

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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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. )

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Docket No. 9318

**ORDER ON MOTIONS TO QUASH RESPONDENTS' SUBPOENAS**

**I.**

On October 26, 2005, Complaint Counsel filed a motion seeking to quash twenty-five subpoenas *duces tecum* served on nonparties by the Corporate Respondents Basic Research, LLC; A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; and BAN, LLC ("Motion").

On October 28, 2005, Complaint Counsel moved for leave to file a supplemental motion and filed their supplemental motion indicating that copies of the motion to quash were served on the nonparties at issue. Complaint Counsel's request to file a supplemental motion is **GRANTED**.

On November 7, 2005, the Corporate Respondents filed an opposition to Complaint Counsel's motion ("Opposition").

On November 15, 2005, nonparty Yahoo! Inc. ("Yahoo!") filed a motion in support of Complaint Counsel's motion to quash and in reply to Respondents' opposition ("Yahoo! Motion"). Yahoo! also filed a motion seeking enlargement of time to respond to Respondents' subpoena. Yahoo!'s motion for enlargement of time is moot and therefore is **DISMISSED**.

On November 23, 2005, the Corporate Respondents filed an opposition to Yahoo!'s motion ("Opposition to Yahoo!").

## II.

Complaint Counsel contends that the subpoenas are untimely; that the subpoenas demand documents and information that are irrelevant and outside the bounds of discovery in this matter; and that the subpoenas are overbroad. Motion at 4-8.

Yahoo! asserts that Respondents' subpoena is untimely; that the Commission has definitively resolved that the discovery Respondents seek is unwarranted and inappropriate because it will not generate documents relevant to this proceeding; that the issue of damage caused by the release of Respondents' confidential information is without merit; and that the subpoena is overly broad and unduly burdensome, as it improperly infringes on Yahoo!'s First Amendment right to receive information and may implicate obligations under the Electronic Communications Privacy Act and other privacy protections. Yahoo! Motion at 1-2.

Respondents contend that the Administrative Law Judge should deny Complaint Counsel's motion to quash because Complaint Counsel lacks standing to file the motion; that Corporate Respondents' subpoenas seek documents from parties identified for the first time on July 25, 2005 and are not untimely; that the harms caused to Corporate Respondents from the publication of their trade secrets is a defense in this case; and that equity requires that the Corporate Respondents be given the opportunity to assess the nature and scope of disclosure of their trade secrets. Opposition at 8-13.

In response to Yahoo!'s motion, Respondents assert that the subpoena is timely; that the subpoena is warranted and appropriate because it may reasonably lead to the discovery of documents relevant to this proceeding; that the subpoenas are properly issued in the context of this proceeding; and that Yahoo! has failed to adequately demonstrate that the subpoena is overly broad and unduly burdensome. Opposition to Yahoo! at 10-17.

## III.

Respondents argue that neither Complaint Counsel nor Yahoo!, a subpoena recipient, have standing to file a motion to quash. Opposition at 9; Opposition to Yahoo! at 8. The general rule is that a party to litigation lacks standing to object to a nonparty subpoena, with a few exceptions not applicable here. *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979); see also *In re Basic Research*, 2004 FTC LEXIS 237 (Dec. 9, 2004) (Order on Complaint Counsel's Second Motion for Protective Order). Therefore, Complaint Counsel's pleading will be treated as a motion in support of Yahoo!'s motion to quash.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the

defense of any respondent.” 16 C.F.R. § 3.31(c)(1); *see FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). The Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2). Pursuant to Rule 3.31(d)(1), the Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. 16 C.F.R. § 3.31(d)(1).

Respondents seek discovery regarding the posting, on the Federal Trade Commission (“FTC”) public website of Respondents’ confidential documents. The circumstances surrounding this disclosure are explained in the Court’s Order certifying motions to the Commission and staying proceedings which certified Respondents’ motion for contempt, motion for electronic files showing who accessed Respondents’ confidential information, and motion for discovery. *In re Basic Research*, 2005 FTC LEXIS 92 (Apr. 6, 2005) (“Certification Order”). On June 17, 2005, the Commission ruled on the certified motions and lifted the stay. *In re Basic Research*, 2005 WL 1541546 (June 17, 2005) (“Commission Order”).

Respondents contend that the harm caused to Respondents when the FTC published their trade secrets is a defense in this case and that the subpoenas at issue seek information relevant to that defense. Opposition at 9-11. Respondents state that “[t]here has been no punishment meted out in this case.” Opposition at 10; Yahoo! Opposition at 12. Respondents’ request for additional discovery and for “punishment” were certified to the Commission and the Commission ruled on those requests. The disclosure issue is therefore resolved at this level and no further discovery or sanctions will be issued by this Court.

Moreover, Respondents’ argument that harm to Respondents from the disclosure offsets any potential finding of liability is specious. Respondents cite no statute or case which would support such an equitable balancing in a Part 3 proceeding. The cases cited by Respondents concern actions seeking consumer redress in federal court under Section 13(b) of the FTC Act. *See FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 467 (11th Cir. 1996); *FTC v. Int’l Diamond Corp.*, 1983 U.S. Dist. LEXIS 15504, \*3-4 (N.D. Ca. 1983). Indeed, the disclosure issue was certified to the Commission in part because it raised allegations “requiring determination of matters beyond the merits of the violation of law charged in the Complaint” and because “the requested relief exceeds the authority delegated to the Administrative Law Judge (“ALJ”).” Certification Order at 2.

The Commission denied Respondents’ request for additional discovery on the disclosure issue, stating that “[d]iscovery in Commission adjudicatory proceedings under Part 3 of the Commission’s Rules is limited to matters that are relevant to the allegations of the Commission’s complaint, to the relief proposed therein, or to the Respondents’ defenses, none of which is at issue in this Discovery Motion. *See* 16 C.F.R. § 3.31.” Commission Order at 8. As this Court has previously indicated, the only material issues are those raised by the allegations of the

Complaint, the proposed relief therein, or to the Respondents' defenses to the Complaint's allegations. The disclosure issue has no bearing on these material issues and the Court will not consider discovery or argument on such irrelevant matters.

Respondents assert, in addition, that the subpoenas at issue are authorized by the Commission Order, which states in relevant part:

Respondents have asked for the production of Web server log information that Respondents allege would reveal who may have accessed the exhibits at issue from the Commission's Web site. The Commission has determined to grant this motion in part by granting Respondents access to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received. 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 these domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC's servers.

Commission Order at 7 (emphasis added). Pursuant to the Commission Order, Respondents may "contact" the domains identified by Complaint Counsel. Commission Order at 7. The Commission Order does not, however, authorize the use of compulsory process in these proceedings to obtain the desired information.

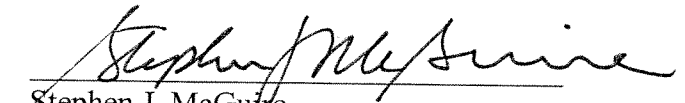
Moreover, the Commission indicated in granting, in part, Respondents' electronic files motion, that the motion was denied in part:

to the extent that it seeks specific Internet Protocol (IP) addresses or other information that would personally identify any specific individual. The Commission acknowledges that such personally identifiable information might better serve Respondents' stated purpose to identify and contact specific individuals who may have accessed the exhibits at issue. Nonetheless, the disclosure of such personally identifiable information would violate the Privacy Act of 1974, 5 U.S.C. § 552a.

Commission Order at 7. The Commission Order cannot be interpreted as suggesting that Respondents could obtain information subject to privacy laws. Yahoo! asserts that the information requested in the subpoena may be subject to prohibitions on disclosure under the Electronic Communications Privacy Act. Yahoo! Motion at 11. Yahoo! also makes a strong argument that the subpoena is overly broad. Yahoo! Motion at 9-11.

Accordingly, Yahoo!'s motion to quash is **GRANTED**. Complaint Counsel's motion to quash is **GRANTED in part** as it applies to Yahoo! and is **DENIED in part** as it applies to other subpoena recipients. Respondents shall resolve objections by recipients of similar subpoenas in a fashion consistent with this Order.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Date: December 1, 2005