

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

THE STATE OF TEXAS,	§	CIVIL NO.: 5:96-CV-0091
Plaintiff,	§	
	§	
VS.	§	
	§	JUDGE: DAVID FOLSOM
THE AMERICAN TOBACCO	§	
COMPANY; R. J. REYNOLDS	§	
TOBACCO COMPANY;	§	MAGISTRATE JUDGE:
BROWN & WILLIAMSON TOBACCO	§	WENDELL C. RADFORD
CORPORATION; B. A. T.	§	
INDUSTRIES, P. L. C.; PHILIP	§	
MORRIS, INC.;	§	
LIGGETT GROUP, INC.; LORILLARD	§	
TOBACCO COMPANY, INC.; UNITED	§	
STATES TOBACCO COMPANY; HILL	§	
& KNOWLTON, INC.; THE	§	
COUNCIL FOR TOBACCO	§	
RESEARCH-USA, INC. (Successor to	§	
Tobacco Institute Research Committee);	§	
and THE TOBACCO INSTITUTE, INC.	§	
Defendants.	§	

**PLAINTIFF’S MOTION TO DEEM PRIVILEGES, IF ANY,
WAIVED FOR FAILURE TO PRODUCE PRIVILEGE LOGS**

Plaintiff, the State of Texas, respectfully requests that this Court order that any privileges allegedly attached to documents and things are waived by certain Defendants’¹ failure to produce any privilege logs.

Article Two of the Civil Justice Expense and Delay Reduction Plan of the Eastern District of Texas requires disclosure of a privilege log. Article Two states, in part:

There is no duty to disclose privileged documents. Privileged documents or information shall be identified and the basis for the claimed privilege shall be disclosed.

¹ United States Tobacco Co. and Hill & Knowlton, Inc.

Judge Folsom, in his January 3, 1997, “Order Modifying Magistrates Discovery Order,” reiterated and clarified the requirement to disclose privilege logs. In that Order, Judge Folsom specifically ordered:

Privileged documents or information shall be identified and the basis for the claimed privilege ... disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

January 3, 1997 Order Modifying Magistrates Discovery Order, at 2-3.

Nevertheless, without excuse, two Defendants have not identified in any sort of privilege log, a single document to which they claim a privilege. They have further objected to and refused to produce privilege logs from other smoking and health litigation.

Documents that are likely to bear significantly on any claim or defense in this case should have been produced by June 5, 1996, the original Court ordered disclosure date. Defendants should have either produced the documents then or, if they claimed they some privilege, they should have produced a privilege log identifying these documents and the basis for the privilege.

Defendants’ refusals to produce documents and a privilege log are flagrant abuses of discovery and openly contemptuous of this Court’s Order. Plaintiff conferred with Defendants’ Liaison counsel requesting compliance with the Court’s orders in the letters attached as exhibits “A” and “B,” all to no avail.

Defendants, United States Tobacco Company and Hill & Knowlton, Inc. have failed to provide any privilege log for documents. Hill & Knowlton has apparently filed something *in camera* related to “document indices databases.” This filing does not meet the requirements discussed above.

If this filing is a privilege log, it is inadequate for two separate reasons. First, the filing does

not, “enable other parties to assess the applicability of the privilege or protection,”² because it was submitted to the Court under seal. The State therefore cannot determine the validity of any assertion of privilege. Second, the description supplied by Hill & Knowlton suggests that this is not a document privilege log, but rather concerns the *in camera* inspection of their “4A” type document indices.

For Defendants’ failure to identify any privileged documents or the basis of any claim of privilege, the State respectfully requests that this Court order that these Defendants have waived any claims of privilege concerning documents and information, pursuant to Fed. R. Civ. P. 37(b)(2) and that Defendants be ordered to disclose all documents that are likely to bear significantly on any claim or defense in this case, as well as all documents responsive to the State of Texas’ Requests for Production of Documents. And, failing complete production as required by the Plan and this Court’s prior Orders, the State of Texas respectfully requests an appropriate sanction of striking Defendants’ pleadings.

Respectfully submitted:

DAN MORALES
ATTORNEY GENERAL OF TEXAS
Texas Bar No.: 14417450

JORGE VEGA
First Assistant Attorney General
Texas Bar No.: 20533800

JAVIER AGUILAR
Special Assistant Attorney General
Texas Bar No.: 00936300

TOM PERKINS
Chief, Consumer Protection Division
Texas Bar No.: 15790850

² Order Modifying Magistrates Discovery Order of January 3, 1997, at p.2-3.

HARRY G. POTTER III
Special Assistant Attorney General
Texas Bar No.: 16175300
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
512.463.2191
512.463.2063 Fax

JOHN M. O'QUINN, P.C.
440 Louisiana St., Suite 2300
Houston, Texas 77002
713.223.1000
713.222.6903 Fax
Texas Bar No.: 15296000

JOHN EDDIE WILLIAMS JR.
8441 Gulf Freeway, Suite 600
Houston, Texas 77017
713.649.6464
713.943.6226 Fax
Texas Bar No.: 21600300

WAYNE REAUD
REAUD, MORGAN & QUINN, INC.
801Laurel
Beaumont, Texas 77701
409.838.1000
409.833.8236 Fax
Texas Bar No.: 16642500

HAROLD W. NIX
NIX LAW FIRM
205 Linda Drive
P. O. Box 679
Daingerfield, Texas 75638
903.645.7333
903.645.5389 Fax
Texas Bar No.: 15041000

HUGH E. MCNEELY, of Counsel for
Provost & Umphrey Law Firm, L.L.P.
2901 Turtle Creek Drive, Suite 201
Port Arthur, Texas 77642
409.727.0800
409.727.7671 Fax
Louisiana Bar No.: 10,628

GRANT KAISER
KAISER & MORRISON, P.C.
Suite 1440 Lyric Centre
440 Louisiana Street
Houston, Texas 77002-1634
713.223.0000
713.223.440 Fax
State Bar No.: 11078900

WALTER UMPHREY, P.C.*
490 Park
P. O. Box 4905
Beaumont, Texas 77074
409.835.6000
409.838.8888 Fax
Texas Bar No.: 20380000
ATTORNEY-IN-CHARGE

* By Grant Kaiser with the permission of Walter Umphrey.

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document and diskette has been sent by overnight delivery service and filed on March 13, 1997, to the following:

ADMINISTRATIVE LIAISON COUNSEL FOR ALL DEFENDANTS:

Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, TX 75505-5517
903.792.8246
903.792.5801 Fax

Respectfully submitted,

Grant Kaiser

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Tobacco Institute Research Committee);	§	
and THE TOBACCO INSTITUTE, INC.	§	
Defendants.	§	

**ORDER GRANTING PLAINTIFF’S MOTION TO DEEM PRIVILEGES WAIVED FOR
FAILURE TO PRODUCE PRIVILEGE LOGS**

Plaintiff’s Motion to Deem Privileges Waived for Failure to Produce Privilege Logs was considered by the Court today. After considering all filings related to this motion, arguments, if any, of counsel and applicable law, the Court is of the opinion the Motion should be granted.

IT IS THEREFORE ORDERED that all privileges as to documents and information that may have been asserted in this action by Defendants United States Tobacco Company and Hill & Knowlton, Inc., are hereby deemed waived. It is further,

ORDERED that Defendants United States Tobacco Company and Hill & Knowlton, Inc., shall produce all documents likely to bear significantly on any claim or defense in this cause and all documents responsive to the State of Texas’ Requests for Production of Documents within ____ days of this order. It is further

ORDERED, given Defendants United States Tobacco Company and Hill & Knowlton, Inc., failure to comply with the Plan and prior Court orders, that their failure to comply with this Order, appropriate sanctions, including striking of their pleadings, will be ordered.

SIGNED THIS _____ DAY OF _____, 1997.

MAGISTRATE JUDGE WENDELL C. RADFORD
UNITED STATES DISTRICT COURT