

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Re:

WESTINGHOUSE SECURITIES
LITIGATION

Civil Action
No. 91-354

Transcript of proceedings on August 19, 1997,
United States District Court, Pittsburgh, Pennsylvania,
before D. Brooks Smith, District Judge

(Proceedings held in open court; August 19, 1997)

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1 **[MR. RUBIN:]** . . . In our motion we requested that the Defendants
2 produce to us, if they have it, any existing index, and this
3 is simply a way of cutting through what we believe to be a
4 difficult situation, because were the Court to simply order
5 the Defendants once again to sit down with us -- and when I
6 say the Defendants, of course I am only referring to the
7 Westinghouse Defendants here -- the effect would be no more
8 than it was -- our fear is it would be no more than it was the
9 last time, so we -- a request for the indices and databases
10 was nothing more than an attempt to create a specific next
11 step that the Court could order the Defendants to comply with.

12 So what we have in their papers is an exposition
13 about how we propounded an interrogatory and required all of
14 this work, et cetera, all of which is simply inaccurate.

15 As to their argument that they cannot be required

16 to produce the indices, there is authority that they can be
17 required to, and I will cite it to the Court, if the Court is
18 interested.

19 And, more importantly, their objection that there
20 is a work product privilege that attaches to these databases
21 ignores the essential organization of a database. In a
22 database, in an electronic database, it is an extremely simple
23 matter. It's a basic database function to omit certain fields
24 within the database in a report. For example, when I say omit
25 certain fields, the database will show Bates range from, to,
1 location of the document, who produced it, and then it would
2 have other fields such as issue coding, such as attorney's
3 comments. Clearly enough. Not all of those fields carry any
4 work product privilege whatsoever.

5 So it is our position that those indices are
6 producible and that they are in fact a way of cutting through
7 the production.

8 **THE COURT:** Well, you acknowledge the defense
9 position that the indices were prepared for the purposes of
10 litigation and that the Defendant, the Westinghouse
11 Defendants, contend that they contain the mental impressions,
12 conclusions, opinions, and legal theories of their attorneys;
13 and there is an affidavit to that effect filed together with
14 the Westinghouse Defendants' Memorandum.

15 Do I take it from your position that you are
16 suggesting the ability to somehow engage in an electronic
17 redacting of that which is work product so that you would
18 obtain only that which does not contain work product?

19 **MR. RUBIN:** Precisely. In a nutshell, that is it.

20 I would point out to the Court redaction for privilege is, of
21 course, something that is done all the time, and that the
22 information that we're seeking is essentially no different
23 than they would produce in a privileged log. And it is, in
24 fact, easier in the case of an electronic database to create a
25 database from that database which only has the objective
1 non-work product fields in it.

2 I don't know exactly what database program that
3 they use, but I have used a number of them myself and I know a
4 good deal about the uses of databases, and it should be a
5 fairly simple matter.

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2 **THE COURT:** Right now one of my major concerns is
3 that if I were to opt to looking more closely into the issue
4 of redaction of these indices, as Mr. Rubin proposes, whether
5 that be with the aid of a discovery master or in the absence
6 of it, that that is simply going to be another step in delay
7 in moving this litigation forward.

8 What I know can be accomplished is to send both
9 sides thither after today and direct that discovery proceed
10 apace, not with meeting, but simply with the normal discovery
11 devices; and I can assure all parties that if I do not resort
12 to redaction, if I do not direct the delivery over to the
13 Plaintiffs of the indices, with or without redaction, that I
14 am not going to be very sympathetic to any suggestions of the
15 burdensome nature of discovery that may follow or the time
16 that is going to be eventuated by Defendants', Westinghouse
17 Defendants that is, review of various document requests before

18 they're handed over.

19 It seems to me that Westinghouse has been given
20 here an opportunity, if it is possible to accomplish the
21 redactions suggested, of handing over that which they
22 certainly have compiled through the use of their own efforts,
23 the expenditure of, I am sure, considerable time, and perhaps,
24 as they have suggested, in anticipation of or in furtherance
25 of this litigation. But if the invocation of the doctrine is
1 in good faith, and assuming the doctrine is applicable and
2 continues to be asserted, then we resort to the old-fashioned
3 way, and then I think Westinghouse Defendants take what comes,
4 assuming that there is no overbreadth in the request that is
5 obvious.

6 But I repeat, you can't have it both ways. If that
7 is the assertion, I'm going to take it as a good faith
8 assertion upon behalf of the Defendants and I am going to
9 uphold the assertion of that privilege. But I am not going to
10 engage in any greater expenditure of time or in a more probing
11 analysis of what is required than did the complained actions
12 of Magistrate Lancaster last time around if this is what we're
13 left with.

14 So I think that the question I posed a few minutes
15 ago to Westinghouse ought to be considered for a very brief
16 period of time. That the Westinghouse Defendants have not
17 suggested that the technology would not allow for this
18 redaction, nor was the response to my question an answer that
19 said, yes, the burdens of redaction outweigh the burdens of a
20 broader request for specific documents.

21 So what I would like to do is provide the

22 Westinghouse Defendants with five days to reply to this Court
23 by letter and/or appropriate memorandum to the effect that
24 this is not possible or that it would be unduly burdensome; or
25 that it is possible and suggest by what date it can be
1 accomplished. If the response -- if the supplemental
2 memorandum and response is the former, then the order that I'm
3 going to enter will be self-executing and Plaintiff's
4 discovery, Plaintiff's document discovery, will proceed at
5 pace with appropriate specific request for documents.

6 We will enter an order setting forth what I have
7 just recited, but are there any questions from the Plaintiff's
8 standpoint on what I had in mind as an alternative approach
9 that would run from this date?

10 **MR. RUBIN:** Your Honor, just one, actually more in
11 the nature of a request. And that is that the Defendants, if
12 you could ask the Defendants to set forth in their submission
13 to the Court, in addition to whether or not it's possible, the
14 database software that was used to create it. Not that we
15 want to embroil the Court in any issue back and forth as to
16 whether it's possible, but I would like to know what kind of
17 software was used, only in the event they say it is not
18 possible to create these databases.

19 **THE COURT:** Well, I think that is an appropriate
20 request because were I to right now either within chambers or
21 via a discovery master direct that this issue be addressed,
22 that is one of the most basic and preliminary inquiries that
23 would be raised in getting to the question of whether or not
24 this could be accomplished.