

PLAINTIFF'S MOTION TO DEEM PRIVILEGES, IF ANY, WAIVED  
FOR FAILURE TO PRODUCE PRIVILEGE LOGS (3/13/97)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY;  
BROWN & WILLIAMSON TOBACCO 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.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

**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' [ United States Tobacco Co. and Hill & Knowlton, Inc.] 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.

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," [ Order Modifying Magistrates Discovery Order of January 3, 1997, at p.2-3.] 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  
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[Additional Plaintiff's attorneys omitted]

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#### **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:

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Respectfully submitted,

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