6-6-96

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID TOMPKIN, et al.,

Plaintiffs,

vs.

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants.

Civil Action No. 5:94CV1302
Judge David D. Dowd, Jr.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

From the inception of this litigation, plaintiffs have sought extraordinarily expansive discovery. Although plaintiffs' document requests have been somewhat narrowed, defendants have been, and continue to be, engaged in a burdensome and expensive document review process. As of early February 1996, Philip Morris and Lorillard had made available for plaintiffs' review over 100,000 pages, and American Tobacco offered, in late April, to make approximately 250,000 pages available for review upon entry of a protective order.[1]

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1. Philip Morris' and Lorillard's documents were made immediately available for plaintiffs' review, conditioned upon plaintiffs' agreement to treat the documents as confidential pending entry of a protective order. (See letters from defense counsel to Russell Smith dated January 30, February 2, and April 8, copies attached as Exhibits A, B and C.) To that end, defendants had provided plaintiffs with a draft protective order in early April. (continued...)

Significantly, plaintiffs do not complain that defendants have failed to produce documents or follow the Court's discovery orders. Indeed, plaintiffs have made no effort to review any of the 350,000 pages of responsive documents made available for plaintiffs' review. Instead of making any effort to review documents which plaintiffs demanded be produced, plaintiffs seek to compel defendants to identify, on a document-by-document basis, which documents "have previously been produced in the Castano class action suit or in any of the tobacco injury cases brought by attorney Marc Edell against any of Defendants."[2] Plaintiffs admit that the sole purpose of this request is to enable them to coordinate with plaintiffs' counsel in other tobacco cases so that plaintiffs herein can limit their review to only those documents

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1.(...continued)

To date, plaintiffs have not responded to either the letters or the draft protective order.

2. Plaintiffs' initial oral request for this information was made in early April 1996. By letter dated April 23 (copy attached as Exhibit D), defendants reiterated their request for plaintiffs' comments on defendants' proposed protective order. Defendants further responded to plaintiffs' oral request, as follows:

> Defendants are unclear of the purpose behind this eleventh-hour request made more than six months after entry of the discovery order in the case and almost four months after the issue of document production was last before Judge Dowd. Absent some explanation for the purpose of this belated request, defendants respectfully decline plaintiffs' request to undergo such a burdensome and pointless exercise.

Defendants did not receive any response to the letter (oral or written) until plaintiffs filed their motion to compel. The parties have discussed this matter since the motion to compel was filed, but they have been unable to resolve the dispute.

which defendants have not previously produced in certain tobacco lawsuits.

In short, plaintiffs' motion presents the novel question of whether defendants, after being required to engage in an expensive and burdensome document production process, can be forced to assist plaintiffs in identifying certain documents which plaintiffs now say they do not wish to review. For the reasons stated below, defendants respectfully request that plaintiffs' motion to compel be denied.

ARGUMENT

A. There Is No Legal Support For Plaintiffs' Motion

As previously stated, plaintiffs do not contend that defendants' document production is deficient in any respect. Defendants have made available for review only those documents which plaintiffs demanded be produced.

Not one of the cases cited by plaintiffs stands for the proposition that a defendant can be compelled to sort, organize, identify or index a document production so as to facilitate a plaintiff's desire to "coordinate" the prosecution of certain claims against that defendant with counsel for plaintiffs involved in similar litigation elsewhere. Indeed, the cases on which plaintiffs rely are readily distinguishable on the ground that each involved evidence of affirmative misconduct or abuse of the discovery process by a litigant responding to a discovery request

pursuant to Fed. R. Civ. P. 33(d).[3] In this case, there is no claim that defendants have, in any way, acted in bad faith. Moreover, defendants are producing documents pursuant to Fed. R. Civ. P. 34, not Rule 33(d).

In fact, the ruling in Technitrol (cited by plaintiffs) supports defendants' position. In response to the defendants' interrogatories in that case, the plaintiff opted to invoke an earlier version of Rule 33(d) and voluntarily "opened its files. . . and made available all of the documents requested." Technitrol, Inc. v. Digital Equip. Corp., 62 F.R.D. 91, 93 (N.D. Ill. 1973). Like plaintiffs here, however, the party seeking discovery in that case sought an order requiring the defendant to further "sort out the material" produced. Id. Finding that a litigant "is not required to structure and organize" its opponent's case, the court denied the motion to compel. Id. A similar result should obtain here.

B. Defendants Should Not Be Compelled to Perform Plaintiffs' Work

Plaintiffs have been advised, from the earliest stage of this case, that their broad

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3. In American Rockwool v. Owens-Corning Fiberglass Corp., 109 F.R.D. 263, 265 (E.D. N.C. 1985), the court found that the defendant had "abused Rule 33(d) by failing to specify its records in sufficient detail to permit American Rockwool to locate and identify . . . the records from which the answers to the interrogatories could be ascertained." Similarly, in Bell v. Automobile Club of Michigan, 80 F.R.D. 228, 232 (E.D. Mich. 1978), there was a finding that the defendants had concealed documents and misled plaintiffs "to prevent proper and necessary discovery" pursuant to Rule 33(d). In Sabel v. Mead Johnson and Co., 110 F.R.D. 553, 555-556 (D. Mass. 1986), the court held that the defendant's invocation of Rule 33(d) was improper based on a failure to "refer to specific documents and state that the information sought can be found therein."

discovery requests would result in the production of a substantial number of documents. Nevertheless, plaintiffs persisted in their demands. Now, after defendants have incurred the burden and expense of producing responsive documents, plaintiffs admit that they do not want to review many of the documents, but instead ask defendants to incur additional expense by designating, on a document-by-document basis, which documents have already been reviewed by other plaintiffs' counsel in certain cases. In essence, plaintiffs are asking defendants to tell them "which documents they really want." Defendants should not be required to do plaintiffs' work. Accordingly, plaintiffs' motion to compel should be denied.

CONCLUSION

For the foregoing reasons, defendants Philip Morris Incorporated, Lorillard Tobacco Company, Lorillard, Inc., the American Tobacco Company and Liggett Group, Inc., respectfully request that plaintiffs' motion to compel be denied.

Respectfully submitted,

Diane P. Chapman (0025731)
Mary M. Bittence (0025751)
BAKER & HOSTETLER
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

Walter L. Cofer
Craig E. Gustafson
John R. Fraser
SHOOK, HARDY & BACON, LLP
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Defendant Philip Morris Incorporated

Patrick McLaughlin (0008190)
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
(216) 523-1500

Walter L. Cofer
Craig E. Gustafson
John R. Fraser
SHOOK, HARDY & BACON, LLP
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Defendants
Lorillard Tobacco Company and
Lorillard, Inc.

Thomas E. Riley
CHADBOURNE & PARKE
30 Rockefeller Plaza
New York, New York 10112

J. Scott Jamieson (0025417)
VORYS, SATER, SEYMOUR & PEASE
52 East Gay Street
Columbus, Ohio 43216-1008

Attorneys for Defendant the American Tobacco Company

Marie V. Santacroce
KASOWITZ, BENSON, TORRES & FREEDMAN, LLP
1301 Avenue of the Americas
New York, New York 10019-6022

Robert P. Monnin
THOMPSON, HINE & FLORY
3900 Society Center
127 Public Square
Cleveland, Ohio 44774-1216

Attorneys for Defendant
Liggett Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel was mailed to A. Russell Smith, Laybourne, Smith, Gore & Goldsmith, 159 S. Main Street, 503 Society Building, Akron, Ohio 44308, and to counsel for defendants, this 6th day of June 1996.

One of the Counsel for the Defendant
Philip Morris Incorporated