UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CITY OF BLOOMINGTON, INDIANA, et al.	)	
vs.	)	CAUSE NO. IP83-9-C
WESTINGHOUSE ELECTRIC CORP. and MONSANTO COMPANY	)	

ENTRY

This cause comes before the Court on plaintiff's motion and supporting memorandum to compel defendant Monsanto Company to produce documents, defendant's brief in opposition, and plaintiff's reply memorandum. The Court, having considered the foregoing and being duly advised, hereby grants in part plaintiff's motion to compel.

This discovery dispute revolves around the following production requests made by the plaintiff on November 30, 1986:

> REQUEST NO. 40: A list of all documents which have been withheld from prior production to plaintiffs under any claim of privilege.
>
> REQUEST NO. 46: All documents relating to any indexes maintained by Monsanto or its employees relating to any file directories or indexes relating to PCB sales, control, disposal, environmental contamination or health effects.

In response the defendant provided plaintiff with a list of ten (10) documents it had withheld from discovery on the basis of the attorney-client privilege. The defendant, however, refused to identify any documents protected by the work-product immunity. The defendant also refused to produce any indexes relating to

HARTOLDMON0029456

PCBs on the basis of the work-product immunity. After the parties failed to resolve their dispute, the plaintiff filed a motion to compel on September 3, 1987.

The work-product immunity articulated by the Court in Hickman v. Taylor, 329 U.S. 495 (1947) is now codified as Fed. R. Civ. P. 26(b)(3). In general terms, this Rule protects from discovery "'ordinary' trial preparation materials . . . [and] 'opinion' work product reflecting the mental impressions, conclusions, opinions and legal theories of attorneys . . . . " Tronitech, Inc. v. NCR Corp., 108 F.R.D. 655, 656 (S.D. Ind. 1985). This protection, however, applies only to work-product "prepared in anticipation of litigation or for trial . . . . " Fed. R. Civ. P. 26(b)(3). As noted previously, the defendant claims that any index relating to PCB materials is protected by the work-product immunity. The defendant asserts that the only index of PCB-related documents is generated by "computerized litigation support system prepared, monitored, and used by Monsanto's counsel." In support of its contentions, the defendant has submitted the affidavits of Thomas M. Bistline, Joseph G. Nassif, and David M. Moore, II. Upon review, this Court concludes that the defendant's litigation support system constitutes work product within the meaning of Rule 26(b)(3). It is clear that this system was created in anticipation of litigation. This Court also agrees with the court In re IBM Peripheral EDP Devices Antitrust Litigation, 5 Computer L. Serv. Rep. 878 (N.D. Cal. 1975) that the litigation support system will reflect counsel's mental impressions, theories, and thought processes. Furthermore, any index generated by the litigation support system

HARTOLDMON0029457

also constitutes work-product. At a minimu, an index generated by the system will show how the information contained in the system is organized. This in turn will reflect counsel's mental impressions, thoughts, or legal theories. Consequently, this Court denies plaintiff's motion to compel to the extent it seeks the prodution of an index of PCB-related documents.

Although the plaintiff is not entitled to the production of a PCB document index, the plaintiff is entitled to a list of documents not produced by the defendant under a claim of privilege. As the court in AM International, Inc. v. Eastman Kodak Co., 100 F.R.D. 255 (N.D. Ill. 1981) stated:

> Turning to the question of identification, the law is clear that relevant documents for which a privilege is claimed must be identified. . . . The rationale for such a rule is compelling. Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of that claim. The outcome is indefensible.

See also F.T.C. v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980) (Party must supply court with sufficient information to determine if communication is protected by attorney-client privilege); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88 (D. Del. 1974) (Party must identify documents protected by attorney-client privilege); 6 C. Wright & A. Miller, Federal Practice & Procedure §2032 (1970) (Work product immunity does not shield from discoveyr "the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery."). Therefore, this Court orders the defendant to provide plaintiff with a list identifying all doguments withheld from discovery under a claim of privilege.

HARTOLDMON0029458

Furthermore, the defendant is reminded of its obligation to respond in good faith and, if necessary to supplement a response, to legitimate discovery requests. If it should subsequently be determined by this Court that the defendant has provided inaccurate or incomplete lists of privileged documents, including the list previously supplied to the plaintiff, this Court will impose sanctions.

Accordingly, this Court grants in part plaintiff's motion to compel production of documents.

DATED this 30th day of June, 1988.

JOHN PAUL GODICH, MAGISTRATE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

HARTOLDMON0029459