobacco companies met, discussed, and decided whether or not a specific project warranted funding. Liggett implicitly acknowledges that the projects were not undertaken for the purpose of producing unbiased reports simply by invocation of the work product privilege. These documents furthered the fraud that CTR Special Projects perpetrated on the public. CTR released the lawyer-picked research projects results under the guise of unbiased scientific findings.

Sackman, 920 F.Supp. at 368 (emphasis added).[4]

The extensive lawyer involvement in CTR Special Projects discussed in Sackman echoes an earlier decision by Judge

[4] This decision, discussed infra II.B., held that numerous documents relating to CTR Special Projects were not protected by the attorney-client, joint defense, or work product privilege and that the plaintiffs had demonstrated prima facie evidence of fraud. This decision is currently on appeal to the district court.

Sarokin in Cipollone v. Liggett Group Inc., 683 F. Supp. 1487 (D.N.J. 1988):

> In this instance [CTR funded research], as well as all aspects of the research being conducted by the companies and under the auspices of the Tobacco Institute, there was the ever prevalent presence of lawyers determining, or at least participating in what research should be conducted, and what should be published or made available to the general public.

Id., 683 F.Supp. at 1492 (emphasis added).

Presumably, many documents regarding Special Projects, given the widely-reported involvement of tobacco industry lawyers, are located in the files of outside counsel for defendants.

3. Scientific Research Information Sent Directly To Outside Counsel For RJR.

Information in the public domain also reveals that RJR used its outside counsel as a repository for sensitive documents. In a BBC program entitled Panorama, it was revealed that an outside consulting firm prepared a report that was addressed to the Jones, Day law firm regarding the shutdown of the RJR "mouse house," a state-of-the art facility where the mechanisms of smoking-related diseases were studied. Plaintiffs have specifically requested this report. Exhibit 10. RJR has objected "on the grounds that it seeks, and is known by plaintiffs' counsel to seek, documents that were prepared by a litigation consultant for outside counsel to Reynolds in anticipation of pending or reasonably anticipated litigation." Id. After meet and confers, RJR agreed to list

this report on a privilege log. Exhibit 11, at p. 55-56.

The "mouse house" report represents a specific instance where plaintiffs are aware of a highly relevant document that was sent directly to outside counsel. It is highly unlikely that this was an isolated incident. Again, the only way to determine whether other probative documents were sent directly to outside counsel is by requiring defendants to fully respond to Document Request No. 8. [5]

B. Many Of The Scientific Documents In The Possession Of Counsel Are Not Privileged Or Work Product.

Plaintiffs do not ask the Court, at this time, to rule that no privilege inures to the scientific research in the possession of defendants' counsel. Rather, plaintiffs simply seek information -- a privilege log -- which will allow a focused challenge to any overly broad assertion of privilege. It is important to note, however, that the legal consensus is

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[5] Philip Morris attorneys apparently also had a hand in closing down research that threatened to haunt the company in litigation. Dr. Victor DeNoble, who studied the effects of nicotine on rats, was told by Philip Morris management that his research posed a risk to pending litigation. Regulation of Tobacco Products: Hearings Before the Subcommittee on Health and the Environment of the House Comm. on Energy and Commerce, 103d Cong., 2d Sess. Vol. 2. (1994), Exhibit 12, p. 5. Dr. DeNoble testified that his lab files were searched and copied by lawyers from Shook, Hardy & Bacon in 1983. Id., p. 52-53. Months later, Philip Morris abruptly shut down Dr. DeNoble's lab:

> The lab was gone, everything was gone. Equipment was gone, the cages were gone, the animals were gone, all the data was gone. It was empty rooms.

Id., p. 56.

that most scientific information, even that possessed by attorneys, is not privileged because, quite simply, it is not legal advice.

Such information is not protected from discovery under Minnesota law. Minnesota law extends protection only to "legal advice" from a legal adviser acting "in his capacity as such". Brown v. St. Paul City Ry. Co., 62 N.W. 2d 688, 700 (Minn. 1954). Neither the attorney-client nor work product protection applies to communications made in the ordinary course of business. Schmitt v. Emery, 211 Minn. 547, 2 N.W. 2d 413, 416 (1942), overruled in part on other grounds, Leer v. Chicago, St. Paul & Pac. Ry, 308 N.W.2d 305 (Minn. 1981). When lawyers direct factual investigations, they are acting in a business, not a legal, capacity. Mission Nat'l Insur. v. Lilly, 112 F.R.D. 160, 163-64 (D. Minn 1986) (where the investigation by in-house counsel included non-legal opinions and thoughts about the facts, as opposed to legal or trial matters, it was "ordinary business. . . outside the scope of. . . privileges.").

Similarly, no information is protected by the work product doctrine unless it is "primarily concerned with legal assistance." In re Air Crash Disaster at Sioux City Iowa, 133 F.R.D. 515, 519 (N.D. Ill. 1990). The scientific information at issue in this motion will establish, among other things, the knowledge possessed by defendants about the hazards of their products. Such factual information is always

discoverable for a "litigant cannot shield from discovery the knowledge it possessed by claiming it had been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer." Rhone-Poulenc Rorer v. Home Indemnity Co., 32 F.3d 851, 864 (3d Cir. 1994).[6]

Thus, for example, CTR "Special Projects" documents lack the required dominant "legal purpose." Indeed, in Sackman v. Liggett Group, Inc., supra, the Magistrate Judge found that 123 "Special Projects" scientific research documents were not privileged. After in camera review of the documents, including correspondence to and from counsel and minutes of meetings where counsel and/or executives discussed the projects, the court found that the documents chronicled "attorneys [] serving a function other than that of legal advisor . . . in a scientific, administrative, or public relations capacity . . . ." Sackman, 920 F. Supp. at 365. Thus, since the "Special Project" documents did not "relate to the rendition of legal advice or legal services," they did not fall under the attorney-client privilege. Id. The documents

[6] During the meet-and-confer sessions on Request No. 8, defendants stated that some of the scientific information was not discoverable because it was being used by defendants' expert witnesses. Exhibit 5, at p. 104-08; Exhibit 4. But the fact that scientific evidence is shared with experts does not place it beyond discovery. Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 994 (D.C.Cir 1980)("facts given by the party to the expert can no more be protected by that fact than facts given by counsel to a party can be brought within the attorney client privilege.")(citing 4 J. Moore, Federal Practice, § 26.66[2] (1976).

also were "devoid of references to litigation strategies or other thought processes otherwise associated with litigation," thus were not protected by the work product doctrine. Id., at 367. Since neither of these protections were available, defendants could not withhold the documents under the "joint defense" privilege, as "attorneys cannot be utilized as conduits of non-legal communications between parties claiming the joint defense privilege." Id., at 365-66.[7]

In short, "counsel cannot suppress evidence by taking possession of it." Paul Rice, The Attorney-Client Privilege in the United States, § 7.11, p. 525 (1993). The attorney-client and work product protections are simply "never available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure." Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963), cert.

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[7] The Sackman court also found that there was probable cause to find that "a fraudulent purpose existed in Liggett's use of CTR Special Projects" and that the documents "furthered the fraud," in that, while the stated purpose of CTR was to research smoking and health, the organization was used instead to "promote scientific research that would support the economic interests of the tobacco industry." 920 F.Supp. at 368. Thus, the court found that the crime/fraud exception to the privileges was an independent basis to overrule Liggett's claim of privilege. Similarly, the United States District Court for the District of Kansas recently ordered RJR to submit for in camera review 33 CTR Special Projects documents. The court specifically found a prima facie case of fraud based on the failure of the members of CTR (which include the domestic manufacturing defendants in this case) to disclose their early knowledge that nicotine was an addictive drug. Burton v. R.J. Reynolds and American Tobacco Co., No. 94-2202-JWL (May 2, 1996), pp. 15-16.

denied, 375 U.S. 929 (1963).

C. At A Minimum, Defendants Must Provide A Privilege Log For Documents They Claim Are Privileged.

To the extent that defendants challenge the above authority, and claim that scientific research is privileged, defendants must, at a minimum, identify the withheld documents on privilege logs. It is axiomatic that "the proponent of the privilege must provide sufficient information about the documents to allow the court to render an opinion as to the applicability of the privilege." Rice, supra, at § 11.6, p. 954. This is the rule of law in any case. It is especially pertinent in the present case, given the blanket assertion of privilege by defendants and their history of abusing privileges to preclude discovery, as detailed in Sackman and in documents in the public domain.

The law is clear. A "proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality." International Paper Co. v. Fiberboard Corp., 63 F.R.D. 88, 94 (D.Del. 1974); In re Wirebound Boxes Antitrust Litigation, 129 F.R.D. 534, 537, reconsideration granted on other grounds, In re Wirebound Boxes, 131 F.R.D. 578 (D.Minn. 1990) (granting motion to compel creation of privilege log because "a general allegation of privilege is insufficient"). A party cannot use a "mere claim" of attorney-client privilege to justify a refusal to

properly identify documents. Roseberg v. Johns-Manville Corp., 85 F.R.D. 292, 301 (E.D. Pa. 1980). Also, simply because defendants contend that scientific research documents are protected from discovery under the work product doctrine does not permit them to conceal those documents by refusing to submit a log. Anderson v. Beatrice Foods Co., 127 F.R.D. 1, 5 (D. Mass. 1989), aff'd, 900 F.2d 388 (1st Cir), cert. denied, 111 S.Ct. 233 (1990)("Invocation of Rule 26(b)(3), however, does not permit concealment of the exempted documents, which must be identified sufficiently to permit judicial resolution of the issue if it is contested by the party seeking discovery").

A log is required because without one, plaintiffs will be precluded from mounting any challenge to the blanket assertions of privilege, and this Court will be unable to rule on the issue. Director of the Office of Thrift Supervision v. Ernst & Young, 795 F. Supp. 7, 13 (D.D.C. 1992) (although submitting a log is more burdensome than invoking privilege in a "general fashion," a log is required because "it is the only way by which OTS and, if necessary, the court could determine whether the documents at issue are truly privileged from production.").

Indeed, a log is constitutionally required because the failure to provide one so impairs the requesting party's ability to contest the claim that it "offends the notions of due process inherent in the Constitution"). Wei v. Bodner,

127 F.R.D. 91, 97 (D.N.J. 1989). Thus, if there is no log, the Court must deny defendants' assertion of privilege. Id. (refusing to grant defendants' request for privilege because, since no log had been provided, the court lacked sufficient information to rule on claimed privileges). If the required information is not provided, any privilege is waived because "an improperly asserted claim of privilege is no claim of privilege at all." International Paper, 63 F.R.D. at 94.[8]

[8] A leading commentator on the issue describes the appropriate log as containing the following information: description of document type, name and title of writer and addressees, date of document, distribution list, a description of the documents' content sufficient to allow meaningful challenge of the privilege. Rice, supra, at § 11.6, p. 955-67.

D. Defendants' Objections To Listing Scientific Documents On a Privilege Log Are Meritless.

1. Plaintiffs' Request Is Not Unduly Burdensome.

Defendants have argued that this request is unduly burdensome, apparently because so many outside counsel have represented them over the years. See, e.g., Exhibit 5, at p. 103. However, any burden caused by defendants' dispersal of scientific information among numerous counsel is their own making, thus no reason to preclude discovery. A defendant may "not excuse itself from compliance... by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents in excessive burdensome and costly expedition." Kozlowski v. Sears Roebuck and Co., 73 F.R.D. 73, 76 (D. Mass. 1976). Indeed, allowing a party to hide behind such a shell game would defeat the purposes of the discovery rules. Biehler v. White Metal Rolling and Stamping Corp., 333 N.E.2d 716, 721 (Ill. App. 1975) ("Neither a litigant nor the insurer of a litigant can frustrate discovery procedures by fragmenting its knowledge among different agents or attorneys").

2. The Scientific Information Is Clearly Relevant.

The relevancy objection asserted by defendants is specious. Plaintiffs' request is limited to documents on "scientific research relating to smoking and health." That topic goes to the heart of plaintiffs' claims for recovery of

the costs associated with the adverse health effects of smoking. Minnesota courts view relevancy broadly, encompassing even inadmissible evidence that may tend to lead to admissible evidence. Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry., 308 N.W.2d at 309. Given that several courts have found that some of the information at issue establishes that defendants, with the help of their attorneys, may have engaged in fraudulent conduct to hide their knowledge of the dangers of cigarettes, relevancy cannot be credibly questioned.

III. PRIVILEGE LOGS PREPARED FOR OTHER LITIGATION.

Plaintiffs' Document Request No. 122 seeks all privilege logs that domestic defendants have produced in similar litigation:

> Request No. 122
>
> All privileged logs produced by your company in any litigation, prior or pending, involving smoking and health.

Exhibit 13.[9]

This request is narrowly drawn to seek only privilege logs that were prepared by defendants and served on other plaintiffs' counsel in smoking and health cases. This will be a small number of documents, no doubt located in a discrete

[9] As part of this request, plaintiffs specifically request the privilege logs from the Sackman and Burton cases, described above. Plaintiffs request that the privilege logs from these two cases, where courts recently ruled on motions relating to the withholding of privileged documents, be produced within 14 days.

place, thus producible without burden.

In addition, these privilege logs are clearly relevant. As shown above, defendants have sought to protect as privileged highly relevant information. Description of that information in earlier privilege logs may thus lead to admissible information.

Many courts have endorsed the sharing of information developed during discovery in one case for use in other cases. Patterson v. Ford Motor Co., 85 F.R.D. 152-153 (W.D. Tex. 1980) ("the availability of discovery information may reduce time and money that must be expended in similar litigation . . . ," thus furthers the Rule 1 mandate that there be a just, speedy determination of every action); Durst, "Confidentiality Agreements in Product Liability Litigation", 15 Trial Lawyers' Quarterly 36 (1983) (courts uniformly hold that the sharing of information between plaintiffs' attorneys furthers the purposes of pretrial discovery).

Production of the logs also will help ensure full disclosure on privilege logs in this case. The sharing of information from other lawsuits serves this public purpose because "[p]arties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." Garcia v. Peeples, 734 S.W.2d 343, 346-47 (Tex. 1987).

Finally, plaintiffs' need for these logs is heightened by

defendants' refusal to promptly produce privilege logs created for this case. This Court has ordered the rolling production of privilege logs. See Order of March 20, 1996, ¶ 5 ("Privilege 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."). Nevertheless, defendants have produced only a tiny fraction of the privilege logs for documents withheld from production in this case. Certain defendants -- including Philip Morris and RJR, the largest domestic cigarette manufacturers -- have yet to produce a single privilege log in this case.

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

Minnesota Rule of Civil Procedure 26.02 expressly authorizes discovery into "the existence, . . . custody, condition and location of documents" containing discoverable matter. The CMO recognizes, by making them subject to the preservation order, that documents in the hands of third-parties may play a role in the litigation. CMO, ¶ I.H.(5). Cognizant of B&W's apparent practice of treating documents in manner calculated solely to place them beyond discovery, plaintiffs seek a description of all incidences where documents have been transferred to corporate affiliates or third-parties:

Interrogatory No. 9:

> Describe with specificity each instance in which documents relating to smoking and health were transferred from your company to a corporate

> affiliate or to a third party for any reason, including but not limited to storage, warehousing, indexing or destruction, and state the name of the entities transferring and receiving the documents, the location of documents prior to and subsequent to the transfer, the date of the transfer, a description of the documents transferred, the volume of the documents transferred, and the present location of the documents.

Exhibit 14.[10]

In response, B&W plays a semantic game, narrowing plaintiffs' request with regard to corporate affiliates and wholly ignoring the request with regard to third parties:

> Brown & Williamson states that, to the best of its present knowledge, and without interrogating all of its employees and without reviewing all documents in its possession, (which would be unduly burdensome), Brown & Williamson has <u>not</u> <u>yet</u> identified a set of documents that it at one time retained and stored in its possession and later transferred its only copy to a corporate affiliate for the purpose of storage, warehousing, indexing, destruction or change of custody. To the extent that plaintiffs believe, based on a document purported in the press, that Brown & Williamson transferred research documents from its R&D library to one of its affiliates, Brown & Williamson has investigated this matter and has determined that no such transfer of documents occurred. Brown & Williamson otherwise objects to Interrogatory No. 9 as vague, overbroad, and unduly burdensome. Interrogatory No. 9 literally appears to require Brown & Williamson to describe every time documents were transferred by Brown & Williamson to one of its corporate affiliates or to a third party, which would mean that Brown & Williamson would be required to describe every piece of correspondence that is ever sent out to a third party and every communication that is sent to a corporate affiliate.

Exhibit 14 (emphasis added).

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[10] Plaintiffs' Interrogatory No. 9 is substantially identical to plaintiffs' Jurisdictional Interrogatory No. 6. Exhibit 15. All defendants other than B&W have agreed to answer Interrogatory No. 9.

In the meet-and-confer process, plaintiffs corrected B&W's exaggerated characterization of the request (allegedly requiring description of "every piece of correspondence") by limiting the request to documents that were transferred for reasons such as storage, warehousing, indexing or destruction as well as corporate reorganizations or sale of assets. Plaintiffs also alerted B&W that plaintiffs expected a reasonable inquiry, not interrogation of every B&W employee. Exhibit 16, at p. 3.

Nonetheless, B&W continues to refuse to answer Interrogatory No. 9 despite -- or, perhaps, because of -- its documented history of attempting to place damaging scientific information outside the reach of discovery. As noted above, in 1985 all research and development reports from the BAT Group were ordered sent to the United States through a Louisville law firm -- instead of directly to B&W. Exhibit 9. B&W also has revealed a propensity to purge damaging probative documents from its files. The infamous "deadwood" memo shows that at one point, B&W's corporate counsel, Mr. Wells, ordered that indisputably relevant documents be moved offshore. JAMA, Exhibit 6, at p. 238. This plan was outlined in a January 17, 1985 memo, in which Mr. Wells categorized "Janus" research as "deadwood." The Janus research demonstrates that tobacco tar is "biologically active." Id. Mr. Wells' plan was to secrete damaging evidence to England:

I suggested that Earl [Kornhorst, a B&W research

> executive] have the documents indicated on my list pulled, put into boxes and stored in the large basement storage area. I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos, or lists.

Id. (emphasis added).

B&W claims that the "deadwood" transfer never took place. However, B&W's refusal to describe whether other transfers did take place is curious. If none did, B&W should welcome a chance to establish that fact under oath.[11]

The law mandates such a disclosure. As noted, Minnesota Rule 26.02 authorizes discovery into the location of potentially relevant evidence. A party may inquire through interrogatories about the existence and locations of documents and use the resulting information to obtain production of the documents. 8 Wright, Miller & Marcus, Federal Practice and Procedure, Civil 2d, 2012, p. 190 (1995). Even if the underlying documents are privileged, a request seeking their "existence and whereabouts" is proper. Harvey v. Emco Corp., 28 F.R.D. 380, 381 (E.D. Pa. 1961) (requiring answers to questions concerning the location of attorney work product).

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[11] In the meet-and-confer process, B&W offered to produce certain documents related to this request, if B&W locates them in a truncated search (that excludes even some documents at B&W's main facilities). Exhibit 17, at p. 1-2, 4. This offer is obviously insufficient. As shown in the "deadwood memo" there may be no description in writing to memorialize any transfer of documents.

If only a party's attorney knows the whereabouts of documents, the appropriate procedure is to depose the attorney to determine where documents are located. Producers Releasing Corp. v. PRC Pictures, 8 F.R.D. 254, 256-57 (S.D.N.Y. 1948); see also Shelton v. American Motors Co, 805 F.2d 1323, 1327 (8th Cir. 1986) (where deposing attorney is the only way to learn of the existence of documents, deposition may be proper).

B&W's objection that the request is "vague, overly broad, and unduly burdensome" has no merit. Even if it did create some burden to track down transfers of documents, "merely because compliance . . . would be costlier or time-consuming is not ordinarily sufficient to defeat discovery." Kozlowski, 73 F.R.D. at 76. Moreover, any burden is of B&W's own making. Id.; see also Snowden By and Through Victor v. Connaught Lab., 137 F.R.D. 325, 333 (D. Kan. 1991) (an "unwieldy record keeping system" is no excuse to discovery). Indeed, allowing a party to hide behind such a shell game would defeat the purposes of the discovery rules. Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (a party cannot avoid discovery merely by shipping documents abroad as, if so, "every United States company would have a foreign affiliate for storing sensitive documents.")

V. DOCUMENTS RELATING TO "YOUNG ADULTS".

Smoking by children, and advertising aimed at children, constitute an important element of plaintiffs' claims. For

this reason, a number of plaintiffs' document requests relate to "youth," which plaintiffs have defined as "persons 18 years or under (or children, adolescents or young adults)." See Plaintiffs' Document Request Nos. 91, 93-99 and 101, Exhibit 18.

Defendants have agreed to produce documents related to persons under age 18, and related descriptors of youth ("minors," "juveniles," "children," "underage purchasers"), but have objected to the term "young adults." Defendants argue that the requests, to the extent they encompass "young adults", are irrelevant and overbroad. See Exhibit 19, at p. 159-66; Exhibit 20, at p. 99-102.[12]

However, it is clear that documents relating to "young adults" are relevant and that the age 18 is not a bright line. Clearly, marketing and advertising aimed at 18 year olds necessarily appeals to 15, 16, and 17 year olds. For example, the U.S. Center for Disease Control ("CDC") has noted that consumer research suggests that children age 14-17 aspire to be young adults; "therefore, advertising and promotional efforts targeted toward young adults may have greater appeal to adolescents because of their age aspirations." Exhibit 21, at p. 5.[13]

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[12] BAT, Liggett, CTR, and the Tobacco Institute have not objected to the term "young adults."

[13] This CDC report also noted the increase in the rate of initiation of smoking among adolescents from 1985 through 1989, and stated:

In fact, in an offer to compromise this dispute, plaintiffs asked for a representation that defendants have never used the term "young adults" to refer to persons under age 18 or for the purpose of referring to persons under age 18 or understanding persons under 18 and why they smoke. Exhibit 19, at p. 165. Defendants refused to respond.

Moreover, it is obvious that defendants use the term "young adults" as a euphemism for children. XXXXXXXXXXXXXXXXXXXXX

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VI. PHILIP MORRIS DOCUMENTS RELATING TO NICOTINE REPLACEMENT DEVICES.

Plaintiffs' Fourth Request for Production of Documents, Request No. 5, requested:

> All documents relating or referring to nicotine replacement treatments or devices, including but not limited to, nicotine patches, nicotine gum, and nicotine aerosol.

Exhibit 25.

The response of Philip Morris was as follows:

> Philip Morris objects to this request on the grounds that the phrase "nicotine replacement treatments or devices" is vague and ambiguous. To the extent that this request seeks documents other than those which Philip Morris has agreed to produced in response to requests No. 71 to 73 of Plaintiffs' First Set of Requests for Production of Documents, Philip Morris further objects to this request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to the subject matter involved in the pending action and is not reasonably calculated to lead to the discovery of admissible evidence.

> groups, surveys, polls, research and marketing plans on smoking.
> • Request 97 seeks documents relating to the attitudes, perceptions or behaviors regarding cigarettes or cigarette advertising, marketing or promotion.
> • Request 98 seeks documents relating to industry or company guidelines or codes on advertising, marketing or promotion of cigarettes.
> • Request 99 seeks documents relating to efforts to prevent or discourage smoking.
> • Request 101 seeks documents relating to the effects of point-of-sale advertising.

Exhibit 18.

Id.

After meet and confer discussions on the subject, Philip Morris elected to stand on its objections to this request. See Exhibit 26, at p. 2.

No other defendant has objected to producing these documents, the relevance of which cannot be legitimately questioned. For example, the potential impact of nicotine replacement devices marketed by others on sales of Philip Morris' nicotine delivery devices, i.e., cigarettes, obviously would be a relevant topic. Documents that discuss the health implications of nicotine replacement devices, particularly in comparison to cigarettes, could also be highly probative.

In short, Philip Morris should be compelled to fully and completely respond to this request.

VII. DISCLOSURE OF TOBACCO INSTITUTE AGENTS IN MINNESOTA.

Plaintiffs' Interrogatory No. 34 to the Tobacco Institute inquires as follows:

> Identify each individual, corporation or entity in the State of Minnesota that has been retained, hired or funded in any capacity by the Tobacco Institute, and for each such individual, corporation or entity state the year(s) and a brief description of the purpose for such retention, hiring or funding.

Exhibit 27.

The Tobacco Institute has answered this question for the years 1990 through 1995 only and has refused to answer for 1958 (the year the Tobacco Institute was established) to 1989. ~~Id.~~[15]

The information sought is highly probative of the Tobacco Institute's activities in the State of Minnesota and is calculated to lead to the discovery of admissible evidence regarding any misrepresentations and fraudulent statements made in Minnesota by Tobacco Institute

[15] This same interrogatory was served on the Counsel for Tobacco Research, which responded in full.

contractors.

Documents in the public domain show the presence of the tobacco industry and the Tobacco Institute in Minnesota through the use of "front groups", ~~see~~ Exhibit 28, at p. 57, XXXXXXXXXXXXX XXXXXXXXXXXX

Exhibit 30.

These interrogatories request information that all other defendants in this litigation (with the exception of Liggett, described below) have agreed to provide. Indeed, Interrogatory 21 seeks information that American reports to the Federal Trade Commission ("FTC") ~~each year~~. Therefore, it is simply inconceivable that American cannot "accurately develop a figure responsive" to Interrogatory 21. ~~Id.~~

Moreover, American will not even agree to a reasonable deadline for answering these interrogatories. In response to plaintiffs' offer of a 45-day deadline, American stated that a deadline "would be a meaningless exercise. . . ." and that an answer will be forthcoming when American "is able to do so." Exhibit 31, at p. 1-2.

Rule 33.01(b) of the Minnesota Rules of Civil Procedure requires that interrogatories be answered within ~~30 days~~ after service, not when a party finds it convenient to provide an answer. American's flouting of the rules of civil procedure should not be tolerated.

Liggett's interrogatory answers also remain deficient. Liggett has failed to provide a complete answer to Interrogatory 17, which seeks information from 1952 to the present regarding advertising agencies hired by Liggett. Exhibit 32. Despite their promise to supplement, Liggett has provided ~~no~~ information for the years 1969-1979. Liggett has also failed to supplement, as promised, Interrogatory 21 regarding funds spent on advertising, marketing and promotion of cigarettes. ~~Id.~~ Liggett has provided ~~no~~ answer for the years 1965-1983.

In sum, plaintiffs move for an order compelling American and Liggett to answer -- within 21 days -- interrogatories that were served over ~~11 months ago~~.

B. ~~Interrogatories Relating to the LRD Division of CTR.~~

Similarly, plaintiffs move for an order compelling RJR, BAT, Lorillard Tobacco Company, Liggett, and the Tobacco Institute to serve amended responses to interrogatories regarding the Literature Retrieval Division ("LRD") of CTR and its successor, LS, Inc., within 21 days. LRD was a division of CTR until April 1983, when the cigarette manufacturers incorporated a new company -- LS, Inc. -- ~~and literally overnight transferred documents from CTR/LRD to LS, Inc.~~ ~~See~~ Exhibit 33.

This transfer of documents to a newly-formed corporation is, of course, highly unusual. Accordingly, starting with the first round of interrogatories, served in June 1995, and following up with a round of interrogatories served in October 1995, plaintiffs have been seeking the most basic of information on this transfer of documents.[16]

For month after month, defendants stonewalled. Plaintiffs had scheduled a motion to compel in the first round on these issues (and defendants had scheduled a corresponding motion for a protective order). However, at the eleventh hour, defendants agreed to provide further responses. Exhibit 35. The defendants listed above, however, have failed to fulfill their promises for further responses. After a wait of up to 11 months, an order mandating a deadline is required.

IX. CONCLUSION.

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

Dated this 31st day of May, 1996.

ROBINS, KAPLAN, MILLER & CIRESI

By: /s/ Gary L. Wilson

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SPECIAL ATTORNEYS FOR THE STATE OF MINNESOTA

[16] The interrogatories at issue are Interrogatory Nos. 5 and 9, of plaintiffs' first set (which seek information identifying databases and the transfer of documents), and a separate set of interrogatories (which seek information on the transfer of documents to LS, Inc. and the most knowledgeable persons regarding the transfer of such documents and the incorporation of LS, Inc.). Exhibit 34.

AND
ATTORNEYS FOR BLUE CROSS AND BLUE SHIELD OF MINNESOTA