

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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In the Matter of )  
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)  
DURA LUBE CORPORATION, )  
AMERICAN DIRECT MARKETING, INC., )  
HOWE LABORATORIES, INC., )  
CRESCENT MANUFACTURING, INC., )  
NATIONAL COMMUNICATIONS CORPORATION ) Docket No. 9292  
THE MEDIA GROUP, INC., )  
corporations, and )  
HERMAN S. HOWARD, )  
SCOTT HOWARD, )  
individually and as officers )  
of the corporations. )

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**ORDER ON RESPONDENTS' MOTION TO COMPEL  
TESTIMONY AND PRODUCTION OF DOCUMENTS**

**I.**

On December 6, 1999, pursuant to Commission Rule 3.38(a), Respondents filed a motion for an order to compel testimony and production of documents in unredacted form. Complaint Counsel filed its Opposition to Respondents' Motion to Compel Testimony and Production of Documents ("Opposition") on December 14, 1999. Respondents filed a reply in support of the motion on December 15, 1999. For the reasons set forth below, Respondents' motion is GRANTED in part and DENIED in part.

**II.**

Respondents' motion has three objectives. First, Respondents assert that Complaint Counsel has refused to produce reports and documents relating to Frederic Litt. Complaint Counsel had designated Litt as an expert witness in its preliminary witness list on August 10, 1999, but subsequently indicated that Litt would not testify as an expert witness. Complaint Counsel has not produced an expert report for Litt. Respondents seek production of all of Complaint Counsel's correspondence and documents relating to Litt. Second, Respondents assert that reports and written communications relating to FTC cases against other after-market additive manufacturers which were authored by Norbert Nann and Lyle Bowman have been redacted to such an extent that these documents are unintelligible. Respondents seek production

of these documents in unredacted form. Third, Respondents assert that Complaint Counsel directed its expert Nann not to answer a number of questions relating to (a) work that he did for the FTC in cases brought against other after-market additive manufacturers, on grounds of work product privilege; (b) opinions that he rendered on what he thought were Dura Lube documents, on grounds that the documents may have related to another case; and (c) his employment in the additives research lab at Texaco, on grounds of a confidentiality provision in his termination agreement with Texaco. Respondents seek an order compelling this testimony from Nann.

### III.

#### A. Reports and documents relating to Litt

Respondents seek to compel production of reports and documents relating to Litt, first under Commission Rule 3.31(c)(4)(i) which allows “[d]iscovery of facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for hearing[.]” 16 C.F.R. § 3.31(c)(4)(i). Although Complaint Counsel originally listed Litt as a testifying expert in this case, Complaint Counsel no longer intends to call Litt as an expert and Respondents have not offered a sufficient explanation to justify continued treatment of Litt as a testifying expert. The rationale for liberal discovery of testifying experts is to enable the opposing party to prepare an effective cross-examination. *In re Thompson Med. Co., Inc.*, 101 F.T.C. 385, 387 (1983). Once a party has removed an individual from the list of expert witnesses expected to testify at trial, the rationale for compelling production of documents relied upon by that expert no longer applies. *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 63 (D.N.M. 1996); *In re Shell Oil Refinery*, 132 F.R.D. 437, 440-41 (D.C. La. 1990); *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Az. 1982). Because Complaint Counsel does not intend to call Litt as an expert at trial, Litt is not treated as a testifying expert and Litt’s documents are not subject to production under Commission Rule 3.31(c)(4)(i).

Respondents next seek to compel production of reports and documents relating to Litt under Commission Rule 3.31(c)(4)(ii) which provides that a party may discover facts known or opinions held by an expert who is not expected to be called as a witness “upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” 16 C.F.R. § 3.31(c)(4)(ii).

The party seeking discovery from a non-testifying retained expert faces a heavy burden. *Hoover v. Dep’t of Interior*, 611 F.2d 1132, 1142 n.13 (5<sup>th</sup> Cir. 1980); *Bank Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 44 (S.D.N.Y. 1997). Mere assertion that exceptional circumstances exist, without providing any facts in support of this contention, is not sufficient to compel the disclosure of nondiscoverable documents. *Martin v. Valley Nat’l Bank of Arizona*, 1992 U.S. Dist. LEXIS 11571, \*13 (S.D.N.Y. 1992). Those cases that do allow discovery from non-testifying experts often involve information about destroyed or non-available materials or situations in which the expert might also be viewed as a fact witness regarding material matters

at issue. Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2032. The Court is not persuaded that exceptional circumstances exist which make it impracticable for Respondents to obtain facts or opinions on the same subject. Accordingly, except as described below, Respondents are not entitled to discovery of reports and documents relating to or prepared by Litt.

However, any documents prepared by Litt, or any other non-testifying expert, which were relied upon or reviewed by Complaint Counsel's testifying experts in forming opinions in the instant case are discoverable, as set forth below. *United States v. City of Torrance*, 163 F.R.D. 590, 593-94 (C.D. Cal. 1995); *Eliassen v. Hamilton*, 1986 U.S. Dist. LEXIS 24509, \*4-5 (N.D. Ill. 1986); *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740, 743 (E.D. Mo. 1983). *See also* Fed. R. Civ. Pro. 26(a)(2) & (4).

## **B. Reports and documents relating to Nann and Bowman**

Respondents seek reports and written communications authored by Nann, Bowman, and Litt that relate to FTC cases against other after-market additive manufacturers. Documents authored by Litt are governed by Rule 3.31(c)(4)(ii), and based on the holding above are not subject to discovery, unless they were relied upon or reviewed by Nann or Bowman in formulating an opinion in this case.

Nann and Bowman are testifying experts. Therefore, documents authored by them are governed by Commission Rule 3.31(c)(4)(i) which entitles parties to "discovery of facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for hearing" and by the Pretrial Scheduling Order entered in this case on June 10, 1999 ("Scheduling Order") which entitles parties to "documents and other written materials relied on by the expert in his/her analysis and conclusions."

To clarify the law regarding disclosure of expert testimony and information, all data, documents, or information considered by a testifying expert witness in forming the opinions to be proffered in a case is discoverable. Fed. R. Civ. Pro. 26(a)(2)(B); 16 C.F.R. § 3.31(c)(4)(B); *Thompson Med. Co.*, 101 F.T.C. at 388. Full disclosure of the basis of an expert opinion ensures the independence of the expert's conclusions. *FDIC v. First Heights Bank, FSB*, 1998 U.S. Dist. LEXIS 21506, \*9-10 (E.D. Mich. 1998). Therefore, for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation against another after-market additive manufacturer. *See In re Shell Oil Refinery*, 1992 U.S. Dist. LEXIS 4896, \*2 (E.D. La. 1992). The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but extends to documents considered but rejected by the testifying expert in reaching those opinions. *Torrance*, 163 F.R.D. at 593-94. Any document considered by an expert in forming an opinion,

whether or not such document constitutes work product or is privileged, is discoverable. *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Rand Ingersoll*, 168 F.R.D. 633, 639 (N.D. Ind. 1996).

Complaint Counsel has represented that “Mr. Nann and Mr. Bowman prepared their reports and based their opinions strictly on information relating to Dura Lube and *not* on other product information or testing.” Opposition at p.8. Considering this representation, issues regarding protection of trade secrets, work product, proprietary information, and information subject to protective orders in other investigations or litigation are not dispositive. The dispositive issue becomes what data, documents, or information has been reviewed or relied upon by Nann or Bowman in forming any opinion in the instant case. If an expert offers an opinion which includes or is based upon a comparative analysis or an opinion relating to general industry standards and the type of testing needed to substantiate particular claims, all data, documents, or other information supporting that opinion is discoverable.

An opposing party is entitled to know if an expert has taken an inconsistent position in another investigation or other litigation. Fundamental fairness dictates that any testifying expert who is asked whether he or she has ever taken a position or given an opinion inconsistent with an opinion asserted or position taken in the instant case must disclose such information. *Karn*, 168 F.R.D. at 640. *See also Herrick Co., Inc. v. Vetta Sports, Inc.*, 1998 U.S. Dist. LEXIS 14544, \*7 (S.D.N.Y. 1998)(“Prior inconsistent opinions by [an expert] on the same subject matter would be highly relevant material.”). The Scheduling Order requires exchange of materials fully describing all prior cases in which the expert has testified or has been deposed and transcripts of such testimony. It follows that the opposing party is entitled to opinions held and positions taken in those prior cases. *See Thompson Med. Co.*, 101 F.T.C. at 388-89 (It is well within the broad discretion of Administrative Law Judges to order the disclosure of prior statements of expert witnesses.). However, while reports and testimony, including deposition testimony, from prior investigations or litigation must be produced, the documents underlying such reports or testimony are not discoverable in this subsequent litigation, unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case.

### **C. Testimony from Nann**

Respondents assert that Complaint Counsel improperly directed its expert Nann not to answer a number of questions during his deposition. To the extent that Nann received information from General Motors, or through his previous employment with Texaco, or through work that he performed for the FTC in cases brought against other after-market additive manufacturers, if that information forms the basis of an opinion that Nann proffers in this litigation, Respondents are entitled to testimony or discovery from Nann on such information. Should Nann offer an opinion in this case on the amount of money Respondents should spend on testing, and bases his opinion in comparison to the amount Texaco spent on testing, Respondents


are entitled to such information from Nann. In addition, if Nann reviewed or relied upon the disputed document referred to in his deposition testimony at pages 165-173 in proffering an opinion in this case, Respondents are entitled to testimony on such document.

#### IV.

Pursuant to my Order on Request for Expedited Consideration on Respondents' Motion to Compel, dated December 8, 1999, Complaint Counsel produced to the undersigned for *in camera* inspection unredacted expert reports and written communications that had previously been produced to Respondents in redacted form authored by Nann and Bowman. Without knowledge of the expert opinions at issue, an analysis of what should be disclosed or redacted would be speculative. Based upon the rulings herein, Complaint Counsel is hereby ordered to review these documents, as well as other written communications authored by Nann and Bowman in connection with their work for FTC staff relating to automotive engine treatments that were not previously provided to Respondents in any form, to determine if any of the documents are discoverable in accordance with this Order. Complaint Counsel shall produce any such documents to Respondents as soon as possible, but no later than noon on Friday, December 17, 1999.

Complaint Counsel may retrieve its documents from my office at its convenience. All copies that were made for the Court's review have been destroyed.

It is SO ORDERED.

  
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D. Michael Chappell  
Administrative Law Judge

Dated: December 15, 1999