STATE OF MINNESOTA
COUNTY OF RAMSEY
SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, 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

March 25, 1997

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL REGARDING PHILIP MORRIS INTERNATIONAL AND DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Kenneth J. Fitzpatrick
Judge of District Court

The above matter came on for hearing on January 30, 1997, before the Honorable Kenneth J. Fitzpatrick. Corey Gordon, Esq., appeared and argued on behalf of Plaintiffs' Motion to Compel Regarding Philip Morris International and in opposition to Defendant' Motion for a Protective Order. Thomas Silfen, Esq., appeared and argued on behalf of Defendants' Motion for Protective Order Regarding Discovery from Non-Party Sister Corporation Philip Morris International, Inc., and in opposition to Plaintiffs" Motion to Compel. The following also were present and identified themselves as appearing on behalf of the party or parties set forth below their names:

Roberta B. Walburn
State of Minnesota and Blue Cross Blue Shield of Minnesota

David Klataske
State of Minnesota and Blue Cross Blue Shield of Minnesota

Tom Pursell
State of Minnesota

Peter Sipkins
Philip Morris, Incorporated

Maurice Leiter
Philip Morris, Incorporated

Lawrence Barth
Philip Morris, Incorporated

John Mulclerig
Philip Morris, Incorporated

Michael L. Zaleski
Philip Morris, Incorporated

James Simonson
R.J. Reynolds Tobacco Company

Jonathan Redgrave
R.J. Reynolds Tobacco Company

Jeffrey Jones
R.J. Reynolds Tobacco Company

Jack Fribley
Brown & Williamson Corporation

Richard Jensen
B.A.T. Industries, p.l.c.

David Martin
Lorillard Tobacco Company

Craig Guftason
Lorillard Tobacco Company

Larry Purdy
The Council for Tobacco Research – U.S.A., Inc.

David Shafted of The St. Paul Pioneer Press, Dave Peterson of the Minneapolis Star Tribune, and other members of the public also attended and observed the proceedings. Based on the file, arguments, and representations of counsel

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IT IS THEREBY ORDERED:

1. Defendants' Motion for Protective Order Regarding Discovery from Non-Party Sister Corporation Philip Morris International, Inc., is thereby DENIED.

2. Plaintiffs' Motion to Compel Regarding Philip Morris Intentional is thereby GRANTED, to wit:

A. Pre-1988 Documents

Within ten days from the date of this Order, Defendant Philip Morris, Incorporated shall produce to Plaintiffs all documents that were in the possession, custody, or control of Philip Morris International (including all of its operating subdivisions and subsidiary entities, including subsidiary corporations) on or prior to December 31, 1987, that are responsive to any of Plaintiffs outstanding document requests and/or all prior Orders of this Court. This specifically includes all documents where legal ownership or control was transferred to Philip Morris Incorporated, or any other subsidiary, sister, or parent corporation, whether or not named in this order.

B. Indices

Within ten days from the date of this Order, Defendant Philip Morris Incorporated shall produce all document indices, as defined by previous Orders of this Court and the August 23, l996, agreement of the parties, relating to any documents in the possession' custody, or control of Philip Morris International, Philip Morris International, Incorporated, or any of their subdivisions or subsidiary entities, including subsidiaries corporations. This includes all indices of INBIFO, CRC, FTR, and Philip Morris Europe SA. Such indices shall be produced in electronic format, in accordance with previous Orders of this Court and the practice of the parties in this litigation.

C. INBIFO, FTR AND CRC SEARCH PARAMETERS

(1) Within ten days from the date of this Order, Defendant Philip Morris Incorporated Shall provide to Plaintiffs all written documents setting forth the search parameters or protocol for documents obtained from INBIFO, CRC, AND FTR in 1994 by U.S. lawyers acting on behalf of Philip Morris Companies, Inc., and/or Defendant Philip Morris Incorporated for production in U.S. litigation.

(2) Within 15 days from the date of this Order, Defendant Philip Morris Incorporated shall produce to Plaintiffs an affidavit from the person most knowledgeable of the search conducted of each of the three entities identified in the preceding paragraph (INBIFO, CRC, and FTR), setting forth in detail and with specificity all activities undertaken by the entity to respond to the search, the individuals responsible for conducting the search, a general description of the categories of documents produced, general descriptions of any documents withheld by the entities and the reasons therefor, and general descriptions of any documents made available to the U.S. lawyers for review but not copied by them.

(3) Within 20 days from the date of this Order, Defendant Philip Morris Incorporated shall produce a detailed log setting forth all identifying information required by prior Court Orders for privilege logs with respect to each document responsive to any of Plaintiffs' outstanding requests or prior Orders of this Court in the possession or control of INBIFO, CRC, or FTR that was not made available for review or was made available to but not copied by U.S. lawyers acting on behalf of Philip Morris Companies, Inc. and/or Philip Morris Incorporated in 1994.

D. Inquiries Regarding Sister and Subsidiary Entities

(1) Within ten days from the date of this Order, Defendant Philip Morris Incorporated shall contact in writing every entity named in the memorandum accompanying this order which is owned or controlled, either directly or through an intermediary, by Defendant's parent corporation, Philip Morris Companies, Inc., and ascertain whether each such entity has in its possession, custody, or control documents responsive to any discovery requests served by Plaintiffs on Defendant Philip Morris Incorporated in this litigation or any Orders of this Court, or any indices that might contain such documents. In addition, Philip Morris Incorporated shall make all

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inquiries necessary to respond to Plaintiffs' document destruction interrogatories as previously ordered by this Court.

(2) Within 15 days from the date of this Order, Defendant Philip Morris Incorporated shall submit an affidavit to this Court setting forth in detail and with specificity all steps undertaken by Philip Morris Incorporated to make the inquiries as ordered in the preceding paragraph. This affidavit shall include the names and titles or positions of the individuals making the contact on behalf of Philip Morris Incorporated, the entities contacted, the names and titles of the individuals within each entity contacted, the text of any written communication to each entity, and the text of each response. Such affidavit must contain counsel's representation that due diligence and a good faith search has been conducted and that there are no documents in the possession or under the control of any affiliate, subsidiary, parent corporation, or sister corporation of Philip Morris.

(3) In addition to inquiring as to the existence of responsive documents as ordered above, Philip Morris Incorporated shall also inquire of each entity whether it has had in its possession at any time in the past documents responsive to any of Plaintiffs' discovery requests or Orders of this Court. If the answer is in the affirmative, Philip Morris Incorporated shall submit a detailed affidavit to the Court describing the documents that were once in the possession of the entity but are no longer, all steps taken to find the documents, why they could not be found, what steps were taken to determine what had happened to them, and what the investigation revealed had happened to them.

E. Production of Post-1988 Documents

If any entity indicates that it has responsive documents or indices in its possession in response to the inquiries ordered above, Defendant Philip Morris Incorporated shall produce all such responsive documents or indices to the plaintiffs within 30 days from the date of this Order.

F. Production of INBIFO, FTR, CRC, PHILIP MORRIS EUROPE SA, and Extramural Research Documents

In addition to the foregoing, within 20 days from the date of this Order, Defendant Philip Morris Incorporated shall produce all documents responsive to any of Plaintiffs' document requests or Orders of this Court within the possession, custody, or control of INBIFO, FTR, CRC, Philip Morris Europe SA, and/or any of the 29 extramural researchers identified by Defendant Philip Morris Incorporated as having conducted research with INBIFO, FTR, or CRC as set forth in the Supplemental Answer to Interrogatory No. 16 served by Defendant Philip Morris Incorporated on January 16, 1997.

G. Translations

If any documents or indices, or portions thereof, whose production has been ordered by the Court in the preceding paragraphs (or previously produced in this litigation) are written in a language other than English, Philip Morris Incorporated shall provide contemporaneously with the production of the document or index all existing translations into English.

H. Storage Facilities

Defendants shall not fail to search all its storage facilities in New York and in New Jersey for responsive documents. Defendant shall search the files of all sister, parent and subsidiary corporations named herein as the source of responsive documents, wherever such documents may be stored.

3. The Memorandum attached hereto is incorporated herein.

MEMORANDUM

Background

Throughout the more than two and one-half years since this action was filed, the parties have expended an unprecedented amount of time and money in the discovery phase. Millions of pages of documents have been produced to date. During this process, the parties have met and conferred in attempts, many successful, to clarify inquiries and narrow requests. We now attempt to complete the document discovery phase.

Two of the numerous discovery issues appearing to cause difficulty, however, are Plaintiffs' inquiries as to whether certain relevant documents

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have been transferred by Defendants to third parties and whether other relevant documents have been destroyed. Despite Defendants' answers to interrogatories and production of documents, however, as the scheduled close of document discovery neared, Plaintiffs discovered that Defendant Philip Morris Incorporated (hereafter "Philip Morris") failed to produce certain document indices. Plaintiffs discovered references to at least three indices that had not been produced, despite more than eight orders of this Court describing, clarifying, and reiterating the process established to expedite discovery and review of millions of pages of documents by requiring products of existing indices. Philip Morris acknowledges the references to the indices in its production as well as its failure to product the indices, which it claimed are not in its files. Philip Morris acknowledges that it has not searched the files of entities such as Philip Morris International, Inc., claiming that it has not done so because Philip Morris International, Inc., is a separate corporate entity and not a party to this action.

Plaintiffs complain that Philip Morris's failure to search all the files of Philip Morris International, Inc., and other subsidiaries of Philip Morris is an egregious attempt to hide information relevant to this action and argue that such a search is required. In light of the corporate structure of Philip Morris, this Court agrees.

The Philip Morris Corporate Structure

In 1902, Philip Morris & Company, Limited, was incorporated and began tobacco-related operations in New York. In 1919, the company became reincorporated in Virginia, changing its name to Philip Morris & Company, Ltd., Inc. It began its cigarette operations. In 1955, Philip Morris & Company, Ltd., Inc., changed its corporate name to Philip Morris Incorporated.[1]

Philip Morris Incorporated created three separate operating divisions in 1967: Philip Morris Domestic (later renamed "Philip Morris USA"), Philip Morris International, and Philip Morris Industrial.[2] Philip Morris Industrial apparently had nothing to do with the cigarette business, but Philip Morris USA dealt with the domestic aspects of the cigarette business and Philip Morris International handled the international cigarette operations. Neither Philip Morris USA nor Philip Morris International were separately incorporated; they were simply divisions of the lone corporate entity, Philip Morris Incorporated.

[organizational chart omitted]

In 1985, Philip Morris Incorporated formed a parent or holding company for itself known as Philip Morris Companies, Inc., by swapping the public shares of Philip Morris Incorporated for Philip Morris Companies, Inc.[3] The newly formed Philip Morris Companies, Inc., became the sole shareholder of Philip Morris Incorporated. Philip Morris Companies, Inc., became the holding company for its two major divisions, Kraft General Foods, Inc. (the food business) and Philip Morris Incorporated (the cigarette business.[4] The 1985 restructuring did not affect the relationship between Philip Morris Incorporated and Philip Morris International, which remained an unincorporated operating division of Philip Morris Incorporated.

[organizational chart omitted]

This relatively simple illustration does not show the whole picture, however.[5]

In 1968 Philip Morris International, the admitted operating division (unincorporated) of Philip Morris Incorporated, became the parent of Philip Morris International Finance Corporation ("IFCO"). IFCO, in turn, became the parent of Philip Morris Europe S.A. and of FTR Holding. FTR Holding, in its turn, became the parent of Fabriques de Tabac Reunies ("FTR"), a Swiss cigarette company in Neuchatel, Switzerland. Then, in 1971 FTR became the parent of a German corporation known as INBIFO, a research facility based in Cologne, Germany.

[organizational chart omitted]

In 1987, Philip Morris Incorporated spun off its Philip Morris International division to create a separate corporation and transferred all of its divisional assets to the new corporation. Philip Morris International also created another subsidiary in the same line as IFCO called Philip Morris Products, Inc. In 1988, the German government banned animal-type testing and Philip Morris set up a research facility in Belgium known as the Contract Research Center ("CRC") under FTR Holding. At some time, another sister subsidiary to Philip Morris Incorporated was created, called Philip Morris Management Corporation. Philip Morris Management Corporation operates a

[1] *See* Exhibit A, to the Affidavit of Corey L. Gordon dated January 21, 1997 ("Gordon Aff.").
[2] *Id.*
[3] *See* Exhibit B, Gordon Aff.
[4] *See* Exhibit C, Gordon Aff.
[5] This is the extent, however, of Philip Morris's response to Plaintiffs' interrogatory. *See* Exhibit A, Gordon Aff. (Answer to Interrogatory No. 10, Plaintiffs' First Set of hterrogatories, served in June 1995).

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document storage facility in Carlstadt, New Jersey. In addition to storing documents of Philip Morris Incorporated, this facility stores documents of Philip Morris International, Inc.

[organizational chart omitted]

The 1987 incorporation of Philip Morris International and, indeed, many of the intertwining sister subsidiaries were undisclosed in sworn interrogatory answers.[6] Philip Morris failed to disclose the transfer of documents that were indisputably owned by Philip Morris Incorporated when it transferred the divisional assets to the new corporation at the end of 1987. Philip Morris now concedes that, in fact, documents in the possession of its Philip Morris International division were, indeed, transferred to the newly-formed corporation Philip Morris International, Inc., at the end of 1987.[7] Philip Morris has excluded these documents from production in this case.[8]

Analysis

It is a fundamental rule of civil discovery that a party upon whom a request is served must produce documents within its possession, custody, or control. Minn. R. Civ. P. 34. Before 1988, Philip Morris International was an operating division of Philip Morris, a party in this action. Pre-1988 documents coming into the hands of Philip Morris International were unquestionably within the possession, custody, or control of Philip Morris and thus must be produced.

Philip Morris stated in its sworn answers to Plaintiffs' interrogatories that it did not transfer documents unless it retained a copy. The Court would expect, then, that all pre-1988 documents of Philip Morris International had in effect been searched for documents responsive to Plaintiffs' requests because Philip Morris swore that it retained copies of any documents transferred. In light of Philip Morris's interpretation of the word "transfer," this expectation appears untrue.

Philip Morris argues that it did not "transfer" Philip Morris International documents because the documents stayed in the same file cabinets in the same building upon reorganization of Philip Morris International from operating division to corporation. The Court finds Philip Morris's argument disingenuous at best. Change of legal ownership constitutes transfer. When the operating division was spun off as a separate corporation in 1987, ownership of all of the international division's assets, including its documents, was transferred - transferred to Philip Morris International, Inc. While the physical location may not have changed, in fact documents were transferred. If, in fact, Philip Morris retained a copy of all pre-1988 documents of Philip Morris International and searched such documents for those responsive to Plaintiffs' requests, then its answer to Plaintiffs' interrogatory remains correct. If it did not, Philip Morris's answer is incorrect.

With respect to documents in the possession, custody, or control of Philip Morris International, Inc., the Court need only look to the extremely close relationship of the subsidiaries to determine that Philip Morris has access to the documents. As painstakingly outlined in the record, and summarily described above, Philip Morris's organizational structure provides practical as well as legal access to the requested documents whether such documents are in the hands of Philip Morris or in the hands of one of its subsidiaries, parent, or sister corporations. "A corporation is required to produce documents held by its subsidiaries …. The rule applies to documents in possession of a so-called sister corporation, another subsidiary of the non-party parent corporation of the party to the action." Haddock & Herr, *Discovery Practice* (Third Ed. 1996). Case law from around the country provides guidance here. *See*, for example, *Strom v. American Honda Motor Co., Inc.*, 667 N.E.2d 1137, 1141-45 (Mass. 1996) (requiring discovery where "information sought is in the possession or custody of a wholly owning parent (or virtually wholly owning) or wholly owned (or virtually wholly owned) subsidiary corporation, or of a corporation affiliated through such a parent or subsidiary … To rule otherwise would be to reward corporations that disperse potentially useful information among related entities."); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) ("Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad …. If defendants could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents."); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1153 employees if U.S. defendant once had control over the managing director, officer, and employee of the non-party).

[6] In January 1996, in response to repeated requests by plaintiffs regarding details of Philip Morris's corporate structure, Philip Morris's counsel stated in correspondence that Philip Morris, Inc. and Philip Morris International were "sister subsidiaries" of Philip Morris Companies. *See* Exhibit D, Gordon Aff. The letter did not disclose that Philip Morris International had been separately incorporated, that documents had been transferred to it, or that Philip Morris was not searching it for documents responsive to discovery requests.
[7] *See* Exhibit E, Gordon Aff., at page 8.
[8] *See* Exhibit F., Gordon Aff., at pages 15-16.

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Philip Morris is not only is related to Philip Morris International, Inc., via the parent-subsidiary tie; it has numerous ties to other sister corporations. Indeed, Philip Morris has demonstrated that it can, when it wishes, obtain documents such subsidiaries through sources as common storage facilities, common management, common employees, etc. Its attempts at hiding documents in the morass of interlocking related organizations shall not be tolerated by this Court. Nor will the Court countenance Philip Morris's self-selected and voluntarily provided set of documents from selected sources. Philip Morris must respond to discovery requests properly, by searching the files of the related entities for responsive documents and by supplementing its answers to interrogatories.

Conclusion

Plaintiffs' Motion to Compel Regarding Philip Morris International is granted. The Motion of Defendant Philip Morris, Inc., for a Protective Order Regarding Discovery from Sister Corporation Philip Morris International, Inc., is denied.

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