

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: DIISOCYANATES)	Master Docket Misc. No. 18-1001
ANTITRUST LITIGATION)	
)	MDL No. 2862
This Document Relates to:)	
All Cases)	

MEMORANDUM ORDER

Presently before the Court is Plaintiffs’ Discovery Motion No. 3 (ECF No. 1004) seeking to compel Defendants Dow Chemical Company (“Dow”) and Wanhua Chemical (America) Co., Ltd. (“WCA”) to produce training materials related to antitrust policies they each withheld pursuant to the attorney-client privilege. The Court also considered the legal memoranda, declarations, and other documentation the parties filed in support of their respective positions. (ECF Nos. 1006, 1007, 1008, 1009, 1020, 1021, and 1023). The Court also conducted an *in camera* review of these training materials.

Underlying this dispute is Plaintiffs’ request for production of Defendants’ antitrust compliance policies, including:

Documents sufficient to show Your policies or practices directed toward compliance with antitrust laws, including but not limited to all written policies, presentations to employees, forms (such as forms to document a competitor meeting or agenda), and statements signed by Your Employees acknowledging their receipt of or compliance with Your antitrust compliance policies or guidelines.

(“RFP No. 23”) (ECF Nos. 1008, ¶ 3; 1008-1). In response, Dow withheld from production and identified on its privilege log an email and related PowerPoint presentation, dated February 6, 2018, entitled “Antitrust Training – CUPS (2018).pptx” and described as a “[p]resentation reflecting legal advice regarding review of antitrust training material.” (ECF. Nos. 1008, ¶ 4; 1008-2). For its part, WCA also withheld from production on attorney-client privilege grounds a

PowerPoint presentation entitled “WHUS ANTITRUST TRAINING 2014.pptx” that it described as a “[c]onfidential document prepared by outside counsel containing privileged information sent by in-house counsel . . . in relation to outside counsel’s preparation for antitrust compliance training.” (ECF Nos. 1008, ¶¶ 8-9; 1008-6; 1008-7). Counsel conferred to resolve these disputes but nonetheless reached impasse. (ECF Nos. 1008, ¶¶ 5-8, 10-11; 1008-4; 1008-5; 1008-8; 1008-9; 1021; 1021-1; 1021-2; 1021-3; 1021-4).

The attorney-client privilege “protects communications between attorneys and clients from compelled disclosure . . . [and] applies to any communication that satisfies the following elements: it must be (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.” *In re Teleglobe Communications Corp.*, 493 F.3d 345, 359 (3d Cir. 2007), *as amended* (Oct. 12, 2007) (quoting Restatement (Third) of the Law Governing Lawyers § 68 (2000)); *see also Sampson v. Sch. Dist. of Lancaster*, 262 F.R.D. 469, 473-74 (E.D. Pa. 2008). Privileged persons include “the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation.” *In re Teleglobe Communications Corp.*, 493 F.3d at 359.

As this Court recently stated, *see* ECF No. 1040, the attorney-client privilege “serves laudable purposes and thus is worthy of maximum legal protection” but nonetheless “obstructs the truth-finding process and is to be construed narrowly.” *Endeavor Energy Res., L.P. v. Gatto & Reitz, LLC*, No. 2:13-cv-542, 2017 WL 1190499, at *4 (W.D. Pa. Mar. 31, 2017) (internal quotation marks and citation omitted). The burden of proving that the privilege applies is placed on the party asserting the privilege. *Id.* Once the privilege-invoking party provides facts showing the privilege is applicable, the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the privilege. *Id.*

Here, Plaintiffs assert that the materials being withheld are general instructional guidelines, and while perhaps based on legal advice, are, in essence, business policies not protected from disclosure pursuant to the attorney-client privilege. *Claiborne v. FedEx Ground Package Systems, Inc.*, 2:18-cv-01698, 2023 WL 8529132, at *4-5 (W. D. Pa. Dec. 8, 2023) (undertaking *in camera* review and concluding that the withheld materials must be produced because they do not contain attorney-client privileged materials but instead contain “general legal information” designed to assist employees in monitoring compliance with wage and hour laws); *Vilkofsky v. Specialized Loan Servicing, LLC*, No. 16-1291, 2018 WL 10215696, at *2 (W.D. Pa. Jan. 10, 2018) (rejecting claim that “instructional guides for complying with various federal laws” are privileged attorney-client communications or work product); *In re Domestic Drywall Antitrust Litigation*, MDL No. 2437, 2014 WL 5090032, at *4 (E.D. Pa. Oct. 9, 2014) (finding that an antitrust compliance policy is more akin to a reference or instructional guide and thus is primarily a business policy not entitled to protection from compelled production by the attorney-client privilege); *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 07-MD-01871, 2009 WL 4641707, at *3 (E.D. Pa. Dec. 7, 2009) (finding that documents prepared by a corporation as part of efforts to ensure compliance with federal regulatory agencies or maintain a positive public image are not protected by the work product doctrine.).

In relation to Dow, Plaintiffs assert that Dow’s own privilege log describes a “general guideline” unworthy of protection from production. (ECF No. 1008-2). Dow responds that the materials it is withholding are not generalized reference or instructional guides but instead contain specific legal advice drafted by its then-internal antitrust counsel about a specific topic and was presented to a small number of its employees in confidence for the purpose of providing legal advice about that specific topic to those specific employees. (ECF No. 1020-1). Nonetheless,

Plaintiffs contend that Dow failed to provide sufficient detail in its log to enable them to assess the applicability of the privilege.

After undertaking an independent review of the relevant log entries and reviewing the parties' conferral efforts documented in the record, the Court concluded that the necessary assessment cannot be completed absent an *in camera* inspection of the underlying documents. *See In re: Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 125 n. 2 (3d Cir. 1986) (stating that "*in camera* review is frequently the only way to resolve whether in fact the privilege asserted applies") (citing *United States v. Nixon*, 418 U.S. 683, 713-14 (1974)). Both Dow and WCA supplied the Court with these PowerPoint presentations for its *in camera* review.

Now, upon undertaking this *in camera* review, the Court finds that Dow's training presentation mainly is a generalized reference or instructional guide akin to a business policy covering its policies and practices such as its Code of Business Conduct. While Dow contends that this training material was presented to a limited audience, the record indicates that its audience included a broad range of personnel such as "Account Managers, Sales Directors, and Production Managers." (ECF No. 1022-1, at ¶ 7). Unknown is the actual number of persons receiving this training or whether it presented a forum for Dow personnel to pose questions and receive particularized legal advice in return. What is clear is that the PowerPoint slide deck itself, which is the sole subject of this discovery dispute, does not communicate particularized legal inquiries or legal advice. To the contrary, the slide text instructs the audience to "consult counsel" or to "[e]ngage your supervisor, Dow Legal representatives or the Office of Ethics & Compliance if you have questions or need additional guidance." Importantly, the presenter's notes contained in the slide deck expressly state that "[t]his training is to raise awareness of the principles and framework in which business decisions will be evaluated by antitrust regulators. It is not a substitute for

specific legal guidance in any particular situation or geography.” Accordingly, the Court concludes that the PowerPoint presentation itself is not entitled to protection from compelled production by the attorney-client privilege.

As for WCA, it contends that its training presentation was prepared in 2014 by its outside counsel for a non-party affiliate, Wanhua Chemical US Holding Inc. (“WHUS”), and thus prior to the relevant discovery period for this case. WCA identified this material on its privilege log because the document had been attached to an email sent from in-house counsel to outside counsel during the discovery period as an example to consider when preparing a new training presentation for WCA. (ECF Nos. 1008-8; 1021-2). WCA contends that this document embodies a communication requesting legal advice and contains attorney work-product shielded from production¹. (*Id.*) Upon undertaking an *in camera* review, the Court finds that the transmittal

¹ WCA also contends that it should not be compelled to produce this training material because it is non-responsive to RFP No. 23, asserting that it was the policy of a non-party affiliate and was created prior to the relevant discovery period. The Court disagrees. While this material was created before the relevant discovery period, was never implemented by WCA, and was never disseminated to WCA’s employees, it was possessed by WCA’s in-house counsel and it was included in a communication to outside counsel, during the relevant discovery period, ostensibly for the purpose of using it as a guide for its own policies and training material. Under these circumstances, the Court cannot conclude that this document is not relevant or non-responsive to RFP No. 23. However, while the Court considers this presentation to be relevant and thus discoverable, Fed. R. Civ. P. 26(b)(1), it may have little if any probative value. That is a question for another day.

Additionally, both Dow and WCA further contend that they already satisfied RFP No. 23 as each has produced records and information to demonstrate sufficiently their antitrust policies and practices. In making this argument, Dow and WCA focus on the “sufficient to show” language contained in RFP No. 23 and assert that they are not required to produce each and every responsive document but merely a “sufficient collection of documents . . . to fairly and accurately reflect the quality and nature of the information sought.” See *In re Blue Cross Blue Shield Antitrust Litig.*, No. 13-cv-20000, 2017 WL 11539486, at *2 n.4 (N.D. Ala. Aug. 1, 2017). Plaintiffs respond by arguing that the “sufficient to show” standard creates an efficiency that allows a party to produce only non-duplicative versions or copies of a requested document and does not envision the wholesale withholding of unique materials. Plaintiffs also point to other language in RFP No. 23 expressly eliciting “all written policies, presentations . . .” Regardless, there is no support in the present record to suggest that the two presentations at issue are duplicative of other materials or that production of these materials would impose a burden or expense that would outweigh their likely benefit. Fed. R. Civ. P. 26(b)(1). The Court also rejects Dow’s and WCA’s timeliness argument as unpersuasive on the present record. Accordingly, the decision to compel production *vel non* rests solely upon whether these two presentations are protected by the attorney-client privilege.

email indeed reflects WCA's request for legal services and briefly and summarily outlines the scope of services requested, yet the presentation attached to the email, which originally belonged to a corporate affiliate and was intended to serve as an exemplar for WCA's use, does not convey any privileged confidences and instead is essentially a generalized reference or instructional guide akin to a business policy considered to be guidance for WCA's use. As such, the Court concludes that this PowerPoint presentation is likewise not entitled to protection from compelled production by the attorney-client privilege.

Accordingly, in the view of the foregoing, the Court enters the following Order:

AND NOW, this 28th day of March 2024, IT IS HEREBY ORDERED that said Motion is GRANTED. Within ten (10) days of the date of this ORDER, Dow Chemical Company and Wanhua Chemical (America) Co., Ltd. shall produce to Plaintiffs the PowerPoint presentations that were submitted to the Court for *in camera* review.

s/ W. Scott Hardy
W. Scott Hardy
United States District Judge

cc/ecf: All Counsel of Record