

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
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)

MOTOR UP CORPORATION, INC. and)
MOTOR UP AMERICA, INC.,)
corporations, and)

DOCKET NO. 9291

KYLE BURNS,)
individually and as an officer)
of the corporations.)
_____)

**ORDER ON RESPONDENTS'
MOTIONS FOR PROTECTIVE ORDERS**

I.

On July 21, 1999 and July 26, 1999, Respondents Motor Up Corporation, Inc., Motor Up America, Inc., and Kyle Burns ("Respondents" or "Motor Up") filed three separate motions for protective orders, pursuant to 16 C.F.R. § 3.31(c)(2) and (3), seeking to deny Complaint Counsel access to or discovery of requested documents on the basis that the materials are privileged, prepared in anticipation of litigation or for hearing. These three motions pertain to materials prepared in anticipation of litigation or hearing by or for: (1) Dr. Neil Canter; (2) Edward Kollin; and (3) Galland, Kharasch & Garfinkle, P.C. Complaint Counsel oppose these motions. For the reasons set forth below, the motions pertaining to Dr. Neil Canter ("Canter") and Edward Kollin ("Kollin") are DENIED. The motion pertaining to Galland, Kharasch & Garfinkle, P.C. ("Galland, Kharash") is GRANTED in part and DENIED in part.

II.

Dr. Canter is an expert retained by Motor Up. As part of his consultation with Motor Up, Canter reviewed and prepared various documents constituting reports and assessments of testing that had been conducted for Motor Up. Respondents assert that these documents contain conclusions and assessments of others who also consulted with Motor Up to assist in the formulation of a defense strategy. Edward Kollin, of Lubrication Science, Inc., was solicited by Canter to conduct testing for Motor Up. Kollin also consulted with Motor Up to assist in the formulation of a defense strategy. Galland, Kharasch is a law firm that provided legal advice to Metro Products, Motor Up, Broadcast

Arts, and National Media Corporation. Galland, Kharasch communicated with various consultants to assist in the defense of the FTC investigation and possible litigation. Respondents assert that Galland, Kharasch prepared documents which contain mental impressions, conclusions, opinions and/or legal strategies of attorneys. Various Motor Up consultants provided documents to Galland, Kharasch to assist in the defense of the investigation and possible litigation.

Motor Up moves to have the following categories of documents protected from discovery: (1) documents given to and reviewed by its consultants; (2) documents prepared by consultants; (3) communications between its former attorneys and its consultants, including the mental impressions conclusions, opinions, and/or legal theories of its former attorneys from meetings with its consultants.

Under FTC Rules of Practice, Rule 3.31(c)(2), the Administrative Law Judge has the authority to enter a protective order to deny or limit discovery to preserve privileges. Respondents assert that the documents described in the exhibits attached to their motions are protected by the work product privilege, set forth in Rule 3.31(c)(3), which states:

[A] party may obtain discovery of . . . [materials] prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) 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. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

16 C.F.R. § 3.31(c)(3).

III.

Documents Given to and Reviewed by Consultants

Among the documents Respondents seek to protect from disclosure are articles, reports and assessments of testing that were not prepared by Respondents or their representatives but were given to Canter and Kollin in anticipation of litigation. These documents are not shielded from discovery by Rule 3.31(c)(3) as they were not prepared by Respondents or their representatives. *See Brown v. Hart, Schaffner & Marx, et al.*, 96 F.R.D. 64, 68 (N.D. Ill. 1982) (even providing documents to counsel does not bring them within the work product doctrine and shield them from discovery). Accordingly, the withheld documents must be produced.

IV.

Documents Prepared by Consultants

Documents, including the reports and assessments of testing that were conducted for Motor Up, that were prepared by Canter and Kollin are covered by Rule 3.31(c)(3). The mental impressions, conclusions, opinions, or theories of Motor Up's consultants would ordinarily be shielded from discovery. However, opinion work product is discoverable when mental impressions are at issue and the need for the material is compelling. *Holmgren v. State Farm Mutual Auto Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (citations omitted). Further, "a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Frontier Refining, Inc. et al. v. Gorman-Rupp Co., Inc., et al.*, 136 F.3d 695, 704 (10th Cir. 1998).

Respondents have placed such documents at issue by raising defenses which assert reliance on information contained in these documents. Since Complaint Counsel cannot obtain from any other source the substantial equivalent of what information Respondents relied upon as substantiation for Respondents' claims, Complaint Counsel has demonstrated a substantial need for these documents in the preparation of its case. Complaint Counsel is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Accordingly, the withheld documents must be produced.

V.

Documents Between Former Counsel and Consultants

Ordinarily, documents communicated between counsel and consultants containing mental impressions, conclusions, opinions, or theories of Motor Up's counsel would be shielded from discovery. However, Respondents waived the work product privilege as to these documents when they put them at issue by raising defenses which assert reliance on information contained in these documents. *Coleco Indus., Inc. v. Universal City Studios, Inc.*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986)("[A] consistent line of cases has developed an exception to the work-product privilege where the party raises an issue which depends upon an evaluation of the legal theories, opinions and conclusions of counsel."). See, e.g., *Panter, et al. v. Marshall Field & Co., et al.*, 80 F.R.D. 718, 725 (N.D. Ill. 1978); *Charlotte Motor Speedway, Inc. v. Int'l Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989). Since Complaint Counsel cannot obtain from any other source the substantial equivalent of what information Respondents relied upon as substantiation for Respondents' claims, Complaint Counsel has demonstrated a substantial need for these documents. Therefore, these documents must be produced.

However, Complaint Counsel is not entitled to discovery of attorney-client information which goes beyond information Respondents relied upon as substantiation for Respondents' claims, such as defensive legal theories, statements reflecting the attorneys' impressions of the merits of the FTC's investigation, or legal tactics or strategies of Respondents' former counsel. Accordingly, Respondents may redact such information from the requested documents.

IT IS SO ORDERED.



D. Michael Chappell
Administrative Law Judge

Dated: August 5, 1999