STATE OF MINNESOTA
COUNTY OF RAMSEY
DISTRICT COURT
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, 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,
Defendants.

ORDER

Kenneth J. Fitzpatrick, Chief Judge

This matter came duly before the undersigned upon the Motion of defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, and The American Tobacco Company (herein the "Moving Defendants"), upon the Motion of defendant B.A.T. Industries p.l.c. (herein "B.A.T."), upon the Motion of defendant Liggett Group, Inc. (herein "Liggett"), upon the Motion of defendant The Council for Tobacco Research – U.S.A., Inc. (herein "CTR"), and upon the Motion of The Tobacco Institute, Inc. (herein "Institute").

WHEREAS, on August 2, 1995, pursuant to Paragraph 4A of this Court's Order dated July 14, 1995, and filed July 17, 1995, plaintiff State of Minnesota (hereafter "Minnesota") submitted to the Court its then existing working litigation index for *in camera* review; no other party submitted such an index at that time;

WHEREAS, plaintiff Blue Cross and Blue Shield of Minnesota represented that it does not have any existing index;

WHEREAS, pursuant to this Court's Order dated August 10, 1995, and in accord with the letter agreement dated August 23, 1995, Liggett, Institute and CTR have each produced materials, including affidavits, for *in camera* review, requesting protective orders;

WHEREAS, pursuant to this Court's Order dated August 17, 1995, and in accord with the letter agreement dated August 23, 1995, Moving Defendants and each of them produced exemplar discs, sealed affidavits, and other materials with respect to certain existing litigation indices or databases for *in camera* review, requesting protective orders;

WHEREAS, pursuant to certain Stipulated Orders of August 18, 1995, and September 6, 1995, reflecting agreement reached by B.A.T. and plaintiffs with respect to B.A.T.'s indices and databases, B.A.T. has produced exemplar discs, sealed affidavit, and other materials for *in camera* review, requesting a protective order;

WHEREAS, the parties came before this Court on September 12, 1995, and the Court entertained arguments with respect to these matters;

WHEREAS, the defendants have provided additional information in the form of memoranda to the Court, pursuant to its directive issued September 12, 1995, with respect to the databases;

Based on the files, records, submissions, memoranda, arguments, and representations of counsel

IT IS HEREBY ORDERED

1. The indices and databases provided to the Court in this matter for its *in camera* review are not in their entireties protected from production under the work-product doctrine. Subjective portions only of said indices and databases are protected from production. Accordingly, the motions are DENIED in part and GRANTED in part, as is further detailed below.

2. Defendants' motion for leave to file under seal, *in camera*, and *ex parte* affidavits containing factual evidence in support of their motions for a work product determination and protective order are hereby GRANTED.

3. Moving Defendants request for an *in camera*, *ex parte* hearing in respect to this matter is DENIED.

4. Minnesota may redact from their index, as provided to this Court, all information contained in the column or field entitled "Comments;"

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and it shall then produce[1] its index, as redacted, to defendants.

5. Moving Defendants may redact from their indices or databases, as provided to this Court, all information contained in columns or fields EXCEPT that information contained in the fields identified below, and each shall then produce[2] its indices, as redacted, to plaintiffs:

A. Philip Morris Incorporated shall release the following fields:

SHB Database:	Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending, Person Noted, Organization Author, Organization Recipient, Organization Copied, Organization Mentioned, Organization Attending, Organization Noted, Mentioned Brand File Name, Site, Area, Verbatim Title
ABC Database:	Starting and Ending Bates Numbers, Date, Title, Document Type, Author, Addressee, Copyee, Source, File
A&P Database:	Source, Document Number, Attachment Range, Document Date, Document *Types 05 through 15 only*, Title, To/Addressee - Personal Names, To/Addressee - Organizational Names, From/Author - Personal Names, From/Author - Organizational Names, Copyee - Personal Names, Copyee - Organizational Names

B. R.J. Reynolds Tobacco Company shall release the following fields:

Litigation Database	Addressee, Attachments, Author, Brand Names, Copyee, Document Date, Document *Id.#*, Document Type, Mentioned Names, Page Length, Referenced Document, RJR Intnl Documents, Source, Split Record, Title
DMS Database	Counsel represents that all documents in this database are included in the Litigation Database, thus this database need not be produced
Additives Database	Counsel represents that all documents in this database are included in the Litigation Database; this database, however, contains eight additional fields. Release Additive Brands, Additive Name, Pesticide Name, and Other Brands in addition to those fields listed for Litigation Database, above.
Camel Congressional Investigations Database	All documents in this database are included in the Litigation Database, thus this database need not be produced.
Premier Database	75% of the documents in this database are included in the Litigation Database, thus of the 25% which is not included, the following shall be released: Addressees AFF, Attachment(s), Authors AFF, Brand(s), Copyees, Document ID#, Document Type, Item Date, Other Names, Source, Title
Outside Attorney Database	Addressee, Attachments, Author, Brand Names, Copyee, Doc ID# Doc Type, Item Date, Other Name, Source, Title

R.J. Reynolds Tobacco Company shall also address the following discrepancies by *in camera* memorandum to the Court within three (3) days of this order:

1. McKim's Affidavit identifies two fewer fields for the Litigation Database (see Exh I) than Parker's Affidavit (p.5, para.8.).

2. McKim's Affidavit identifies six fewer fields for the DMS Database (see Exh J) than Parker's Affidavit (p.10, para.16).

3. McKim's Affidavit identifies one fewer field for the Additives Database (see Exh K) than Parker's Affidavit (p.12, para. 23).

4. McKim's Affidavit identifies two fewer fields for the Camel Database (see Exh L) than Parker's Affidavit (p.14, para. 30).

C. Brown & Williamson Tobacco Corporation shall release the following fields:

Litigation Database:	Document Identification Number, Document Date, Objective Date, Document Type, Primary Document Type, Secondary Document Type, Personal

[1] For purposes of this Order, production of indices shall be in the form of ASCII or WordPerfect 5.0/5.1 documents on 3.5 inch disk only and shall take place not later than two weeks from the date of implementation of this Order.
[2] See footnote 1 *supra*.

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	Names/Organizations, Recipient, Originator, Copyee, Mentioned, Forwarded To, Owner of Document, Attendee, File Folder Name, Area/Sub-Area Name, Brand Names, Verbatim Title, Substances, Substances No Code, Diseases
Stolen Database (Exhibits G&H)	DocID, Date File, Type, To, From, Orig, Title (V)erbatim only (i.e., may redact Title inferred)

D. Lorillard Tobacco Company shall release the following fields:

Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending Person Noted, Organization Author, Organization Recipient, Organization Copies, Organization Mentioned, Organization Attending, Organization Noted, File Name, Site, Area, Verbatim Title, Mentioned Brand

E. The American Tobacco Company shall release the following fields:

Exhibit A:	DOCNO, DATE, TITLE, TYPE, AUTHOR, RECIP, COPIES, PERSONS, BRANDS, PAGES, ATTACH, DRAFT, COMPS, ORGS
Exhibit B:	DOC_TYPE, BEGIN_DOC, END_DOC, TITLE, DESCRIPTION, AUTHOR, ADDRESSEE, COPIED, MENTION, DOC_DATE, ATTACHMENT, DRAFT
Exhibit C:	BEGIN_BATE, END_BATE, RENUMBERED, DOCNO, DATE, TITLE, TYPE, AUTHOR, RECIP, COPIES, PERSONS, BRANDS, PAGES, ATTACH DRAFT, COMPS, ORGS
Exhibit D:	BOXNO, BARCHNO, PAGESTART, PAGEEND, YRSTART, YREND, BLUESTART, BLUEEND, DATE, AUTHOR, RECIPIENT, PAGECOUNT
Exhibit E:	PAGENO, PAGESTART, PAGEEND, BLUESTART, BLUEEND, PAGECOUNT, YRNUMBER
Exhibit F:	BOX_NUMBER, BATCH_NO, START_PAGE, END_PAGE, BLUE_START, BLUE_END, DATE, AUTHOR, RECIPIENT, PAGE_COUNT, LOOSE
Exhibit G:	START_DATE, END_DATE, DOC_TYPE, AUTHOR, RECIPIENT, TITLE, PERS_COPIED, COMP_COPIED, NUMBER_PAGES, ATTACHMENT, PERSONS, COMPANIES, SUBJECTS, ATCO_FILES
Exhibit H:	Counsel represents that this exhibit contains portions of Exhibit B - Produce all information in fields listed at Exhibit B above.
Exhibit I:	Counsel represents that this exhibit contains portions of Exhibit C - Produce all information in fields listed at Exhibit C above.
Exhibit J:	Counsel represents that this exhibit contains portions of Exhibit G - Produce all information in fields listed at Exhibit G above.
Exhibit K:	This exhibit appears to merely list all field names already identified in Exhibits A through G. Accordingly, this summary need not be produced.

6. Liggett may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below, and it shall then produce[3] its index, as redacted, to plaintiffs:

Document Number, End Number, Date, Type, Author, Recipient, Name Mentioned

7. CTR may redact from its indices or databases all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce[4] its indices, as redacted, to plaintiffs:

Debevoise Database	Authors, Recipients, Copyees, Document Date and Date Qualifier, Title, Primary Doc, Primary Doc and Secondary Doc, Attendee, Mentioned Names, Brand Names and Reference Brands, Doc Range, Original Doc ID, Custodian, Doc ID
Special Projects Publications Database	Publ, Recip

[3] See footnote 1 *supra*.
[4] See footnote 1 *supra*.

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8. Institute may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce[5] its index, as redacted, to plaintiffs:

> PREFIX, BPROD, BSUFFIX, EPROD, OPROD, DATE, AUTHOR, ADDRESSEE, COPY, PLACE, TYPE, NAMES, COPY

9. B.A.T. and plaintiffs have already reached agreement with respect to certain objective fields of B.A.T.'s REVA database, and B.A.T. has begun and shall continue production of the following fields of information from its REVA database:

> Site, LWD File Number, R&DC File Number, File Title, Start Date, Finish Date, Location, Owner, Original File User, Projects, Reports, Pagination

B.A.T. may redact all other fields of information contained in its REVA database. As plaintiffs agree not to seek production of the CDIS database at this time, this Court need not address whether and to what extent the CDIS database is privileged.

10. Those fields of information redacted from each index pursuant to this Order need not be listed in a privilege log nor must each such index be marked as redacted in the location of the document where it is redacted. Any redactions other than those ordered herein, however, shall comply with the terms of the Case Management Order entered in this action.

11. This order, with respect to production of materials submitted *in camera*, shall be stayed for thirty (30) days from the date of filing. In the event the parties or any of them shall pursue appellate remedies within such thirty (30) day period, such stay shall be extended until the parties have exhausted their available appellate remedies. No party need produce to opposing counsel any materials submitted *in camera* until such stay has terminated.

12. Upon termination of such stay, all materials submitted to this Court *in camera* which remain in this Court's possession or under its control shall be returned to the submitting parties. Counsel may make arrangements with the Court's clerk to obtain their respective submissions.

13. The Memorandum attached hereto is incorporated herein.

MEMORANDUM

As a part of its Case Management Order dated March 29, 1995, this Court ordered the parties to produce existing indices, if any, of documents relative to the subject matter of this action. (*See* Case Management Order filed March 30, 1995, para. D.%.) Each party claiming that an existing index contained subjective information protected by attorney-client or work product privilege was ordered to submit the index to the Court for *in camera* inspection and determination. (*See* July 17, 1995, Order, para. 4.A., and August 10, 1995, Order.) Five defendants, namely the "Moving Defendants" identified in the Order attached hereto, sought modification of that Order, claiming that production of full copies of all existing indices would be unduly burdensome due to the millions of documents such indices identified. Moving Defendants motion was granted and they were allowed to comply with the August 10, 1995, Order by providing exemplar discs of portions of each existing index. (*See* August 17, 1995, Order.) Defendant B.A.T. Industries, p.l.c. ("B.A.T.") and plaintiffs came to agreement with respect to B.A.T.'s indices, and Stipulated Orders reflecting their agreement were filed August 18, 1995, and September 6, 1995. Accordingly, all parties produced indices or exemplar indices to the Court for *in camera* review, seeking protection from discovery of all or part of each index.

The scope of discovery is, by definition, very broad. As set forth in the Minnesota Rules of Civil Procedure:

> Parties may obtain discovery regarding *any matter*, not privileged, which is relevant to the subject matter involved in the pending action… including the existence, description, nature… and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably *calculated to lead to* the discovery of admissible evidence.

Minn. R. Civ. P. 26.02 (1995) (emphasis added). Limitations, however, exist. Relevant here is the work product privilege for materials prepared in anticipation of litigation.

The parties state that the databases which

[5] See footnote 1 *supra*

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contain the information from which each index is produced were prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Minn. R. Civ. P. 26.02(3) (1995); *See Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947). This is undisputed. Accordingly, discovery of the database may be had only if the party seeking discovery shows "substantial need" of the materials to prepare the party's case and that the party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* Further, once such a showing has been made, the Court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of attorneys or other representatives concerning the litigation. *Id.* As discussed below, this Court has examined the arguments and materials submitted by the parties and finds that the proper showing has been made. Counsel have demonstrated that certain portions of the databases, however, reflect counsel's opinions and theories. Accordingly, this Court protects such opinion work product from discovery, ordering production of objective information only.

In this action, millions of documents must be reviewed to sieve the relevant documents from those that constitute the remainder of each party's universe of documents. Much of the reviewing has already taken place over the years by counsel for the parties in response to prior claims. Certain information was deemed relevant or important enough that counsel wished to be able to identify and locate it without undue burden. In many cases a computerized database was employed by counsel to list the hundreds and thousands of documents reviewed and keep track of the information. The masses of information on the database can be selected, accessed, and located more quickly and accurately by computer than by other processes and without duplication of effort.

The parties have disclosed that millions of pages of documents will be produced during discovery in response to discovery requests. For example, defendants have estimated that they will eventually produce 9,000,000 pages. If five attorneys were to devote 12 hours each per day, five days per week, to the task of reviewing those nine million pages - and limit their review to one minute per pate - it would take nine years to review those documents alone. Creation of a new and separate database identifying the nine million documents would be duplicative, time-consuming, and costly.

Because of the enormous volume of documents which may be relevant to the issues of this complex action, there is substantial need to utilize whatever technology exists to efficiently sort and identify documents. There is no equivalent substitute for the databases at this time. Via use of the existing databases, objective information can be produced regarding the millions of documents already entered onto the databases, without duplication of efforts and the accompanying delays and expenses. This Court finds that the required showing of substantial need and inability to obtain the equivalent without undue hardship has been met.

The Court, however, must protect against disclosure of attorney impression, opinions, and theories. A database in its entirety may reveal too much. The design of a database, its use, and detailed descriptions, as well as instructions and guidelines as to particular information to be extracted from documents to be coded, may reveal counsel's theories and mental impressions. *IBM Peripherals*, 5 Comp. Law Serv. Rptr. 878 (N.D. Cal. 1975). The computerized databases, in their entireties, therefore, shall not be disclosed to opposing counsel. Certain information contained within each database, however, does not reveal attorneys' mental impressions, strategies, opinions, or theories; it is no offered the same degree of protection from disclosure.

When reviewing a document for coding into a database, certain items or fields are determined to be important. Individual pieces of information selected for insertion on the database are objective, such as the date printed on a document, its author, its title, or its recipient. Some fields are administrative, such as date reviewed, reviewer's/coder's name, date entered on the database, and duplicate check features. Some information entered is subjective, such as whether a document contains confidential information or trade secrets, whether a document could serve as strong evidence for or against a particular legal position, comments, etc. Where objective information may be disclosed without revealing mental impressions and without undue burden, the information does not merit protection.

This Court has examined the *in camera* submissions of the parties to factually evaluate the information contained in the various databases. The Court does not find persuasive defendants' argument that mere selection of documents for insertion onto the database reveals counsel's mental impressions, strategies, and thought processes. Counsel have selected thousands of documents to index, not "a few documents out of thousands." *Sporck v. Peil*, 759 F.2d 312, 316, *cert. denied*, 474 U.S. 903, 106 S.Ct. 232, 886 L.Ed.2d 230 (1985). Many of the databases at issue reference millions of documents and hundreds of subjects; they were created over a period of years for numerous lawsuits and potential claims. *Cf. Shelton v.*

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American Motors Corp, 805 F.2d 1323, 1329 (8th Cir. 1986) (the Court protected an attorney from listing at deposition those documents "important enough to remember"). Unlike identifying a few significant documents out of thousands, the sheer number of the documents identified in the indexes at issue provide protection. Access to an opponent's index of thousands of documents gathered for litigation aids efficiency in discovery without revealing strategy. *Washington Bancorporation v. Said*, 145 F.R.D. 274, 277 (D.D.C. 1992). Not every piece of information in a list which may in some sense reveal counsel's mental impressions is protected as opinion work product. *In Re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st. Cir. 1988). In many cases, the parties have themselves described certain fields of information as objective.

The Court has examined the numerous examples of the indices which were produced by the parties' databases and has determined that fields containing objective information exist in each database, as do fields containing administrative and subjective information. The parties have each stated that it is possible without undue burden to produce an index from each database that contains certain selected fields while protecting from disclosure other fields of information. This Court must protect from disclosure subjective and administrative information with respect to the databases which may reveal protected opinion work product. Accordingly, this Court orders that only the objective information contained in the fields identified in the Order attached hereto be produced to avoid inefficient, extended, expensive discovery to the extent possible.

The tools themselves, the databases in their entireties, are not discoverable. Certain forms of information produced by the tools, such as indices, are. The parties can produce indices of objective information on the millions of documents on their databases without revealing attorney opinion, mental impressions, strategies, or theories. Such indices are not protected opinion work product and, because their production will prevent duplication of time, effort, and expense in the discovery phase of this complex action, such indices are discoverable.

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