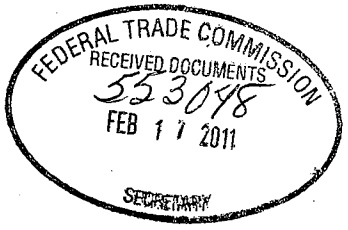
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



In the Matter of LABORATORY CORPORATION OF AMERICA and LABORATORY CORPORATION OF AMERICA HOLDINGS, Respondents.	)	DOCKET NO. 9345

ORDER DENYING SUN CLINICAL'S MOTION TO QUASH OR LIMIT SUBPOENA DUCES TECUM

I.

On February 4, 2011, third party Sun Clinical Laboratories ("Sun Clinical") filed a "Motion to Quash and/or Limit Subpoena Duces Tecum and Protective Order." ("Motion"). On February 14, 2011, Respondents filed an Opposition to Sun Clinical's Motion. For the reasons set forth below, Sun Clinical's Motion is DENIED.

II.

Sun Clinical states that the Subpoena Duces Tecum served on it by Respondents on February 1, 2011 ("Subpoena") is overly broad and unduly burdensome; that the documents and information demanded contain privileged, confidential, proprietary, and trade secret information; and that good cause exists to prevent the disclosure, dissemination, and use of Sun Clinical's trade secrets and confidential information to its direct competitor.

Respondents assert that Sun Clinical filed its motion without a good faith attempt to confer; that Sun Clinical is attempting to relitigate issues already decided; that the Protective Order sufficiently protects Sun Clinical's interests; and that the information requested is discoverable, reasonable, and not unduly burdensome.

III.

A. 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). Sun Clinical attaches to its Motion a signed declaration from counsel describing the telephone calls it placed to Respondents' counsel on February 2, 2011 and February 3, 2011, and the e-mail it sent to Respondents' counsel on February 3, 2011. The declaration further recites that counsel for Sun Clinical was informed that counsel for Respondents were travelling for the preliminary injunction hearing in the related federal action between the parties.[1] Sun Clinical avers that it filed its Motion on February 4, 2011, due to the 10 day time limit in the Commission's Rules for filing motions to quash. *See* 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith.").

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 Sun Clinical scarcely amount to an effort in good faith to resolve the dispute. Whether Sun Clinical complied with Rule 3.22(g) need not be decided because, as set forth below, Sun Clinical's motion is denied for failure to demonstrate that the Subpoena imposes an undue burden.

B. The Protective Order Adequately Safeguards Confidential Information

Sun Clinical asserts that a Protective Order is necessary to safeguard its confidential information. Sun Clinical's challenges relating to the Protective Order issued in this case were resolved against it by the Order Denying Sun Clinical's Motion for Broader Protective Order, dated January 28, 2011 (January 28, 2011 Order), and will not be addressed again.

C. Disclosure of Confidential Information and Trade Secrets

Under the Commission's Rules of Practice, 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)(1). 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; (ii) the party seeking discovery has had ample opportunity by discovery in the

[1] *See Federal Trade Commission v. Laboratory Corporation of America*, No. 8:10-cv1873 (C.D. Cal., Southern Division).

action to obtain the information sought; 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).

Sun Clinical objects to the demand for disclosure of confidential information and trade secrets, asserting that disclosure would ruin Sun Clinical's competitive standing and grant its competitors all the information needed to effectively strategize against Sun Clinical's business plans and wipe out its business. As Sun Clinical was previously informed in the January 28, 2011 Order, courts routinely address concerns that a business' confidential information will be disclosed to competitors by issuing a protective order restricting information to outside counsel only. Such a Protective Order has been entered in this case. *See* January 28, 2011 Order at 2.

"The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971); *In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 20, at *4 (Feb. 5, 2004). *See also FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement."). Information from competitors is frequently crucial in antitrust proceedings. *In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 20, at *4 (citing *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954); *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961)). In addition, courts interpreting discovery sought under the Federal Rules of Civil Procedure have held that there is no immunity protecting the disclosure of trade secrets. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *29 (Oct. 17, 2000) (citing *FTC v. J.E. Lonning*, 539 F.2d 202, 209-10 (D.C. Cir. 1976) (other citations omitted)). Because adequate safeguards are in place to ensure sensitive information will not be misused, Sun Clinical may not withhold relevant materials on grounds that the information is confidential and/or contains trade secrets.

D. Scope of the Requested Information

Sun Clinical argues that the demands made by Respondents are unreasonable and overly burdensome. It asserts that the Subpoena requires Sun Clinical to produce documents dating as far back as 2001 and documents relating to costs and revenues for each month dating back to 2005. Sun Clinical further states that the number of documents requested is "extremely large" and that information such as the finances or revenue of Sun Clinical and Sun Clinical's own market analysis regarding the laboratory clinical testing market is irrelevant or immaterial to the action against Respondents. On this basis, Sun Clinical argues that to force it to reveal its confidential information is overly burdensome.

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 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 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). Furthermore, 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); *In re Intel*, 2010 WL 2143904 (May 19, 2010).

Sun Clinical has provided no specific information regarding, or indication of, the burden or expense involved in producing the requested documents and has offered no explanation for its claim that the requested documents are irrelevant or immaterial. Accordingly, Sun Clinical has failed to meet its burden of demonstrating that the Subpoena is unduly burdensome.

Respondents represent that they have attempted to minimize the burden on Sun Clinical by limiting the dates of most requested documents to 2008 or more recent. Respondents further represent that counsel has offered to work with Sun Clinical to further reduce any burden that might result from the Subpoena. In light of the Protective Order entered in this case, Sun Clinical's inadequate attempts to meet and confer with opposing counsel, and Respondents' representation to limit the dates of most requested documents and to work with Sun Clinical to further reduce the scope of documents requested, Sun Clinical has not met its burden in support of its motion.

IV.

For the above stated reasons, Sun Clinical's Motion to Quash and/or Limit Subpoena Duces Tecum and Protective Order is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 17, 2011