

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AUTOMOTIVE REFINISHING :
PAINT ANTITRUST LITIGATION : MDL NO. 1426
:

SURRICK, J.

MAY 26, 2006

MEMORANDUM & ORDER

Presently before the Court are Defendants PPG Industries Inc. and Sherwin-Williams Co.'s Motion To Compel Plaintiffs To Respond To Interrogatories And Document Requests ("First Motion to Compel") (Doc. No. 171), Defendants' Motion For Leave To File Their Reply Brief In Support Of Their Motion To Compel Plaintiffs To Respond To Interrogatories And Document Requests (Doc. No. 173), Defendants' Motion To Compel Answers To Interrogatories ("Second Motion to Compel") (Doc. No. 174), and Defendants' Motion To Preclude Persons And Documents Not Properly Disclosed By Plaintiffs During Discovery (Doc. No. 175). Defendants' Motion for Leave to File will be granted. For the following reasons, Defendants' First Motion to Compel will be granted in part and denied in part, Defendants' Second Motion to Compel will be granted, and Defendants' Motion to Preclude will be denied.

I. BACKGROUND

In this antitrust class action, Plaintiffs allege that from January 1, 1993, to December 31, 2000 (the "Class Period"), various domestic and foreign manufacturers of automotive refinishing paint "conspir[ed] to fix, raise, maintain or stabilize prices for automotive refinishing paint in the United States" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Defendants are E.I. DuPont de Nemours and Company and DuPont Performance Coatings, Inc. ("DuPont"); BASF Aktiengesellschaft, BASF Coatings AG, and BASF Corp. ("BASF"); PPG Industries, Inc.

(“PPG”); Sherwin-Williams Co. and Sherwin-Williams Automotive Finishes Corp. (“Sherwin-Williams”); and Akzo Nobel Car Refinishes and Akzo Nobel Coatings, Inc. (“Akzo”). Plaintiffs seek damages, injunctive relief, and attorney’s fees pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. On September 5, 2003, and September 27, 2004, after providing notice to all potential Class Members and holding fairness hearings, we granted final approval of partial settlements between the Class and Defendants Akzo, BASF, and DuPont. (Doc. Nos. 108, 135.) The Defendants that remain are PPG and Sherwin-Williams.

Defendants filed the First Motion to Compel seeking to compel Plaintiffs to respond to certain interrogatories and document requests which had been served on Plaintiffs. (Mem., Doc. No. 171 at 3-5.) Through this discovery, Defendants seek, *inter alia*, the identities of persons with knowledge concerning Plaintiffs’ core allegations as well as documents and communications that support certain of the claims in the Complaint. (Doc. No. 171 at Exs. E, F, G, K, L.) At issue are fifty-four interrogatories and seventeen requests for production of documents. (Mot., Doc. No. 171 ¶ 5.) According to Defendants: (1) “Plaintiffs have refused to answer . . . interrogatories seeking the names of persons with knowledge of and documents or communications relating to Plaintiffs’ core allegations[,] . . . arguing that these are premature contention interrogatories;” (2) “Plaintiffs [wrongfully] contend that answering [certain] interrogatories will force Plaintiffs to identify the names of persons contacted by Plaintiffs’ counsel, which are protected by the attorney work product doctrine;” (3) “Plaintiffs have refused to provide documents or information in the possession of Plaintiffs’ counsel . . . [or] to make any representation that they do or do not have any documents;” and (4) “Plaintiffs have refused to

respond to numerous document requests that generally seek to discover the market conditions that the Plaintiffs experienced.” (Mot., Doc. No. 171 ¶¶ 1-4.)

Defendants PPG and Sherwin-Williams filed the Second Motion to Compel on April 24, 2006. Here, Defendants complain that Plaintiffs’ responses to recently-served contention interrogatories were “grossly incomplete.” (Doc. No. 174 at 1.) Both Sherwin-Williams and PPG served Plaintiffs with contention interrogatories during the period specified in our Amended Pretrial Scheduling Order. (*Id.* at Exs. A, B.) In response, Plaintiffs raised a series of objections, arguing that the interrogatories call for legal arguments and conclusions, are unduly burdensome and overly broad, require production of privileged information, seek information already in Defendants’ possession, or are properly the subject of expert testimony. (*Id.* at Exs. C, D.) Rather than provide individual responses to each question, Plaintiffs submitted nearly identical eight-page narratives to both PPG and Sherwin-Williams. (*Id.* at Ex. C, pp. 8-16; *id.* at Ex. D, pp. 8-15.) In addition, Plaintiffs provided one general list of “persons with knowledge supporting or relating to their contentions,” rather than craft individual lists for each of the thirty-three interrogatories. (*Id.* at Ex. C, pp. 16-19; *id.* at Ex. D, pp. 15-18.) This list contains nearly 300 names. Similarly, Plaintiffs provided a single list of relevant documents, encompassing thousands of pages of materials. (*Id.* at Ex. C, pp. 20-26; *id.* at Ex. D, pp. 19-26.) Defendants now seek more complete responses to both sets of contention interrogatories.

On the day that Defendants filed the Second Motion to Compel they also filed the Motion to Preclude Persons and Documents Not Properly Disclosed by Plaintiff During Discovery. (Doc. No. 175.) Defendants request that, in the event Plaintiffs do not produce the evidence sought in the First and Second Motions to Compel, Plaintiffs be barred from later surprising

Defendants with late or partial disclosures of such evidence for use at trial or in support of dispositive motions. (*Id.* at 1-2.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 26(b)(1) permits litigants to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.” The information sought in discovery need not be admissible, as long as it “appears reasonably calculated to lead to discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). Relevance is generally construed broadly. *See Oppenheimer Funds v. Sanders*, 437 U.S. 340, 351 (1978). The liberal discovery permitted by the Federal Rules of Civil Procedure ensures that no relevant facts remain hidden. *Northern v. City of Phila.*, Civ. A. No. 98-6517, 2000 U.S. Dist. LEXIS 4278, *1 (E.D. Pa. Apr. 4, 2000). Moreover, where a party receives evasive or incomplete answers to a discovery request, they are permitted to bring a motion to compel disclosure and, where appropriate, for sanctions. *See Fed R. Civ. P. 37*. The party resisting production bears the burden of persuasion. *See Fid. & Deposit Co. of Md. v. McCulloch*, 168 F.R.D. 516, 520 (E.D. Pa. 1996). The resisting party “must show specifically” how the information requested “is not relevant or how each question is overly broad, burdensome or oppressive.” *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982).

While construed liberally, permissible discovery is not without limits. Among those is the work-product doctrine, which was first articulated in *Hickman v. Taylor*, 329 U.S. 495 (1947), and which immunizes from discovery those documents “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative.” Fed. R. Civ. P. 26(b)(3). A party asserting work-product protection bears the burden of proving that the

materials in question were prepared in anticipation of litigation. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000). In applying the doctrine, courts consider the nature of the document for which protection is sought as well as the circumstances surrounding its creation and distribution. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993). Based upon these facts, the court determines whether “the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir. 1979).

In undertaking this analysis, a court must consider the motivating purpose behind the creation of the document. *United States v. Rockwell*, 897 F.2d 1255, 1266 (3d Cir. 1990). “Generally, a reasonable anticipation of litigation requires existence of an identifiable specific claim or impending litigation at the time the materials were prepared.” *Schmidt, Long & Assoc., Inc. v. Aetna U.S. Healthcare, Inc.*, Civ. A. No. 00-CV-3683, 2001 U.S. Dist. LEXIS 7145, at *13 (E.D. Pa. May 31, 2001). However, “[a]dvising a client about matters which may or even likely will ultimately come to litigation does not satisfy the ‘in anticipation of’ standard. The threat of litigation must be more imminent than that.” *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 948 (E.D. Pa. 1976).

III. FIRST MOTION TO COMPEL

A. Premature Contention Interrogatories

In their responses to the discovery served by Defendants, Plaintiffs claim that some of the interrogatories are “premature contention interrogatories,” which Plaintiffs are not obligated to answer. In our Memorandum and Order dated October 14, 2003, we addressed Plaintiffs’ earlier

refusal to answer certain “premature contention interrogatories.” (Doc. No. 111 at 4-5.)

Contention interrogatories can be characterized as:

any question that asks another party to indicate *what* it contends . . . [a question asking] another party *whether* it makes some specified contention . . . [a question asking] an opposing party to state all *facts* on which it *bases* some specified contention . . . [a question asking] the responding party to take a position, and then to explain and defend that position, with respect to *how the law applies to facts* . . . [a question asking] parties to spell out the *legal basis* for, or theory behind, some specified contention.

Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 95 (E.D. Pa. 1992) (citing *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 332 (N.D. Ca. 1985)). At that time, we reviewed certain of Defendants’ interrogatories and agreed that they were contention interrogatories.¹ (Doc. No. 111 at 6.) Because substantial discovery then still remained to be conducted, we determined that such interrogatories were premature and that Defendants had not justified their use at that time. (*Id.*)

Upon review, we conclude that the interrogatories at issue here are not contention interrogatories. Of the fifty-four interrogatories, forty-four ask Plaintiffs to identify either: (1) “any and all persons with knowledge” concerning certain allegations in their Complaint,² (2) “persons who have provided [them] with information” concerning certain allegations,³ or (3)

¹ Each of these interrogatories cited an allegation in the Complaint and asked Plaintiffs to “[s]tate all facts that you believe support this allegation.” (Doc. No. 101 at 7.)

² See Def.’s Joint 2d Set of Interrogs. & Req. for Prod. of Docs., Interrog. Nos. 1, 5, 8, 10, 13; PPG Indus. Inc.’s 1st Set of Interrogs., Interrog. Nos. 1, 2, 4, 6, 8, 10, 11, 13, 15, 16; Sherwin-Williams Co. & Sherwin-Williams Automotive Refinishing Corp.’s 1st Set of Interrogs. & Reqs., Interrog. Nos. 1, 2, 4, 6, 8, 10, 11, 13, 15, 16, 18, 19.

³ See Def.’s Joint 2d Set of Interrogs. & Req. for Prod. of Docs., Interrog. Nos. 2, 3, 6, 16.

documents which support certain of Plaintiffs' allegations.⁴ Interrogatories such as these, "which seek the identification of witnesses or documents that support or contradict any of the controverted allegations" in a complaint, do not fall into the category of contention interrogatories. *Fischer & Porter Co.*, 143 F.R.D. at 95; *see also United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, Civ. A. No. 00-737, 2005 U.S. Dist. LEXIS 17014, at *8 (E.D. Pa. Aug. 15, 2005). The remaining ten interrogatories seek specific factual support for Plaintiffs' allegations: two ask Plaintiffs to clarify their Complaint by identifying entities and products made reference to therein,⁵ two ask Plaintiffs to identify any meetings where manufacturers may have discussed paint pricing,⁶ and the remaining six ask Plaintiffs to identify any communications regarding paint pricing.⁷ Such questions do not fit within the definition of contention interrogatories as stated in *In re Convergent*.

Plaintiffs argue that these interrogatories, which collectively seek all documents and witnesses as to particular contentions, are tantamount to demands for "all facts" relating to these allegations and are thus contention interrogatories. (Doc. 45, 01-cv-2830, at 5-6.) Their only

⁴ *See* Def.'s Joint 2d Set of Interrogs. & Req. for Prod. of Docs., Interrog. Nos. 4, 7, 9, 11, 14, 17; PPG Indus. Inc.'s 1st Set of Interrogs., Interrog. Nos. 3, 9, 14; Sherwin-Williams Co. & Sherwin-Williams Automotive Refinishing Corp.'s 1st Set of Interrogs. & Reqs., Interrog. Nos. 3, 9, 14, 20.

⁵ *See* Def.'s Joint 2d Set of Interrogs. & Req. for Prod. of Docs., Interrog. Nos. 12, 15.

⁶ *See* PPG Indus. Inc.'s 1st Set of Interrogs., Interrog. No. 12; Sherwin-Williams Co. & Sherwin-Williams Automotive Refinishing Corp.'s 1st Set of Interrogs. & Reqs., Interrog. No. 12.

⁷ *See* PPG Indus. Inc.'s 1st Set of Interrogs., Interrog. No. 5, 7, 17; Sherwin-Williams Co. & Sherwin-Williams Automotive Refinishing Corp.'s 1st Set of Interrogs. & Reqs., Interrog. No. 5, 7, 17.

support for this argument, however, is the language of our earlier Memorandum. (Doc. No. 111 at 5.) In this instance, we do not agree with Plaintiffs. Unlike Defendants' earlier interrogatories, these requests to identify supporting witnesses and documents do not necessarily require Plaintiffs to enumerate all the facts that support particular allegations. The current interrogatories, although comprehensive in their breadth, are not contention interrogatories. Plaintiffs' objections to these interrogatories as such are therefore without merit.

B. Names of Persons with Knowledge

Plaintiffs object to a number of interrogatories which ask them to “[i]dentify any and all persons who have provided you with information” concerning certain specific allegations in Plaintiffs' Complaint. (Doc. No. 171 at Ex. A ¶¶ 2, 3, 6, 16.) According to Plaintiffs, these interrogatories are “tantamount to asking for a list of persons whom plaintiffs' counsel has interviewed.” (Doc. No. 45, 01-cv-2830, at 8-9.) Such a list, Plaintiffs contend, would be protected from discovery by the work-product doctrine.

While “the identity and location of persons having knowledge of any discoverable matter” are explicitly within the scope of permissible discovery under the Federal Rules, Fed. R. Civ. P. 26(b)(1), Plaintiffs rightly point out that some courts have applied work-product protection to certain inquiries into “the identity of persons contacted and/or interviewed during an investigation . . . in anticipation of litigation or for trial.” *Schibley v. Gould*, Case No. 91-1420, 1994 U.S. Dist. LEXIS 4082, at *5 (D. Kan. Mar. 29, 1994); *see also BASF Corp. v. Old World Trading Co.*, Case No. 86 C 5602, 1992 U.S. Dist. LEXIS 951, at *10 (N.D. Ill. Jan. 30, 1992) (work product applies to list of persons interviewed by counsel during investigation). The Third Circuit, however, has generally concluded otherwise. In *United States v. Amerada Hess*

Corp., 619 F.2d 980 (3d Cir. 1980), the Court of Appeals found that a list of persons interviewed by Amerada Hess's counsel did "not directly or indirectly reveal the mental processes of [defendant's attorneys]" and "furnish[ed] no information as to the content of any statement." *Id.* at 987-88. After "balancing [the] competing considerations" and finding that a list of interviewees was "of rather minimal substantive content, and presents none of the classic dangers to which the *Hickman v. Taylor* rule is addressed," the court held that work product did not preclude its production. *Id.* at 988.

Courts of this District have reached the same conclusions when addressing such requests. See *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 1999 U.S. Dist. LEXIS 8038, at *6-7 (E.D. Pa. May 26, 1999) (citing *Amerada Hess* in finding "names . . . of individuals interviewed by Plaintiffs' counsel . . . [have] minimal work product conduct" and are not protected under *Hickman*); *In re Towner Petroleum Co. Sec. Litig.*, MDL No. 607, 1986 U.S. Dist. LEXIS 29067, at *32-34 (E.D. Pa. Feb. 21, 1986) (request to identify persons interviewed by attorney "does not seek the substance of any conversations . . . [and] is not protected by privilege"). In each case it appears that the court's determination was based on the specific facts at hand, with the overriding considerations being "the extent to which the information discloses an attorney's thought processes" and whether disclosure would reveal the attorney's "mental impressions, conclusions, opinions, or legal theories." *In re Aetna*, 1999 U.S. Dist. LEXIS 8038, at *10 (quoting Fed. R. Civ. P. 26(b)(3)).

The interrogatories found objectionable by Plaintiffs seek the identities of persons who provided Plaintiffs with certain information at certain times. (Doc. No. 171 at Ex. A ¶¶ 2, 3, 6, 16.) While these lists may provide a remote clue as to the nature and scope of Plaintiffs'

investigation, their substantive work product content is minimal. In producing this information, Plaintiffs need not reveal any of the details of the interactions that occurred or the mental impressions, conclusions, legal theories, or opinions drawn therefrom. Defendants merely seek “specific subcategor[ies] of all potential fact witnesses,” a permissible subject for discovery. *In re Aetna*, 1999 U.S. Dist. LEXIS 8038, at *9. Plaintiffs have provided no justification for their objection beyond the blanket prohibitions employed by the District Courts in Kansas and Illinois. (Doc. No. 45, 01-cv-2830, at 8-9 (citing *Schibley*, 1994 U.S. Dist. LEXIS 4082, at *5; *BASF Corp.*, 1992 U.S. Dist. LEXIS 951 at *10).) In this jurisdiction, the courts have reached a different result, refusing to apply work-product protection and compelling production in similar situations. Accordingly, Plaintiffs’ responses to these interrogatories will be compelled.

C. Documents and Facts in Possession of Plaintiffs’ Counsel

Plaintiffs also object to certain Requests for Production of Documents which may require them to reveal documents obtained from third parties. (Mem., Doc. No. 171 at 13.) During the correspondence that preceded the First Motion to Compel, Defendants apparently “asked [Plaintiffs] to confirm that [they we]re not withholding any responsive documents based on their objections” to at least one such interrogatory.⁸ (Doc. No. 171 at Ex. C ¶ 4.) While Plaintiffs confirmed that the class representatives were not in possession of responsive documents, they refused to “make any representation that plaintiffs’ counsel do or do not have any documents

⁸ Request No. 15 in Defendants’ First Joint Request for Production of Documents to Plaintiff seeks the production of:

All documents concerning communications between any manufacturer, distributor or purchaser of automotive refinishing paint products and another manufacturer, distributor or purchaser of automotive refinishing paint products concerning or relating to the price or pricing of automotive refinishing paint in the United States. (Doc. No. 171 at Ex. K.)

obtained from third parties.” (*Id.*) According to Plaintiffs, this information represents “the results of independent research and investigation by counsel conducted in the course of preparing this case.” (Doc. No. 45, 01-cv-2830, at 11.) Plaintiffs again contend that the work-product doctrine shields such information from discovery. (Doc. No. 45, 01-cv-2830, at 11.)

Plaintiffs rely on *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985), and *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), for the principle that “the selection and compilation of documents by counsel is protected by the work-product doctrine.” (Doc. No. 45, 01-cv-2830, at 11 (internal quotation omitted).) While *Sporck* is the controlling precedent in this jurisdiction, both it and *Shelton* are easily distinguished from the case at bar. The plaintiff in *Sporck* sought the identity of certain documents that were specifically used by defense counsel to prepare a deposition witness. *Sporck*, 759 F.2d at 313. At the deposition, defense counsel refused to identify the documents, arguing that although “the individual documents that comprise the grouping are not attorney work product . . . the selection process itself represents defense counsel’s mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation.” *Id.* at 315. The Third Circuit agreed, finding that:

[W]ithout the protection that the product doctrine accords his preparation, defense counsel may have foregone a sifting of the documents, or at the very least chosen not to show the documents to [the witness]. As a result, [the witness] may not have been as well-prepared for his deposition, and neither plaintiff nor defendant would have realized the full benefit of a well-prepared deponent’s testimony.

Id. at 317.

In *Shelton*, the plaintiff chose to depose an in-house attorney from defendant’s litigation department. *Shelton*, 805 F.2d at 1325. At her deposition, the witness refused to answer certain questions concerning the existence or nonexistence of various documents. *Id.* Defendants

argued that counsel’s “acknowledgment of the existence of documents referred to by plaintiffs’ counsel would reflect her judgment as an attorney in identifying, examining, and selecting from [defendant]’s voluminous files those documents on which she will rely in preparing her client’s defense in this case.” *Id.* at 1328. The Eighth Circuit held that counsel’s recollection of the specific documents that she reviewed “reflects [her] legal theories and thought processes, which are protected as work product,” and “involves answers to questions that would reveal more than the mere existence of documents.” *Id.* at 1329. Work-product protection was deemed to apply to this information.

The facts of the instant case are notably different. In both *Sporck* and *Shelton*, all documents in question had already been turned over in discovery. Thus, any relevant facts contained within those documents had already been discovered. The only benefits to be derived from those requests were a greater insight into opposing counsel’s “conscious segregation” of certain documents: in *Sporck*, what materials counsel utilized in preparing a deponent; in *Shelton*, whether counsel specifically recalled certain documents from her trial preparation. *Kravco Co. v. Valley Forge Ctr. Assocs.*, Civ. A. No. 91-4932, 1991 U.S. Dist. LEXIS 18752, at *11 (E.D. Pa. Dec. 17, 1991). Here, the Class has not already made available the documents in question, nor will Plaintiffs even acknowledge whether they exist. Unlike *Sporck* or *Shelton*, Defendants are not inquiring into whether or how Plaintiffs used documents in preparing their case. Rather, Defendants just want to know whether Plaintiffs possess any such documents at all. They are merely seeking to uncover the factual basis for Plaintiffs’ claims—the central purpose of discovery.

Plaintiffs cannot avoid disclosure based upon the simple fact that counsel obtained certain documents from third parties. The information in question does not fall within the protection of the work-product doctrine. *See Directory Dividends, Inc. v. SBC Commc'ns, Inc.*, Civ. A. No. 01-CV-1974, 2003 U.S. Dist. LEXIS 24296, at *5-8 (E.D. Pa. Dec. 31, 2003); *Arnold v. E.W. Bliss Co.*, Civ. A. No. 00-3985, 2001 U.S. Dist. LEXIS 24100, at *4-5 (E.D. Pa. Oct. 5, 2001); *Mead Corp. v. Riverwood Natural Res. Corp.*, 145 F.R.D. 512, 517-18 (D. Minn. 1992); *Kravco Co.*, 1991 U.S. Dist. LEXIS 18752, at *10-11. Accordingly, Plaintiffs cannot rely on this objection to avoid these discovery requests and must provide full responses to the interrogatories in question.

D. Downstream Data Concerning Market Conditions and Financial Information

Plaintiffs raise additional objections to document requests for evidence “relating to the market conditions and competitive landscape in the automotive refinishing paint industry.” (Doc. No. 173 at 9.) Thus far, Plaintiffs have limited their responses to such requests to information about direct purchases of paint. (Mem., Doc. No. 171 at 15.) Defendants also seek information about indirect paint purchases or sales as well as Plaintiffs’ audited financial statements. (*See, e.g.*, Doc. No. 171 at Exs. K, L.) In response, Plaintiffs argue that such evidence either (1) constitutes “downstream data,” which is “irrelevant, and consequently not an appropriate subject of discovery, in the context of a price-fixing antitrust action” or (2) represents a “fishing expedition[] into the financial records of purchasers of price-fixed goods” which is similarly not permitted. (Doc. No. 45, 01-cv-2830, at 13.)

Discovery of the information sought by Defendants is generally disfavored. This results from the rule that downstream data—information about product transactions that occurred after

the initial sale by the alleged price-fixer—cannot be used to support a pass-on defense,⁹ except under limited circumstances. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe* and *Illinois Brick* the Supreme Court desired to avoid the “fishing expeditions” that result when downstream discovery was permitted. *See Go-Tane Serv. Stations, Inc. v. Ashland Oil, Inc.*, 508 F. Supp. 200, 204 (N.D. Ill. 1981). This prohibition was subsequently extended to instances where, as here, no pass-on defense is being asserted. *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 226 F.R.D. 492, 497-98 (M.D. Pa. 2005); *In re Plastics Additives Antitrust Litig.*, Civ. A. No. 03-2038, 2004 U.S. Dist. LEXIS 23989, at *50-52 (E.D. Pa. Nov. 29, 2004) (“[C]ase law prevents discovery of events occurring in the chain of distribution after the initial sales of the price-fixed product, information otherwise known as ‘downstream data.’”); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 297-302 (D.D.C. 2000). It has also been further extended to exclude information about plaintiffs’ financial condition as well. *See In re Vitamins*, 198 F.R.D. at 302; *In re Folding Cartons Antitrust Litig.*, MDL No. 250, 1978 U.S. Dist. LEXIS 20409, at *8 (N.D. Ill. May 5, 1978).

Defendants advance three theories to support their position that this discovery should be permitted: (1) that the requested information will demonstrate the highly competitive nature of the paint industry and, in turn, prove the nonexistence of a price-fixing scheme; (2) that such information will be relevant when determining damages, in that it will indicate the price that

⁹ Defendants to a charge of price-fixing cannot assert as a defense against direct purchasers that the alleged victims “passed-on” the overcharge to the indirect purchasers with whom they transacted. *Ill. Brick Co. v. Illinois* 431 U.S. 720, 725 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

Defendants may have charged in a “but for” world; and (3) that this information will indicate whether Plaintiffs engaged in speculative purchasing, the process by which a buyer stockpiles inventory in anticipation of a price increase and then sells the product after the increase in order to enhance profits.¹⁰ (Doc. No. 171 at 15-16.)

With respect to their third theory, we see little difference between this logic and a standard pass-on defense. Defendants indicate only that downstream data may prove that Plaintiffs also profited from the increased prices. “Whether [a] purchaser[] absorbed, passed-on, or made a profit on the overcharges in comparison with the industry generally is irrelevant, and investigations into such matter are proscribed by *Illinois Brick*.” *In re Folding Carton*, 1978 U.S. Dist. LEXIS 20409 at *8. This theory provides no justification for permitting discovery of downstream data.

The second theory advanced by Defendants also fails to convince us that the discovery in question should be compelled. In *In re Vitamins*, the court had to consider whether individual downstream data was relevant to a determination of damages. The impact of demand on damages, it was argued, could have been determined just as easily using either public information

¹⁰ It is interesting to note that Defendants have argued the reverse in a brief submitted to the Judicial Panel on Multidistrict Litigation. In that brief, which opposes the consolidation of this case with another case brought by a group of indirect purchasers, *Atlantic Auto Collision, Inc. v. PPG Industries*, CV-05-1448 (E.D.N.Y.), Defendants argued:

[D]iscovery relating to (a) transactions between jobbers and body shops [and] (b) transactions between body shops and their customers . . . is relevant to establishing both the fact and amount of damage for Atlantic Auto Collision and the class it seeks to represent. Such discovery, however, is not relevant to the claims asserted by direct purchasers, the plaintiffs in the MDL Proceeding. (Mem. In Supp. of Defs’ Mot. to Vacate Conditional Transfer Ord., MDL Docket No. 1426, at 11.) In a letter to the Court, Defendants nonetheless maintain that evidence of these “‘indirect’ purchases is relevant towards showing the fierce competition between the paint manufacturers.” (Letter from David H. Marion, Mar. 16, 2006.)

of overall market demand or sales data provided by the manufacturer defendants. *In re Vitamins*, 198 F.R.D. at 299. Because the defendants failed to sufficiently justify the need for individualized downstream data, their request was denied. Here, Defendants advance no additional reason why individualized downstream data or information regarding Plaintiffs' finances is necessary or relevant to the determination of damages.¹¹ Accordingly, we accept the rationale of *In re Vitamins*.

Defendants' first theory is novel, but no more valid. We agree that it is plausible that information concerning the competitive nature of the automotive paint refinishing industry may provide circumstantial support for the nonexistence of alleged price-fixing among Defendants. Certain activities, like aggressive marketing on the part of manufacturers, would militate against the existence of a price-fixing arrangement. In support of such a theory, Defendants might legitimately seek evidence of the "broad array of competitive options" available to refinishing paint buyers, including discounts and rebates offered by manufacturers. (Mem., Doc. No. 171 at 15.) But Defendants' contention that discovery of downstream data is necessary to substantiate this claim is nonetheless counterintuitive. The case of *Williamson Oil Co., Inc. v. Philip Morris*

¹¹ Defendants cite to two decisions in support of their argument, neither of which convinces us to depart from the holding in *In re Vitamins*. The decision to compel discovery in *JBDL Corp. v. Wyeth-Ayerst Laboratories, Inc.*, 01-CV-704, Doc. No. 112 at 6 (S.D. Ohio June 6, 2004), was based on the defendant's allegation that its price increases were "the result and not the cause of downstream speculative purchasing." No such allegation is made by Defendants here. In addition, the court in *JBDL Corp.* explicitly precluded discovery aimed at using downstream data for the purposes of mitigating the defendant's damages. In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003), downstream discovery was permitted as a means to determine whether class certification prerequisites were satisfied. *Id.* at 1191. *But see In re Pressure Sensitive Labelstock*, 226 F.R.D. at 497 (refusing to require plaintiffs to produce downstream data to resolve class certification issue); *In re Plastics Additives*, 2004 U.S. Dist. LEXIS 23989, at *49-50 (same). Class certification is not an issue here.

USA, 346 F.3d 1287 (11th Cir. 2003), is instructive. There, the court found that it was the manufacturers' actions, not the actions of the plaintiffs or third-party middlemen, which were "wholly inexplicable if we assume that a price fixing arrangement had been reached." *Id.* at 1321. Plaintiffs' activities are almost wholly irrelevant in proving or disproving the underlying charge. This claim must be substantiated by evidence of Defendants' activities, not Plaintiffs'. Accordingly, we will deny Defendants' request that we depart from the long-held practice of proscribing discovery of downstream data and financial information.

IV. SECOND MOTION TO COMPEL AND MOTION TO PRECLUDE

The Second Motion to Compel addresses Plaintiffs' response to the contention interrogatories served by Defendants within the time prescribed by our Amended Pretrial Scheduling Order. Defendants argue that Plaintiff's answers are deficient because (1) they do not identify which persons support Plaintiffs' contention and (2) they do not answer numerous questions. (Doc. No. 174.) Specifically, Defendants object to Plaintiffs' use of a single narrative, a single list of persons with "knowledge supporting or relating to" the contentions in question, and a single list of responsive documents. (Doc. No. 174 at Ex. C, pp. 8-26; *id.* at Ex. D, pp. 8-26.) In addition, Defendants complain that a number of the interrogatories remain entirely unanswered. (Doc. No. 174 at 10.) Plaintiffs raise a series of general objections to these interrogatories, arguing that Defendants have "disregard[ed] the purpose and function of contention interrogatories" and that such interrogatories "pose a well-recognized risk of overbroad and burdensome discovery." (Doc. No. 48 at 9-11.)

A party resisting discovery "must show specifically" how the information requested "is not relevant or how each question is overly broad, burdensome or oppressive." *Josephs*, 677

F.2d at 992. “Mere recitation of the familiar litany that an interrogatory or document production request is ‘overly broad, burdensome or oppressive’ will not suffice.” *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996) (quoting *Josephs*, 677 F.2d at 992). Plaintiffs have not met their burden. In support of their objections, they point out that contention interrogatories “pose a potential drawback if they serve to ‘reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated.” (Doc. No. 48, 01-cv-2830, at 9 (quoting *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1396, 1412 (D.N.J. 1996)). Even the Advisory Committee Notes to the Federal Rules of Civil Procedure admit that this danger, which is not at issue here, arises very infrequently. *Sperling*, 924 F. Supp. at 1412.

Plaintiffs also cite to a series of cases, none from this jurisdiction, where the use of contention interrogatories was limited or criticized. In *IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316 (D. Kan. 1998), for example, the district court determined that interrogatories that “ask for every fact and application of law to fact which supports [certain] identified allegations” were overly broad and unduly burdensome, in that the “burden to answer them outweigh[ed] the benefit to be gained.” *Id.* at 321; *see also Lawrence v. First Kan. Bank & Trust Co.*, 169 F.R.D. 657, 660 (D. Kan. 1996). As a threshold matter, antitrust cases generally call for broad discovery. *Callahan v. A.E.V. Inc.*, 947 F. Supp. 175, 179 (W.D. Pa. 1996). In these cases, “the burden or cost of providing the information sought is less weighty a consideration than in other cases.” *United States v. Int’l Bus. Mach. Corp.*, 66 F.R.D. 186-189 (S.D.N.Y. 1974). Moreover, courts of this jurisdiction have been accepting of contention interrogatories when properly utilized in the discovery process. *See, e.g., Fischer & Porter Co.*, 143 F.R.D. at

95. While the contention interrogatories here are comprehensive, and their responses will require significant effort, we do not find them to be overly broad or burdensome.

In overruling Plaintiffs' objections, we must assess the adequacy of their submitted responses to the interrogatories in question. First, Plaintiffs' substantive responses consists of only a single eight-page narrative. This format is not impermissible per se. A single narrative, if it sufficiently responds to the questions posed, might be an acceptable response to multiple interrogatories. *Cf. Bayou Steel Corp. v. Danieli Corp.*, Civ. A. No. 99-3440, 2001 U.S. Dist. LEXIS 5946 (E.D. La. Apr. 30, 2001) (finding narrative response to three interrogatories acceptable, but compelling plaintiff to provide adequate list of documents to replace "blanket reference to the 4,500 documents previously produced"). However, as Defendants correctly point out, the narrative provided by Plaintiffs fails to address many of the questions raised by Defendants. (Doc. No. 174 at 10.) As currently constructed, it is simply insufficient. For this reason, Plaintiffs must augment and reorganize their current responses to make them individually responsive to each of the twenty-five interrogatories put forward by Defendants.

Plaintiffs' identification of individuals and documents is similarly inadequate. Plaintiffs have submitted single lists of individuals with knowledge as well as responsive documents, which purport to cover all of the contention interrogatories, without any additional information. We agree with Plaintiffs that the language of Defendants' interrogatories, seeking "persons with knowledge relating to [each] contention" and "persons with knowledge supporting or relating to [each] contention," is broad. (Doc. No. 174 at Ex. A, p. 6; *id.* at Ex. B, p. 6.) By no means are Defendants entitled to any lists other than those requested in their interrogatories, such as a list of "persons known to be supporting Plaintiffs' claims." However, Plaintiffs must at least submit

lists of persons specifically responsive to each interrogatory. For instance, Plaintiffs must provide separate lists in response to subparts (e), (f), and (g) of Interrogatories Nos. 1, 2, and 3 in Sherwin-Williams First Set of Contention Interrogatories. (Doc. No. 174 at Ex. A.) Plaintiffs bear the same responsibility to create separate lists of documents responsive to each interrogatory requesting such a list. The current responses, consisting of single lists of names and documents, are unacceptable. *See, e.g., In re Aetna*, 1999 U.S. Dist. LEXIS 8038, at *12 (“Without the Court’s intervention, Defendants would be forced to engage in a time-consuming and expensive effort to ferret out the veritable needle in the haystack. . . . The Court will not allow the discovery process to be subverted in this way.”).

Finally, we address the Motion to Preclude Persons and Documents Not Properly Disclosed by Plaintiffs During Discovery brought by Defendants in order to “prevent Plaintiffs from unfairly surprising Defendants through the use of late or partial disclosures.” (Doc. No. 175 at 1.) Such a motion is inappropriate at this stage of the litigation. The Third Circuit requires that before “a court precludes a party from presenting certain evidence at trial, it must first find that the party: (1) revealed previously undisclosed evidence when trial was either imminent or in progress; or (2) acted in bad faith, which is more than a mere lack of diligence.” *Stein v. Foamex Int’l, Inc.*, Civ. A. No. 00-2356, 2001 WL 936566, at *3 (E.D. Pa. Aug. 15, 2001). By extension, an order to compel compliance with discovery is usually a prerequisite to the imposition of sanctions under Rule 37. *Cf. McMullen v. Bay Ship Mgmt.*, 335 F.2d 215, 217 (3d Cir. 2003). Only after a party has failed to comply with such an order to compel should sanctions be imposed. *Id.* (citing *Daval Steel Prods. v. M/V Fakredine*, 915 F.2d 1357, 1363-64 (2d Cir. 1991)). Until now, the discovery at issue herein has not been the subject of an order to compel.

As such, we will not preclude its use before Plaintiffs have been granted an opportunity to comply with this Order.

V. CONCLUSION

Defendants' First Motion to Compel will be granted with respect to all interrogatories and document requests, except those seeking downstream data and Plaintiffs' financial information.

Defendants' Second Motion to Compel will be granted. Defendants' Motion to Preclude will be denied. In addition, the Amended Pretrial Scheduling Order dated October 26, 2005 will be amended by separate Order.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AUTOMOTIVE REFINISHING :
PAINT ANTITRUST LITIGATION : MDL NO. 1426
:

ORDER

AND NOW, this 26th day of May, 2006, upon consideration of Defendants' Motion To Compel Plaintiffs To Respond To Interrogatories And Document Requests ("First Motion to Compel") (Doc. No. 171), Defendants' Motion For Leave To File Their Reply Brief In Support Of Their Motion To Compel Plaintiffs To Respond To Interrogatories And Document Requests (Doc. No. 173), Defendants' Motion To Compel Answers To Interrogatories ("Second Motion to Compel") (Doc. No. 174), Defendants' Motion To Preclude Persons And Documents Not Properly Disclosed By Plaintiffs During Discovery (Doc. No. 175), and all documents filed in support thereof and opposition thereto, it is ORDERED as follows:

1. Defendants' Motion for Leave to File (Doc. No. 173) is GRANTED.
2. Defendants' First Motion to Compel (Doc. No. 171) is GRANTED in part and DENIED in part, consistent with the attached Memorandum. Plaintiffs are directed to provide full and complete answers to the following within thirty (30) days from the date of this Order:
 - i. Defendants' Joint Second Set of Interrogatories, Interrog. Nos. 1-17
 - ii. PPG Industries, Inc.'s First Set of Interrogatories, Interrog. Nos. 1-17
 - iii. Sherwin-Williams Co. and Sherwin-Williams Automotive Refinishing Corp.'s First Set of Interrogatories and Document Requests, Interrog. Nos.

Plaintiffs are further directed to provide full and complete answers to the following within thirty (30) days from the date of this Order, except that Plaintiffs need not provide downstream data or financial information:

- iv. Defendants' Joint Second Set of Interrogatories and Requests for Production of Documents, Req. No. 1.
 - v. Defendants' First Joint Request for Production, Req. Nos. 1, 15
 - vi. PPG Industries First Joint Request for Production, Req. Nos. 7-9, 24
 - vii. Sherwin-Williams Co. and Sherwin-Williams Automotive Refinishing Corp.'s First Set of Interrogatories and Document Requests, Req. No. 1
3. Defendants' Second Motion to Compel (Doc. No. 174) is GRANTED consistent with the attached Memorandum. Plaintiffs are directed to provide full and complete answers to Defendants' contention interrogatories on or before July 14, 2006.
 4. Defendants' Motion to Preclude (Doc. No. 175) is DENIED.
 5. The deadlines in the Amended Pretrial Scheduling Order (Doc. No. 169) dated October 26, 2005 will be extended by separate Order.

IT IS SO ORDERED.

BY THE COURT:

/s R. Barclay Surrick

R. Barclay Surrick, Judge