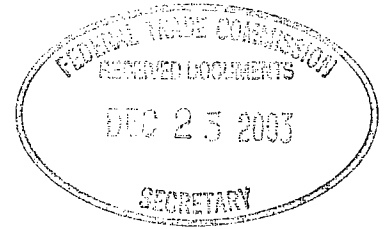


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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In the Matter of )  
 )  
 )

TELEBRANDS CORP., )  
TV SAVINGS, LLC, and )  
AJIT KHUBANI, )  
Respondents. )  
\_\_\_\_\_ )

Docket No. 9313

**ORDER DENYING RESPONDENTS' MOTION TO COMPEL  
THE PRODUCTION OF CONSUMER SURVEY INFORMATION**

**I.**

On December 11, 2003, Respondents filed a motion to compel Complaint Counsel to produce consumer survey information. Complaint Counsel filed its opposition on December 22, 2003. For the reasons set forth below, Respondents' motion is **DENIED**.

**II.**

Respondents move for an order compelling Complaint Counsel to produce questionnaires, data, and other factual information related to a consumer survey conducted by Complaint Counsel's non-testifying marketing expert in connection with this proceeding. Respondents assert that its request is narrow and limited only to factual information - not opinions and thus is subject to production pursuant to Commission Rule 3.31(b)(4)(ii).

Complaint Counsel asserts that the request improperly seeks material that was developed by non-testifying expert witnesses. Complaint Counsel further asserts that the requested information is protected by the attorney work product doctrine.

**III.**

Commission Rule 3.31(c)(4)(ii) 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). 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.

In this case, Respondents argue that because Complaint Counsel's case will rise or fall on surveys of consumer perceptions, the special circumstances called for by Rule 3.31(b)(4)(ii) exist. Based on the arguments presented, it is clear that Respondents are equally capable of conducting their own consumer surveys. Because Respondents have not demonstrated that "it is impracticable of [Respondents] to obtain fact or opinion on the same subject" (16 C.F.R. § 3.31(b)(4)(ii)), the exceptional circumstances necessary for ordering production are not met. Accordingly, except as described below, Respondents are not entitled to the surveys or consumer perception information prepared by Complaint Counsel's non-testifying expert.

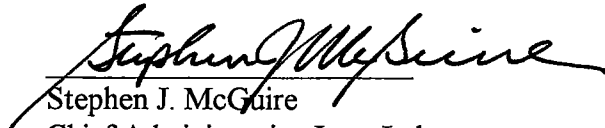
Commission Rule 3.31(c)(3) provides that a party may "obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for hearing . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation 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). Complaint Counsel has demonstrated that the work product privilege extends to this material. *See In re Schering Corp.*, 1990 FTC LEXIS 133 (1990) (survey of consumers regarding their perception of an ad and memos by non-testifying expert found to be work product material protected from discovery). Respondents have not argued, nor demonstrated, that they have a substantial need for the materials.

However, if any of the withheld information was relied upon or reviewed by Complaint Counsel's testifying experts in forming opinions in this case, the information is discoverable. *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). Data, documents, or information considered by a testifying expert witness in forming the opinions to be proffered in a case are discoverable. Fed. R. Civ. Pro. 26(a)(2)(B); 16 C.F.R. § 3.31(c)(4)(B); *In re Thompson Med. Co., Inc.*, 101 F.T.C. 385, 388 (1983). 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 whether a document was originally generated by a non-testifying expert. *See In re Shell Oil Refinery*, 1992 U.S. Dist. LEXIS 4896, \*2 (E.D. La. 1992). 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). Therefore, Complaint Counsel is admonished that if Complaint Counsel provides information to its testifying experts and the testifying experts review or rely upon such information in forming opinions in this case, Complaint Counsel shall produce such information to Respondents.

Moreover, if Complaint Counsel intends to introduce at trial the withheld surveys or consumer perception information identified in Complaint Counsel's supplemental privilege log, it must produce such evidence immediately or Complaint Counsel will be precluded from introducing such evidence at trial.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

December 23, 2003