

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. 99-CV-02496 (GK)
v.)	
)	
PHILIP MORRIS INCORPORATED, <u>et al.</u> ,)	
Defendants.)	

LETTER OF REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
(Andrew Foyle)

TO THE SENIOR MASTER OF THE QUEEN'S BENCH DIVISION,
ROYAL COURTS OF JUSTICE,
STRAND, LONDON, WC2:

The United States District Court for the District of Columbia presents its compliments to you and requests your assistance in the following manner:

WHEREAS, this proceeding is properly under the jurisdiction of and is now pending before the United States District Court for the District of Columbia located in Washington, District of Columbia, United States of America, between plaintiff United States of America and defendants Phillip Morris, Inc.; Phillip Morris Companies, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Company; British American Tobacco (Investments) Ltd.; Lorillard Tobacco Company; American Tobacco Company; The Liggett Group, Inc.; The Council for Tobacco

Research - U.S.A., Inc.; and The Tobacco Institute, Inc., as shown in the Amended Complaint (attached as Exhibit 1);

WHEREAS, the claims asserted in this action arise out of violations of United States racketeering laws under 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d). Section 1962(c) prohibits “any person employed by or associated with any enterprise” engaged in or affecting interstate or foreign commerce from “conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.” Section 1962(d) prohibits a conspiracy to violate any of the other provisions of 18 U.S.C. § 1962. Racketeering activity is “defined as behavior that violates certain other laws, either enumerated federal statutes or state laws addressing specified topics and bearing specified penalties.” Rotella v. Wood, 528 U.S. 549, 552, 120 S. Ct. 1075, 1079 (2000) (citing 18 U.S.C. § 1961(1)). Civil racketeering activity may include, but is not limited to, a conspiracy to commit fraud or other intentional tortious conduct.

Paragraph 174 of the Amended Complaint in this action alleges that not later than 1953, defendants formed an enterprise and entered into a conspiracy, which was reaffirmed by subsequent explicit and implicit agreements, to deceive consumers into starting and continuing to smoke, without regard to the truth, the law, or the health consequences to the American people by:

(1) fraudulently maintaining that there was an open question as to whether smoking causes disease, despite the fact that defendants knew otherwise;

(2) concealing and suppressing relevant research on the health consequences of smoking and funding biased or irrelevant research on the health consequences of smoking, while publicly claiming to do everything in their power, including fund independent research, to determine if smoking causes cancer or other diseases;

(3) deceiving consumers into becoming or staying addicted to cigarettes by claiming that nicotine is not addictive, despite the fact that defendants knew that nicotine is addictive;

(4) manipulating the design of cigarettes and the delivery of nicotine to smokers to maintain and enhance the addictiveness of cigarettes, while at the same time denying that they engaged in such manipulation;

(5) marketing and advertising “light” and “ultra-light” cigarettes as conferring health benefits over other cigarettes, despite their knowledge that no such health benefits existed; and

(6) marketing and advertising with the intent of addicting children into becoming lifetime smokers, while claiming that they did not market to children.

WHEREAS, it appears that it is necessary for the purpose of justice and for the due determination of the matters in question between the parties that Andrew Foyle, within your jurisdiction, should be called upon to provide certain evidence relating to those matters.

Mr. Foyle's business address is Andrew Foyle, Lovells, 65 Holborn Viaduct, London EC1A 2DY, United Kingdom.

In support of its Motion to this Court for the issuance of a Letter of Request, the Plaintiff has offered the following information, set forth in the numbered paragraphs below, all of which are allegations of the Plaintiff and are not findings of this Court:

1. Defendant British American Tobacco (Investments) Ltd. ("BATCo"), as well as its parent, British American Tobacco p.l.c. ("BAT"), and their predecessor corporations, have been long-time clients of the Lovells law firm (formerly known as Lovell White King and as Lovell White Durant). Mr. Foyle is a long-time solicitor for the Lovells firm, and has had extensive contacts with BATCo, BAT, defendant Brown & Williamson, and other companies within the BAT group.

2. BAT-affiliated companies have twice given sworn testimony before United States courts regarding document destruction based upon factual information obtained from Mr. Foyle. (Amended Responses of B .A.T. Industries P.L.C. to Plaintiffs' Interrogatories Relating to Document Destruction, State of Minnesota v. Philip Morris Inc., et al., No. Cl 94-8565 (Mimi. Dist. Ct., Ramsey County Second Judicial Dist. Feb. 4, 1997) (Bates Nos. 0000390 - 0411) (copy attached as Exhibit 3); Amended Responses and Objections of Defendant British-American Tobacco Company Limited to Plaintiffs' First Set of Interrogatories to All Defendants Regarding Document Destruction Policies, State of Florida v. American Tobacco Company, et al., No. CL 95 1466 AH (Fla. Cir. Ct., 15th Judicial Cir. Feb. 18, 1997) (Bates Nos. 321117989-8008) (copy attached as Exhibit 4).)

3. In the mid-1980s, BATCo became very concerned about the prospect that its research and development documents could be used against it or its American affiliate, Brown & Williamson, if they were discovered or produced in litigation. On September 10, 1985, Nicholas Cannar, the head of BATCo's legal department, and another attorney from BATCo's U.K. headquarters, Anne Johnson, wrote that it was clear that BATCo's research and development documents, located in the U.K. and elsewhere, would very likely be subject to discovery in the United States "at some stage in the current US litigation" against Brown & Williamson. (Memorandum of September 10, 1985, Cannar and Johnson to Bruell and Heywood, cc's to Herd and Thornton, entitled "Smoking Issues" (Bates Nos. 107333990 - 3991) at 1) (copy attached as Exhibit 5). As a result, Mr. Cannar and Ms. Johnson recommended "a full review of GR&DC's [BATCo's research and development facility] research reports and document files . . . in view of their potential impact in any law suit." (Id.) To facilitate this review, BATCo would "begin the process of educating a firm of UK solicitors into the complexities of smoking and health issues so that in due course this firm will be available to provide advice and additional man power." (Id.)

4. A long series of communications followed between BATCo's in-house counsel and attorneys from Lovell White Durant, related (among other items) to avoiding discovery in U.S. litigation. At a May 1986 meeting, Mr. Foyle and another attorney from Lovell White & King met with Mr. Cannar, Ms. Johnson, and a BATCo scientist named Ray Thornton to discuss a “discovery exercise” that Lovell White & King would undertake. Lovell's “discovery exercise” was to include a “U.S. style” document review so that BATCo would be prepared for discovery requests from U.S. litigation. (Minutes dated May 21, 1986 of May 15, 1986 meeting of Cannar, Johnson, Thornton, Foyle, and Maas [another Lovell attorney]) (Bates Nos. 107443680- 3689), at 1) (copy attached as Exhibit 6).

5. It was clear from the first that the “discovery exercise” would include not only reviewing and coding documents and creating a database (id.), but also destroying documents under the guise of a “spring clean”:

NBC [Nicholas Cannar] said that Mr. Sheehy [Sir Patrick Sheehy, then BATCo Chairman] did not wish it to be seen that BATCO had instituted a destruction policy only when the possibility of their being involved in litigation became real and after they had instructed solicitors. Thus, it was decided that no destruction policy should be adopted, rather that R&DC [Research & Development Centre] would tidy up the loose papers held by individuals, which "spring clean" could involve the destruction of documents such as previous drafts.

. . . . It was agreed that such a “spring clean” of all of the loose papers held outside the official filing systems is essential to enable L.W.&K.'s “task force” to carry out stages I and II (the listing and reviewing of the files).

(Id. at 3.)

6. The “first step” was for Lovell White & King “to attend a further meeting with S.H.&B. [Shook, Hardy & Bacon] in Kansas in order to obtain a much better idea of how they set about their document review for B&W.” (Id. at 2.) BATCo also requested Lovell White & King during this meeting to prepare a memorandum addressing “how BATCo could employ delaying

tactics” if an American plaintiff sought discovery of BATCo documents. (Id. at 7.) BATCo was explicit that not only the documents were confidential, “but also the fact that the exercise is being carried out should also be regarded as such.” (Id. at 6.)

7. Matters proceeded as discussed at the May 15, 1986 meeting. The next month, in June 1986, BATCo sent Mr. Foyle a formal contract for Lovell's assistance in the “discovery exercise” (letter dated June 9, 1986, Johnson to Foyle, entitled “Smoking & Health” (Bates No. 503140845) (copy attached as Exhibit 7); and a month later, in July 1986, a Lovell attorney traveled to Kansas City for meetings with Shook, Hardy & Bacon (letter dated July 21, 1986, Livingston to Johnson, entitled “Smoking and Health - Document Review/US Trip” (Bates No. 503140817) (copy attached as Exhibit 8)).

8. The Lovell White & King “discovery exercise” took at least two years, according to the testimony of Kay Corner Kinnard, a scientist who was seconded to the project from 1985 to 1987. Ms. Kinnard testified that Mr. Foyle “was the senior lawyer involved in managing the project,” and that his involvement began “at the start.” (Tr. Alison Kay (Corner) Kinnard Depo. Day 2 (May 31, 2002) at 64, 63.) Lovell White & King provided Ms. Kinnard with four to six weeks’ training at its offices, and during her two years working on the “discovery exercise,” she communicated regularly with Lovell attorneys - including Mr. Foyle - and had meetings at Lovell’s offices as often as on a weekly basis. (Id. at 36, 41,49, 50.)

9. In the late 1980s, BATCo became increasingly worried about whether its documents could be discovered in litigation involving other subsidiaries and BAT affiliates. On behalf of BATCo, Mr. Foyle in 1989 and 1990 reviewed the “document retention” policy of BATCo's Australian subsidiary, then known as W.D. & H.O. Wills. On November 17, 1989, Mr. Foyle met with Graham McGregor and Tas Wilson, two of Wills’ scientists, to discuss “the type of research

undertaken by Wills, the documents which they have received from BATCO and the information which their employees have about the BATCO research.” (Foyle memorandum dated March 1990 [hereinafter “Foyle Memorandum”], as quoted in McCabe v. British American Tobacco Australia Services Ltd., [2002] VSC 73, ¶¶ 25, 97 (Supr. Ct. of Victoria at Melbourne (Australia) Mar. 22, 2002) (copy attached as Exhibit 2). (British American Tobacco Australia Services (BATAS) succeeded W.D. & H.O. Wills.)

10. The McCabe court struck BATAS’s defenses on the basis that it destroyed relevant documents when faced with impending litigation. The McCabe court concluded that “the primary purpose of the development of the new policy in 1985 and subsequently was to provide a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement.” McCabe, ¶ 19. The McCabe court found that “Andrew Foyle, from the English firm Durrant, was engaged by BATCO for purposes of addressing policy on document handling.” McCabe, ¶ 20. According to the McCabe court, Mr. Foyle made clear in his March 1990 memorandum that Wills had already destroyed smoking and health documents pursuant to a 1985 policy, including BATCO research documents. McCabe, ¶¶ 29-31. In requesting an Australian firm of solicitors, Clayton Utz, to review the 1985 policy and develop a new policy, Mr. Foyle wrote:

For the purpose of this exercise it can be assumed that, over the years, Wills has received copies of most of **the sensitive documents generated by BATCO** but that most of these (with the exception of the research reports) **will have been destroyed as a result of the new retention policy.**

Foyle Memorandum, as quoted in McCabe, ¶ 98 (emphasis added). In addition, Mr. Foyle instructed Clayton Utz that if further information was needed, it was not to contact the ostensible client, W.D & H.O. Wills, but rather to contact Lovell White Durant instead. McCabe ¶¶ 32.4(a), 33.

11. Two years later, on February 21, 1992, Mr. Foyle participated in a conference call with David Schechter (in-house counsel for BATUS), Robyn Chalmers (a solicitor for the Australian

firm Mallesons, representing Wills), Stuart Chalfen (in-house counsel for BATCo), and Bob Northrip (an attorney with Shook, Hardy & Bacon of Kansas City). Chalmers headed her notes, “Dispose of Documents,” and quoted Northrip as opening by saying that “Pro is you get rid of them”, but the “con” was “plaintiffs firm may persuade courts to more readily allow discovery from BATCO or order Wills to get other documents or a sanction will be imposed.” Id. ¶ 25. Chalmers “had no doubt that the intentions that Schechter and Northrip had expressed in 1991 and 1992 were related to impeding the prospects of any plaintiff by destroying damaging documents.” Id. ¶ 151.¹

12. Paragraphs 33, 36, 45, and 204(d) of the Amended Complaint in this case (attached as Exhibit 1) specifically allege that defendants, including BATCo, destroyed smoking and health-related documents. The documents determined by the Australian court in McCabe are relevant to the claims in this action, because the document destruction policies and practices identified in McCabe involved the actions of BATCo employees and agents.

13. Separately from his involvement in document classification and destruction schemes, Mr. Foyle also advised BATCo clients on how to manipulate the British legal professional privilege to protect communications between scientists. In 1988, Mr. Foyle wrote to BATCo scientist Ray Thornton:

I referred earlier to our desire to create a modus operandi to ensure that legal professional privilege is not lost. Because correspondence on the subject of Buerger’s disease exchanged between you and your colleagues in other companies might not be privileged, **it is important that contact between the scientists should be routed through the lawyers.** In addition, you should ensure that any internal

¹ The United States acknowledges that, according to Ms. Chalmers’ notes (as quoted by the McCabe court), Mr. Foyle stated that if the action was not settled or struck out “the solicitors would be in contempt of court if the docs were destroyed. Solicitors under an obligation to ensure clients preserve documents.” McCabe ¶¶ 25-26. This particular phone conference is not significant as one in which Mr. Foyle himself directed that documents be destroyed, but because it shows the United States’ need for Mr. Foyle’s testimony as a witness to and participant in conversations among counsel for BATCo and its affiliates during which counsel openly discussed destroying sensitive documents that they believed were relevant to current and anticipated litigation involving their clients.

memoranda written on the subject of Buerger's disease in relation to the current investigations should be captioned "Privileged and Confidential".

(Letter dated March 21, 1988, Foyle to Thornton, cc's to Cannar and Corner, entitled "Buerger's Disease" (Bates Nos. 300517039 - 7040) at 2) (copy attached as Exhibit 10) (emphasis added).

WHEREAS, this Court is authorized by Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 to issue this Letter Rogatory to the appropriate judicial authority in the United Kingdom requesting assistance in this matter;

NOW THEREFORE, I, Gladys Kessler, United States District Court Judge, pursuant to Rule 28(b) of the Federal Civil Judicial Procedure and Rules, hereby request that, in furtherance of justice and by the proper and usual process of your court, you summon Andrew Foyle to appear before you or some competent person by you, at a time and place by you to be fixed, there to answer questions upon oral deposition relating to the following matters;

1. The creation of the document management policy:
 - 1.1 Time of creation of the document management policy;
 - 1.2 Individuals responsible for creation of the document management policy;
 - 1.3 BATCo's connection to the creation of the document management policy;
 - 1.4 Brown & Williamson's connection to the creation of the document management policy;
 - 1.5 BAT's connection to the creation of the document management policy;
 - 1.6 Effect of prospective litigation on the creation of the document management policy;
 - 1.7 Awareness of prospective litigation at the time of the creation of the document management policy;
 - 1.8 BATCo litigation at the time of the creation of the document management policy;

- 1.9 Brown & Williamson litigation at the time of the creation of the document management policy;
- 1.10 BAT litigation at the time of the creation of the document management policy;
- 1.11 Purpose of the creation of the document management policy;
- 1.12 Individuals who were aware of the creation of the document management policy;
- 1.13 Individuals who were aware of the purpose of the document management policy;
2. The implementation of the document management policy:
 - 2.1 Time of implementation of the document management policy;
 - 2.2 BAT entities that implemented the document management policy;
 - 2.3 Individuals with responsibility for implementing the document management policy;
 - 2.4 Effect of implementing the document management policy upon litigation;
 - 2.5 Effect of implementing the document management policy upon prospective litigation;
 - 2.6 Effect of implementing the document management policy upon record keeping at BATCo;
 - 2.7 Effect of implementing the document management policy upon record keeping at Brown & Williamson;
 - 2.8 Effect of implementing the document management policy upon record keeping at BAT;
 - 2.9 Effect of implementing the document management policy upon the dissemination to the public of smoking and health related scientific reports;
 - 2.10 Effect of implementing the document management policy upon the dissemination to the public of youth marketing information;

- 2.11 Effect of implementing the document management policy upon the dissemination to the public of information about the health effect of “low tar” cigarettes;
- 2.12 Effect of implementing the document management policy upon the dissemination to the public of information on addiction;
- 2.13 What documents were destroyed;
- 2.14 Information contained in documents that were destroyed;
- 2.15 Ownership of destroyed documents;
- 2.16 Authors of destroyed documents;
- 2.17 Nature of destroyed documents;
- 2.18 Representations made in destroyed documents;
- 3. Rules and procedures set forth by document management policy
 - 3.1 Documents subject to the document management policy;
 - 3.2 Selection of documents to be destroyed;
 - 3.3 Selection of documents to be saved;
 - 3.4 Destruction of original documents;
 - 3.5 Destruction of copies of documents;
 - 3.6 Creation of a database or databases for sensitive documents;
 - 3.7 Status of databases for sensitive documents;
 - 3.8 Individuals’ access to sensitive documents;
 - 3.9 BATCo’s access to sensitive documents;
 - 3.10 Brown & Williamson’s access to sensitive documents;
 - 3.11 BAT's access to sensitive documents;
 - 3.12 Changes to the document management policy;

- 3.13 Effect on BATCo;
- 3.14 Effect on Brown & Williamson;
- 3.15 Effect on BAT;
- 3.16 Treatment of subject matter under the document management policy;
 - 16.1 Smoking and health;
 - 16.2 Addiction;
 - 16.3 Youth marketing;
 - 16.4 Low tar;
- 4. Destruction of smoking and health documents that pertain to BATCo and Brown & Williamson's litigation position in the United States;
 - 4.1 Documents destroyed in the U.K.;
 - 4.2 Documents destroyed in the United States;
 - 4.3 Documents destroyed in Australia;
 - 4.4 Documents destroyed elsewhere;
- 5. Transportation, routing, storage, and warehousing of documents;
 - 5.1 Intentional warehousing of documents at law firms or in certain jurisdictions to shield document from discovery;
 - 5.2 Creation, maintenance, and destruction of document databases or other electronic records;

and that you will cause his testimony to be committed to writing and be videotaped, and that the transcript and videotape and any exhibits thereto be sent to: Sharon Y. Eubanks, Civil Division, Torts Branch, United States Department of Justice, 1331 Pennsylvania Avenue, Suite 1150, Washington, D.C. 20004, U.S.A.

This Court expresses its appreciation to you for your courtesy and assistance in this matter and states that, pursuant to the authority of 28 U.S.C. § 1782, it stands ready and willing to do the same for you in a similar matter when required.

Oct 3, 2002
Date

Gladys Kessler
Gladys Kessler
United States District Judge

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