PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON D.C.

In the Matter of UNION OIL COMPANY OF CALIFORNIA, a corporation.	Docket No. 9305

UNION OIL COMPANY OF CALIFORNIA'S OPPOSITION TO NON-PARTY TURNER, MASON & COMPANY'S MOTION TO LIMIT SUBPOENA DUCES TECUM

Union Oil Company of California ("Unocal") submits this opposition to the motion of non-party Turner, Mason & Company ("Turner Mason") to limit the subpoena *duces tecum* served by Unocal.

ARGUMENT

I. Turner Mason has made no showing that the allegedly confidential information relating to the studies it provided to CARB is entitled to be withheld from production.

Turner Mason is a consulting organization which provides services to the refining industry. Cunningham Declaration dated April 30, 2003, at ¶ 1.[1] Unocal served a subpoena *duces tecum* upon Turner Mason on April 7, 2003, seeking (among other things):

- all studies or analyses which Turner Mason provided to CARB relating to regulations for reformulated gasoline;
- the work papers underlying such studies;
- the linear program models which Turner Mason used in the preparation of such studies;

[1]Mr. Cunningham's declaration was submitted by Turner Mason in conjunction with its motion to limit the subpoena *duces tecum* filed on May 1, 2003.

- communications from members of the Western States Petroleum Association (WSPA) and Auto/Oil members relating to such studies;
- all other documents which Turner Mason submitted to CARB relating to regulations for reformulated gasoline.

Declaration of Sara A. Poulos, dated May 9, 2003, ¶ 1, Ex. A, specifications 1- 5.

Turner Mason has asked to exclude from the scope of each of these specifications information provided from third-party refiners to Turner Mason on the grounds that Turner Mason is precluded from disclosing this information without the consent of the third parties.

The information Turner Mason proposes to withhold is highly relevant to the allegations in the FTC's Complaint against Unocal and to Unocal's defenses to those allegations. For example, the Complaint alleges that CARB did not do its own studies, but rather purportedly relied upon the studies submitted to it by others (¶ 25); that three of the studies submitted to CARB were commissioned by the Western States Petroleum Association (¶¶ 56-59), and that Unocal committed fraud by not providing certain information to WSPA for inclusion in these studies. (¶¶ 57- 59, ¶¶ 87-89). At least some of the studies referenced in the Complaint were performed by Turner Mason. *See, e.g.*, Ex. B to Poulos Declaration.

Moreover, the Complaint also alleges that but for Unocal's conduct, CARB would have not have adopted RFG regulations which substantially overlapped with Unocal's patent claims (¶ 5), and that refiners would have incorporated knowledge of Unocal's pending patent rights into their capital investment and refinery reconfiguration decisions. (¶ 90).

The studies which Turner Mason provided to CARB more than ten years ago were based in part upon linear program models that attempted to simulate the refining capabilities of California

refineries in order to compare the costs of alternative regulations and to analyze the necessary capital investment refiners would need to make. Poulos Decl. ¶ 2, Ex. B. To develop and run these models, Turner Mason incorporated information from California refineries such as the amount of sulfur and benzene in certain of their blend streams from 1989 and the yields for certain refinery units. *See, e.g.* Cunningham Decl., ¶ 6, Ex. D. This is the type of information which Turner Mason is now withholding as confidential. Turner Mason admits that if this information is redacted from the LP models, the models cannot be used to simulate the production of CARB 2 gasoline. *Id.* ("TM&C could provide redacted materials that maintain the confidentiality of the industrial data that was previously designated as confidential. However, if redacted, the TMMS LP models could not be used to make CARB 2 RFG without replacement of these redacted unit yield structures.") Hence, if Unocal is to both analyze the studies Turner Mason provided to CARB and fully respond to the FTC's allegations regarding what CARB and the refiners would have done but for Unocal's conduct, Unocal must have full access not only to the allegedly misleading studies provided to CARB, but also the work papers and models underlying those studies.

A party resisting discovery of relevant information carries a heavy burden of showing why discovery should be denied. *In the Matter of Schering-Plough Corp.*, 2001 FTC Lexis 105, *3 (July 6, 2001). Indeed, Turner Mason does not contest the relevancy of this information. Instead, it simply argues that the information can be sought from WSPA or API, citing to 16 C.F.R. § 3.31(c)(1)(I) which provides that the judge may limit discovery if he determines that the discovery sought is "unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient or less expensive." Turner Mason makes no attempt to show that any of the provisions of this rule apply.

In fact, since the specifications to Turner Mason specifically seek the studies that *Turner Mason* submitted to CARB, together with *Turner Mason's* underlying work papers and computer models, it is clear on the face of the requests that the best source for this material is Turner Mason. Indeed, counsel for WSPA has stated that WSPA does not even have possession of this information. Poulos Decl.¶ 4. Courts have refused to limit subpoenas on the grounds that the information can be obtained from another source when the claimed "other source" may have similar or only partially duplicative information. *See, e.g., Diamond State Insurance Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 697 (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. La Salle National Bank,* 1990 U.S. Dist. LEXIS 3846, *5 (Apr. 6, 1990) (refusing to limit a non-party subpoena because the non-party failed to establish that its documents were identical to those recoverable from any other source). Here, Turner Mason has made no showing that the requested discovery could be obtained from another source, much less one that is more convenient or less expensive.

Moreover, in its motion to limit, Turner Mason does not even attempt to make a showing as to how this information (most of which appears to date from the late 1980s or early 1990s) remains competitively sensitive more than a decade later. The party asserting confidentiality bears the burden of establishing that the privilege applies to a given set of documents. *See Diamond State Insurance Co.*, 157 F.R.D. at 697. As the Supreme Court has noted, "orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel . . . or to the parties." *See Federal Open Mkt.*

Comm. v. Merrill, 443 U.S. 340, 362, n. 24, 61 L. Ed. 587, 99 S. Ct. 2800 (1979) (citations omitted); *see also In the Matter of Hoechst Marion Roussel, Inc.*, 2000 FTC Lexis 155, *27-29 (October 17, 2000) (confidential information not immune from discovery in FTC proceeding where needed for relevant information).

Here, not only is the requested data more than ten years old, but neither of the parties to this action (Unocal or the FTC) are competitors in the refining business. Significantly, to the extent third parties express confidentiality concerns, there is already a protective order in place in this litigation designed to protect material which third parties may deem highly confidential by limiting it to counsel and their consultants. And, if any third party wants additional protection beyond what is already provided, the protective order specifically allows that third party to seek additional or different protections. Protective Order, ¶ 18.

II. Turner Mason has not established that the subpoena should be limited to exclude communications between Turner Mason and the FTC regarding Unocal.

Unocal's subpoena also seeks information which Turner Mason has provided to the FTC regarding Unocal, as well as communications between the FTC and Turner Mason relating to Unocal. Poulos Decl., ¶ 1, Ex. A, specifications 11 and 12. Turner Mason raises several objections to this request, none of which have merit.

First, Turner Mason objects on the grounds of relevancy. The material at issue, apparently relating to a 1997 investigation by the FTC of the sale of Unocal's California refining assets to Tosco[2] (another California refiner), may well lead to the discovery of admissible evidence relating to the relevant markets alleged by Complaint Counsel in this matter. The Complaint alleges that Unocal has obtained and exercised market power in the market for CARB-compliant "summer-time"

[2]*See* Cunningham Decl., ¶ 6 , Ex. F.

reformulated gasoline produced and supplied for sale in California. (¶¶ 73, 75, 91). To the extent these 1997 materials exchanged between the FTC and Turner Mason relate in anyway to the market for reformulated gasoline in California, they may certainly prove relevant to the allegations in the Complaint. *See, e.g., In the Matter of Hoechst Marion Roussel, Inc.*, 2000 FTC Lexis 155, *27 (documents probative in defining relevant product market held relevant).

Turner Mason also objects to specifications 11 and 12 on the grounds that these specifications seek documents which it claims are privileged. But the subpoena directs that Turner Mason provide a schedule of the items withheld as privileged, as set forth in § 3.38A(a) of the FTC Rules of Practice. Poulos Decl., ¶ 1, Ex. A at Instruction 18. Section 3.38A(b) of the FTC Rules of Practice specifically states that a party who wishes to withhold material for reasons described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit.[3] Thus, the fact that some of the responsive documents may be subject to a claim of privilege is not grounds for a motion to limit. Rather, these documents should be described on a privilege log containing sufficient information about the documents to give Unocal the opportunity to assess the privilege claims.[4]

CONCLUSION

[3]*See In the Matter of Hoechst Marion Roussel, Inc.*, 2000 FTC Lexis 134, *8-9 (Aug. 18, 2000) (listing requirements for claim of deliberative process by the FTC including "a detailed specification of the information for which privilege is claimed").

[4]There is no undue burden associated with the preparation of such a log. Turner Mason has written to the FTC that there are "about three file pockets (one-third of a file box) of 1997 FTC information relating to this subpoena." Cunningham Decl. ¶ 6 , Ex. F. In contrast, in response to specifications nos. 6 and 10 Turner Mason told Unocal that it would be extremely burdensome to compile a schedule of withheld privileged documents, and Unocal consequently agreed to relieve Turner-Mason of its obligation to compile a privilege log with respect to these specifications. Poulos Decl., ¶ 4.

For all the foregoing reasons, Unocal requests that Turner Mason's motion to limit the Subpoena *Duces Tecum* served by Unocal be denied in its entirety.

Dated: May 16, 2003.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By *Original Signature on File with Commission*
Martin R. Lueck
David W. Beehler
Sara A. Poulos
Diane L. Simerson
Steven E. Uhr
Bethany D. Krueger
David E. Oslund

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
Phone: 612-349-8500
Fax: 612-339-4181

and

GIBSON, DUNN & CRUTCHER, LLP
Joseph Kattan, P.C.
Chris Wood
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Phone: (202) 955-8500
Fax: (202) 530-9558

ATTORNEYS FOR UNION OIL COMPANY OF CALIFORNIA