UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE PACKAGED ICE ANTITRUST LITIGATION _____ THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTIONS	Case Number: 08-MD-01952 Honorable Paul D. Borman

DIRECT PURCHASER PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL THE U.S. DEPARTMENT OF JUSTICE TO PRODUCE CERTAIN TAPE RECORDINGS AND VERBATIM TRANSCRIPTS THEREOF

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Exhibits To Memorandum

Exhibit A	Memorandum Order in *Rail Freight Fuel Surcharge Antitrust Litigation,* MDL No. 1869 (D.D.C. September 9, 2010)
Exhibit B	Declaration of Gregory K. Arenson, Esq. with three attachments
Exhibit C	Amended complaint in *Martin McNulty v. Reddy Ice, et al*., Civil No. 2:08-cv-13178 (E.D. Mich.)(Borman, J.), docket no. 43 (excerpts)
Exhibit D	Stipulated Protective Order Concerning Confidentiality of Discovery Materials, *In re Packaged Ice Antitrust Litigation,* 08-MD-1952 (November 8, 2010, Docket no. 295)

The Government's ("DOJ") arguments are off point, and plaintiffs' motion should be granted. The DOJ argues that Fed. R. Civ. P. 45, and its standards for a subpoena are improper, because the DOJ has not "waived sovereign immunity" and the only proceeding can be through the Administrative Procedures Act. (DOJ brief at pp. 2-4). To the contrary, "federal agencies cannot…claim sovereign immunity to avoid compliance with third-party subpoenas." *Linder v. Calero-Portacerrero,* 251 F.3d 178, 180 (D.C. Cir. 2001). *Watts v. SEC,* 482 F.3d 501, 508 (D.C. Cir. 2007), held that "a challenge to an agency's refusal to comply with a Rule 45 subpoena should proceed and be treated not as an APA [Administrative Procedure Act] action but as a Rule 45 motion to compel…" The DOJ is a "person" for purposes of a subpoena under Fed. R. Civ. P. 45. *Yousuf v. Samantar,* 451 F.3d 248, 257 (D.C. Cir. 2006). ("[The] Government is a 'person' subject to subpoena under Rule 45 regardless of whether it is a party to the underlying litigation.") As a recent example, see Ex. A, a decision enforcing a subpoena served upon a federal agency in a federal civil antitrust action.[1]

Fed. R. Civ. P. 45 incorporates Rule 26's standard that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). *Heat & Control, Inc. v. Hester Indus, Inc.,* 785 F.2d 1017, 1023 (Fed. Cir. 1986) ("Rule 45(b)(1) must be read in light of Rule 26(b)"). Rule 45 exempts from production

[1] "Sovereign immunity" is only implicated in state court proceedings which seek to compel the federal agency. *Houston Bus. Journal v. Office of Comp. Treas. Dept.,* 86 F.3d 1208, 1211-1211 (D.C. Cir. 1996). "A federal-court litigant, on the other hand, can seek to obtain documents from a federal agency by means of a federal subpoena." *Id.* at 1212. *Accord Connaught Laboratories v. Smithkline Beecham,* 7 F.Supp.2d 477 (D. Del. 1998) (compelling FDA to comply with federal subpoena). The DOJ mistakenly relies upon *Boron Oil v. Downie,* 873 F.2d 67 (4th Cir. 1989), *Appeal of Sun Pipe Line Co.,* 831 F.2d 22 (1st Cir. 1987) and *Swett v. Schenk,* 792 F.2d 1447 (9th Cir. 1986). (DOJ at 3-4). Each of these cases involved underlying state court proceedings. As *Watts, supra,* held "state court subpoenas present entirely different issues because of the supremacy clause and sovereign immunity…" 482 F.3d, note * at p. 508.

only "privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(c)(3). Thus, the only legal issue before the Court is whether or not the materials at issue are "privileged." The only "privilege" claimed by the DOJ is the "investigative files" privilege. (DOJ Ex. A, p. 2). That privilege, in turn, is controlled by the decision in *United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 658-59 and n.4 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). In sum, there is only one issue before the Court, namely whether the materials sought by the subpoena are privileged under *Leggett.* The Administrative Procedures Act and Sovereign Immunity are red herrings.

The DOJ tries to distinguish *Leggett* on three bases. First, it claims the discovery rules are different when the U.S. is a party than when it is a third party. (DOJ brief at 13-14). To the contrary, the issue of privilege is identical. This is confirmed by the two cases upon which the DOJ initially relied (Ex. A to DOJ brief, p. 2), discussed in plaintiffs' opening brief at pp. 12-13. *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336 (D.C. Cir. 1984), was a third party subpoena upon the federal agency. *Black v. Sheraton Corp of America,* 564 F.2d 531 (D.C. Cir. 1977), in contrast, involved the F.B.I. as a party defendant. The analysis of "investigative files privilege" was the same.

Second, the DOJ argues that *Leggett* did not define the contours of the privilege. (DOJ brief at 14, first paragraph). This argument is refuted by reading the decision itself. (Pl. Br., p. 10). Third, the DOJ argues that *Leggett* supposedly concerned a different privilege, the "deliberative process privilege." (DOJ brief at 14-15). This is far-fetched. *Leggett* termed it the "qualified governmental official information privilege," 542 F.2d at 658, and it related solely to information in governmental files. It is the same privilege at issue herein. Professors Wright and

Graham agree. *Federal Practice & Procedure, Federal Rules of Evidence, Rejected Rule 509,* §5681 "Investigative Files Privilege" (West 2011), note 151 and text thereto.[2]

Ms. Varney's declaration (DOJ Ex. C) demonstrates that she did not address or apply the *Leggett & Platt* standards when making the decision to withhold, and still does not address those standards. Nor does Mr. Culum. (DOJ Ex. D). There is no contention by either of them that production of these tape recordings or verbatim transcripts would reveal "suggestions, advice, recommendations and opinions" of the DOJ, the governing standard, 542 F.2d at 658 n. 4. Thus, these materials have been withheld under the wrong legal standard.

The DOJ cites *Dellwood Farms v. Cargill, Inc.,* 128 F.3d 1122 (7th 1997) (DOJ at 15), which occurred while the criminal proceeding was ongoing, but does not address *In re High Fructose Corn Syrup Litig.,* 216 F.3d 621, 624 (7th Cir. 2000), the follow-up decision after the criminal proceeding was concluded. Once the criminal case ended, the DOJ voluntarily gave plaintiffs over 200 tape recordings which **had never been played at the criminal trial and had never been made public**. *See* Arenson declaration, Ex. B hereto, ¶9. This very substantially undercuts Ms. Varney's contention that the tapes here cannot be produced because "the requested recordings have never been played in public" (Varney, ¶10), and Mr. Culum's contention the recordings here would impermissibly reveal non-public matters. (Culum, ¶11-14). Moreover, the tape recordings here can be subject to the confidentiality order this Court has entered (docket entry 295, Ex. D hereto), as they were in *High Fructose.*

[2] Further, the "deliberative process privilege" does not shield these materials. "The test is whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions…[P]urely **factual, investigative matters** that are severable without compromising the private remainder of the documents do not enjoy the protection of the exemption." *Norwood v. F.A.A.*, 993 F.2d 570, 577 (6th Cir. 1993) (emphasis supplied).

The DOJ response claims a need to protect "confidential sources." (Culum ¶ 14). The DOJ does not explain how this factor carries any weight where, as here, the "sources" at issue (Home City, Mr. Mowrey, and Mr. McNulty) have all publicly identified themselves. (Pl. Br., pp. 4-6). Mr. McNulty's amended complaint further discloses his consensual recording. Ex. C.

The DOJ argues that "disclosure would violate the Privacy Act." (DOJ brief at 5). Ms. Varney claims she relied upon the Privacy Act to withhold these materials. (Ex. C, ¶ 13). However, the Privacy Act creates no discovery privilege. *Laxalt v. C.K. McClatchy,* 809 F.2d 885, 888 (D.C. Cir. 1987):

> The Privacy Act, however does not create a qualified discovery privilege as that concept is generally understood, and we find no basis in the statute or its legislative history for inferring one...We find no basis for inferring that the statute replaces the usual discovery standards of the FRCP, in particular, Rule 26 and 45(b), with a different and higher standard.

Much of the DOJ brief is spent arguing that its own internal regulations, 28 C.F.R. §16.26, should control and prevent disclosure. (DOJ brief, pp. 4, 7-12 and Varney at ¶¶5-8). These "Touhy" regulations create no rights or privileges for the DOJ, for reasons explained in plaintiffs' opening brief at pp. 15-18. The DOJ cites *United States ex. Rel. Touhy v. Ragen,* 340 U.S. 462 (1951) at p. 3 (the case for which the "Touhy Regulations" are named), but does not acknowledge that 5 U.S.C. §301 (the statutory authority for the "Touhy regulations") was subsequently amended in 1958 to make explicit that it provides no authority for withholding materials from the public. The Sixth Circuit expressly so held in *In re Bankers Trust Co.,* 61 F.3d 465, 470 (6th Cir. 1995). The DOJ brief and affidavits ignore *Bankers Trust.*

Ms. Varney claims plaintiffs do not need the recordings because they could "interview or depose" people without the recordings. (Varney ¶11). She and the DOJ brief do not address the "best evidence" rule under *Gorden v. U.S.,* 344 U.S. 414, 421 (1953)(Pl. Br., pp.19-20).

Finally, the DOJ invokes the qualified "work product" privilege. (DOJ brief, pp. 18-19). The DOJ did not contend there was any attorney work product at issue when it produced the 200 non-public tape recordings to plaintiffs' counsel in *High Fructose* (Ex. B hereto at Ex. 1), and has made no effort to explain why the present case is different. The work product doctrine involves "protection of the privacy of an attorney's mental processes." *Goldberg v. U. S.*, 425 U.S. 94, 106 (1976). "The less the lawyer's 'mental processes' are involved, the less will be the burden to show good cause." *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971). *Accord,* Epstein, *The Attorney-Client Privilege and Work Product Doctrine* (ABA Section of Litigation, 2007), Vol. II, p. 817 (verbatim answers to questions, even questions posed by attorney, are entitled to very low protection). The DOJ relies upon *In re Grand Jury Proceedings (Duffy),* 473 F.2d 840, 842-47 (8th Cir. 1973), which involved an attorneys' interview notes, memoranda, recollections of interviews and conclusions. Plaintiffs seek no such materials from the DOJ. Further, assuming *arguendo* there were a privilege, the qualified work product privilege can be overcome by a showing of "substantial need" for the materials and the inability "without undue hardship to obtain the substantial equivalent of the materials by other means." *Leggett, supra,* 542 F.2d at 660. Both conditions are met here.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served through the Court's ECF system upon all counsel registered to receive ECF in this case on April 1, 2011, including:

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