

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_) )  
In the Matter of ) )  
MSC.SOFTWARE CORPORATION, ) Docket No. 9299  
a corporation. ) )  
\_\_\_\_\_)

**ORDER DENYING RESPONDENT MSC.SOFTWARE CORPORATION'S  
MOTION TO COMPEL PRODUCTION OF THIRD-PARTY TRANSCRIPTS**

**I.**

On April 15, 2002, Respondent MSC Software Corporation ("MSC") filed a motion to compel Complaint Counsel to produce verbatim third-party witness transcripts and a third-party declaration. Complaint Counsel filed an opposition to the motion on April 25, 2002. Oral argument was heard on the motion on April 25, 2002. For the reasons set forth below, MSC's motion is DENIED.

**II.**

MSC asserts that Complaint Counsel has improperly withheld verbatim third-party witness transcripts and a third party declaration. MSC argues that Complaint Counsel has failed to meet its burden in asserting the deliberative process privilege; that the informer's privilege does not apply, either because the prerequisites have not been met or because Complaint Counsel has waived the privilege through producing transcripts of some interviews, but withholding transcripts of other interviews; and that the work product privilege does not shield from discovery the factual information contained in the statements of third parties. MSC next argues that it has demonstrated substantial need to overcome the qualified privileges asserted for the third party investigational hearing transcripts and the declaration.

Complaint Counsel argues that the investigational hearing transcripts and declaration are protected by the informer's privilege and the work product privilege. Complaint Counsel asserts that the informer's privilege applies to the transcripts of individual interviews because those individuals communicated to Complaint Counsel concerning matters that are the subject of the FTC Act violations alleged in the Complaint. Complaint Counsel asserts that transcripts of witness statements reflect FTC counsel's questions, are within the class of documents prepared in

anticipation of litigation, and thus are covered by the work product privilege. Complaint Counsel further asserts that Respondent has failed to demonstrate any particular need to overcome either privilege.

### III.

#### A. Informer's Privilege

The identities of the individuals with whom Complaint Counsel communicated during the investigation of the matter which resulted in this litigation were protected from disclosure by the informer's privilege. *In re MSC Software Corp.*, Docket No. 9299 (February 22, 2002) (*citing In re Harper & Row, Publishers, Inc.*, 1990 FTC LEXIS 213, \*8-9 (June 27, 1990) (The informant's privilege is "the government's privilege to withhold from disclosure the identity of persons who provide information about violations of the law to law enforcement officials and others who render assistance that is necessary to effective law enforcement."). MSC did not demonstrate substantial need to overcome the informer's privilege with respect to identities of the individuals with whom Complaint Counsel communicated. *In re MSC Software Corp.*, Docket No. 9299 (February 22, 2002) (denying MSC's motion to compel Complaint Counsel to respond to its interrogatory seeking the identities of individuals with whom it communicated).

"Documents are not protected by the privilege unless they would tend to reveal the informant's identity, and, when his identity is known, the privilege does not protect documents submitted by him." *Harper & Row*, 1990 FTC LEXIS 213 at \*8 (*citing Roviaro*, 353 U.S. at 60). A transcript of an interview or declaration may reveal the informant's identity. Redacting the name of the interviewee would not sufficiently protect his or her identity. *See In re Seropian*, 1991 FTC LEXIS 472, \*2 (Oct. 28, 1991) (specifications seeking documents relating to communications between the FTC that would likely disclose the names of Commission informants seek information which is protected by the informer's privilege); *In re Detroit Auto Dealers Assoc., Inc.*, 1985 FTC LEXIS 93, \*2 (April 17, 1985) ("While not every . . . bit of information supplied by the informants indicates a violation of law, disclosure of this information might reveal the identity of the informant."). Accordingly, the witness statements or transcripts of individuals whose identities are not already known are protected from disclosure.

Where the informant's identity has already been revealed, the informer's privilege does not protect the transcript of his or her interview from disclosure. Thus, to the extent that Complaint Counsel has already revealed the identities of informants in response to interrogatories, the informer's privilege no longer protects the transcript of the interview. However, "a report of an interview of an informant may be protected by the work product privilege although the informant's identity has been disclosed." *Harper & Row*, 1990 FTC LEXIS 213 at \*8 n.6. The applicability of the work product doctrine to any such transcripts is discussed *infra*.

Complaint Counsel's identification of some of the individuals with whom it

communicated during the investigatory stage and Complaint Counsel's production of the investigational hearing transcripts of those individuals does not waive the privilege as to other individuals' identities that have not yet been disclosed. *Harper & Row*, 1990 FTC LEXIS 213 at \*15 (finding that the informer's privilege protects the identities of individuals with whom complaint counsel has communicated, while also stating that complaint counsel must reveal the identities of individuals of witnesses they expect to call); *In re College Football Assoc.*, 1991 FTC LEXIS 119 (April 16, 1991) (The argument that respondent has already seen 17 investigative transcripts obtained from sympathetic witnesses does not mean that complaint counsel waived the privilege as to all investigative transcripts.).

The government informer privilege is not absolute, but is qualified by the need of respondents for information defend themselves. *Harper & Row*, 1990 FTC LEXIS 213 at \*8. "The 'public interest in protecting the flow of information' must be weighed 'against the respondents' right to prepare their defense.'" *Id.* at \*9 (citing *Roviaro*, 353 U.S. at 62). "The respondents have the burden of showing that the identity of the informants is essential to their defense." The party seeking disclosure must show that the privileged information sought is "essential to a fair determination of the issues." *Id.* at \*12 (citing *Westinghouse Elec.*, 351 F.2d at 769).

MSC has not made a particularized showing of need. MSC's only argument is that Complaint Counsel has verbatim witness statements of customers of MSC that MSC believes will support MSC's defense and that MSC does not have sufficient time to conduct discovery of all of the industry participants. It is not enough that the information sought might be helpful to MSC. MSC has not demonstrated that it cannot obtain its own statements from customers that support its defense or that the requested information is essential to the preparation of its defense. Accordingly, MSC has not overcome its burden.

## **B. Work Product Privilege**

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, material prepared in anticipation of litigation by one party may be obtained through discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3).

In *In re General Motors Corp.*, 99 F.T.C. 464, 1982 FTC LEXIS 39, \*324 (1982) the Commission held "there seems to be no question that the witness statements or interview reports or attorneys' notes in question are within the class of documents 'prepared in anticipation of litigation' and covered by [Commission Rule 3.31(c)]." Administrative Law Judges have consistently held that investigative hearing transcripts of persons whom Complaint Counsel do not intend to call as witnesses are protected from disclosure under the work product doctrine. *In*

*re Toys R' Us*, 1997 FTC LEXIS 336, \*15 (March 24, 1997); *In re Seropian*, 1991 FTC LEXIS 445 (Oct. 18, 1991); *In re College Football Assoc.*, 1991 FTC LEXIS 119, \*5 (April 16, 1991); *In re Detroit Auto Dealers Assoc., Inc.*, 1985 FTC LEXIS 93, \*5 (April 17, 1985). "The attorney in an investigational hearing questioning a third party witness should be able to ask questions, lead the witness, comment and summarize without fear that the transcript would later be turned over to his adversary, unless that adversary can show compelling circumstances and need within the meaning of *Hickman v. Taylor*." *Detroit Auto Dealers*, 1985 FTC LEXIS 93 at \*6. Accordingly, the investigational hearing transcripts and declaration that Complaint Counsel seek to withhold from discovery are protected by the work product doctrine.

The work product privilege can be overcome only if MSC can demonstrate (1) that it has substantial need for the materials, and (2) that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 16 C.F.R. § 3.31(c)(3). MSC's sole argument is that Complaint Counsel has verbatim witness statements of customers of MSC that MSC believes will support MSC's defense and that MSC does not have sufficient time to conduct discovery of all of the industry participants. Discovery of the results of complaint counsel's investigation is not a "need," nor a right recognized by the Commission's rules. *In re Gillette Co.*, 98 F.T.C. 875, 1981 FTC LEXIS 2, \*13 (1982). In *Gillette*, the Commission characterized the respondent's strongest argument as one of convenience and held that this rationale does not meet the "substantial need test." *Id.* at \*13. In the instant case, MSC has made only a convenience argument and has not demonstrated substantial need. Nor has MSC demonstrated inability to obtain the substantial equivalent of the materials by other means since MSC is capable of conducting interviews and taking depositions of its customers that it believes will support its defense. Accordingly, the work product privilege has not been overcome.

### C. Deliberative Process Privilege

Complaint Counsel's opposition does not assert that the deliberative process shields the investigational hearing transcripts and declaration from discovery. Indeed, Complaint Counsel's opposition states, "transcripts of investigative hearings and witness statements are plainly protected by the informer's and work product privileges without the need to resort to the deliberative process privilege." Because the informer's and attorney work product privileges protect the information at issue from disclosure, whether the deliberative process privilege might have applied and whether Complaint Counsel waived this privilege through failure to assert it properly, are not dispositive.

## IV.

Where the identity of an informant has not previously been disclosed, the informer's privilege protects the requested transcripts and declaration at issue from disclosure. Complaint Counsel has not waived this privilege through revealing the names of some informants, while withholding the names of other informants. The attorney work product protects the transcripts

and declaration at issue from disclosure, even if the identity of the informant has been disclosed. MSC has not demonstrated sufficient need to overcome either privilege. Accordingly, MSC's motion is DENIED.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: May 7, 2002