STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

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.

COURT FILE NO. C1-94-8565

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTIONS TO COMPEL DISCOVERY AND FOR A PROTECTIVE ORDER
TO BE HEARD OCTOBER 8TH, 1996**

REDACTED

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INTRODUCTION

Plaintiffs respectfully submit this memorandum in support of the following motions to be heard on October 8, 1996:

- Compelling defendants to respond to plaintiffs' interrogatories relating to document destruction (as modified as a result of the meet-and-confer process);
- Compelling defendants to respond to plaintiffs' outstanding discovery requests relating to product standards, designs, ingredients, specifications, and additives, and the licensing of patents relating to smoking and health; and
- Granting a protective order to ensure that all documents obtained by defendants from the State of Minnesota pursuant to the Minnesota Government Data Practices Act are subject to the same procedures and orders as other documents produced in this litigation.

Plaintiffs are simultaneously filing a second brief for another motion scheduled to be heard on October 8, relating to deficiencies in defendants' privilege logs.[1]

I. DOCUMENT DESTRUCTION

A. Introduction

The interrogatories at issue in this motion were served after discovery began to reveal a disturbing number of instances of the destruction -- or potential destruction -- of relevant documents. In a typical lawsuit, even one instance of intentional document destruction is cause for alarm. In the present case, however, initial discovery has revealed an extraordinary array of evidence of destruction. Much of this evidence is remarkably explicit, with references, as detailed below, to xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx "destroy," and "bury" -- oftentimes of scientific research.

In addition, mounting evidence points to a pattern by certain defendants -- including Philip Morris Incorporated ("Philip Morris") -- of purposefully using third parties to maintain their documents, apparently to preclude discovery.

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[1] See Plaintiffs' Memorandum in Support of Motion to Waive Privilege for Documents Inadequately Described on Defendants' Privilege Logs Or, in the Alternative, In Camera Review of the Inadequately Described Documents.

Faced with this evidence, described more fully below, plaintiffs have propounded the discovery at issue in this motion.

B. The Interrogatories At Issue

On June 26, 1996, plaintiffs served interrogatories on all defendants relating to document destruction, including:

> **INTERROGATORY NO. 1:**
>
> Identify each person who provided any information which forms the basis of response to any of these interrogatories and for each person identify which interrogatories or parts thereof for which such person provided information.
>
> **INTERROGATORY NO. 2:**
>
> Describe with specificity each instance in which documents relating to smoking and health or the marketing, advertising and promotion of cigarettes were destroyed by your company or by persons or entities acting at the direction of, in consultation with, or with knowledge of your company. For each instance described in response to this interrogatory, state the date of the destruction, a detailed description and listing of the documents destroyed, the volume of documents destroyed, and all persons with knowledge of the destruction.

Exhibit 1.[2]

Plaintiffs specifically limited these interrogatories to documents relevant to this litigation -- i.e. "documents relating to smoking and health or the marketing, advertising and promotion of cigarettes" and instances where "the only or sole copy of a document was destroyed." Exhibit 2, at p. 4, ¶ 10. Nevertheless, defendants interposed numerous objections, including overly broad, unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and attorney-client and work-product privilege. Exhibit 1.[3]

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[2] All exhibits are to the Affidavit of Corey L. Gordon.

[3] A third interrogatory in this set was responded to by all defendants, except Philip Morris, which refused to answer. Interrogatory No. 3 states:

> Describe with specificity each instance in which documents relating to the advertising, marketing or promotion of cigarettes 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 names of the entities transferring and receiving the documents, the location of the documents prior to and subsequent to the transfer, the date of the transfer, a description of the documents

Clearly, there can be no legitimate question that these interrogatories seek relevant information, i.e., descriptions of documents relating to smoking and health where the only copy has been destroyed. In most instances, however, defendants claimed that they could not identify every instance of document destruction, and used that as an excuse for failing to identify any instance, even if ascertainable with reasonable inquiry. Id.[4]

After an exchange of correspondence, see, e.g., Exhibit 4, and a meet-and-confer, defendants agreed to draft a proposal for limiting the scope of the interrogatories. Exhibit 5, at p. 207-09. To date, however, defendants have failed to propose any alternative.

Accordingly, plaintiffs hereby submit the following proposal, drafted to accommodate the concerns expressed by defendants, for modifying Interrogatory No. 2:

> Defendants' responses to Interrogatory No. 2 may be limited to instances of document destruction which can be identified by (1) a due diligence inquiry which includes, at a minimum, an investigation of all instances of document destruction disclosed in the search of all available indices, databases, and lists, whether maintained by the party or its in-house or outside counsel, (2) an inquiry of all individuals with knowledge of such instances of document destruction, as revealed in the due diligence inquiry detailed above, into those instances and any other instances of which the same individuals have knowledge, and (3) an inquiry of all in-house and outside counsel who have been involved in any respect in smoking and health litigation.
>
> This order shall encompass document destruction as well as documents subject to any instruction, directive, practice, or understanding (1) that documents not be sent to a defendant (from,

---

> transferred, the volumes of documents transferred, and the present location of the documents.

Exhibit 1.

[4] One defendant, R.J. Reynolds Tobacco Company ("RJR"), indicated that one unidentified employee destroyed paper copies of documents that were supposed to have been, but were not, microfilmed. RJR indicated that there were "approximately four" such documents, but offered no description of these documents. Exhibit 1. By letter dated September 6, RJR offered to serve a supplemental interrogatory answer within 30 days providing additional information relating to the "approximately four" documents. Exhibit 3. In addition, some defendants listed a limited number of individuals in response to Interrogatory No. 1. However, other defendants -- Philip Morris, Brown & Williamson Tobacco Corporation ("B&W"), and American Tobacco Company ("American") -- refused to provide any information in response to Interrogatory No. 1. Exhibit 1.

> for example, a scientific research organization or an advertising agency) and thus not "retained" by a defendant, or (2) that documents be routed through or to a third party, and thus not "retained" by a defendant.

This refinement of Interrogatory No. 2 strikes the proper -- indeed, conservative -- balance between defendants' concerns about the scope of the original interrogatory and plaintiffs' ability to conduct discovery which, given the evidentiary record to date, is clearly both relevant and necessary to this case.

C. Evidence of Document Destruction

1. Philip Morris

Some of the evidence of Philip Morris' document destruction relates to its biological research facility in Cologne, Germany, known as INBIFO. Once a private laboratory, Philip Morris purchased INBIFO in the early 1970s. Over the years, both before and after its purchase, Philip Morris has used INBIFO for extensive -- and sensitive -- scientific research. In fact, Philip Morris has long viewed INBIFO as a good place to conduct potentially damaging research, perhaps beyond the purview of discovery. See, e.g., Exhibit 6 ("this is a locale where we might do some of the things which we are reluctant to do in this country").

In reviewing documents produced in this litigation by Philip Morris from the files of Thomas S. Osdene, former director of research, plaintiffs discovered a handwritten note that discusses both the destruction and the unusual routing of INBIFO documents, as follows:

> 1. Ship all documents to Cologne . . . .
>
> 2. Keep in Cologne.
>
> 3. Okay to phone & telex (these will be destroyed).
>
> 4. We will monitor in person every 2 - 3 months.
>
> . . .
>
> 6. If important letters or documents have to be sent, please send to home -- I will act on them & destroy.

Exhibit 7 (emphasis added).[5]

[5] Although no author is identified on this note or the Philip Morris 4B index, the document was produced from Dr. Osdene's files and appears to be in

In addition, it was apparently Philip Morris policy to purposefully avoid certain written contact with INBIFO. Thus, another document, authored in 1977 by Robert Seligman, Philip Morris vice president for research and development, states:

> We have gone to great pains to eliminate any written contact with INBIFO, and I would like to maintain this structure. . . .
>
> [P]erhaps we should consider a "dummy" mailing address in Köln [Cologne] for the receipt of samples. The written analytical data will still have to be routed to FTR if we are to avoid direct contact with INBIFO and Philip Morris U.S.A. . . .
>
> In any event, I would suggest you retrieve the March 24 letter Helmut Gaisch sent to Jerry, including all copies. My copy is returned herewith.

Exhibit 9 (emphasis added).[6]

In fact, the willingness of Philip Morris to destroy (or suppress) unfavorable research appears to be a pervasive philosophy within the company. Thus, another Philip Morris document -- authored by William Dunn, a scientist nicknamed "the nicotine kid" within Philip Morris, and addressed to Dr. Osdene -- discussed a proposed scientific study into the addictive properties of nicotine:

> I have given Carolyn [Levy] approval to proceed with this study. If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this avenue with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.

Exhibit 10 (emphasis added).

2. RJR

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. . .
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documents relating to advertising, marketing or promotion of cigarettes prepared for RJR by Mezzina Brown were not sent to or retained by RJR. Id. In response, RJR stated:

> Reynolds cannot rule out that Mezzina/Brown may have prepared, directly or indirectly, documents that were not sent to and, thus, not retained by Reynolds. Reynolds further states that at various times Mezzina/Brown may have discarded, and was authorized by Reynolds to discard, various documents such as drafts of creative materials which were rejected by Mezzina/Brown or otherwise not utilized by Reynolds. Copies of such materials provided to Reynolds have . . . been retained.

Exhibit 1.

Clearly, RJR's answer to this interrogatory, xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, raises the possibility of important documents being retained or destroyed by Mezzina/Brown. Any such documents, however, have not been identified by RJR.

3. B&W

xxxxxxxxxxxxxxxxxxxx

The evidence presented above reflects some, but not all, of the indications of document destruction developed to date in this litigation. At this time, plaintiffs cannot state with certainty which of the above references actually relates to instances where the only copy of a relevant document was destroyed. That, of course, is the purpose of the interrogatories at issue. However, given the information cited above, it is clear that the targeted inquiries of the plaintiffs are relevant, proper, and of great significance.

Moreover, the evidence demonstrates the ease with which defendants can undertake an effort to respond, starting with the specific instances of destruction referenced in the documents and indices cited herein. Accordingly, plaintiffs respectfully request an order compelling each defendant to respond to Interrogatory No. 2, as modified above, as well as Interrogatory No. 1.[7]

II. INDUSTRY AGREEMENTS RELATING TO PRODUCT STANDARDS, DESIGNS, INGREDIENTS, SPECIFICATIONS, OR ADDITIVES, AND LICENSING OF PATENTS RELATED TO SMOKING AND HEALTH

In an effort to clarify the scope of discovery, plaintiffs advised all defense counsel by letter dated August 5, 1996 that:

> [A]ll documents relating to agreements or potential agreements or understandings or discussions on product standards, designs, ingredients, specifications, additives, etc., among one or more defendant in this litigation are encompassed by plaintiffs' existing document requests.
>
> In addition, all documents relating to agreements or potential agreements or understandings or discussions relating to the licensing or use by one or more defendants of another defendant's patent(s) relating to smoking and health also are encompassed by our existing document requests.
>
> Let us know immediately if you disagree.

Exhibit 14.

Three defendants -- Philip Morris, RJR, and Lorillard -- have responded

[7] In addition, plaintiffs request an order compelling Philip Morris to respond to Interrogatory No. 3, and compelling RJR to supplement its response to Interrogatory No. 4, subject to the modifications proposed by plaintiffs for Interrogatory No. 2, as detailed in Section I.B., above.

to this letter. Exhibit 15. These responses, however, have been less than a paradigm of lucidity, and, in fact, have led to a flurry of correspondence -- with no progress -- on what is a simple issue. Id. Inasmuch as the primary purpose of the August 5 letter was to clarify that defendants concurred that these categories of documents were covered by existing requests, so there would be no misunderstandings in discovery, defendants' responses are entirely unsatisfactory. Because of the importance of these documents, plaintiffs request an order that all defendants produce all documents detailed in plaintiffs' August 5 letter, all of which are covered by long-outstanding discovery requests.

In fact, a number of plaintiffs' outstanding document requests encompass the documents detailed in the letter of August 5. For example, a dozen requests from plaintiffs' first set of document requests specifically ask for all documents "exchanged or shared between your company and any other defendant in this present case" relating to a variety of issues, including smoking and health (Request 37), biological activity of cigarettes (Request 39), carbon dioxide (Request 40), cancer (Request 41), heart disease (Request 42), arteriosclerosis (Request 43), stroke (Request 44), emphysema (Request 45), chronic obstructive pulmonary disease (Request 46), and health hazards of cigarette additives (Request 47). Additional requests seek all documents relating to agreements on issues involving the health hazards or addictiveness of cigarettes (Requests 28 and 29). Other requests seek documents relating to safer cigarettes (Requests 61, 63, and 65), catalysts (Request 62), nicotine analogs (Request 78), the addition of any substances that affect nicotine delivery (Request 80), acetaldehyde (Request 82), and patents relating to nicotine control or manipulation (Request 90). Plaintiffs' fourth set of requests, No. 2, seeks all documents relating to Chemosol, a cigarette additive. Exhibit 16.

Certainly, any agreements or understandings between or among any of the defendants related to standards, designs, ingredients, specifications, or additives would be encompassed by one or more of these requests. In addition,

to the extent that one or more defendants have licensed to any other defendant patented equipment or processes for the production of cigarettes, and to the extent that any such patent relates to smoking and health, this also would clearly be covered by any number of plaintiffs' requests.

Moreover, recent information disclosed in this litigation demonstrates the significance of plaintiffs' requests. In documents produced by RJR related to its additives database, x xxxx

agreements or understandings or discussions relating to the licensing or use by one or more defendants of another defendant's patent(s) relating to smoking and health.

III. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT

As document production reaches the final stages in this litigation, defendants have begun a campaign to purposefully circumvent this Court's carefully constructed framework for discovery by obtaining documents from the plaintiff State of Minnesota ("the State") through use of the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. § 13.03, et seq.

Defendants' recent MGDPA requests are specifically designed to obtain documents for use in this litigation. However, some of defendants' MGDPA requests are in direct contravention of agreements reached by the parties during the year-long meet-and-confer process in this case. Defendants' MGDPA requests also encompass documents which defendants previously sought through document requests in this litigation; after the State objected to the production pursuant to the Minnesota Rules of Civil Procedure, defendants -- rather than bringing a motion to compel, in which both sides could be heard and this Court could rule on the appropriate boundaries for discovery -- simply circumvented this Court and filed data practices requests. Still other documents requested by defendants through the MGDPA are duplicative of documents already produced to the Minnesota Depository, which, of course, simply forces the State to produce the same documents --twice -- for no apparent reason, other than harassment.

Despite this conduct, at this time plaintiffs do not seek an order that the defendants may not use the MGDPA to obtain documents in this case. Instead, plaintiffs seek a protective order, detailed below, which provides that, once access is gained to such documents, the orders of this Court and the Minnesota Rules of Civil Procedure will govern the use of such documents in this litigation. The MGDPA simply provides access to documents but does not govern the use of the documents in this litigation. Accordingly, it is

entirely within this Court's discretion and power under Rule 26.03 of the Minnesota Rules of Civil Procedure to dictate a fair and just use of such documents in this case.[10]

At the outset of this litigation, defendants made a number of requests pursuant to the MGDPA, although very few documents were obtained. Within the last month, however, defendants have served three wide-ranging data practices requests on the State.

The first request was served on the Commissioner of the Department of Health and requests information post-dating July 1996. This request specifically circumvents the parties' agreements in this case -- entered at defendants' urging -- to preclude discovery for documents which post-date the complaint, with very limited exceptions. Thus, had defendants' data practices request been made as a request for production of documents under the rules of civil procedure, defendants are well aware that plaintiffs would have asserted this appropriate objection. To circumvent this process, defendants simply made a data practices request specifically for the purpose of obtaining post-complaint documents in this litigation.

On August 26, 1996, defendants served two expansive requests on the Minnesota Health Care Commission and the Minnesota Department of Public Safety. Exhibits 21 and 22. The request to the Minnesota Health Care Commission is not limited in time and clearly seeks documents which post-date the complaint. In fact, to the extent this request seeks relevant documents which pre-date the complaint, those documents have already been collected, indexed, and prepared for production to the Minnesota Depository. In addition, this request seeks all documents "that relate to . . . alcohol use

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[10] The tobacco industry's reputation for harassing public health authorities through the use of data practices requests is well known. See, e.g., Exhibit 19 (Aguinaga and Glantz, "The Use of Public Records Acts to Interfere With Tobacco Control"). In this litigation, the Case Management Order ("CMO") states that defendants are not prohibited from obtaining information under the MGDPA. By Stipulated Order dated February 9, 1996, the parties agreed that all such requests would be made in writing, clearly state that they were made on behalf of the tobacco industry, and copied to the State's outside counsel, Robins Kaplan Miller & Ciresi.

or sales." Exhibit 21, at p. 2, ¶ 6. In the litigation, plaintiffs interposed appropriate objections to defendants' wide-ranging document requests relating to alcohol. Now defendants, obviously aware of the feebleness of their contention that all such documents are relevant to this litigation, have declined to bring a motion to compel and instead filed a data practices request, against which there is no mechanism for the State to require that the request be relevant and of reasonable scope.

The request to the Minnesota Department of Public Safety also is overly broad and expansive, seeking essentially all documents related to tobacco and alcohol in the Department's former Office of Drug Policy and Violence Prevention (currently a division of the Minnesota Department of Children, Families and Learning). Exhibit 22. Again, to the extent that this request seeks documents responsive to defendants' requests, these documents have already been compiled, reviewed, indexed, and prepared for production to the Minnesota Depository. To the extent that the request seeks documents which are not responsive nor probative of any issue in this case, the request circumvents the carefully constructed process by which the plaintiffs can seek some boundaries to the scope of discovery. [11]

Minn.R.Civ.P. 26.03 provides that a party from whom discovery is sought, for good cause shown, may move the Court for an order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

As the Minnesota Supreme Court stated in Thermorama, Inc. v. Shiller, 271 Minn. 79, 83, 135 N.W.2d 43, 46 (1965):

> Normally, the trial court has wide discretion in determining whether the discovery rules are being used by a litigant in bad faith to unreasonably annoy, embarrass, oppress, or injure a party or the witnesses and also has wide discretion in protecting the parties and witnesses from such abuses.

[11] Although there is some ambiguity in the data practices requests, it appears that defendants may also be seeking volumes and volumes of electronic mail, which directly circumvents an agreement of the parties that to the extent such electronic mail has not been converted into hard copy, it need not be produced.

The threat posed to the integrity of the carefully constructed case management directives in this case through the use of documents obtained through the MGDPA is clearly good cause for this Court to enter an order that all documents obtained from the State in this case under MGDPA be subject to the same orders of this Court as all other documents. Without such a Protective Order, the case management directives of this case will be wholly undermined, fundamental rights of the State under the Minnesota Rules of Civil Procedure will be abrogated, and this Court's ability to set reasonable boundaries for discovery will be eliminated.[12]

Accordingly, the State respectfully requests an order that no document obtained by defendants from the State through the MGDPA shall be used in any manner in this litigation until the following procedures have been complied with:

> a. Defendants shall notify plaintiffs' liaison counsel of their intent to use documents obtained from the State pursuant to the MGDPA in this litigation. Such notice shall specifically identify each such document which defendants intend to use in this litigation.
>
> b. Within 45 days of this notice, plaintiffs shall assert appropriate objections, if any, to the use of those documents in this litigation pursuant to the Minnesota Rules of Civil Procedure, this Court's Case Management Order dated March 29, 1995, paragraph III.D.13, and all other applicable orders in this case.
>
> c. In the event the defendants take exception with the objections asserted by the State pursuant to paragraph (b) above, the parties shall meet and confer. If the parties cannot resolve their disputes, defendants shall bring a motion in accordance with the Minnesota Rules of Civil Procedure and the orders of this Court for a ruling permitting the use of such documents in this litigation.
>
> d. Any documents which this Court finds are <u>not</u> properly within

[12] The State is also very concerned that defendants' direct contact with high-level officials at the State contravenes Rule 4.2 of the Minnesota Rules of Professional Conduct. Before this Court, defendants represented that they had no intention of contacting "somebody in a managerial position or somebody whose acts or omissions are such that their acts and omissions can be imputed to the party for whom they work." Transcript of Proceedings, February 10, 1995, at pp. 88-89. Instead, defense counsel represented that contacts under the MGDPA would be with "document librarians at various state agencies." <u>Id.</u> However, defendants directed the three most recent requests to the Commissioner of the Department of Health, the Executive Director of the Minnesota Health Care Commission, and an Assistant Commissioner at the Minnesota Department of Public Safety.

the bounds of discovery in this case -- i.e., are not relevant nor reasonably calculated to lead to the discovery of admissible evidence -- may not be used for any purpose in this litigation.

e. Any documents which this Court finds are properly within the bounds of discovery in this case shall be placed into the Minneapolis Depository by defendants within 15 days of this Court's order.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court compel defendants to respond to plaintiffs' interrogatories relating to document destruction, and to respond to plaintiffs' outstanding discovery requests as they relate to product standards, designs, ingredients, specifications, and additives, Maximum Use Levels, and licensing of patents relating to smoking and health, as set forth in Plaintiffs' Proposed Order. In addition, the State of Minnesota respectfully requests that the Court enter Plaintiffs' Proposed Order with respect to the MGDPA.

Dated this 16th day of September, 1996.

RESPECTFULLY SUBMITTED,

ROBINS, KAPLAN, MILLER & CIRESI

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