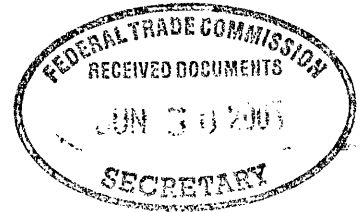


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
UNION OIL COMPANY OF) DOCKET NO. 9305
CALIFORNIA,)
a corporation.)
_____)

**ORDER DENYING MOTION BY NON-PARTY
TURNER, MASON & CO. TO LIMIT SUBPOENA *DUCES TECUM***

I.

Non-party Turner, Mason & Company (“Turner”) filed a motion on May 1, 2003, to limit the subpoena *duces tecum* served on it by Respondent Union Oil Company Of California (“Unocal”). Respondent filed its opposition on May 14, 2003. For the reasons set forth below, Turner’s motion is DENIED.

II.

Turner is a consulting firm with expertise in petroleum refining and the economics of refining. Declaration of Robert E. Cunningham, (“Cunningham Decl.”) at ¶ 1. Turner asserts a general objection to the subpoena to the extent that the subpoena requires Turner to produce documents subject to the attorney-client privilege or attorney work product immunity of third parties.

Turner asserts the following specific objection to five of the specifications sought by Unocal and seeks to exclude from production “highly confidential refinery information provided by third party refiners to Turner to conduct certain studies.” Turner Motion at 3. Turner asserts that it is precluded from producing such confidential information because Turner signed confidentiality agreements which prevent Turner from disclosing third party refinery information.

Turner asserts the following specific objection to two of the specifications sought by Unocal and seeks to exclude from production “confidential privileged documents provided by Turner to the FTC in matters other than the Unocal Matter as defined in the subpoena” on the grounds that such documents are not relevant and may be privileged. Turner Motion at 5.

Unocal argues that the information that Turner seeks to withhold is relevant to the allegations in the FTC’s Complaint against Unocal and to Unocal’s defenses to those allegations. Unocal asserts that because it seeks the studies that Turner submitted to the California Air

Resources Board (“CARB”), together with Turner’s underlying work papers and computer models, the best source for this material is Turner, and not the third party refiners that provided the information to Turner.

Unocal further asserts that the information that Turner provided to the FTC regarding Unocal, as well as communications between the FTC and Turner relating to Unocal, are relevant. Unocal states that because Turner has not provided a privilege log, Unocal has not had the opportunity to assess Turner’s asserted privilege claims.

III.

Discovery sought in a proceeding before the Commission must be “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent.” 16 C.F.R. § 3.31(c)(1). *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). Discovery may be limited if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1)(iii). Pursuant to Rule 3.31(d)(1), the Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. 16 C.F.R. § 3.31(d)(1). Thus, if the documents sought by Unocal are relevant to the subject matter of this action, the subpoena should be enforced unless the documents are privileged or the subpoena is unreasonable, oppressive, annoying, or embarrassing.

A.

Through Specifications 1, 2, 3, 4, and 5 of the subpoena served on Turner by Unocal, Unocal seeks all studies or analysis that Turner provided to CARB relating to regulations for reformulated gasoline; the work papers underlying such studies; the linear program models that Turner used in the preparation of such studies; communications from members of Western States Petroleum Association (“WSPA”) and Auto/Oil members relating to such studies; and all other documents that Turner submitted to CARB relating to regulations for reformulated gasoline.

Turner objects to Specifications 1, 2, 3, 4, and 5 on the grounds that Turner should not have to produce confidential information that was provided to Turner by third parties. Turner states that when it was retained by WSPA and American Petroleum Institute (“API”), Turner signed confidentiality agreements which preclude Turner from disclosing third party refinery information. Turner Motion at 3. Turner further argues that because Unocal can seek the information directly from WSPA and API, Turner should not have to produce such information. *Id.* Turner does not dispute the relevancy of the requested documents.

The Commission’s Rules of Practice do not specifically protect confidential information from discovery. Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission’s ability to disclose confidential information to the public. However, these rules do

not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (1981) (These provisions do "not absolutely bar disclosure of business data as evidence in [FTC] adjudicatory proceedings.").

Courts interpreting discovery sought under the Federal Rules of Civil Procedure have held that there is no immunity protecting the disclosure of confidential documents. *Federal Trade Commission v. J.E. Lonning*, 539 F.2d 202, 209-210 (D.C. Cir. 1976); *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery."). *See also Federal Trade Commission v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on the grounds that it seeks confidential information "poses no obstacle to enforcement."). Although Turner asserts that it is bound by its confidentiality agreements with WSPA and API, the burden of production does not outweigh Unocal's need for the documents. "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors).

In addition, courts have refused to limit subpoenas on grounds that the information can be obtained from another source when the claimed other source may have similar or only partially duplicative information. *E.g.*, *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 697 (D. Nev. 1994) (refusing to limit subpoena, recognizing that, although the party and non-party subpoenas were duplicative in part, the discovery requests were directed toward two separate entities and documents actually maintained in the files of each entity may not be identical); *Greer Properties, Inc. v. LaSalle Nat'l Bank*, 1990 U.S. Dist. LEXIS 3846, *5 (N.D. Ill. 1990) (refusing to limit a non-party subpoena on grounds that the non-party failed to establish that its documents were identical to those recoverable from any other source). Turner has not demonstrated that the requested discovery should be obtained from another source.

Pursuant to 16 C.F.R. § 3.31(d)(1), a protective order was entered in this case. The provisions of the Protective Order, entered March 27, 2003, adequately safeguard the confidential documents of third parties. Further, Turner or the third party refiners may file motions for *in camera* treatment to prevent disclosure to the public of their confidential materials if the parties seek to introduce their documents at trial. *See* 16 C.F.R. § 3.45(b).

Even though the documents sought from Turner may contain confidential information provided by third parties to Turner, this alone is not a basis for precluding discovery. Accordingly, Turner's specific objections to Specification Numbers 1, 2, 3, 4, and 5 are overruled.

B.

Through Specifications 11 and 12 of the subpoena served on Turner by Unocal, Unocal seeks information that Turner provided to the FTC regarding Unocal, as well as communications between the FTC and Turner relating to Unocal.

Turner's position with respect to Specifications 11 and 12 is that documents that Turner provided to the FTC relating to Unocal are not relevant to the allegations of the Complaint. Turner Motion at 5-6. Turner further states that it has been instructed by the FTC not to produce any documents that are protected by the FTC's deliberative process privilege or by the work product doctrine. *Id.*

Unocal states that the "material at issue, apparently relating to a 1997 investigation by the FTC of the sale of Unocal's California assets to Tosco (another California refiner), may well lead to the discovery of admissible evidence relating to the relevant markets alleged by Complaint Counsel in this matter." Opposition at 5. Unocal argues that, to the extent the 1997 materials exchanged between the FTC and Turner relate in anyway to the market for reformulated gasoline in California, they may be relevant to the allegations in the Complaint.

The Complaint alleges that Unocal has obtained and exercised market power in the market for CARB-compliant "summer-time" reformulated gasoline produced and supplied for sale in California. (Complaint ¶¶ 73, 75, 91). To the extent these 1997 materials exchanged between the FTC and Turner relate to the market for reformulated gasoline in California, they may be relevant to the allegations in the Complaint at this stage of the proceeding. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *27 (documents probative in defining relevant product market found relevant). Thus, Turner's assertion that the documents are not relevant is not a valid basis for withholding non-privileged responsive documents.

To the extent that any of the documents responsive to Specifications 11 and 12 are privileged, privilege has not been properly asserted. "Governmental privileges must be formally asserted and delineated in order to be raised properly." *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984). Assertion of the deliberative process privileges requires: "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). These procedural requirements have not been met with the statement by Turner in its motion that its counsel "has been instructed by the FTC not to produce any documents that are protected by the FTC's deliberative process privilege and/or by the work product doctrine." Turner Motion at 5. Accordingly, the deliberative process privilege does not shield responsive documents held by Turner from discovery.

Further, Turner has not demonstrated that the documents are protected by the work product doctrine. 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. The information provided by Turner in its motion and attachments thereto does not establish that the documents it seeks to withhold were created by lawyers or whether any privilege attaching to them has been waived through disclosure.

Respondent has demonstrated that the documents requested by Specification Numbers 11 and 12 are relevant to the allegations of the Complaint or Unocal's defenses thereto. Turner has not validly asserted any privilege. Accordingly, Turner's objections to Specification Numbers 11 and 12 are overruled.

C.


Turner also asserts a general objection to the subpoena to the extent that the subpoena requires Turner to produce documents subject to the attorney-client privilege and or attorney work product immunity. The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance[.]" *Fisher v. United States*, 425 U.S. 391, 403 (1976). As the party asserting privilege, Turner bears the burden of demonstrating that: "(1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived." *United States v. Bollin*, 264 F.3d 391, 412 (4th Cir. 2001). Turner's bald assertion, with no detail or explanation, that documents called for in the subpoena may be subject to the attorney-client privilege or work product doctrine, is not sufficient to sustain its burden.

According to Unocal, Turner has not provided a privilege log. Commission Rule 3.38A requires "[a]ny person withholding material responsive to a subpoena issued pursuant to § 3.34 . . . if so directed in the subpoena . . . [to submit] a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged." This rule applies to "any person," which includes non-parties such as Turner. Unocal has stated that it has agreed to relieve Turner of its obligation of compiling a privilege log with respect to Specifications 6 and 10. As to all of the other Specifications in the subpoena served on Turner by Unocal, Turner shall provide a privilege log.

VI.

For the reasons set forth above, Turner's motion to limit the subpoena is DENIED. Turner shall produce all responsive, non-privileged documents. If Turner asserts that documents are protected by the attorney-client privilege or attorney work product doctrine, Turner shall provide a privilege log that meets the requirements of 16 C.F.R. § 3.38A. Turner has no standing to assert the deliberative process privilege. Turner shall comply with this Order within five business days.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: June 30, 2003