UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC	)	**Docket No. 9318**
LABORATORIES, L.L.C.,	)	
BAN, L.L.C.,	)	**PUBLIC**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
	)	
Respondents.	)	

CORPORATE RESPONDENTS' MOTION IN OPPOSITION TO NONPARTY YAHOO! INC.'S MOTION IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO QUASH RESPONDENTS' TWENTY-FIVE SUBPOENAS DIRECTED TO THIRD PARTIES AND IN REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO QUASH CORPORATE RESPONDENTS' SUBPOENAS

Corporate Respondents respectfully request that the Presiding Officer to deny "Nonparty Yahoo! Inc.'s Motion in Support of Complaint Counsel's Motion to Quash Respondents' Twenty-Five Subpoenas Directed to Third Parties and counter-reply in opposition to Yahoo! Inc.'s Reply to Respondents' Opposition to Complaint Counsel's Motion to Quash Corporate Respondents' Subpoenas."

Yahoo! Inc. received a subpoena because it is a Web domain company identified

by Commission's Counsel[1] as one of twenty-five that accessed Corporate Respondents' trade secret and confidential materials that were improperly posted because the FTC unlawfully and without justification[2] disclosed the same on its docket and on its Web site. Corporate Respondents have a right to ascertain the extent of harm caused by the unlawful FTC disclosure. Corporate Respondents' Counsel issued subpoenas to the parties identified by the FTC and now seek logs and records of information that was accessed.

In response, Yahoo! Inc. moved and posited four arguments: (1) Corporate Respondents' subpoena is untimely; (2) the FTC has "already definitely resolved that the discovery Respondents seeks is unwarranted and inappropriate [...]"; (3) the subpoenas are "meritless" to the proceeding; and (4) that the subpoenas are overly broad and unduly burdensome. Yahoo! Inc.'s arguments fail to take into account Corporate Respondents' rights to assess the complete nature and scope of the destruction of their trade secrets. Yahoo! Inc. fails to take into account the fact that the Commission anticipated further

[1] Yahoo! Inc. originally was identified as a Web domain company that accessed FTC's Web site in a letter dated July 25, 2005.

[2] "Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment." 18 U.S.C. § 1905.

discovery in its decision of June 17, 2005 (*see* Order at 7-8) (explaining that the data on the Web log it ordered its lawyers to produce "provides Respondents with information regarding the extent of the disclosures and will enable Corporate Respondents to contact these domains to determine to what extent the domain operators themselves, or users of those domains, may have retrieved, stored, used, shared, or disclosed exhibits the FTC servers"). Corporate Respondents are entitled for leave to conduct discovery that is reasonable and necessary to evaluate the damage caused, and to take remedial actions to prevent further injury.

As stated in Corporate Respondents' November 7, 2005 Opposition to Complaint Counsel's Motion to Quash Corporate Respondents' Subpoenas, Corporate Respondents are not adequately redressed by the mere issuance of FTC's July 25, 2005 identification letter. It is facetious even to assume that argument has merit. It attempts to prevent Corporate Respondents from ascertaining the extent and scope of the trade secret violation damages would be completely unfair and cause an inequitable result in the face of a valid Protective Order. The foreclosure of subpoena investigation effectively would deny Corporate Respondents the opportunity to collect evidence that could offset any liability that could arise from even improbable adverse findings and conclusions that the Commission could issue in this case to deflect attention from its lawyers illegal conduct. As a result, Corporate Respondents must be permitted to conduct reasonable discovery to determine the extent of FTC dissemination of their trade secrets, because that information will reveal financial harm caused by FTC, as a result of FTC misconduct in this very case.

I. FACTS

FTC posted Corporate Respondents' trade secrets[3] and confidential material on its website on December 6, 2004 and on January 31, 2005.[4] The January 31 motion was posted on FTC's public docket for this case on February 15, 2005. The December 8th motion was posted earlier.[5] Both sets of exhibits were removed on February 17th, after Respondents' Counsel discovered and informed Complaint Counsel of the unlawful publication.

The contents of the published exhibits were designated as highly confidential financial information because Corporate Respondents are not publicly traded companies. Specifically, their sales figures and financial records (appended in Exhibits R, 15, and 42 to December 6 and January 31st filings, respectively) are not public and consist of confidential proprietary information. *See* Respondents' Response to Order to Show Cause, Declaration of Carla Fobbs at 4-6.[6] In addition, the product formulations detailed within (Exhibit 11 to January 31st filing) are closely guarded trade secrets, and their disclosure allows competitors to duplicate the formulas and market identical products, both in this country for the non-ephedra products and in those countries where sale of ephedra products remains legal. *See* Fobbs Declaration at 3. The advertising

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[3] A trade secret is "any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts § 757(b)(1939).

[4] Corporate Respondents have not attached copies of the documents revealing FTC's trade secret disclosures in an effort to avoid further circulation of those documents. They instead refer the Presiding Officer to the nonpublic filing of those documents in this case.

[5] The Commission in its order did not identify the date when the December 6 filing was posted, although Web logs reflect access as early as December 10, 2004.

[6] Complaint Counsel has argued that the Presiding Officer's review of Exhibit 42 revealed that the exhibit did not meet the standard for *in camera* treatment. That argument ignores the fact that the Presiding Officer acknowledged before issuance of his opinion that it was not a detailed analysis of the arguments presented and that analysis would be conducted "when and if the exhibits are offered as exhibits at trial." April 6 Order at 8-9.

dissemination schedule (Exhibit 45 to the January 31st filing) is another vital trade secret, developed over a 13 year period, at a business cost of over 13 million dollars. In addition to constituting a major investment for Corporate Respondents, the advertising schedule also defines the best marketing, promotion channels, and strategies for all of respondents' products.

The disclosed information can be used by Corporate Respondents' competitors for unlimited commercial advantage. *See* Fobbs Declaration at 7-8. Had FTC followed the protective order provisions contained in the Presiding Officer's orders concerning discovery and FTC Rules of Practice, this highly confidential information would not have been exposed to poaching by Respondents' competitors. *See* Fobbs Declaration at 8. In addition to the financial damage caused by the unlawful disclosure on the FTC website, Corporate Respondents' privacy and customer security policies were violated by the publication of customer emails, which adversely affects their goodwill and reputation for preserving their clients' confidentiality.

On April 6, 2005, in response to three motions by Corporate Respondents' counsel concerning those disclosures, the Presiding Officer issued an order certifying those motions to the Commission and staying the proceedings. The Presiding Officer's order found that "[n]umerous statutes and rules prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission." *Id.* at 4 (*citing* 18 U.S.C. § 1905; 15 U.S.C. § 46(f); 15 U.S.C. § 50). The order further acknowledged that, "Courts routinely order companies to provide confidential information to the Commission, noting the protections of statutes and rules that prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission." *Id.* at

4 (*citing FTC v. MacArthur*, 532 F.2d 1135, 1143 (7th Cir. 1976); *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 n.6 (D.C. Cir. 1978)).

In the course of his preliminary assessment of the nature of the materials disclosed, the Presiding Officer noted that the disclosure of the net gross revenue and advertising expenditures by year for all six products at issue and the advertising dissemination schedule are confidential business records and that the Respondents have demonstrated that "disclosure of this information would result in a clearly defined, serious competitive injury to Respondents." *Id.* at 9. Given the egregious nature of FTC's violation, Corporate Respondents are entitled to evaluate the damage to their business interests in investigating the extent of the injury caused by the unlawful publication, including the investigation of parties who host weblog and server domains for internet access. As a result, Yahoo! Inc. is an appropriate recipient of Corporate Respondents' subpoena because it is an active internet service provider with subscribing users who may have accessed the trade secret information at issue in this proceeding by using the Yahoo! Inc. search site.

On June 17, 2005, the Commission issued its order granting, in part, Respondents' request for FTC to produce web server log information for those exhibits. The Commission granted Respondents access "to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received." The Commission further stated:

> Disclosure of this information provides Respondents with information regarding the extent of the disclosures and may allow the Respondents to contact these domains to determine to what extent the domain operators themselves, or users of those domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC's servers. [...].

> [D]isclosure of aggregate data would allow Respondents to contact the operators of the Web domains from which requests for the exhibits originated, and determine if those domains might assist in identifying, retrieving, or destroying any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves [...]. *Id.* at 7-8.[7]

On July 25, 2005 FTC released redacted[8] web server logs to Complaint Counsel. According to FTC's web server logs, the gross sales figures (the December 8th Exhibit) were accessed by **23** different companies (identified by their web domains) starting on December 10, 2004 through and including February 16, 2005. The product ingredients and ratios information (Exhibit 11 to the January 31st motion) were accessed by **six** different companies (identified by their web domains) on February 15th and 16th, 2005. The advertising dissemination schedule was accessed by **five** different companies on February 15th and 16th. The Net gross revenue and advertising expenditures for all six products, the customer email, and the balance sheet were accessed by **seven** different companies on February 15th and 16th.

On October 12, 2005, by letter served on all counsel of record, Corporate Respondents' counsel requested 25 subpoenas stating,

> [The subpoenas would] be served on the domestic parties identified in the Commission's letter of July 27, 2005. The forms will replace those issued to corporate respondents' previous counsel on August 19, 2005. Previous counsel

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[7] The Commission stated that IP addresses would be redacted because of the protections of the Privacy Act, 5 U.S.C § 552A. Corporate Respondents do not agree that the IP addresses are protected by the Privacy Act. IP addresses machines, not individual users. There may be, and likely are, multiple users of a machine identified by an IP address.

[8] Not just the IP addresses were redacted from those logs. It appears that Web domain identifiers were redacted as well because Corporate Respondents' prior counsel Feldman &Gale was not identified in the logs produced by FTC despite repeated contacts by that firm to the site once the discovery was made of the trade secret disclosures. There was no reason for FTC to redact any user's domain identifiers from the Web server logs. Indeed, by having done so the accuracy and completeness of the remaining material is called into question.

completed the subpoena forms with their service information but did not serve them before being replaced by new counsel. Because of the substitution of counsel, we seek to have new copies executed because they will bear the name of new counsel. We became counsel for the corporate respondents on September 8, 2005.

Upon receipt of the subpoena forms, the subpoenas were prepared and served on October 21, 2005 on each of the twenty-five parties identified in subpoenas attached to Complaint Counsel's Motion to Quash.

II. PERTINENT RULES

Rule 3.34(b) states in pertinent part:

> A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

16 C.F.R. § 3.34(b).

Section (c) of Rule 3.34, permitting motions to quash, states, in pertinent part:

> Any motion **by the subject of a subpoena** to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits, and other supporting documentation, and shall include the statement required by Rule 3.22(f). *Id.* at (c)(emphasis added).

Rule 3.31 on discovery states, in pertinent part:

> (1) In general; limitations. Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent...Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 3.31(c)(1).

III. ANALYSIS

Yahoo! Inc. argues that the subpoenas are untimely, seek irrelevant documents,

constitute an impermissible counterclaim within the administrative proceeding and are overbroad. Yahoo! Inc. lacks standing to challenge the subpoenas on their merits. Yahoo! Inc.'s arguments also fail to raise appropriate grounds for quashing the subpoenas from the perspective of a recipient party.[9] Corporate Respondents have acted reasonably and timely following the receipt of the July 25, 2005 web domain identifying information in order to assess the information available from those web server logs and to obtain any additional information related to that log information through the use of the twenty-five subpoenas.[10] The documentation and records sought in the subpoenas are necessary, as the Commission stated, in "identifying, retrieving, or destroying any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves." Equity demands that the injury inflicted on Corporate Respondents when their trade secrets and confidential commercial information were destroyed be weighed against any liability that may arise in this case. Assessment of the

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[9] In opposing the subpoenas, Yahoo! Inc. is "confronted with a [difficult] task." *FTC v. Dresser Industries*, 1977 U.S.Dist. LEXIS 16178, *8 (D.D.C. 1977)(Exhibit B). One who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same even if the subpoena is directed to a third party not involved in the adjudicative or other proceedings out of which the subpoena arose. *Dresser Industries*, *8-9 (citing *FTC v. Tuttle*, 244 F.2d 605 (2d Cir. 1957) cert. denied, 354 U.S. 925, *FTC v. Bowman*, 149 F.Supp. 624 (N.D. Ill.), aff'd 248 F.2d 456 (7th Cir. 1957)(citations omitted)).

[10] The Web information supplied is not comprehensible to laymen but requires a computer scientist to evaluate. See Exhibit A. Corporate Respondents retained that expertise and received professional consults on how to develop appropriate queries to yield information that would reveal the extent of the trade secret disclosures. Some of the information not supplied by FTC is indispensable to the search and may ultimately prevent subpoena recipients from providing meaningful responses. For example, FTC has not supplied IP addresses and without IP addresses for a large company like Microsoft there may be no way for it to identify what machine accessed the trade secret and confidential information. There would be no way then to examine records for that machine and its users' records to determine if any documents were created when those trade secrets and confidential documents were viewed, downloaded, accessed, printed or otherwise used (causing the information to be further disseminated).

extent of that injury through the subpoenas at issue is necessary to prevent an inequitable liability determination (one that does not account for the economic damage suffered due to FTC's unlawful destruction of trade secrets and confidences).

Failure to calculate the cost of the disclosure in arriving at any equitable assessment is wholly inequitable when FTC is liable for the destruction of the trade secrets and confidences – a deprivation of property without due process of law, a tort recognizable under the Federal Tort Claims Act, 28 U.S.C. § 2674 et seq., and a crime punishable under federal law, 18 U.S.C. § 1905. Finally, Yahoo! Inc.'s argument fails to prove the agency subpoenas unduly burdensome. Yahoo! Inc.'s argument is wholly unsupported by any specific factual allegations, affidavits, or other documents and is based entirely on hypothetical assumptions. Yahoo! Inc. has failed to seek and obtain the requisite first-hand knowledge to determine the nature and extent of their record-keeping for the purpose of determining whether the requests are indeed unduly burdensome; in short, Yahoo! Inc. has failed to establish sufficient grounds to justify the quashing of Corporate Respondents' subpoenas.

A. Corporate Respondents' Subpoena Is Timely Because It Aims to Discover Documents from Yahoo! Inc. Identified For the First Time in FTC's July 25, 2005 Letter and Attached Web Log.

The subpoenas are a timely and reasonable effort by Corporate Respondents to assess whether parties FTC identified as having accessed the trade secrets and confidential financial information have made any use of that information, downloaded it, copied it or otherwise disseminated it, exacerbating the effects of the disclosure. The FTC's July 25, 2005 letter was the first time following the December 6th and January 31st filings that Corporate Respondents had notice of the fact that Yahoo! Inc.'s users did in

fact access the trade secret and confidential financial information. Yahoo! Inc.'s restatement of the timeliness argument made by Complaint Counsel concerning the deadline for issuing subpoenas *duces tecum* in discovery[11] (November 8, 2004) ignores the fact that the disclosures of the trade secrets took place **after** that date.

Corporate Respondents first received the web contact information from FTC on July 25, 2005. They then received expert counsel on how to fashion subpoenas to acquire information based on the contact information and acquired executed copies for service on August 14, 2005. New counsel entered the case on September 8, 2005. Newly executed subpoenas were obtained on October 14, 2005 and were served on Friday, October 21. Those steps reveal appropriate diligence and a timely prosecution of this matter. Yahoo! Inc.'s argument that the subpoenas are untimely further ignores the fact that the Commission in its June 17th Order (again, after discovery had closed) encouraged Corporate Respondents to take the information in the web server logs and conduct discovery to determine the extent of the trade secret disclosures. *Id.* at 7-8. Thus, the subpoenas are timely and reasonable.

B. The Subpoena Issued to Yahoo! Inc. by Corporate Respondents Is Warranted and Appropriate Because It Reasonably Leads to the Discovery of Documents Relevant to This Proceeding

The Commission's June 17th Order acknowledged that its decision was a "remedy designed to prevent a future violation" and did "not necessarily address a past violation." *Id.* at 6. Indeed, for three of the documents the Presiding Officer stated that "disclosure of this information would result in a clearly defined, serious competitive injury to Respondents." April 6 Order at 9. There is no "would" in this equation. The disclosure

[11] As discussed in the following section Rule 3.34 (b) does not limit a party's use of subpoena duces tecum to only discovery.

has happened and the damages are accruing. The destruction of the trade secrets and confidences has resulted in a clearly defined, serious competitive injury to Corporate Respondents. The Presiding Officer acknowledged that "numerous statutes and rules prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission." Id. at 4. There has been no punishment meted out in this case. The perpetrators are free and the injured parties' damages have not been recompensed.

Equity requires that the injury FTC has inflicted on Corporate Respondents by disclosing their trade secrets offset any potential finding of liability or for consumer redress in this case. Without such an equitable assessment, Corporate Respondents would be doubly penalized, in fact penalized far in excess of any remedy available to the Commission under its statutes. The disclosure of the trade secrets and confidential financial information caused irreparable injury and irrecoverable loss that not even monetary relief will completely recompense. Thus, the subpoenas are seeking material that meet the general requirements in Rule 3.31 requiring discovery be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

Furthermore, that general discovery rule is subsumed by Rule 3.34 on subpoena *duces tecum*. The subpoena rules state that subpoenas "may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes." *Id.* at (b); *see also, FTC v. Dresser Industries,* 1977 U.S. Dist. LEXIS 16178, *11 (D.D.C. 1977).[12] The Commission's longstanding interpretation of 3.34(b)(2) requires only a general showing of relevance. *Dresser Industries*, at *11. "In the

[12] Attached as Exhibit A.

relevance inquiry, the court must be satisfied merely that the material sought is 'reasonably relevant'; there need be no showing that the subpoenaed material is clearly or unquestionably relevant [...]." *Id.* at *9 (citations omitted). The subpoenas seek documents that Corporate Respondents' trade secrets and confidential financial information were disseminated to additional entities, republished on the web, printed, downloaded, or otherwise used. Those documents would be used in evidence to offset any potential finding of liability against the Corporate Respondents. Thus, the documents sought are reasonably relevant and meet the general showing requirement.

Moreover, Yahoo! Inc. misconstrues the nature and effect of the Commission's Order regarding further discovery of the trade secret violations by introducing an argument entirely rooted in semantics, claiming that the term "contact" contained within the Order refers to an "out-of-court, self-help process [...]." Yahoo! Inc. further objects to the issuance of subpoenas on the basis that the Order "does not imply the right to seek discovery or otherwise use governmental power to compel nonparties." (emphasis in the original). These claims of personal interpretation are completely unsubstantiated and, fittingly, demonstrate that Corporate Respondents must be permitted to explore the extent of the economic damage imposed by the unlawful disclosure of their trade secrets via the subpoena power, which is a standard form of compulsory legal process. As is evident throughout Yahoo! Inc.'s motion, Corporate Respondents would be entirely unsuccessful in relying on the voluntary transfer of information from parties identified in FTC's June 27, 2005 letter.

Accordingly, the subpoena issued to Yahoo! Inc. is not unduly burdensome but is reasonable and appropriately tailored to seek the very information the Commission

contemplated in its Order. Corporate Respondents must be given the opportunity to mitigate the damages inflicted by the unlawful publication of their trade secrets by notifying third parties with potential access to the information of its confidential status. Corporate Respondents cannot adequately mitigate the damages without being granted the opportunity to explore the identities of all entities that were granted access to the FTC website. Yahoo! Inc.'s attempt to foreclose Corporate Respondents' discovery efforts in this context contravenes the findings and resulting order of the Presiding Officer.

C. Corporate Respondents' Subpoenas Are Properly Issued in the Context of This Proceeding

Yahoo! Inc. unconvincingly argues that Corporate Respondents lack merit when they submit that FTC's violation of their property rights in this proceeding effects damages that must equitably be assessed against a redress award, if any, in this case. In attempting to bolster its theory, Yahoo! Inc. claims that the potential for Corporate Respondents' resulting liability from this proceeding cannot turn on FTC's unlawful conduct. That argument is tautological in the sense that it wrongly assumes that Corporate Respondents' are precluded from pursuing remedial actions for the violations committed during the course of this proceeding in this very proceeding. Such an outcome would eviscerate the equitable factors this agency uses in determining redress. *See FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *FTC v. Mylan Labs, Inc.*, No.1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Furthermore, Yahoo! Inc. completely fails to gauge the importance of expedient action in preserving evidence that is subject to the threat of destruction in an industry characterized by constant fluctuations in information retention.

Yahoo! Inc. further alleges that the speculative nature of economic sanctions that

may be imposed on the Corporate Respondents precludes the pursuit of information discovery via the subpoena process. As an initial matter, Yahoo! Inc. does not have standing to challenge the issuance of subpoenas on substantive grounds such as merit claims. Instead, Yahoo! Inc. has an obligation to provide Corporate Respondents with relevant information and materials responsive to the requests posed by the subpoena, not interpose unrelated arguments concerning the merits of the underlying case.

The extent of financial loss caused by FTC's unlawful publication of the Corporate Respondents' trade secrets and confidences has a direct equitable bearing on any assessment of damages in this case. One cannot achieve an equitable result without taking into account fully the economic injury brought about by the FTC's own unlawful conduct within this very proceeding. All equitable factors that bear on the ability to pay and the propriety of redress are fair game. *See FTC v. International Diamond Corp./Full Service Import Brokers, Inc.*, 1983 U.S. Dist. LEXIS 15504 (D. Cal. July 12, 1983).[13][14]

D. Yahoo! Inc. Has Failed to Adequately Demonstrate That the Subpoena Issued by Corporate Respondents is Overly Broad and Unduly Burdensome.

Yahoo! Inc. argues that the subpoena request issued by Corporate Respondents is

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[13] Generally, the Commission will consider the following three factors in determining whether to seek disgorgement or restitution in a competition case. *First*, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. *Second*, there must be a reasonable basis for calculating the amount of a remedial payment. *Third*, the Commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings. A strong showing in one area may tip the decision whether to seek monetary remedies. For example, a particularly egregious violation may justify pursuit of these remedies even if there appears to be some likelihood of private actions. Moreover, the pendency of numerous private actions may tilt the balance the other way, even if the violation is clear. *See* Federal Trade Commission Policy Statement on Monetary Equitable Remedies in Competition Cases. July 25, 2003.

[14] Attached as Exhibit B.

overbroad and constitutes an unreasonable burden in the scope of their business practices. In response, Corporate Respondents refer the Presiding Officer and Yahoo! Inc. to the following standard of burden assessment:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

As is clearly established in *Dresser Industries*, the fact that Yahoo! Inc. is a leading internet service provider that hosts a web search engine is "what makes the subpoena served upon [it] critical" to ascertain whether its access of the FTC website resulted in any republication, downloading, copying, printing or further dissemination of Corporate Respondents' trade secrets and confidential financial information. Id. at *14.[15] Moreover, Yahoo! Inc. is a large corporate enterprise accustomed to complying with all forms of extensive requirements of the legal process, including subpoenas. Thus, there is no undue burden on Yahoo! Inc.

Furthermore, any burden on Yahoo! Inc. is outweighed by the necessity that Corporate Respondents be given the opportunity to ascertain the complete nature and extent of the loss inflicted upon them by the FTC's destruction of the Corporate

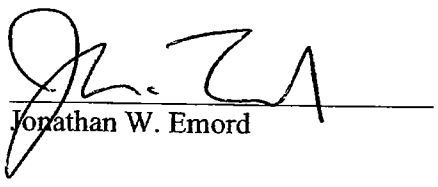
[15] Ironically in *Dresser Industries* the subpoena recipient also argued against production of documents because it would require production of "vital trade secrets and other confidential information." Id. at *15. The Court did not find that argument persuasive because "the administrative law judge has entered a comprehensive protective order **which should be sufficient to safeguard the confidentiality of Dresser's secrets.**" *Id* (emphasis added). Here, Corporate Respondents seek to assess their injury where just such a safeguard was insufficient.

Respondents' confidential and trade secret information, a factor no doubt contemplated by the Commission before it issued its Order. Failing to allow Corporate Respondents that opportunity compounds the harm they suffer and affords them no discovery to ascertain the extent of damages.[16] Without access to full and complete dissemination information, Corporate Respondents are left with only the July 25th letter identifying the companies that accessed the information. They are denied the ability to determine whether those companies used, copied, republished, downloaded, printed or otherwise further disseminated the trade secret and confidential financial information. The Commission clearly stated in its June 17, 2005 Order that the Respondents were expected to use that web log information to further elucidate the dissemination of their trade secrets. *Id.* at 7-8. Because the Corporate Respondents' trade secrets were destroyed by the FTC through no fault of the Respondents, equity demands that they be given reasonable opportunity to investigate to determine the nature and scope of the disclosure. Yahoo Inc.'s motion in support of Complaint Counsel's motion to quash should therefore be denied.

IV. CONCLUSION

The Corporate Respondents respectfully request that Nonparty Yahoo! Inc.'s Motion be denied period. The subpoena Yahoo! Inc. received must be honored.

Respectfully Submitted,



Jonathan W. Emord

[16] As explained supra at 5, FTC's failure to disclose IP addresses and Web domain names may cause the present subpoenas to bear no fruit. Such a circumstance would warrant visitation by the FTC of its interim decision not to disclose IP address identifiers.

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Date submitted: November 23, 2005

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

In the Matter of

BASIC RESEARCH, LLC **A.G. WATERHOUSE, LLC** **KLEIN-BECKER USA, LLC** **NUTRASPORT, LLC** **SOVAGE DERMALOGIC LABORATORIES, LLC** **BAN LLC d/b/a BASIC RESEARCH LLC** **OLD BASIC RESEARCH, LLC** **BASIC RESEARCH, A.G. WATERHOUSE,** **KLEIN-BECKER USA, NUTRA SPORT, and** **SOVAGE DERMALOGIC LABORATORIES** **DENNIS GAY** **DANIEL B. MOWREY d/b/a AMERICAN** **PHYTOTHERAPY RESEARCH** **LABORATORY, and** **MITCHELL K. FRIEDLANDER,** **Respondents**	**Docket No. 9318**

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2005, I caused Corporate Respondents' Motion In Opposition To Nonparty Yahoo! Inc.'s Motion In Support Of Complaint Counsel's Motion To Quash Respondents' Twenty-Five Subpoenas Directed To Third Parties And In Reply To Respondents' Opposition To Complaint Counsel's Motion To Quash Corporate Respondents' Subpoenas to be filed and served as follows:

1) an original and one paper copy filed by hand delivery and one electronic copy in PDF format filed by electronic mail to

Donald S. Clark
Secretary
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.

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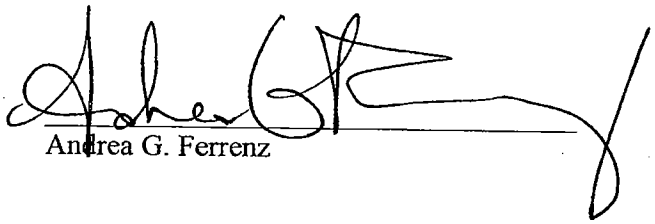

Andrea G. Ferrenz

EXHIBIT A

Service: **Get by LEXSEE®**
Citation: **1977 us dist lexis 16178**

*1977 U.S. Dist. LEXIS 16178, *; 1977-1 Trade Cas. (CCH) P61,400*

Federal Trade Commission (on relation of Kaiser Aluminum & Chemical Corp.) v. Dresser Industries, Inc.

Misc. No. 77-44.

United States District Court for the District of Columbia.

1977 U.S. Dist. LEXIS 16178; 1977-1 Trade Cas. (CCH) P61,400

April 26, 1977, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff Federal Trade Commission (FTC) filed a petition for enforcement of a subpoena against defendant chemical corporation. The subpoena originated in a case pending before the FTC, in which an aluminum corporation applied to the FTC's Administrative Law Judge (ALJ) for issuance of subpoenas duces tecum to other chemical manufacturers. The chemical corporation claimed that the subpoenas were too burdensome.

OVERVIEW: The ALJ issued subpoenas to large and small chemical manufacturers. The more elaborate subpoenas were directed to the leading manufacturers of the product. Several companies sought to quash the subpoenas, and the ALJ modified the specifications in order to lessen the burden of compliance. When the chemical company still refused to comply, the FTC filed its action for enforcement. The court ordered the chemical company to comply with the ALJ's subpoenas, finding that the chemical company's claim that compliance would cost it $ 400,000 was insufficient to meet its heavy burden of showing that compliance with the subpoena would unduly disrupt or seriously threaten normal operations. The court found that is was to be expected that the chemical company's burden would be greater that the other subpoenaed companies, because the chemical company was the dominant firm in the industry. Indeed, it was the chemical company's dominance in the industry that made the subpoena served upon it critical to the aluminum company's defense. Thus, the court held that the burden imposed by the subpoena was not an unreasonable one so as to warrant quashing or further limiting the subpoena.

OUTCOME: The court ordered that the ALJ's subpoenas must be enforced against the chemical corporation.

CORE TERMS: subpoena, subpoenaed, discovery, administrative law, specification, relevance, issuance, protective order, civil discovery, adjudicative, unduly, duces tecum, purposes of discovery, reasonably relevant, manufacturers, Federal Trade Commission Act, confidential information, enforcement proceedings, subpoena duces tecum, trade secrets, mere fact, investigative, dissemination, confidential, acquisition, refractories, burdensome, egregious, sweeping, opposing

LexisNexis(R) Headnotes ◆ Hide Headnotes

Administrative Law > Separation & Delegation of Power > Subpoenas

HN1 In a subpoena enforcement proceeding brought by a federal agency, the court's role is a strictly limited one, and the scope of issues which may be litigated in an

enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity. In the usual case such matters will be summary in nature in order to facilitate the rapid resolution of issues which may significantly bear upon the agency's law enforcement responsibilities. More Like This Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN2 At least in this circuit, subpoena enforcement proceedings are considered to be summary in nature unless there appears some compelling reason for a fuller procedure. More Like This Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN3 Fed. R. Civ. P. 81(a)(3) provides: These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings. More Like This Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN4 It is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. In view of this standard and the "strictly limited" role of the court, one who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same even if the subpoena is directed to a third party not involved in the adjudicative or other proceedings out of which the subpoena arose. More Like This Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN5 The Federal Trade Commission's rule for the issuance of subpoenas duces tecum, 16 C.F.R. § 3.34(b), provides, in pertinent part: (1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the administrative law judge, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena. (2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of non-privileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN6 Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. The Federal Trade Commission's (FTC) longstanding interpretation of 16 C.F.R. § 3.34(b)(2) is that it only requires a general showing of relevance. In the absence of a clear error, the FTC's reading of its own regulation is entitled to great deference from this court. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas

HN7 The Court of Appeals for the District of Columbia Circuit recently defined the showing of burden that would be necessary in order successfully to oppose an agency

subpoena: the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business. More Like This Headnote

Administrative Law > Separation & Delegation of Power > Subpoenas
Civil Procedure > Discovery Methods > Requests for Production & Inspection
Trade Secrets Law > Federal & State Regulation > U.S. Federal Trade Commission
HN8 The mere fact that some of the subpoenaed material may be confidential does not excuse compliance with the subpoena. More Like This Headnote

OPINIONBY: [*1]

FLANNERY

OPINION: Memorandum Opinion

FLANNERY, D.J.: This is an action brought by the Federal Trade Commission on petition for enforcement of a subpoena. The subpoena was issued pursuant to the Commission's authority under Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which provides that "the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." The subpoena originated in an adjudicatory proceeding currently pending before the Commission in which Kaiser Aluminum and Chemical Corporation is alleged to have violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by its acquisition of the Lavino Division of International Minerals and Chemical Corporation. The acquired division is a major producer of basic refractories, which are non-metallic insulating materials. Although Kaiser raised a number of defenses, those defenses generally contended that the acquired division had ceased to be a significant competitor in the industry and that the acquisition actually increased **[*2]** competition in the relevant markets.

In order to obtain the information necessary for its defense, Kaiser applied to the Commission's Administrative Law Judge for issuance of subpoenas duces tecum to other manufacturers of basic refractories. Sixteen subpoenas, directed to smaller manufacturers, contained only six specifications. Fourteen other subpoenas were more complex and contained 22 specifications. The more elaborate subpoenas were directed to the leading manufacturers of the product. One company, respondent Dresser Industries, One company, respondent Dresser Industries, Inc., was directed to answer a twenty-third specification concerning a major raw materials supply contract between Dresser and Lavino. Several of the subpoenaed companies moved to quash the subpoenas, and in a thorough and carefully reasoned Order of November 12, 1976, the Administrative Law Judge denied the motions to quash but did modify 13 of the 22 specifications in order to lessen the burden of compliance. Appeals from this Order were denied by the Commission, which found that the Administrative Law Judge had not abused his discretion in upholding the subpoenas. Subsequent to that decision by the **[*3]** Commission on December 16, 1976, four companies continued to refuse to comply with the subpoenas. The Commission, through its General Counsel, then initiated the instant petition for enforcement in the district court. As of the hearing of this

matter on April 7, 1977, only Dresser remained in noncompliance, the other companies having elected to obey the subpoenas.

At the April 7 hearing, two of the pending motions were decided from the bench. First, the court denied Dresser's motion to stay the proceedings or, in the alternative, to transfer them to the Northern District of Texas, where Dresser had earlier filed an action for declaratory relief from the subpoena. Second, the court granted Kaiser's motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Argument was then heard on the remaining matters: (1) the motion by Dresser for civil discovery and (2) Dresser's opposition to the petition for subpoena enforcement. With respect to its motion for civil discovery, Dresser contends that the circumstances presented here require the granting of such discovery to enable it to probe the motives of Kaiser and the Commission. In its opposition to the subpoena, **[*4]** Dresser argues that the subpoena fails to meet the standards of relevance prescribed by the Commission's rules, that compliance with the subpoena would be too burdensome, and that the subpoenaed material would not be adequately safeguarded from disclosure of confidential information. Dresser further urges that, if the subpoena is found to be valid and enforceable, the court issue a protective order designed to prevent dissemination of this confidential material.

At the outset, certain basic principles should be stated which must guide the court in its consideration of the issues. HN1 In an enforcement proceeding of this sort, the court's role is "a strictly limited one," and "the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." Federal Trade Commission v. Texaco, Inc., No. 74-1547 (D.C. Cir. Feb. 23, 1977), slip opinion at 16, 18. In the usual case such matters will be summary in nature in order to facilitate the rapid resolution of issues which may significantly bear upon the agency's law enforcement responsibilities.

Despite the specific **[*5]** ruling of Judge Parker in the Order to Show Cause of March 4, 1977, Dresser insists, contrary to that Order, that this is not a summary proceeding. HN2 At least in this circuit, subpoena enforcement proceedings are considered to be summary in nature unless there appears some compelling reason for a fuller procedure. See Federal Trade Commission v. Texaco, Inc., supra at 39 n. 48; Federal Trade Commission v. Sherry, 1969 TRADE CASES. [*] 72,906 (D.D.C. 1969). See also In Re FTC Corporate Patterns Report Litigation, F. Supp. , Misc. No. 76-126 (D.D.C. Jan. 31, 1977). Even HN3 Rule 81 (a)(3) of the Federal Rules of Civil Procedure, upon which Dresser relies for its claim of a right to civil discovery, provides:

These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(Emphasis added.) Here the Order to Show Cause clearly specified that the proceeding was to be summary with no discovery for any party **[*6]** in the absence of further order by the court.

In a proceeding such as this, discovery is available only upon a strong showing of need. The areas in which Dresser requests discovery and which it alleges to be central to its opposition to the subpoena are as follows: (1) the possibility that Kaiser's motive in requesting the subpoenas was only to delay the adjudicative proceeding against it; (2) the fact that Kaiser has settled with other parties subpoenaed but not with Dresser; (3) the Commission's alleged abuse of its subpoena power; (4) the Commission's alleged failure to protect Dresser's rights as a non-party to the adjudicative proceeding; and (5) the Commission's alleged failure to follow its own rules in the issuance of the subpoena. Some of these issues appear to require

no discovery as they involve purely legal issues, such as whether the Commission has in fact failed to follow its rules of procedure. Others appear not to be genuine issues at all. For example, counsel for Kaiser revealed at the hearing that Dresser had been offered essentially the same terms for compliance with the subpoena as the other companies, but that Dresser had refused those terms while the other **[*7]** companies had accepted them. In light of that fact, which was not contradicted by Dresser, it is difficult to see how Dresser can allege that the other companies were the beneficiaries of a favorable or preferential settlement.

This case features none of the egregious circumstances found in a case like United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir. 1976). Nor does it appear that Dresser has been subjected to a "sweeping or irrelevant" subpoena request, as in United States v. Theodore, 479 F.2d 749, 754 (4th Cir. 1973), where the particular summons involved was described by the court as "unprecedented in its breadth." Most importantly, Dresser has alleged no specific facts to support its claim of bad faith on the part of Kaiser and the Commission. Some such specific factual allegations are necessary before the court will abrogate the usual rule that discovery is not allowed in summary proceedings. See United States v. Fensterwald, No. 76-1290 (D.C. Cir. Mar. 8, 1977). In the absence of these allegations and of any indication of bad faith or improper motive on the part of Kaiser or the Commission, the court must refuse Dresser's request for civil discovery. The mere **[*8]** fact that Dresser is not a party to the pending adjudicative proceeding does not alter the basic principle the discovery rights are inconsistent with the summary nature of subpoena enforcement. See Federal Trade Commission v. United States Pipe and Foundry Co., 304 F. Supp. 1254 (D.D.C. 1969). Any other result might seriously threaten the Commission's investigative powers, as well as prejudice the rights of parties such as Kaiser who are engaged in litigation with the Commission.

In opposing the subpoena on the merits, Dresser is confronted with a task at least as difficult as overcoming the presumption against discovery in summary enforcement proceedings. The basic standard for challenges to agency subpoena power is set forth in United States v. Morton Salt Co., 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950), where the Supreme Court said:

HN4[It] is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.

In view of this standard and the "strictly limited" role of the court, see Federal Trade Commission v. Texaco, Inc., supra at 16, one who opposes an agency's subpoena necessarily must bear a heavy burden. **[*9]** That burden is essentially the same even if the subpoena is directed to a third party not involved in the adjudicative or other proceedings out of which the subpoena arose, Federal Trade Commission v. Tuttle, 244 F.2d 605 (2d Cir. 1957), cert. denied, 354 U.S. 925, 1 L. Ed. 2d 1436, 77 S. Ct. 1379; Federal Trade Commission v. Bowman, 149 F. Supp. 624 (N.D. Ill.), aff'd, 248 F.2d 456 (7th Cir. 1957); Federal Trade Commission v. United States Pipe and Foundry Co., supra.

Dresser does not contend that the subpoena is beyond the statutory authority of the Commission, but instead focuses upon the other two elements discussed in Morton Salt, supra. Specifically, Dresser asserts that the subpoena violates the Commission's own standards of relevance and that the subpoena is so indefinite and sweeps so broadly that Dresser is unduly burdened. In the relevance inquiry, the court must be satisfied merely that the material sought is "reasonably relevant"; there need be no showing that the subpoenaed material is clearly or unquestionably relevant or, as Dresser contends, "relevant and necessary." Federal Trade Commission v. Texaco, Inc., supra at 20-21 n. 23.

Dresser's arguments concerning relevance revolve primarily **[*10]** about HN5the Commission's rule for the issuance of subpoenas duces tecum. 16 C.F.R. § 3.34(b) (1976). That rule provides, in pertinent part:

(1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the administrative law judge, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena....

(2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of non-privileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

Dresser apparently views the language **[*11]** of "constitute or contain evidence" found in § 3.34(b)(2) as requiring a determination, prior to issuance of a subpoena, that subpoenaed material would be admissible in evidence. Such an interpretation is clearly inconsistent with the statement in the same rule to the effect that HN6"[subpoenas] duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes." Furthermore, it is inconsistent with the Commission's own longstanding interpretation of § 3.34(b)(2), which is that it only requires a general showing of relevance. In the absence of a clear error, the Commission's reading of its own regulation is entitled to great deference from this court. See Udall v. Tallman, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965). If Dresser's view of the rule were adopted by the court, the use of a subpoena duces tecum, at least for purposes of discovery, would be completely undermined.

Dresser also alleges that the application for issuance of a subpoena duces tecum was insufficient in that it failed to make a strong showing of relevance and need. As noted above, such is not the correct standard. Instead, **[*12]** the applicant for a subpoena need only show that the materials sought are generally or reasonably relevant. Even if there were some inadequacy in the application - and the court does not believe that there was in this instance - Dresser would not have been prejudiced by it for the administrative law judge made a specification-by-specification finding of relevancy. In the process, he limited the scope of some of the specifications where he deemed it appropriate. The court has examined the complaint, the defenses raised by Kaiser, the specifications found in the subpoena, and the findings of the administrative law judge with reference to each of the specifications, and must conclude that the documents and other material subpoenaed meet the standard of "reasonable relevance" and that the administrative law judge did not abuse his discretion in upholding the specifications, as modified by his order.

In opposing the subpoena on the ground that it imposes too great a burden, Dresser again faces a very difficult task. HN7The court of appeals for this circuit recently defined the showing of burden that would be necessary in order successfully to oppose an agency subpoena:

We emphasize **[*13]** that the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Federal Trade Commission v. Texaco, Inc., supra at 39-40.

Based on an uncontradicted affidavit, Dresser claims that the cost of compliance with the subpoena would be $ 400,000. Even if the affidavit were totally convincing in the statistics which it presents, this would not necessarily satisfy Dresser's burden. Dresser must show that compliance with the subpoena would "unduly disrupt or seriously threaten normal operations." This Dresser has not done. As the court **[*14]** of appeals observed in Federal Trade Commission v. Texaco, Inc., supra at 40, it is not insignificant that other companies were willing and able to comply with similar subpoenas without undue effort. Here all the other companies which were subpoenaed, including those with subpoenas virtually identical to that of Dresser, have agreed to comply, a fact which strains the credibility of Dresser's claim of unreasonable burden. It may very well be that Dresser's burden is greater than that of the other subpoenaed companies, but that is to be expected from the fact that Dresser is the dominant firm in the industry with by far the largest volume of sales. Indeed, it is Dresser's dominance in the industry which makes the subpoena served upon it critical to Kaiser's defense. Thus, as the record now stands, the court must find that the burden imposed by the subpoena is not an unreasonable one so as to warrant quashing or further limiting the subpoena. Furthermore, though the subpoena is admittedly a sweeping one, it is not illegal or overbroad, for the breadth of the request is dictated by the scope of the adjudicative proceeding.

Finally, Dresser urges that the subpoena not be enforced **[*15]** because inadequate protection is afforded for vital trade secrets and other confidential information. HN8 The mere fact that some of the subpoenaed material may be confidential does not, however, excuse compliance with the subpoena. Federal Trade Commission v. Lonning, 176 U.S. App. D.C. 200, 539 F.2d 202, 211 (D.C. Cir. 1976); Federal Trade Commission v. Tuttle, 244 F.2d 605, 616 (2d Cir. 1957), cert. denied, 354 U.S. 925, 1 L. Ed. 2d 1436, 77 S. Ct. 1379. The administrative law judge has entered a comprehensive protective order which should be sufficient to safeguard the confidentiality of Dresser's secrets. Dresser's primary fear appears to be that the protective order does not bind the Commission itself. It is not clear that Dresser's fear is wellfounded in this regard, but in any event there are other barriers to dissemination by the Commission. First, such material is exempt from disclosure requirements under the Freedom of Information Act. 5 U.S.C. § 552(b)(4). Second, 15 U.S.C. § 46(f) bars the Commission from making public trade secrets and other confidential information such as the names of customers. And the court cannot lightly assume that the Commission will fail to discharge diligently and in good faith its responsibilities **[*16]** under the law. Under the circumstances, a protective order by this court would be neither necessary nor appropriate.

The court believes that the subpoena, as modified by order of the administrative law judge, should be enforced, and an appropriate order to that effect accompanies this memorandum opinion. The court is not unmindful of the tremendous impact which compliance with such subpoenas can have upon companies which appear to be innocent bystanders. The cost of effective economic regulation, however, is one which must be shared by all industry, indeed by the entire society. The expeditious enforcement of such subpoenas, usually without the civil discovery and the protective order which were requested of the court in this case, is an integral part of the regulatory scheme, and only in the most egregious of circumstances should a court intervene to delay or hinder the enforcement process.

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EXHIBIT B

Service: **Get by LEXSEE®**
Citation: **1983 us dist lexis 15504**

*1983 U.S. Dist. LEXIS 15504, *; 1983-2 Trade Cas. (CCH) P65,506*

Federal Trade Commission v. International Diamond Corp./Full Service Import Brokers, Inc., et al.

No. 82-0878 WAI (JSB).

United States District Court for the Northern District of California.

1983 U.S. Dist. LEXIS 15504; 1983-2 Trade Cas. (CCH) P65,506

July 12, 1983

CASE SUMMARY

PROCEDURAL POSTURE: Defendant diamond corporation brought a motion for summary judgment to dismiss plaintiff Federal Trade Commission's (FTC) action under § 13(b) of the FTC Act, 15 U.S.C.S. § 53(b). The diamond corporation claimed that the diamonds it sold were not worthless.

OVERVIEW: In response to the FTC's action against it under § 13(b) of the FTC Act, 15 U.S.C.S. § 53(b), the diamond corporation claimed that the FTC Act did not authorize the court to order rescission and restitution of contracts or other similar redress and that rescission and restitution were unavailable against individual defendants who were not parties to the contracts which the FTC sought to redress. The diamond corporation also claimed that monetary redress was not available because the goods delivered by the diamond corporation were not worthless or of only token value. The court held that § 53 (b) did authorize the court to grant consumer redress, including rescission of contracts, ancillary to a permanent injunction. The court held that the diamond corporation was clearly liable for the money paid by 12 investors who had executed purchase agreements or who received material misrepresentations.

OUTCOME: The court ruled in favor of the FTC and denied the diamond corporation's motion for partial summary judgment.

CORE TERMS: redress, restitution, rescission, consumer, privity, FTC Act, status quo, purchaser, seller, restore, summary judgment, permanent injunction, ancillary, authorize, matter of law, worthless, salesmen, unjust enrichment, proper measure, enrichment, defrauded, equitable, monetary, freezing, preliminary injunction, individual liability, sales manager, moving party, culpability, evidentiary

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Summary Judgment > Summary Judgment Standard

HN1 Summary Judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must sustain the burden of proof and all permissible inferences must be drawn in favor of the party opposing the motion. More Like This Headnote |
Shepardize: Restrict By Headnote

Antitrust & Trade Law > Federal Trade Commission Act

HN2 Section 13(b) of the Federal Trade Commission Act (FTC), 15 U.S.C.S. § 53(b), gives the FTC two options. The Commission can, under normal circumstances, seek a preliminary injunction pending an administrative proceeding. Alternatively, in proper cases, such as routine fraud cases where the agency's expertise is unnecessary, the Commission can seek relief directly in federal court without also initiating wasteful and repetitious administrative proceedings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Antitrust & Trade Law > Federal Trade Commission Act

HN3 Section 13(b) of the Federal Trade Commission Act (FTC), 15 U.S.C.S. § 53(b), authorizes the court to grant consumer redress, including rescission of contracts, ancillary to a permanent injunction. More Like This Headnote | *Shepardize:* Restrict By Headnote

Antitrust & Trade Law > Federal Trade Commission Act

HN4 Privity of contract between an individual defendant and the consumer is not required to establish individual liability for civil penalties or redress under Federal Trade Commission law. Corporate officers have been held liable for consumer redress under both § 19, and § 13(b) of the Federal Trade Commission Act. An individual may be held liable for the conduct of a corporation which the individual controlled or had authority to control, or when the individual knew or should have known of the violation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Breach > Causes of Action

HN5 The privity requirement is appropriate to limit potentially astronomical liability which could result from open market transactions in which no benefit accrues to the defendant or where culpability is often minimal and the imposition of unlimited damages would be unfair. Even where the monetary equivalent of rescission is involved as a potential remedy, the privity requirement may be abrogated in a fraud case in the interest of justice. More Like This Headnote

Contracts Law > Remedies > Restitution

HN6 The measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. More Like This Headnote | *Shepardize:* Restrict By Headnote

OPINIONBY: [*1]

BRENNAN

OPINION: Order Denying Partial Summary Judgment

BRENNAN, U.S. Magis.: Defendant Susan Dohrmann's Motion for Partial Summary Judgment, having been taken under submission for consideration and decision based on the record and the pleadings on file in this case and the arguments of counsel.

It Is Hereby Ordered that the Motion for Partial Summary Judgment is denied.

Discussion

The plaintiff Federal Trade Commission (FTC) commenced this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) against International Diamond Corporation and four individuals: Thomas Lewsader, Stephen Greenbaum, Susan Greenbaum Dohrmann and Bernhard Dohrmann.

Defendant Susan Dohrmann brings this Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56. Defendant Stephen Greenbaum joins the motion. Although denominated a motion for summary judgment, in essence the motion contends that, as a matter of law, there is no authority for some or all of the relief requested. The only evidentiary material submitted by defendants is a brief declaration offered for the uncontested assertion that the diamonds sold by defendants are not worthless.

A. Summary Judgment

HN1 Summary Judgment **[*2]** is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must sustain the burden of proof and all permissible inferences must be drawn in favor of the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1279 (9th Cir. 1979), cert. denied, 445 U.S. 951 (1980).

Defendants havaing submitted no supporting affidavits or other evidentiary material to controvert the allegations of the complaint, those allegations must be accepted as true for purposes of this motion. See 6 J. Moore, Moore's Federal Practice P56.11 [2] at 56-209 to 56-213; P56.11[1.1] at 56-198 to 56-199 (2d ed.). Defendants must establish that they are entitled to judgment as a matter of law despite the allegations in the complaint.

B. Issues

Susan Dohrmann raises four arguments: (1) that Section 13(b) of the FTC Act does not authorize the District Court to order rescission **[*3]** and restitution of contracts or other similar redress; (2) that rescission and restitution are unavailable against individual defendants who were not parties to the contracts which the plaintiff seeks to redress; (3) that the proper measure of restitution is the amount of unjust enrichment by each defendant; and (4) that monetary redress is not available because the goods delivered by the defendant International Diamond Corporation were not worthless or of only token value.

1. Authority of the District Court under Section 13(b) of the FTC Act to order consumer redress ancillary to a permanent injunction.

This Court concurs with the interpretation of the FTC Act as explained in FTC v. H.N. Singer, Inc., 534 F. Supp. 24, 27 (N.D. Cal. 1981), aff'd, 668 F.2d 1107 (9th Cir. 1982). HN2 Section 13(b) gives the FTC two options. The Commission can, under normal circumstances, seek a preliminary injunction pending an administrative proceeding. Alternatively, "in proper cases," such as routine fraud cases where the agency's expertise is unnecessary, the Commission can seek relief directly in federal court without also initiating wasteful and repetitious administrative proceedings. FTC **[*4]** v. H.N. Singer, Inc., supra, 534 F. Supp. at 27; aff'd, 668 F.2d 1107 (9th Cir. 1982); see generally S. Rep. No. 151, 93d Cong., 1st Sess. at 30-31. Thus interpreted, the FTC Act envisions consumer redress under Section 13(b). As the Ninth Circuit held in FTC v. H.N. Singer, Inc., supra, 668 F.2d at 1113:

. . . Congress, when it gave the District Court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit the traditional equitable power explicitly or by necessary and inescapable

inference. In particular, Congress thereby gave the district court the power to order rescission of contracts.Hence § 13(b) provides a basis for an order freezing assets.

See Porter v. Warner Holding Co., 327 U.S. 395, 398 (1947); see also Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960); Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162, 182 (9th Cir. 1960) ("Congress must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light **[*5]** of statutory purposes.")

In FTC v. N.H. Singer Inc., supra, the Commission sought consumer redress under Section 19 for alleged violations of the Franchise Rule, a permanent injunction under Section 13(b) for alleged false promises and false and misleading representations contrary to Section 5(a) and refunds for third parties as relief ancillary to the injunction, and a preliminary injunction freezing assets pending trial on the merits. The Ninth Circuit affirmed the district court order freezing assets. Since Singer included pure Section 5(a) violations, it is clear that the Ninth Circuit's holding that rescission was an available remedy under Section 13(b) was essential to justify an asset freeze to provide relief for the Section 5(a) violations and is not, as defendants urge, mere surplusage.

The defendants' alternative argument that consumer redress cannot be read into Section 13 (b) without rendering Section 19 superfluous ignores the clear language of Section 19(e) that:

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any **[*6]** authority of the Commission under any other provision of law.

Section 19(e), 15 U.S.C. § 57b(e).

The defendants' reliance on Heater v. FTC, 503 F.2d 321 (9th Cir. 1974) for the proposition that the FTC Act does not authorize consumer redress other than pursuant to actions under Section 19 is similarly unpersuasive. Heater held only that the FTC lacks power to order redress itself as part of an administrative cease and desist order. Any eventual redress in this action will be ordered by the Court, not by the Commission.

Moreover, the defendants have not convinced the court that the Commission will never pursue redress under Section 19 if identical relief is available under Section 13(b). It is sufficient to note that expedited consumer protection proceedings under Section 13(b) are available only "in proper cases" and that the Court, not the Commission, determines what is a proper case.

Other courts have also held that Section 13(b) authorizes a variety of equitable relief ancillary to the granting of an injunction. See FTC v. Southwest Sunsites, Inc., 655 F.2d 711 (5th Cir. 1982); FTC v. Virginia Homes Mfg. Corp., 509 F.Supp. 51 (D. Md.), aff'd, 661 F.2d 920 (4th Cir. **[*7]** 1981) (ancillary relief, in the form of compulsory notice to consummers, granted under court's general equitable powers).

Accordingly, the court concludes that HN3 Section 13(b) authorizes the court to grant consumer redress, including rescission of contracts, ancillary to a permanent injunction.

2. Individual Defendants May in a Proper Case Be Held Liable for Consumer Redress

HN4 Privity of contract between an individual defendant and the consumer is not required to establish individual liability for civil penalties or redress under FTC law. Corporate officers have been held liable for consumer redress under both Section 19, FTC v. Glen W. Turner Enterprises, Inc., 1983-1 TRADE CASES (CCH) P65,244 (M.D. Fla. 1982), and Section 13(b),

FTC v. H.N. Singer, Inc., 1982-83 TRADE CASES (CCH) P65,011 (N.D. Cal. 1982). An individual may be held liable for the conduct of a corporation which the individual controlled or had authority to control, or when the individual knew or should have known of the violation. See e.g., United States v. Johnson, 541 F.2d 710 (8th Cir.) cert. denied, 429 U.S. 1093 (1976); FTC v. H.N. Singer, Inc., supra; FTC v. Turner, supra; United States v. Bestline Products **[*8]** Corp., 412 F. Supp. 754 (N. D. Cal. 1976).

Cases cited by the defendant to support the privity requirement are not persuasive as they concern securities law violations in market trading situations. E.g., Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), aff'd in part, rev'd in part on other grounds, 103 S.Ct. 683 (1983); Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) (Sneed, J. concurring).HN5

The privity requirement is appropriate to limit potentially astronomical liability which could result from open market transactions in which no benefit accrues to the defendant or where culpability is often minimal and the imposition of unlimited damages would be unfair. See, e.g., Huddleston v. Herman & MacLean, supra; Note, The Measure of Damages in Rule 10(b)-5 Cases Involving Actively Traded Securities, 26 Stanford Law Rev. 371 (1974).

Even where the monetary equivalent of rescission is involved as a potential remedy, the privity requirement may be abrogated in a fraud case in the interest of justice.See, e.g., Gordon v. Burr, 506 F.2d 1080 (2nd Cir. 1974); Cady v. Murphy, 113 F.2d 988 (1st Cir.), cert. denied, 311 U.S. 705 (1940); Johns Hopkins Univ. **[*9]** v. Hutton, F. Supp. 1165 (D. Md. 1968), aff'd in part, rev'd in part and remanded, 422 F.2d 1124 (4th Cir. 1970).

The instant case involves transactions in which consumers were allegedly defrauded in face to face transactions with International Diamond, a corporation controlled by the various individual defendants. Plaintiff also alleges that the individual defendants participated in the fraudulent transactions. Under the circumstances of this case the degree of direct, personal involvement in and control exerted by the individual defendants over the corporation, or of each individual's degree of knowledge as to the conduct of other corporate officers and employees, will bear on both their individual liability and the form of any relief or redress ultimately ordered.

The complaint alleges that defendants Thomas Lewsader, Stephen Greenbaum and Susan Greenbaum Dohrmann were corporate officers and members of the IDC Board of Directors as well as the sole principal stockholders and that defendant Bernhard Dohrmann held a variety of corporate positions with IDC. The complaint also alleges that the individual defendants "formulated, directed, controlled, and participated in the acts **[*10]** and practices of the corporate defendant" which led to this lawsuit. Complaint at 3, lines 17-19. The defendants disavow any knowledge or control of any alleged unlawful conduct.

The pleadings have raised a genuine issue of material fact as to the degree of knowledge, control, or participation of the individual defendants in the alleged fraudulent transactions which can be resolved only at trial.Accordingly, the propriety of an equitable form of redress which may include the monetary equivalent of rescission cannot be disposed of by summary judgment.

3. The Proper Measure of Restitution

While ordinarily the proper measure of restitution is the amount of enrichment received, Restatement of Restitution § 1 (1937), if the loss suffered by the victim is greater than the unjust benefit received by the defendant, the proper measure of restitution may be to restore the status quo. See Restatement of Restitution § 1, Comment a (1937); 5 J. Moore, supra, P38.24[2] at 38-195; Gordon v. Burr, supra; Cady v. Murphy, supra.

In securities cases, stock purchasers have been restored to the status quo by salesmen and brokerage houses regardless of the defendant's degree of enrichment. **[*11]** In Gordon v. Burr, supra, the court held that rescission was available against an individual who was not in privity with the defrauded purchaser but was a party to the fraud. The court explained that in the interest of justice it might be appropriate to restore the customer to the status quo by salesmen and brokerage houses regardless of the defendant's degree of enrichment. In Gordon v. Burr, supra, the court held that rescission was available against an individual who was not in privity with the defrauded purchaser but was a party to the fraud. The court explained that in the interest of justice it might be appropriate to restore the customer to the status quo even though the amount of rescission exceeded the defendant's unjust enrichment:

As between two tortfeasors, one the seller and the other not a privy to the transaction, it is desirable that the seller be the person from whom the purchaser recover; otherwise the seller will benefit from his fraud to the extent of the purchase price. The choice, then is between returning to the seller the status quo prevailing prior to the fraud or forcing the defrauder not in privity to a worse status than he occupied quo ante. To avoid **[*12]** unjust enrichment, general equitable principles indicate the preferability of the purchaser pursuing first the seller, rather than his partner in the fraud. However, as between the innocent purchaser and the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase, equity requires the wrongdoer to restore the victim to the status quo.

Gordon v. Burr, 506 F.2d at 1085 (emphasis added).

Similarly the Restatement of Restitution states:

[HN6↑T]he measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited.

Restatement of Restitution, Introductory Note, Topic 2, §§ 150-59 (1937). Accord J. O'Connell, Remedies 77-78 (1977); D. Dobbs, Handbook on the Law of Remedies: Damages-Equity-Restitution 623-24 (1973).

The district court in FTC v. H.N. Singer, Inc., 1982-83 TRADE CASES P65,011, found **[*13]** a sales manager individually liable for restitution because of his authority to control and knowledge of the deceptive acts and practices of his salesmen. The degree of restitution ordered in Singer clearly exceeded the amount of money the sales manager had received, but the court held,

Defendant is, however, clearly liable for the money paid by the twelve investors who had executed purchase agreements with Hot Box or who received material misrepresentations from or on behalf of Hot Box during defendant's tenure. This amounts to $290,000. The issue of further liability remains a question of fact.

FTC v. H.N. Singer, at 70,619.

To the extent that the benefit and loss are not co-extensive, the determination of who should bear the added cost of restitution will turn on considerations of fairness and culpability. In light of the pleadings on file, this presents a question of fact to be resolved at trial.

4. Appropriateness of Rescission and Restitution When the Goods Are Not Essentially Worthless

Defendants' final contention -- that restitution is available only when the goods purchased are essentially worthless -- rests upon administrative cases which were decided prior **[*14]** to Heater v. FTC, supra. Those decisions reflect self-imposed restraints by the Commission in its efforts to develop standards under Section 5 in order to justify administratively ordered redress. The Ninth Circuit in Heater, held that the Commission lacked authority to order administrative redress, which rendered the Commission's self-inposed standards nugatory.

For the above reasons, the Motion for Partial Summary Judgment is denied.