

1. Counsel for Mr. Nokes has conferred with Commission staff as required by the Commission's Rule of Practice 3.22(f) on May 2 regarding the burden imposed by the staff's last-minute Subpoena and the uncertainty of whether compliance was necessary. Mr. Nokes' counsel told counsel staff that Mr. Nokes resides in California where his business is located. Forcing Mr. Nokes to travel approximately 2500 miles to and from Washington, D.C. with less than three days' concrete notice would be unduly burdensome. Mr. Nokes' appearance at a later date in May would also be unduly burdensome because of previously scheduled international travel. Mr. Nokes' counsel invited Commission staff to consider less burdensome means of proving their case, including relying upon business records and a declaration submitted in connection with another Commission staff investigation of a product similar to that of the product in the Telebrands administrative litigation. Staff declined.

2. The Commission staff Subpoena was issued with inadequate notice. The Subpoena apparently seeks Mr. Nokes' appearance on May 4, 2004, or some other unnamed time, one week after the Subpoena was sent to Mr. Nokes. Mr. Nokes, who resides in California, cannot reasonably be expected on less than a week's notice to interrupt his business and make arrangements for travel across the country to appear in Washington, D.C. Further compounding the lack of adequate notice to Mr. Nokes is the uncertainty that Commission staff cast on the necessity or timing of Mr. Nokes' appearance and the uncertainty as to the specific date reflected in the subpoena itself. Even on the day before Mr. Nokes' appearance might be required by the Subpoena, Commission staff was still uncertain whether his appearance was necessary.

3. The Subpoena imposes an undue burden on Mr. Nokes personally, and threatens to unduly disrupt and seriously hinder the normal operations of his business. Mr. Nokes' wife is out of town this week due to a family medical emergency, and Mr. Nokes thus has child care obligations precluding him from traveling overnight. Further, Mr. Nokes is actively engaged in the operation of a business in California and has ongoing commitments during the time period identified in the Subpoena. Compliance with the Subpoena would unduly interrupt Mr. Nokes' business activities, substantially hinder the normal operations of his business, and require Mr. Nokes to cancel his existing engagements and arrange to travel across the country on virtually no notice and without any meaningful opportunity to arrange for the conduct of his business and personal affairs during his absence. This undue burden is not outweighed by the need for his testimony, which does not appear to be greatly or at all relevant to the staff's case. *See, e.g., Federal Trade Commission v. Anderson*, 442 F. Supp. 1118, 1122 (D.D.C. 1977) (noting that an agency's exercise of adjudicatory subpoena power may be challenged as unduly burdensome).

4. The foregoing shortness of notice, combined with the purported exercise of personal jurisdiction based national service of process by the Commission's Subpoena as applied in this matter violates the due process requirement of the U.S. Constitution. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985) (due process protections are based on individual liberty interests and not territorial sovereignty, and require "fair notice" that a person's activities will render them liable to suit in a particular forum); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935 (11th Cir.

1997) (due process requires some measure of basic fairness be met to satisfy constitutional requirements even in national service of process cases); *Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000) (same). As a result of the unreasonably short notice and Mr. Nokes' lack of any individual contacts with the District, the Subpoena imposes an undue burden on Mr. Nokes and deprives Mr. Nokes of his right to due process of law under the United States Constitution by requiring that he travel across the country on a few days notice in order to comply with the Subpoena. For the foregoing reasons, Mr. Nokes respectfully requests that the Commission quash the Subpoena.

Respectfully submitted,

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COUNSEL FOR JOHN NOKES

CERTIFICATE OF SERVICE

I certify that on this 3rd day of May, 2004, I caused an original, two paper copies, and an electronic copy of the Motion to Quash of John Nokes to be filed by hand delivery and electronic mail with:

Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, Rm. H-159
Washington, D.C. 20580
E-mail: secretary@ftc.gov

I also certify that on this 3rd day of May, 2004, I caused two copies of the Motion to Quash of John Nokes to be delivered by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, Rm. H-112
Washington, D.C. 20580

I also certify that on this 3rd day of May, 2004, I caused one copy of the Motion to Quash of John Nokes to be delivered by electronic mail and U.S. mail to each of the following:

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CERTIFICATE OF CONFERENCE

Counsel for Mr. John Nokes conferred with counsel for the Federal Trade Commission in a good faith effort to resolve the issues raised herein by agreement, and has been unable to reach such an agreement. Said conference occurred on May 2, 2004, at 5:00 p.m. via telephone. Participants were Daniel F. McInnis for Mr. John Nokes and Connie Vecellio for the FTC.

Daniel McInnis

COPY CERTIFICATION

I certify that the electronic version of the Motion to Quash of John Nokes, filed by electronic mail with the Secretary of the Commission, is a true and accurate copy of the paper original and that a paper copy of the original signature has been filed with the Secretary of the Commission on this day.

Tonya Rodriguez

