

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST)
LITIGATION)

) Misc. No. 99-197 (TFH)
) MDL No. 1285

THIS DOCUMENT APPLIES TO:)
ALL ACTIONS)

FILED

MAY 07 2002

ORDER

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

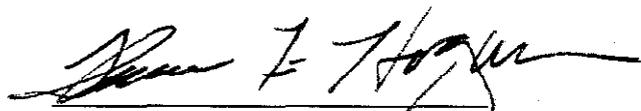
It is hereby

ORDERED that Plaintiffs' Motion to Compel Documents Responsive to Plaintiff's
Third Request to Defendant E.I. du Pont de Nemours is **GRANTED**. It is further hereby

ORDERED that Defendant is ordered to produce documents responsive to Document
Request No. 21 within seven days of this Order and that Defendant may redact information on
DMA and MMA in the documents that it produces.

SO ORDERED.

May 6th 2002



Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MEMORANDUM OPINION

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Pending before the Court are the objections pursuant to Fed. R. Civ. P. Rule 53 of E.I. du Pont de Nemours and Company ("DuPont") to the April 17, 2002 Report and Recommendations of the Special Master Respecting Plaintiffs' Motion to Compel Documents Responsive to Plaintiffs' Third Request to Defendant E.I. du Pont de Nemours and Company ("April 17 Report"). Upon careful consideration of the parties' briefs, the April 17 Report, and the entire record herein, the Court adopts the reasoning of the April 17, 2002 report and affirms the recommendations of the Special Master.¹ As such, the Court grants the plaintiffs' March 12, 2002 motion to compel and orders DuPont to produce documents responsive to Document Request No. 21 but will allow DuPont to redact information regarding two products, DMA and MMA.

The instant discovery dispute concerns Document Request No. 21 in plaintiffs' Third Request for Production of Documents to Defendant Dupont served on July 19, 2001. That request seeks "[a]ll documents that reflect, refer, or relate to the manner in which the cost of

¹ The Special Master originally filed the Report and Recommendations on April 17, 2002 under seal. However, on April 22, 2002 he resubmitted the report without change as the public version after being assured by parties that the Report contained no information required to remain under seal.

manufacturing methylamines was and/or is allocated to the production of TMA.” To put the request in context, Plaintiffs allege that DuPont participated in the vitamins conspiracy with respect to the sale of choline chloride. April 17 Report at 1. In 1986, DuPont and defendant ConAgra, Inc., formed DuCoa as joint venture to produce and sell choline chloride, DuPont and ConAgra each owned a 50 percent share of DuCoa. Id. Plaintiffs further allege that DuPont manufactures methylamines and “needed an outlet for its production of trimethylamine (‘TMA’), a toxic by-product that results from the methylamine process and which is one of the key raw material components of choline.” Id. at 1-2. Plaintiffs allege that DuPont supplied TMA to DuCoa from December 1986 through August 1997. Id.

DISCUSSION

As the April Report correctly points out, Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,” and that “[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” However, Fed. R. Civ. P. 26(b)(2)(iii) states that discovery shall be limited by the court “if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” Therefore, the Special Master addressed the issue of relevance and weighed the benefits of the information to the plaintiffs against the burden to defendant in producing it.

The Special Master found that Document Request No. 21 did meet the test of relevance

required for discovery. The Special Master determined that the request was aimed at discovering whether DuPont artificially inflated the price of TMA it charged DuCoa consistent with increases in the price of choline pursuant to the conspiracy. If this were so, plaintiffs' could argue at trial that any estimate of the but-for cost of choline should not rely on the price DuPont charged to DuCoa for TMA but instead should be based on a lower price. April 17 Report at 4-6. The April 17 Report stated: "The question before me is whether plaintiffs have made out a case that Document Request No. 21 seeks information that is potentially relevant to claims or defenses in this litigation. Under the circumstances, and particularly since DuPont owned DuCoa and is alleged to have participated in a conspiracy respecting choline, I find that plaintiffs have met their burden as to the relevance of the document requested." Id. at 6.

DuPont argued that the only relevant price of TMA is the actual market price and not a price based on the requested cost data. However, as the Special Master found, Request No. 21 seeks cost allocation data which could be used with information on both raw material and production costs to develop evidence of the fair market rate of return which could help plaintiffs arrive at an estimate of the competitive fair market price of TMA that differs from the price DuPont charged and DuCoa paid. Id. at 4. DuPont again argued this point in its Rule 53 Objection. Def. Obj. at 3. In support of this, DuPont offers, for the first time, the deposition testimony of a DuPont employee regarding the market conditions for TMA. DuPont argues that this testimony refutes plaintiffs' claims as to the importance of TMA in the production of choline and suggests that TMA is not a "by-product of the amines process, but a valuable *co-product*, and that DuPont long has had the technology to control the proportions of MMA, DMA, and TMA actually produced by the reactive process used to manufacture these methylamines, including, if

it wished to do so, producing no TMA at all.” Id. at 4. While DuPont may be correct and the argument may be successful at trial, the deposition testimony does nothing to undermine the Special Master’s finding of relevance of the requested discovery.

DuPont also argued to the Special Master that the plaintiffs did not establish relevance because they did not support their claims with an affidavit from an economist stating that he or she needed the information sought in Request 21 and could, in fact, use it in a model estimating plaintiffs’ damages. The Special Master did not find the economic theory put forth by the plaintiffs so complex as to warrant the support of an economist. Thus, this argument too was without merit. DuPont has offered nothing in its objection to undermine this finding and the Court agrees with the Special Master - that the information sought may be helpful in establishing a different but-for price of choline than by using the TMA price DuPont charged DuCoa and that the economic theory is not so complex, at least for the purposes of determining the propriety of allowing discovery to go forward, as to require the affidavit of an economist.

DuPont offered additional arguments before the Special Master in its attempt to claim that the requested discovery was irrelevant including: that the most accurate method of determining the competitive fair market price of TMA is to look at the price DuPont’s competitors were selling TMA to other companies; that the primary cost driver for choline was not TMA but was ethylene oxide; and, that plaintiffs have not shown how DuPont could unilaterally raise the price of TMA. These arguments may be successful at trial in a battle of the experts, however, they are not sufficient to preclude plaintiffs from obtaining discovery to develop what they theorize to be a more accurate model of the but-for price of choline. DuPont has offered no additional arguments in its objection requiring a different finding from that of the

Special Master.

DuPont does add one additional argument to its objection - that “plaintiffs are trying to inflate the damages they claim to have suffered in the alleged price-fixed choline market by trying to *deflate* the actual prices Ducoa paid for TMA” and that this is “another variation of their umbrella theory of damages rejected by this Court in other contexts and, it has no more validity here than it had in those contexts.” Def. Obj at 4. DuPont has offered no support for its characterization of the plaintiffs’ damage theory as an “umbrella theory” that should preclude the requested discovery. Therefore, Court finds this argument without merit.

After finding that the requested discovery met the relevance test, the Special Master analyzed whether the burden of producing the requested discovery outweighed its potential benefit. The Special Master found that DuPont had not offered any concrete estimate of the amount of time or the costs involved to the respond to the request beyond stating that the burden would be significant for any company and the data may not be in the form that the plaintiffs would like, see April 17 Report at 8, and concluded that “[s]uch speculation is insufficient to deny discovery on burden grounds.” *Id.* citing Chubb Integrated Sys. Ltd. v. Nat’l Bank of Wash., 103 F.R.D. 52, 59-60 (D.D.C. 1984). DuPont has not objected to this aspect of the April 17 Report. Thus, the Court has no trouble affirming this portion of the Special Master’s Report.

Lastly, the Special Master discussed the issue of confidentiality and found that the existence of a protective order was sufficient as to most of the information sought in Request No. 21. However, he found persuasive DuPont’s argument that the request would also require producing highly sensitive and proprietary cost information with regard to two products, DMA and MMA which are not relevant to this litigation. April 17 Report at 9. DuPont argued that

providing cost information on TMA would necessarily shed light on DMA and MMA as well. Thus, the Special Master recommended allowing DuPont to redact information about DMA and MMA in the documents it produces in response to Request No. 21. DuPont has not objected to this portion of the Special Master's report and as such the Court has no trouble affirming his reasoning and recommendation. The standing protective order combined with allowing DuPont to redact information will reduce the risk that sensitive and propriety information concerning DMA and MMA will be revealed.

Conclusion

For the forgoing reasons, the Court affirms and adopts the Special Master's April 17, 2002 Report and Recommendations Respecting Plaintiffs' Motion to Compel Documents Responsive to Plaintiff's Third Request to Defendant E.I. du Pont de Nemours and Company. As such, the Court grants the plaintiffs' March 12, 2002 motion to compel and orders DuPont to produce documents responsive to Document Request No. 21 but will allow DuPont to redact information regarding two products, DMA and MMA. An order will accompany this opinion.

May 6 2002



Thomas F. Hogan
Chief Judge