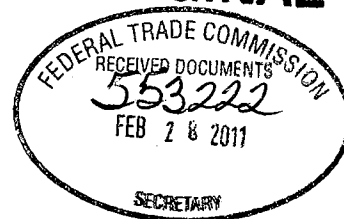


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



In the Matter of)

LABORATORY CORPORATION)
OF AMERICA)

and)

LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
Respondents.)

DOCKET NO. 9345

**ORDER DENYING HUNTER LABORATORIES'
MOTION TO QUASH SUBPOENA *DUCES TECUM***

I.

On February 8, 2011, third party Hunter Laboratories ("Hunter Labs") filed a Motion to Quash Subpoena. ("Motion"). On February 18, 2011, Respondents filed an Opposition to Hunter Labs' Motion. For the reasons set forth below, Hunter Labs' Motion is DENIED.

II.

Hunter Labs moves to quash the Subpoena *Duces Tecum* served on it by Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") on February 1, 2011 ("Subpoena"). Hunter Labs asserts that the Subpoena violates a discovery ruling in a civil action pending in the State of California ("California action"); that the discovery sought is unreasonably cumulative or duplicative, is obtainable from some other source that is more convenient, less burdensome, and less expensive; and that the burden and expense of the proposed discovery outweigh its likely benefit.

Respondents oppose the Motion, arguing that Hunter Labs failed to comply with Commission Rule 3.22(g) and that the state court order denying discovery is irrelevant. Respondents further contend that Hunter Labs has not demonstrated that the requested documents are irrelevant and has not shown undue burden.

III.

A. The California Action

Hunter Labs states that it filed a *qui tam* action against LabCorp and other defendants for violation of the California False Claims Act and that, in that action, the court-appointed Special Master denied LabCorp's motion to compel responses from Hunter Labs to certain discovery requests. The resolution of a discovery dispute in another action involving different parties, claims, and defenses, and brought under a different statute than the present case, is not dispositive of the instant dispute. In this action, the Commission's Rules of Practice govern. Those rules set forth that the 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. 16 C.F.R. § 3.31(c). The Commission's Rules provide that the Administrative Law Judge may limit discovery if he determines that the discovery sought is unreasonably cumulative or unduly burdensome. 16 C.F.R. § 3.31(c). It is these factors, as stated in the Commission's Rules, and applicable case law, that govern the issue of whether the Subpoena served in this action should be quashed.

B. Meet and Confer Requirement

Rule 3.22 of the Commission's Rules of Practice requires that each motion to quash shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. 16 C.F.R. § 3.22(g). Hunter Labs does not attach a separate signed statement, but does state in its motion that counsel for *qui tam* plaintiffs promptly wrote to counsel representing LabCorp in the California action, asking them to withdraw the Subpoena, in light of the Special Masters' report and recommendation in the California action. LabCorp's counsel in the California action responded that it did not intend to withdraw the Subpoena and informed Hunter Labs to direct its questions regarding the Subpoena to counsel representing LabCorp in the FTC action. Respondents' counsel in this action states that, besides copying them on the letter to counsel in the California action, Hunter Labs took no other step to contact Respondents' counsel prior to filing the instant motion.

Pursuant to Rule 3.22, counsel have a duty to make an effort in good faith to confer with opposing counsel before filing a motion to quash. 16 C.F.R. § 3.22(g). The efforts undertaken by Hunter Labs do not amount to an effort in good faith to resolve the dispute. Because Hunter Labs failed to comply with Rule 3.22(g), its motion could be rejected on that basis. However, as set forth below, Hunter Labs' motion is denied because Hunter Labs failed to demonstrate that the Subpoena imposes an undue burden.

C. Scope of the Subpoena

Discovery shall be limited by the Administrative Law Judge if he or she determines that: (i) 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 (iii) the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2). In addition, the Administrative Law Judge may deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

Hunter Labs argues that the Subpoena seeks unreasonably cumulative discovery and that the burden and expense of the proposed discovery outweighs its likely benefit. Hunter Labs states, without providing factual support, that the requests would take months and tens or even hundreds of thousands of dollars to comply with. Hunter Labs further states that it is unclear what, if any relevance, the requested documents have to the instant action, as it is Hunter Labs' understanding that this action alleges that the Lab-Corp-Westcliff integration would decrease competition in the Southern California market for capitated contracts, while Hunter Labs is a Northern California lab that does not offer capitated contracts. Because, according to Hunter Labs, their business practices would shed no light on the issues pertinent to the FTC action, the burden and expense of the Subpoena outweigh the likely benefit.

Respondents state that the founder of Hunter Labs is on Complaint Counsel's preliminary witness list, and that Complaint Counsel expects to call him to testify regarding his business organization, the capability of Hunter Labs to expand into Southern California, and Hunter Labs' ability to compete for capitated contracts.¹ Consequently, Respondents assert, the Subpoena seeks evidence of Hunter Labs' business plans and ability to compete in the market proposed by Complaint Counsel, as well as the alternative markets proposed by Respondents. Respondents further assert that the documents requested are relevant to Respondents' ability to prepare a defense, given that Hunter Labs' founder has already provided testimony in an investigational hearing and that Complaint Counsel expects him to provide additional testimony at trial regarding Hunter Labs' business position and ability to enter and expand into the relevant market.

A party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome. *FTC v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178 at *12 (D.D.C. 1977); *In re Intel*, 2010 WL 2143904 (May 19, 2010); *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *9 (Jan. 15, 2009). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will

¹ Pursuant to Commission Rules 3.22(c) and 3.45(e), Respondents redacted certain information from their Opposition because it was subject to confidentiality protections pursuant to the Protective Order entered in this case. Where a document has been designated as Confidential, but the information revealed does not require *in camera* treatment, such material may be disclosed in a public version of an order. See *In re Polypore Int'l Inc.*, 2010 FTC LEXIS 17, *13 (March 1, 2010); 16 C.F.R. § 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding").

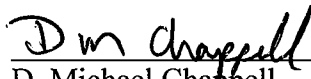
impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *In re Kaiser Alum. & Chem. Co.*, 1976 FTC LEXIS 68 at *19-20 (Nov. 12, 1976). Information from competitors is frequently crucial in proceedings such as this one. See *In re North Tex. Specialty Phys.*, 2004 FTC LEXIS 20, *4 (Feb. 5, 2004) (citing *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954)). Information from a company whose founder is listed as expected to testify at trial on its ability to enter and expand into a relevant market is relevant to the allegations of the Complaint and the defenses of Respondents.

Hunter Labs has provided no specific information regarding the burden or expense involved in producing the requested documents other than its unsupported statement that the requests would take months and tens or even hundreds of thousands of dollars to comply with. A movant’s general allegation that a subpoena is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied. *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). Hunter Labs has failed to meet its burden of demonstrating that the Subpoena is unduly burdensome or that the burden or expense of the discovery outweigh its likely benefit.

IV.

For the above stated reasons, Hunter Labs’ Motion is DENIED. Respondents and Hunter Labs are encouraged to meet and confer to minimize any burden that might result from compliance with the Subpoena.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 28, 2011