

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>and</b>	:	<b>Civil Action No. 99-2496 (GK)</b>
	:	
<b>TOBACCO-FREE KIDS ACTION</b>	:	
<b>FUND, <i>et al.</i>,</b>	:	
	:	
<b>Plaintiff-Intervenors,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>PHILIP MORRIS USA INC., <i>et al.</i>,</b>	:	
	:	
<b>Defendants.</b>	:	

**ORDER #39 REMAND  
CONSENT ORDER CONCERNING PROCEDURES  
FOR REVIEWING MINNESOTA PRIVILEGE CLAIMS**

On consideration of the parties' Joint Motion for Consent Orders Concerning Procedures for Reviewing Minnesota Privilege Claims and Concerning the Disclosure of Privileged Information Regarding the Review of Minnesota Privilege Claims, it is this 23rd day of April, 2013, hereby **ORDERED**, that

**1. General.** The privilege and confidential document challenge procedures for documents at issue in the Minnesota Depository Secure Room (the "MN Privilege Claim Procedures") shall proceed in accordance with the relevant provisions of Order 51, Paragraph II, as modified and set forth below.

**2. Status Conferences.** The Special Master can schedule Status Conferences to address the status of discovery and privilege disputes as the Special Master deems appropriate.

**3. Challenge Schedule.** The United States and/or Intervenors may initiate meet-and-confer sessions to discuss challenges to the assertion of privilege by Defendants for up to 50 documents collectively per thirty (30) day period. Following those meet-and-confer sessions, the United States and/or Intervenors may submit briefing challenging the assertion of privilege for up to 25 documents collectively per thirty (30) day period. The Special Master may, in his discretion, modify the number of challenges a party can initiate or brief each month, as circumstances dictate. The United States and Intervenors will have the opportunity over time to initiate discussions and brief as many of the documents at issue in the Minnesota Depository Secure Room as they determine are appropriate.

**4. Challenge Notification.** Prior to filing a motion for relief with the Special Master with respect to challenging an assertion of privilege, the parties shall meet and confer in good faith, in accordance with LCvR 7.1(m), with respect to the assertion of privilege. The party challenging the assertion shall submit its list of the document identification numbers of the documents or categories of documents being challenged (no more than 50 in a 30 day period) to the party asserting the privilege and the party's reason for the challenge no later than five (5) days prior to the meet and confer. The challenged documents shall be those that the challenging party has a reasonable, good faith belief are not privileged.

**5. Meet and Confer.** Without prejudice to other discussions or matters, this and all subsequent stages proposed here are not "mediation"; whatever information the parties exchange is not subject to protection under Rule 408 or mediation confidentiality. However, the parties remain bound by the terms of Protective Orders 7 and 36, which govern the disclosure of information subject to confidentiality.

**6. Privilege/Protection Withdrawal.** A defendant may notify the United States and Intervenor of the challenged document, if any, for which it will withdraw its privilege and protection claims. The defendant will voluntarily make such document publicly available at Minnesota (and post them on its document website, to include appropriate indices).

**7. Special Master Notification of Challenge.** If after the meet and confer there remain unresolved privilege disputes, the United States and/or Intervenor may, within twenty-five (25) days following the meet and confer, file and serve upon the Special Master and the defendant, a motion for relief in accordance with the procedures set forth in paragraph 8 below.

**8. Challenging Brief.**

(a) The Government and/or Intervenor may file a motion for relief and supporting papers with the Special Master and serve counsel of record.

(b) The defendant against whom relief is sought may file a written response within twenty (20) days.

(c) The moving party may file and serve a reply no later than twenty (20) days after the response was served.

(d) The memoranda in support of the motion, the opposition, and the reply each may not exceed twenty (20) pages in length. These page limits do not apply to attachments used to support or illustrate an argument or to transmit pertinent cases. These page limitations do not apply to document-by-document defenses, challenged privileged documents and/or supporting materials.

(e) If any party believes it needs additional time and/or additional pages to brief any matters governed by these procedures, the parties may stipulate to such an addition and provide notice to the Special Master. If the parties cannot agree, the party seeking additional time or pages

may seek leave from the Special Master under procedures developed by the Special Master. In no event may the parties stipulate to a page limit extension of more than five (5) pages or additional time of more than three (3) days without the express approval of the Special Master.

(f) The party challenging the privilege assertion shall indicate in its memorandum to the Special Master the document identification number of the challenged documents, the identity of the party asserting the privilege, and the legal and factual bases on which the party believes that the document is not privileged. The party alternatively shall argue, in the event that the Special Master finds that the document(s) are privileged, the factual and legal bases for any exceptions to privilege that the party in good faith believes apply. The party shall include any submissions or other evidentiary showing necessary to support its arguments. If the party does not argue exceptions to privilege at this time, the party shall be deemed to have waived the arguments, unless the moving party can show good cause for not raising the issue in the motion.

(g) The party asserting the privilege shall, in its response and accompanying memorandum, indicate the factual and legal bases that justify the assertion of the privilege. The party shall also set forth the factual and legal bases on which it argues that the exceptions claimed by the moving party are inapplicable to the assertion of privilege. The party shall include any submissions or other evidentiary material necessary to support its arguments.

**9. *In Camera and Ex Parte Proceedings.*** The Special Master and Court shall allow motions, oppositions, replies, supporting memoranda, affidavits, and other submissions to be submitted *ex parte* and *in camera*, as necessary, to maintain any claims of privilege. At any hearing required or authorized by the Order, the party asserting the privilege shall be provided an opportunity to present submissions and argument *ex parte* and *in camera* as necessary to protect its claim of

privilege. Any *ex parte* hearings regarding privilege shall be transcribed and the transcript shall be sealed and made available only to the Special Master, the Court, and the party presenting such argument and submissions. Any *ex parte* and *in camera* filings and copies of transcripts of *ex parte* hearings made available to the Special Master or Court shall be indexed and held under seal by the Clerk of Court. Any filing pursuant to this provision may be done without the necessity of obtaining a Court order, pursuant to LCvR 5.1(j)(1). Pursuant to a subsequent Order of the Court, the Special Master shall have access to such materials during normal business hours.

**10. Special Master Preliminary Rulings.** Upon completion of the briefing, the Special Master shall review the material and inform, orally or in writing, the United States, Intervenor, and defendant of his preliminary rulings as to each document. Any party that wishes may request the Special Master to prepare a formal Report and Recommendation as to whichever documents it wishes. Any such request shall be made no later than seven (7) days after the service of the preliminary ruling.

**11. Reports and Recommendations.**

(a) Any final Report and Recommendation of the Special Master issued pursuant to the procedures set forth in this Order shall become effective twenty-five (25) days after it is filed with the Court and served upon the parties, unless any party files objections with the Court.

(b) Objections shall be asserted and briefed on the following time schedule and with the following page limitations:

(i) Within twenty-five (25) days of the filing and service of the Special Master's Final Report and Recommendation, any party with an objection shall file a Notice of Objection with the Court and serve it upon the parties and the Special Master. At the same time, the

objecting party shall file a memorandum, not to exceed fifteen (15) pages, setting forth the grounds upon which it contends that the Special Master's report should be modified or rejected.

(ii) The party opposing the modification or rejection of the Special Master's Report shall file a responsive memorandum not to exceed fifteen (15) pages no later than twenty (20) days after service of the objecting party's memorandum.

(iii) The objecting party may submit a reply memorandum not to exceed five (5) pages no later than ten (10) days after service of the responsive memorandum.

(c) To the extent that the Special Master's Final Report and Recommendation reveals or discusses privileged information not otherwise available to all of the parties, the Special Master shall provide a redacted copy of the Final Report and Recommendation to all parties, and a non-redacted version to the party or parties whose privileged information is revealed. The non-redacted copy shall be filed under seal with the Clerk of Court and the redacted copy shall be filed in the public file with the Clerk of Court.

(d) The disclosure of any information in any report, recommendation, finding of fact, conclusion of law or order of the Special Master or Court shall not waive any claim of privilege. Any *ex parte*, *in camera* submission regarding the challenged documents, including additional materials or information subject to privilege claims, to the Special Master shall not be deemed a waiver of any claim of privilege or confidentiality, nor in any way diminish or extinguish any privilege, protection, or right against disclosure or production that otherwise exists. Such documents, information contained within the documents, and statements by counsel regarding the content of the documents shall be confidential and under seal and shall not be disclosed to any party

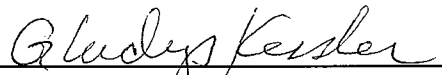
other than the party submitting the materials or the Court, except upon further order of the Special Master or the Court.

(e) In the event of an objection to a Special Master's Report and Recommendation, the parties may refer to the matters in the record before the Special Master, and such materials shall be made available to the Court for its review consistent with ¶¶ 11(c)-(d) above, including as appropriate, *in camera* and *ex parte* materials, which shall be filed under seal. Evidentiary materials not previously submitted to the Special Master may be submitted only on good cause shown. While the parties may request oral argument in the Notice of Objection or in the responsive papers, it is anticipated that oral argument will be the exception, not the rule.

(f) Any transcripts of proceedings before the Special Master necessary for review by the Court shall be prepared and transmitted at the parties' expense in the same manner as compensation for the Special Master, pursuant to paragraph 4 of the Court's December 22, 2000 Order (Order #41).

**12. Non-Waiver/Federal Rule of Evidence 502(d) Consent Order.** The Court is concurrently issuing a Rule 502(d) Consent Order Concerning the Disclosure of Privileged Information Regarding the Review of Minnesota Privilege Claims.

April 23, 2013

  
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Gladys Kessler  
United States District Judge

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<sup>1</sup> The Court regrets the delay in issuing the two Consent Orders. For some strange reason, these filings were not brought to its attention until April 22, 2013.