

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA,

Case Type: Other Civil

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

COURT FILE NO. CF-94-8565

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.

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL
DISCOVERY CONCERNING PRODUCT STANDARDS, ETC.**

Defendants hereby respond to plaintiffs' motion to compel the production of documents described in plaintiffs' August 5 letter regarding "product standards," among other things.

I. **BACKGROUND**

This matter does not belong before the Court. Indeed, plaintiffs' latest discovery dispute over "product standards" represents an example of plaintiffs' apparent strategy in recent months: bringing as many discovery disputes as possible before the Court rather than trying to resolve such disputes through any genuine "give and take" discussions to address the parties' concerns.

Over the course of these proceedings, the defendants have undertaken extraordinary efforts to informally resolve a wide variety of discovery requests by way of letters. All told, the defendants have received and responded to hundreds of letters from plaintiffs' counsel addressing a wide variety of issues in this case, including a significant number of discovery issues. On the vast majority of those issues, the defendants have accommodated the plaintiffs' requests.

Plaintiffs' latest "motion to compel" arises out of one such letter. On August 5, 1996, plaintiffs sent a letter identifying categories of documents that exceed the scope of their own document requests and calling for the production of certain documents that even the plaintiffs would not want. After reviewing plaintiffs' document requests and plaintiffs' letter, certain defendants explained their concerns with plaintiffs' letter request. The responding defendants nonetheless indicated, however, that they would produce the documents described in plaintiffs' letter to the extent they were responsive to plaintiffs'

existing document requests.¹

Unfortunately, the defendants could not agree to all of the terms set forth in plaintiffs' letter because, even by plaintiffs' standards, plaintiffs' letter request was simply overbroad. Plaintiffs' letter request, for instance, sought whole categories of documents that do not even relate to smoking and health. Moreover, plaintiffs' letter request would require new and expanded searches, which the defendants have not yet undertaken.

Of course, if plaintiffs still wanted the broader categories of documents set forth in their letter, they could have simply served a new document request, so the parties could lodge appropriate objections and, to the extent possible, undertake appropriate inquiries. Why the plaintiffs did not do so remains a mystery.² Instead, plaintiffs embarked upon an unpleasant campaign of correspondence, repeatedly accusing the defendants of "gamesmanship." Such correspondence is both unnecessary and unwarranted in these proceedings.

The correspondence with Reynolds represents an example of plaintiffs'

1. The categories of documents that the defendants are producing in response to plaintiffs' existing requests are described in the defendants' document responses or in other agreements reached among the parties.

² The only possible explanation for the somewhat puzzling position that plaintiffs have taken on this issue is a desire to force their new "letter" request into the existing production schedule. As the Court is aware, the Court's March 20, 1996 order requires that "[t]o the extent not already produced, the parties shall produce all documents properly requested on or before March 5, 1996 ("Requested Documents"), depositing them in the appropriate Document Depository not later than December 31, 1996." (See March 20, 1996 Order, p. 2, ¶ 1). The defendants are investing enormous resources to complete that production. Documents requested by plaintiffs after March 5, 1996, however, are not subject to that deadline. (See Court's March 20, 1996 Order, p. 2, ¶ 1). Apparently the plaintiffs do not want to serve a document request for the documents they now seek, because they want to take the position that the new categories were "requested before March 5, 1996." If that is plaintiffs' reasoning, it is plainly improper. The plaintiffs' letter request is overly broad for the reasons stated in this memorandum, but, even if plaintiffs' motion to compel were granted, it would be unfair, impracticable, and unduly burdensome to place the production of those new categories of documents on the existing December 31, 1996 production schedule.

communications on this issue. Plaintiffs' August 5, 1996 letter to all defense counsel states as follows:

Please be advised that all documents relating to agreements or potential agreements or understandings or discussions on product standards, designs, ingredients, specifications, additives, etc., among one or more defendant [sic] 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.

Please let me know immediately if you disagree.

(Affidavit of Corey Gordon ("Gordon Aff."), Ex. 14.)

The first paragraph of plaintiffs' letter would require "all documents relating to" any "discussions on product standards" -- whether or not such standards relate to smoking and health. As plaintiffs know, cigarette manufacturers and vendors may discuss many product standards -- just as other manufacturers and vendors do -- regarding such things as the size of cigarettes, the size of packaging, and so on. Even plaintiffs have conceded they do not want certain types of those documents. Nor have the defendants been searching for them.

On August 12, 1996, Reynolds responded to plaintiffs' letter, noting that plaintiffs' August 5 letter "appears to request additional documents beyond plaintiffs' previously served document requests." Of course, Reynolds was only doing what plaintiffs requested -- advising the plaintiffs as to whether the defendants "disagree" with plaintiffs' August 5 letter. In an effort to resolve the matter, however, Reynolds also noted that it is producing the documents sought by plaintiffs to the extent they fall within the categories of

documents responsive to plaintiffs' existing document requests. (Gordon Aff., Ex. 15.)

Reynolds presumed that would resolve the issue.

Two days later, however -- on August 14 -- plaintiffs replied as follows:

Your proviso that Reynolds will be producing documents "to the extent that they are otherwise responsive to the category of documents" does not, of course, address the issues raised in my letter. As stated in my letter, plaintiffs believe that such documents are responsive. To the extent that Reynolds believes that certain documents are not encompassed by our request, please advise us as to specific categories of documents described in my letter which Reynolds is withholding. Also, please be advised that we intend to place this issue on the agenda for the September 10 status conference if we cannot resolve this prior to that time.

(Gordon Aff., Ex. 15.)

In response to that letter, Reynolds wrote back on August 27, 1996, restating that plaintiffs' August 5 letter is inaccurate. The documents described in that letter simply are not "encompassed" by plaintiffs' existing requests. As Jonathan Redgrave stated in his letter:

I understand that Reynolds is undertaking a reasonable inquiry to locate and produce or list on a privilege log documents responsive to plaintiffs' formal document requests as agreed upon, except as they are objected to. In doing so, Reynolds will be producing documents that may fall within the categories identified in your August 5, 1996 letter to the extent that they also fall within your previously served document requests as agreed upon.

By the same token, you should note that Reynolds is not producing all documents that may fall within the categories identified in your letter because none of plaintiffs' existing document requests correspond to all of the documents that may be within the categories your letter sets forth. For example, there is no request to Reynolds for the production of "all documents relating to agreements or potential agreements

or understandings or discussions on product standards." As such, my August 12, 1996 letter to you simply reflects the fact that Reynolds is not producing documents that you have not requested under Rule 34.

(Gordon Aff., Ex 15.)

Again, Mr. Redgrave's position hardly seemed unreasonable. Plaintiffs' initial August 5 letter asked the defendants to advise the plaintiffs as to whether the documents described in that letter were "encompassed" by plaintiffs' existing requests. After reviewing the requests, the answer was "no." Again, however, Reynolds indicated that it would produce the documents at issue if they were responsive to the plaintiffs' existing requests as set forth in Reynolds' responses.

Nonetheless, one day after receiving Mr. Redgrave's August 27 letter, Ms. Walburn telecopied the enclosed letter to him:

This is the fifth piece of correspondence which we have now exchanged relating to what started as a simple inquiry by plaintiffs on August 5 regarding the production of certain documents. RJR's obstinance in this regard is but one example of defendants' continuing attempts to make discovery in this action as difficult as possible. We intend to place this matter on the agenda for the September 10 status conference, as we previously advised you. We see no reason why this matter could not have been resolved with a simple single exchange of correspondence.

(Gordon Aff., Ex. 15.)

After receiving that letter, Mr. Redgrave called plaintiffs' counsel in an effort to discuss and resolve this issue. Mr. Redgrave explained that the plaintiffs' letter was simply too broad and noted that plaintiffs' request may include mundane things, such as equipment standards, which Ms. Walburn indicated she did not want. As a follow-up to that discussion, Mr. Redgrave also again reviewed all 155 document requests previously

served by plaintiffs. After completing that review, Mr. Redgrave again wrote to plaintiffs in an effort to resolve this matter. (Gordon Aff., Ex. 15.)

In that letter, Mr. Redgrave states:

In light of our discussion on Friday, August 30, 1996, however, I have again reviewed this matter. In particular, I have reviewed each of the plaintiffs' existing 155 document requests to Reynolds and I have been unable to identify any request that calls for the categories that your August 5, 1996 letter purports to identify. In addition, during our discussion, I understood that you did not want documents that discuss equipment standards, if any exist, which your letter would appear to request. Stated simply, your letter requests, as drafted, appear to exceed plaintiffs' document requests and would appear to call for documents that plaintiffs do not want.

In an attempt to resolve this matter, Reynolds agrees that it will not withhold from its production or logging of documents that are responsive to plaintiffs' previously-served document requests, as previously agreed upon by Reynolds, any documents on the grounds that they discuss or refer to the items set forth in your August 5, 1996 letter (excluding, of course, the category of "etc." as we discussed last Friday). To the extent that plaintiffs want a collection of documents broader than those previously requested, however, plaintiffs should serve a document request for such documents, so that we can attempt to resolve this issue in the context of a document request.

(Gordon Aff., Ex. 15.)

After sending that letter, Mr. Redgrave also again called Ms. Walburn to discuss resolving the issue. Ms. Walburn did not return the telephone call. Instead, plaintiffs sent yet another letter the next day, communicating the following:

Your letter of September 3 continues defendants' gamesmanship on this issue. Despite repeated correspondence, we are no closer to resolution. Also, it now appears that Philip Morris has been using RJR as a stalking horse on this issue. A number of representations in your letter are inaccurate, and I will not take the time herein to correct the

record previously established. We will not serve a new document request on this matter since (1) our existing document requests cover these issues and (2) to the extent that defendants believe the existing requests are insufficient, you have had one month now to respond to my letter of August 5.

(Gordon Aff., Ex. 15.)³

In short, this entire "dispute" -- and plaintiffs' correspondence regarding it -- grows out of one letter. The plaintiffs sent a letter indicating that they felt certain categories of documents were "encompassed" by the plaintiffs' existing requests and asking the defendants whether they "disagree[d]." The defendants reviewed plaintiffs' existing requests and concluded that plaintiffs were in error. The defendants noted that they would be producing the documents described in plaintiffs' letter if they were responsive to existing requests, but could not agree to all of the terms in plaintiffs' letter. Instead of simply narrowing the terms of their informal request, or serving a document request under Rule 34, plaintiffs filed the instant motion to compel. That motion is not well taken.

II. **ARGUMENT**

A. **Plaintiffs Motion To Compel Is Not Properly Before This Court, Because Plaintiffs "Letter" Requests Exceed The Scope Of Plaintiffs' Own Document Requests.**

Plaintiffs' "motion to compel" arises out of one letter that requests new categories of documents that are substantially broader than plaintiffs' own document requests.

Just by way of example, plaintiffs' letter seeks to have the Court order production of all "documents relating to . . . discussions relating to the . . . use by one or

³Plaintiffs' reference to documents discussing "maximum use levels" raises the same issue. (Gordon Aff., Ex. 15.) (Sept. 13, 1996 Letter from Jeffrey J. Jones to Roberta Walburn.)

more defendants of another defendant's patent(s) relating to smoking and health." (Gordon Aff., Ex. 14.) There is simply no outstanding document request that addresses the use of every patent by a co-defendant.

Similarly, plaintiffs' letter seeks all "documents relating to agreements . . . on . . . designs," which, on its face, is extremely broad. A few existing document requests relate to cigarette "designs." Examples include:

All documents relating or referring to methods of designing or manufacturing cigarettes so that the actual intake of tar or nicotine by smokers would be less accurately reflected by the Federal Trade Commission testing methods or would be different from the levels reflected by the Federal Trade Commission testing methods.

(Request No. 116 from Plaintiffs' First Set of Requests.)

All documents relating or referring to the placement of ventilation holes in the filters of cigarettes in a manner which might affect or alter the Federal Trade Commission testing results as compared with the actual smoking by persons.

(Request No. 117 from Plaintiffs' First Set of Requests.)

Obviously, the nature of the "design" information sought by these and other similar requests differ substantially from the nature of the information sought by plaintiffs' August 5 letter, which specifies no particular "design" information of any kind. Similarly, plaintiffs' letter seeks "all documents relating to . . . discussions on product standards." (Gordon Aff., Ex. 14.) There is no document request for all discussions on product standards, including, for instance, standards having nothing to do with "smoking and health."

In short, there is no outstanding document request that purports to seek all of the categories of documents set forth in plaintiffs' August 5 letter. In their motion to compel,

plaintiffs now claim that their requests regarding such subjects as cancer, arteriosclerosis, and emphysema "certainly" encompass the broader categories of standards, designs, ingredients, specifications, and additives. (See Plaintiffs' Memorandum in Support of Motions to Compel Discovery at 12). But that is simply wrong. A simple comparison of plaintiffs' document requests to plaintiffs' letter makes that clear. (Aff. of Jonathan M. Redgrave in Support of Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery Concerning Product Standards, Etc., Ex. 1.)

Moreover, the defendants have already agreed to produce the documents sought by plaintiffs' August 5 letter to the extent they are responsive to plaintiffs' existing requests. The defendants, however, simply could not "agree" that all of the documents sought by plaintiffs' August 5 letter are encompassed by plaintiffs' existing document requests. On that issue, the defendants are clearly correct.

In short, plaintiffs' motion to compel is improper. Plaintiffs cannot move to compel the production of documents under Rule 34 of the Minnesota Rules of Civil Procedure that have never been requested by way of a document request under Rule 34. Accordingly, plaintiffs' motion does not belong before the Court.

B. Even If Plaintiffs Had Served Their Letter Request In The Form Of A Document Request, It Is Overly Broad.

Plaintiffs have not yet served a document request seeking all the documents sought in their letter. But, even if they had, that request would be overly broad as currently drafted.

Plaintiffs, for instance, seek an order to compel the production of the following materials: (1) "all documents relating to agreements or potential agreements or understandings or discussions on product standards, designs, ingredients, specifications,

additives, etc., among one or more defendant [sic] in this litigation" and (2) "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." (Gordon Aff., Ex. 14.) Those requests are overbroad.

Plaintiffs bear the burden of demonstrating how all discussions relating to any product standards or all potential discussions concerning any designs can be relevant to this litigation. See, e.g., Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115, 121 (N.D. Ind. 1991); Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93, 101 (N.D. Ga. 1977). Unless the information sought is relevant, discovery is not available. See Minn. R. Civ. P. 26.02(a); Shetka v. Kueppers, Kueppers, Von Feldt and Salmen, 454 N.W.2d 916, 919 (Minn. 1990); EEOC v. University of Pennsylvania, 850 F.2d 969, 979 (3d Cir. 1988), aff'd, 493 U.S. 182 (1990). Here, plaintiff cannot make the required showing.

In fact, plaintiffs' letter requests purport to seek documents regarding "product standards" -- whether or not they relate to smoking and health. Likewise, plaintiffs purport to seek documents regarding "patent" issues -- regardless of the particular "patents" at issue. Even plaintiffs have indicated they do not want all of the documents potentially responsive to their letter requests as written. (Gordon Aff., Ex 15.) (Sept. 13, 1996 letter from Jonathan M. Redgrave to Roberta Walburn.) Indeed, given plaintiffs' repeated complaints about purportedly insignificant documents, it makes no sense to order the defendants to produce documents in response to overly broad requests.

Accordingly, plaintiffs should simply narrow the terms of their August 5 letter and serve it in the form of a document request, so the parties can respond to that request as the Civil Rules contemplate and, hopefully, resolve this issue without the need for any

court involvement.

III. Conclusion

For the foregoing reasons, the defendants respectfully request the Court deny plaintiffs' motion to compel the production of documents currently described in plaintiffs' August 5 letter.

Dated: September 30, 1996

Respectfully submitted,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

By _____
James S. Simonson (Bar No. 10133)
Jonathan M. Redgrave (Bar No. 221922)
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402-3796
(612) 343-2800

JONES, DAY, REAVIS & POGUE
Robert F. McDermott, Jr. (pro hac)
Barbara McDowell (pro hac)
Metropolitan Square
1450 G Street
Washington, D.C. 20005-2088
(202) 879-3939

Jeffrey J. Jones (pro hac)
1900 Huntington Center
Columbus, Ohio 43215
(614) 469-3939

On Behalf of R.J. REYNOLDS TOBACCO
COMPANY And Counsel For The Other
Defendants (See Appendix of Counsel)

APPENDIX OF COUNSEL

American Tobacco

Mary T. Yelenick, Esq.
Chadbourn & Parke
30 Rockefeller Plaza
New York, NY 10112

Byron E. Starns, Jr.
Leonard, Street & Deinard
2270 Minnesota World Trade Center
30 East Seventh Street
St. Paul, MN 55101

John W. Getsinger
Leonard, Street & Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

B.A.T. Industries

Michael V. Corrigan
John C. Gustafsson
Patrick D. Bonner
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017-3954

Gerald L. Svoboda, Esq.
Fabyanske, Svoboda, Westra,
Davis & Hart
1100 Minneapolis Centre
920 Second Avenue South
Minneapolis, MN 55402

Brown & Williamson

William E. Hoffman, Jr.
Richard A. Schneider
King & Spalding
2500 Trust Company Tower
191 Peachtree Street, N.E.
Atlanta, GA 30303-1763

Steven D. McCormick
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

Jack M. Fribley, Esq.
Faegre & Benson
200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901

Council for Tobacco Research

Steven Klugman, Esq.
Joseph P. Moodhe, Esq.
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022

Gary J. Haugen, Esq.
Maslon, Edelman, Borman & Brand
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140

Liggett Group

Michael M. Fay
Kasowitz, Benson,
Torres & Friedman, L.L.P.
1301 Sixth Avenue
New York, NY 10019

Robert V. Atmore, Esq.
Lindquist & Venum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2205

Lorillard Tobacco

William J. Crampton
Gene E. Voights
Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

David G. Martin
Doherty, Rumble & Butler
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, MN 55101

Philip Morris Incorporated

Thomas E. Silfen
Arnold & Porter
555 - 12th Street, N.W.
Washington, D.C. 20004-1202

Maurice A. Leiter, Esq.
Arnold & Porter
777 South Figueroa Street
44th Floor
Los Angeles, CA 90017-2513

Mark B. Helm
Munger, Tolles & Olson
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560

Peter Sipkins
Michael A. Lindsay
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402-1498

Tobacco Institute

Paul R. Duke
Patrick Davies
John Vanderstar
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

George W. Flynn, Esq.
Cosgrove, Flynn,
Gaskins & O'Connor
29th Floor, Lincoln Centre
333 South Seventh Street
Minneapolis, MN 55402

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