# SUPERIOR COURT OF CALIFORNIA

**County of San Diego**

**DATE: May 14, 2007** **DEPT. 71** **REPORTER A:** **CSR#**

**PRESENT HON. RONALD S. PRAGER** **REPORTER B:** **CSR#**

**JUDGE**

**CLERK: K. Sandoval**

**BAILIFF:** **REPORTER'S ADDRESS: P.O. BOX 120128**

**SAN DIEGO, CA 92112-4104**

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**IN RE: JCCP 4221/4224/4226&4428 – Natural Gas Anti-Trust Cases (Price Indexing)**

**RULING INDEPENDENT PLAINTIFFS McKESSON ISSUE**

The attached Court's ruling regarding applies to all cases listed as follows:

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| **4221-00020** | **UYEDA vs CENTERPOINT ENERGY INC** |
| **4221-00021** | **BENSCHEIDT vs AEP ENERGY SERVICES INC** |
| **4221-00022** | **COUNTY OF SANTA CLARA vs SEMPRA ENERGY** |
| **4221-00023** | **CITY AND COUNTY OF SAN FRANCISCO vs SEMPRA ENERGY** |
| **4221-00024** | **COUNTY OF SAN DIEGO vs SEMPRA ENERGY** |
| **4221-00025** | **OLDER vs SEMPRA ENERGY** |
| **4221-00026** | **CITY OF SAN DIEGO vs SEMPRA ENERGY** |
| **4221-00027** | **TAMCO vs DYNEGY INC** |
| **4221-00028** | **A L GILBERT COMPANY vs CORAL ENERGY RESOURCES LP** |
| **4221-00029** | **OBERTI WHOLESALE FOOD INC vs ENCANA ENERGY SERVICES INC** |
| **4221-00030** | **BROWN vs ENCANA ENERGY SERVICES INC** |
| **4221-00031** | **LOIS THE PIE QUEEN vs ENCANA ENERGY SERVICES INC** |
| **4221-00032** | **VITTICE CORPORATION vs ENCANA CORPORATION** |
| **4221-00033** | **COUNTY OF ALAMEDA vs SEMPRA ENERGY** |
| **4221-00034** | **THE REGENTS OF THE UNIVERSITY OF CALIFORNIA vs RELIANT ENERGY SERVICES INC** |
| **4221-00035** | **SCHOOL PROJECT FOR UTILITY RATE REDUCTION vs SEMPRA ENERGY** |
| **4221-00036** | **ASSOCIATION OF BAY AREA GOVERNMENTS vs SEMPRA ENERGY** |
| **4221-00037** | **OWENS-BROCKWAY GLASS CONTAINER INC vs SEMPRA ENERGY** |
| **4221-00038** | **TEAM DESIGN DBA TIMOTHY ENGELN INC vs RELIANT ENERGY INC** |
| **4221-00039** | **CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER vs RELIANT ENERGY SERVICES INC** |
| **4221-00040** | **SACRAMENTO MUNICIPAL UTILITY DISTRICT vs RELIANT ENERGY SERVICES INC** |
| **4221-00041** | **SHANGHAI 1930 RESTRAURANT PARTNERS LP vs ENCANA ENERGY SERVICES INC** |
| **4221-00042** | **PODESTA vs ENCANA ENERGY SERVICES INC** |

**4221-00042 PODESTA vs ENCANA ENERGY SERVICES INC**
**4221-00044 COUNTY OF SAN MATEO vs SEMPRA ENERGY**
**4221-00045 BUSTAMANTE vs WILLIAMS ENERGY SERVICES**
**4221-00046 PABCO BUILDING PRODUCTS vs DYNEGY INC**
**4221-00047 BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY vs DYNEGY INC**
**4221-00043 NURSERYMAN'S EXCHANGE OF HALF MOON BAY vs SEMPRA ENERGY**

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**TENTATIVE RULING:** The Court rules on Independent Plaintiffs et al. (collectively "Plaintiffs") *McKesson* motion to compel against defendants Aquila Merchant Servs., Inc. et al. (sometimes collectively "Defendants") re privileged documents provided to third parties as follows:

*Request for Judicial Notice.* Plaintiffs' quest for judicial notice of documents filed with their reply brief is granted, absent an objection from Defendants at oral argument on due process grounds.

*Plaintiffs' Evidentiary Objections.* The Court rules as follows with respect to the evidentiary objections to portions of the following declarations:

Aquila: The objections to (1) paragraph 2, (2) paragraph 4, lines 22-1, (3) paragraph 5, (4) paragraph 7, lines 17-23 and paragraph 8, lines 2-4, (5) paragraph 9, lines 7-9, 11, (6) paragraph 10, lines 18-20, (7) paragraph 12, lines 5-10, (8) paragraph 13, lines 16-20, (9) paragraph 14, lines 25-1, and (10) paragraph 16, lines 9-15 of the Uffelman Declaration are overruled.

The objections to (1) paragraph 6, lines 6-8, (2) paragraph 8, lines 26-28, (3) paragraph 8, lines 2-4, (4) paragraph 9, lines 11-13, (5) paragraph 10, lines 14-16, (6) paragraph 11, lines 22-25, (7) paragraph 12, lines 1-3, (8) paragraph 13, lines 7-10, and (9) paragraph 14, lines 22-23 of the Weiss Declaration are overruled.

Coral: The objections to (1) paragraph 4, lines 22-25, (2) paragraph 9, lines 24-6, and (3) paragraph 10, lines 7-10 of the Tuohey Declaration are overruled.

Duke: The objections to (1) paragraph 3, lines 12-23, (2) paragraph 4, lines 3-14, (3) paragraph 5, lines 18-1, (4) paragraph 6, lines 4-15, (5), paragraph 7, lines 16-23, (6) paragraph 8, lines 24-1, (7) paragraph 9, lines 4-9, (8) paragraph 9, lines 9-11, (9) paragraph 10, (10) paragraph 11, (11) paragraph 12, and (12) paragraph 13 of the Trent Declaration are overruled.

Dynegy: The objections to (1) paragraph 3, lines 11-13 and (2) paragraph 4 of the Williamson Declaration are overruled.

The objections to (1) paragraph 4, lines 19-23, (2) paragraph 4, lines 23-27, (3) paragraph 5, lines 1-5, and (4) paragraph 5, lines 5-8 of the Buchman Declaration are overruled.

Williams: The objections to (1) paragraph 3, lines 6-8, (2) paragraph 4, (3) paragraph 5, (4) paragraph 6, lines 1-5, (5) paragraph 7, lines 7-16, and (6) paragraph 12, lines 14-16 and 21-22 of the Goldberg Declaration are overruled.

As a preliminary matter, it is noted that the noticed motion was limited to the waiver issue. (*See* Plaintiffs' Notice of Motion, p. 2, ll. 1-4 ("Said motion will be made...on the grounds that Defendants have waived any privileged or attorney work protection they may have had by producing the documents at issue to third parties") and Plaintiffs' P&A, pp. 1, ll. 2-6 and 11, ll. 22-25 ("the only objections at issue in this motion are those based on privilege and attorney work product.") The Court cannot grant different relief, or relief on different grounds than the relief requested in Plaintiffs' Notice. (*Taliaferro v. Riddle* (1959) 167 Cal. App. 2d 567, 570 and *Luri v. Greenwald* (2003) 107 Cal. App. 4th 1119, 1124.)

The motion to compel is denied for the reasons stated below.

Evidence Code section 912 subd. (a) provides that the privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Waiver of the work product doctrine is not expressly defined by statute but is generally found under the same set of circumstances as waiver of the attorney-client privilege. (*McKesson HBOC, Inc. v. Super. Ct.* (2004) 115 Cal. App. 4th 1229, 1239 (hereafter "*McKesson*").)

Plaintiffs argue that Defendants waived the privilege by disclosing documents and information to the government pursuant to *McKesson.* Defendants, on the other hand, contend, that there was no waiver since the disclosures to the government were coerced.

In *McKesson,* the court held that McKesson waived the attorney-client privilege and work product protection with respect to documents it shared with the government pursuant to confidentiality agreements. (*Id.* at pp. 1232-1234.) Importantly, the court noted that McKesson voluntarily consented to the disclosure of the privileged information. (*Id.* at p. 1236.) Thus, unlike the defendants in this case, McKesson did not argue that it was coerced into producing the privileged documents.

Interestingly, the cases from other jurisdictions that Plaintiffs cited in support of their motion state that cases involving voluntary disclosure are distinguishable from cases in which there was coercion. (*See In re Steinhardt Partners, L.P.* (2nd Cir. 1993) 9 F. 3d 230, 234 (hereafter "*In re Steinhardt Partners*") and *In re Subpoena Dues Tecum* (1984) 738 F.2d 1367, 1373.) In these cases, the courts noted that the privileged documents were voluntarily disclosed since there was no allegation that the government agency involved coerced or



required compliance in any way. (*Ibid.; See also In re Qwest Comms. Internat., Inc.* (10th Cir. 2006) 450 F.3d 1179, 1182 fn. 1 (hereafter "*In re Qwest*").) Furthermore, the courts in *In re Steinhardt* and *In re Subpoena Duces Tecum* specifically declined to adopt a per se rule that all voluntary disclosures to the government waived the privilege and stated that the crafting of rules

relating to privilege with respect to governmental investigations must be done on a case-by-case basis. (*See In re Steinhardt Partners, supra,* 9 F. 3d at p. 234 and *In re Qwest, supra,* 450 F.3d at pp. 1191-1192.) More importantly, the court in *In re Qwest* rejected the "culture of waiver" argument presented by amici curiae due to the sparseness of the record on that issue particularly with respect to Qwest's dealings with the agencies and whether it experienced the tactics deplored by amici. (*See In re Qwest, supra,* 450 F. 3d at p. 1199.)

As noted above, section 912 subd. (a)'s states that a waiver must not be coerced. Neither *McKesson* nor the persuasive authority noted above from other jurisdictions involved situations where the parties who waived the privilege and produced the documents argued that they were coerced by the government. Thus, it appears to be an issue of first impression that this court must determine.

The key issue is the meaning of coercion under section 912. The term is not defined in the statute and the annotated cases shed no light on its meaning. Plaintiffs argument that the privileges were waived because the Defendants produced documents and information to the government ignores the factual differences between their cited cases and this one outlined above as well as the difference between a voluntary and volitional act. The relinquishment is voluntary if it was "the product of fee and deliberate choice rather than intimidation, coercion, or deception." (*People v. Whitson* (1998) 17 Cal. 4th at p. 247.) On the other hand, although a volitional act may be the product of coercion. (*See e.g.,* Pen. Code §§518, 519; *See also People v. Goodman* (1958) 159 Cal. App. 2d 54, 61 and *People v. Goldstein* (1948) 84 Cal. App. 2d 581, 586.)

Here, Defendants cited the Thompson and Holder Memoranda, Seaboard Report, and other documents analyzing their effect on corporations. The court in *United States v. Stein* (S.D.N.Y. 2006) 435 F. Supp.2d 330, 364, found that The Thompson Memorandum constituted an express threat. Importantly, Defendants provided the declarations of counsel and other relevant parties as to their respective dealings with the government. All Defendants provided evidence indicating that they were served with subpoenas to produce the privileged documents and were subsequently pressured to do so when the government determined that they were not complying with the subpoenas that were issued. Therefore, this case is distinguishable from *In re Qwest.*

Based on the foregoing, it is not necessary for this Court to engage in the choice of law analysis urged by defendant AEP Energy Servs, Inc. (hereafter "AEP"). Furthermore, even assuming it was necessary to apply such an analysis to this case, this Court would find that it AEP had not met its burden of showing that the law of California materially differed from the laws in New York and Ohio.

**IT IS SO ORDERED.**