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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE CALIFORNIA TITLE INSURANCE  
ANTITRUST LITIGATION

No. C-08-1341 JSW (EMC)

THIS DOCUMENT RELATES TO ALL  
ACTIONS

**ORDER RE “JOINT REPORT RE  
DISCOVERY DISPUTE FOLLOWING  
JANUARY 21, 2011 ORDER”**

**(Docket Nos. 216, 217)**

The Joint Report Re Discovery Dispute Following January 21, 2011 Order filed by the parties report substantial progress in resolving the discovery disputes which were the subject of Plaintiffs’ Motion to Compel (Docket No. 188). The parties did not, however, and have now reported that they cannot, resolve the dispute concerning the production of documents provided in response to two CDOI examinations that are potentially responsive to Request Nos. 11-13. The issue concerns the applicability of California Insurance Code § 735.5.

Plaintiffs contend that materials submitted in response to an investigation under § 790.04 (part of Article 6.5) – contrast to an examination under Article 4, § 730 – are not protected under § 735.5 and are thus subject to discovery pursuant to a proper court order. In that regard, the Court notes the Government Code § 11181(g), cited by First American, governs conditions under which disclosure may be made to other agencies. It would not appear applicable here. The Court further notes that Insurance Code § 12938, also cited by First American, states that work papers are not required to be disclosed to the public along with adopted reports which are so required; it provides an exception as “otherwise provided by law.” The literal terms of this exception would appear to permit a federal court to compel discovery pursuant to such other law – *i.e.* the Federal Rules of

1 Civil Procedure. On the other hand, First American cites regulations which state that information  
2 received even in the context of an investigation for violations of § 790.03 are to be kept confidential  
3 under § 735.5 and Government Code §§ 11180 *et seq.* California Code of Regulations, Title 10  
4 Section 2695.1(g). That issue need not be resolved here.

5         The CDOI examination at issue herein, *In the Matter of the Certificate of Authority of First*  
6 *American Title Ins. Co.*, File No. DISP050466622, was explicitly instituted pursuant to both  
7 California Insurance Code §§ 730 and 12414.21, not under Article 6.5. Although reference in the  
8 Accusation is made to violations of § 790.03 which perhaps could have been investigated under  
9 § 790.04, the Accusation confines the bases of its examination to §§ 730 and 12414.21. Were the  
10 examination conducted solely under § 730, § 735.5 would apply and the Court would be inclined to  
11 hold that documents provided in response thereto would not be subject to discovery here, consistent  
12 with the state court rulings cited by First American. However, the examination is also based on  
13 § 12414.21. First American in its papers filed with the Court has not cited any statutory authority  
14 for the proposition that materials provided in response to an examination under § 12414.21 must be  
15 held confidential, even as against a federal court order. First American does not argue that § 735.5  
16 applies to examination initiated under § 12414.21. It has not pointed to any parallel provision  
17 governing Article 5.5 of which § 12414.21 is a part.

18         The issue then is how materials provided in response to investigations initiated under two  
19 different laws, each with different confidentiality provisions, should be treated. In this regard, this  
20 case is analogous to the situation in which the Court must determine how to treat dual purpose  
21 documents which are created for two purpose (*e.g.* in part for a business purpose and in part in  
22 anticipation of litigation), only one of which is privileged (*e.g.* as attorney-work product). The  
23 Ninth Circuit has adopted a “but for” test in determining the publication of the privilege to dual  
24 purpose documents. In *In re Grand Jury Subpoena, Mark Torf/Torf Env’tl. Mgmt.* (Torf), 357 F.3d  
25 900, 907 (2004), the court held that dual purpose documents are deemed prepared because of  
26 litigation (and thus privileged) if “in light of the nature of the document and the factual situation in  
27 the particular case, the document can be fairly said to have been prepared or obtained *because of* the  
28 prospect of litigation.” *Id.* (emphasis added). In applying the “because of” standard, the Court must


1 consider the totality of the circumstances and determine whether the “document was created  
2 because of anticipated litigation, and would not have been created in substantially similar form but  
3 for the prospect of litigation.” *Id.* at 908 (*quoting United States v. Adlman*, 134 F.3d 1194 (2d Cir.  
4 1998)).

5 Here, the Accusation was initiated pursuant to two different statutes, only one of which is  
6 governed by § 735.5. Having reviewed the Accusation, the Court concludes that it cannot be said  
7 that the Accusation would not have been initiated (and hence responsive document submitted) but  
8 for the inclusion of Insurance Code § 730 as one of its bases. Section 12414.21 appears in the  
9 Accusation with equal prominence. Accordingly, § 735.5 does not bar the documents in question  
10 from discovery in the instant case.

11 Defendants are ordered to produce responsive documents within 21 days from the date of this  
12 order.

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14 IT IS SO ORDERED.

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16 Dated: February 8, 2011

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EDWARD M. CHEN  
United States Magistrate Judge

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