IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	Case No. 1:13-mc-00524

THE FEDERAL TRADE COMMISSION'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA ISSUED PURSUANT TO 28 U.S.C. § 1782

The Federal Trade Commission ("FTC" or "Commission") hereby moves this Court for an order directing Aegis Mobile LLC ("Aegis") to comply with a subpoena issued to it pursuant to a court order under 28 U.S.C. § 1782. The FTC, pursuant this Court's order of November 1, 2013, issued the subpoena over two months ago, and, despite multiple telephone conferences and discussions, Aegis has refused to comply. In support of this motion, the FTC states:

1. The FTC issued the subpoena following a request for assistance from the Competition Bureau, Canada ("Bureau"). The Bureau is presently conducting an enforcement proceeding in which it alleges that four Canadian entities – three telecommunications companies and the Canadian Wireless Telecommunications Association ("CWTA") – deceived Canadian consumers with respect to the costs of premium text messaging services. *See Commissioner of Competition v. Rogers Communications Inc., et al.*, Court File No. 12-55497 (Ontario Superior Court of Justice) [hereinafter, "Canadian Proceeding"].

2. Aegis, a U.S. company, provides monitoring and compliance services to CWTA. The Bureau believes that Aegis is likely to maintain information relevant to the ongoing Canadian Proceeding. Accordingly, pursuant to Section 6(j) of the Federal Trade Commission Act, 15 U.S.C. § 46(j), the Bureau requested that the FTC obtain the necessary information from Aegis.

3. Section 6(j) authorizes the FTC to apply to this Court under 28 U.S.C. § 1782 for an order authorizing a subpoena. 15 U.S.C. § 46(j)(2)(B).

4. On November 1, 2013, the FTC applied for such an order pursuant to 28 U.S.C. § 1782 and this Court granted the application, authorizing the issuance of the subpoena on the same day. The FTC issued the subpoena to Aegis on November 8, 2013. The subpoena specified that documents be produced by November 26, 2013 and that testimony take place on December 17, 2013.

5. Since November 8, 2013, and despite two telephone conferences and multiple exchanges of letters and e-mails among counsel for the FTC and Aegis, Aegis has not produced any information to the FTC. Aegis's refusal to respond has rendered the FTC unable to assist the Competition Bureau and has thwarted the ongoing proceeding by the Bureau in Canada.

6. This motion includes the following exhibits and attachments:

Att. 1 Certificate of Conference of Counsel pursuant to Local Rules 104.7 and 108;

Att. 2 Declaration of Guilherme Roschke, FTC, January 28, 2014;

Att. 3 E-mail from David Lacki, Esq., counsel for Aegis, to Guilherme Roschke, September 17, 2013;

Att. 4 Order, November 1, 2013 (Dkt. 2);

Att. 5 Subpoena to Obtain Information from Aegis Mobile LLC on behalf of the Competition Bureau, Canada, November 8, 2013;

Att. 6 Objections to Subpoena Duces Tecum on Aegis Mobile LLC & Other Matters, November 22, 2013;

Att. 7 Letter from Laureen Kapin, FTC, to David J. Lacki, December 6, 2013;

Att. 8 E-mail from Laureen Kapin to David Lacki, December 12, 2013;

Att. 9 Exhibits 1 and 2 to the FTC's Application Pursuant to 28 U.S.C. § 1782;

Att. 10 Fresh as Amended Statement of Claim, *Commissioner of Competition v. Rogers Communications Inc., et al.*, Court File No. 12-55497 (Ontario Superior Court of Justice), January 17, 2013;

Att. 11 Memorandum of Law in Support of Motion to Compel; and

Att. 12 Proposed Order.

For these reasons and for the reasons stated in the attached Memorandum of Law, this Court should grant the FTC's Motion to Compel and enter the attached Order directing Aegis to comply with the November 8, 2013 subpoena in full.

Respectfully submitted,

OF COUNSEL:

LAUREEN KAPIN
GUILHERME ROSCKHE
Attorneys
Office of International Affairs

Dated: January 28, 2014

JONATHAN E. NUECHTERLEIN
General Counsel

DAVID C. SHONKA
Principal Deputy General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

/s/ Burke W. Kappler
BURKE W. KAPPLER
Attorney, Office of General Counsel

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2043
(202) 326-2477 (fax)
bkappler@ftc.gov
Assigned bar number 801057

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	Case No. 1:13-mc-00524

CERTIFICATE OF CONFERENCE OF COUNSEL PURSUANT TO LOCAL RULES 104.7 AND 108

Pursuant to Local Rules 104.7 and 108, the Federal Trade Commission ("FTC" or "Commission") provides this Certificate of Conference of Counsel in support of its Motion to Compel Compliance with Subpoena Issued Pursuant to 28 U.S.C. § 1782. Counsel for the FTC certifies to the following conferences and communications with counsel for Aegis Mobile LLC, ("Aegis") to resolve disputes related to Aegis's compliance with the subpoena issued by the FTC on November 8, 2013:

November 21, 2013: Telephone conference re subpoena. Participating for FTC: Michele Arington, Stacy Feuer, Guilherme Roschke. Participating for Aegis: David Lacki.

November 22, 2013: Letter from David Lacki to Laureen Kapin, FTC, with Objections to Subpoena Duces Tecum On Aegis Mobile LLC & Other Matters.

December 6, 2013: Letter from Laureen Kapin to David Lacki, with responses to Aegis's objections to the subpoena.

December 13, 2013, 2:30 PM: Telephone conference re subpoena. Participating for FTC: Michele Arington, Laureen Kapin, Burke Kappler, Guilherme Roschke. Participating for Aegis: David Lacki.

January 2, 2014: E-mail from Laureen Kapin to David Lacki, seeking information on the status of Aegis's compliance.

In addition to these telephone conferences and exchanges of correspondence, counsel for the FTC and Aegis have also exchanged numerous e-mails on, among others, December 10-13, 2013 and December 18, 2013. By e-mail dated December 12, 2013, the FTC agreed to Aegis's request that subpoena requests for testimony be withdrawn without prejudice.

Respectfully submitted,

OF COUNSEL:

LAUREEN KAPIN
GUILHERME ROSCHKE
Attorneys
Office of International Affairs

Dated: January 28, 2014

JONATHAN E. NUECHTERLEIN
General Counsel

DAVID C. SHONKA
Principal Deputy General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

/s/ Burke W. Kappler
BURKE W. KAPPLER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	)	Case No. 1:13-mc-00524

DECLARATION OF GUILHERME ROSCHKE

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission ("FTC" or "Commission"), in Washington D.C. I serve as an attorney for international consumer protection matters with the FTC's Office of International Affairs ("OIA"). I am assigned to assist the Competition Bureau of Canada ("Bureau") in obtaining information from Aegis Mobile LLC ("Aegis"), a U.S. company based in Maryland, in support of the Bureau's ongoing enforcement proceeding involving deceptive acts or practices in the marketing and sale of premium text messaging services in Canada. *See Commissioner of Competition v. Rogers Communications Inc., et al.*, Court File No. 12-55497 (Ontario Superior Court of Justice) [hereinafter, "Canadian Proceeding"].

2. I am authorized to execute a declaration verifying facts that are set forth in the FTC's Motion to Compel Compliance with Subpoena Issued Pursuant to 28 U.S.C. § 1782 ("Motion To Compel"). I have read the motion and attachments thereto, and verify that

Attachments 3 through 10 are true and correct copies of the original documents. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.

3. On November 8, 2013, Laureen Kapin, an OIA attorney, and I prepared a subpoena seeking both documents and testimony from Aegis. I served the subpoena on David Lacki, Aegis's counsel, by agreement, via email, that same day. The subpoena identified a due date of November 26, 2013 for the specified documents and December 17, 2013 for testimony. Ms. Kapin and I developed the subpoena specifications to seek only information requested by the Bureau in support of the Canadian Proceeding.

4. On November 21, 2013, counsel for FTC had its first telephone conference with counsel for Aegis regarding the subpoena. The attorneys participating for the FTC were Michele Arington from the Office of the General Counsel ("OGC") and Stacy Feuer and myself from OIA. David Lacki participated in the call on behalf of his client, Aegis.

5. During the call, Mr. Lacki indicated that Aegis had no responsive documents over some of the applicable time period, and that the scope of some of the specifications was too broad. Mr. Lacki also indicated objections to the subpoena based on the proprietary/trade secret nature of the documents requested and potential claims of privilege over the documents. Finally, Mr. Lacki stated that Aegis would not produce any documents by November 26, 2013, the due date for document production. On November 22, 2013, Mr. Lacki sent a letter to Ms. Kapin in which he asserted Aegis's objections to the subpoena requests for documents and for testimony.

6. On December 6, 2013, Ms. Kapin responded on behalf of the FTC to Aegis's objections to the subpoena's request for documents. By letter, the FTC agreed to modify the scope of certain specifications and clarify the relevant time period. In further response to specific objections, the FTC agreed to modify the request for electronic documents to allow production in PDF or TIFF format, rather than native format. In response to the objections concerning claims of privilege, the FTC agreed to accept privilege logs consistent with the schedule of any rolling production. The FTC also agreed to accept a rolling production beginning on December 13, 2013. Further, in response to the objections concerning proprietary information, the FTC agreed to facilitate negotiations between Aegis and the Competition Bureau for a protective order. The FTC, along with the Bureau, also agreed to maintain the confidentiality of any marked document while such negotiations were pending.

7. The Bureau's agreement to maintain confidentiality is consistent with its written certification to the FTC (contained in the FTC's standard form document for investigative assistance requests from foreign law enforcement agencies) that it will keep information it receives from the FTC in response to its request for investigative assistance confidential; that it will only use such information for official law enforcement purposes; and that it will notify any entities that provide the FTC with information responsive to the Bureau's request if it intends to make a public disclosure of such information (*e.g.*, in a court filing).

8. On December 12, 2013, in response to Mr. Lacki's request, Ms. Kapin e-mailed Mr. Lacki and indicated that the FTC agreed to withdraw its request for testimony without

prejudice. This agreement was based on the belief that doing so would expedite production in response to those subpoena specifications calling for documents.

9. On December 13, 2013, at 2:30 p.m., counsel for the FTC had a second telephone conference with counsel for Aegis regarding Aegis's compliance with the subpoena. The attorneys participating for the FTC were Michele Arington and Burke Kappler (OGC) and Laureen Kapin and myself (OIA). Mr. Lacki again participated in the call on behalf of his client, Aegis.

10. During this conference, Mr. Lacki represented that Aegis had documents responsive to the subpoena based on its relationship as a service provider to the Canadian Wireless Telecommunications Association ("CWTA"). He further represented that Aegis did not contract with any of the three Canadian wireless companies named as defendants in the Canadian Proceeding.

11. Mr. Lacki indicated that Aegis took the position that it was merely a custodian of records belonging to CWTA and that all of its documents belonged to CWTA. He further indicated that Aegis believed that CWTA may view these documents as privileged and that Aegis could not produce these documents until the privilege issue was resolved. Mr. Lacki, though, did not identify any specific privilege that would apply to Aegis's documents. He also indicated that the contract between Aegis and CWTA did not create any privilege or require Aegis to assert privilege on CWTA's behalf. He added that he had attempted to get more information from CWTA as to which privilege(s) could apply, but had not received any information. Mr. Lacki stated that Aegis would not produce information without further direction from CWTA.

12. Mr. Lacki also indicated that the documents responsive to the subpoena contained Aegis's own confidential trade secrets. Mr. Lacki further indicated that Aegis was required to protect the confidentiality of the documents relating to CWTA and would not produce them without appropriate protective orders. He acknowledged, however, that the FTC had offered to facilitate discussions regarding a protective order in the December 6, 2013, letter from Ms. Kapin to Mr. Lacki.

13. The FTC requested that Mr. Lacki consult with CWTA to determine whether any subset of Aegis's documents could be produced immediately. Mr. Lacki agreed to do so and specified that he would respond by December 18, 2013.

14. On December 18, 2013, Mr. Lacki responded by e-mail to state that he was still awaiting further information from CWTA. Since December 18, 2013, although the FTC has sought an update regarding the status of a rolling document production, there has been no further progress resolving the three main issues the FTC has discussed with Aegis, namely: (a) which documents Aegis could produce immediately; (b) which documents Aegis would produce at a later date (including production privilege logs); and (c) a response to the FTC's offer to enter into a protective order covering proprietary/trade secret information belonging to Aegis and the CWTA.

15. Aegis has not produced any documents or information in response to the subpoena. Aegis's failure to comply has thwarted the Bureau's investigation and the Canadian Proceeding. It has also prevented the FTC from rendering the assistance to the Bureau that Congress intended.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2014.

Guilherme Roschke
Attorney for International Consumer Protection
Office of International Affairs
Federal Trade Commission

Roschke, Guilherme

From: David Lacki <djlacki@lackico.com>
Sent: Wednesday, September 18, 2013 5:36 PM
To: Roschke, Guilherme
Subject: Re: Aegis Mobile CID

Guilherme - are there any updates to the below?

Thanks in advance.

David J. Lacki
Principal

LACKI & COMPANY, LLC, 2 Wisconsin Circle, Suite 700, Chevy Chase, MD 20815
240.235.5020 direct | 240.465.2335 fax | 703.244.0812 mobile | www.lackico.com
Lacki & Company, LLC is a legal services and business consultancy firm.

On Sep 17, 2013, at 3:53 PM, "Roschke, Guilherme" <groschke@ftc.gov> wrote:

David,

Thanks for your email. To clarify, I would need to confer with others before agreeing to delay the return date, or setting up a rolling production schedule. So no need to ask me to 'reconsider' that. In order so that I may better confer with others, can you (1) propose a date by which you can have the production finished, and (2) a potential rolling schedule ?

-Guilherme

Guilherme Roschke
Counsel for International Consumer Protection, Office of International Affairs
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Mobile 202-413-6860
groschke@ftc.gov

From: David Lacki [mailto:djlacki@lackico.com]
Sent: Tuesday, September 17, 2013 3:48 PM

To: Roschke, Guilherme
Subject: Aegis Mobile CID

Guilherme - thank you for taking the time yesterday to go through my questions and concerns I have regarding my client's response to the CID. As requested, I've summarized below the issues I have identified at this early stage that will require further discussion prior to the production of any documents and/or information by Aegis Mobile in this matter. The following should not be considered comprehensive, but if we can work through these concerns, I think we could have a productive conversation.

The issues presented by the specifications in the CID are provided in the order that we discussed them yesterday:

- Request for a stay from the September 23, 2013 return date;
    - Aegis Mobile is concerned about the purpose and use of the CID in this instance. Specifically, the named Canadian parties in the specifications are either direct or indirect clients of Aegis Mobile. Many of the documents requested in the specifications are a mix of documents that are either (i) held on a custodial basis by Aegis Mobile on behalf of their clients; or, (ii) privileged and proprietary to third parties. Thus, before commencing any document production, Aegis Mobile will have to understand the premises for the CID and then have to coordinate with such parties with whom Aegis has contractual and legal obligations of confidentiality. Therefore, Aegis Mobile will be unable to comply with the full request for information as stated in the CID by the return date of September 23, 2013.
- I understand that you are not prepared now to grant a stay, but that, you would agree to a "rolling" production schedule for the documents and information requested:
    - As we discussed, immediately upon receipt of the CID on September 5th, Aegis Mobile commenced the identification and collection of potentially responsive documents. And through such process Aegis Mobile's IT custodian has made it clear that the collection of the information will not be completed by the return date. It is for the above reasons that Aegis Mobile is seeking not only a stay of the return date, but also, an agreement on a schedule for the production of documents to the FTC and an agreement as to deadlines for appealing issues we might not resolve.
- Request to file post return date petitions seeking waivers from production of certain documents based upon privilege and/or confidentiality:
    - From our discussion yesterday, Aegis Mobile understands that the CID is being used as part of the FTC's procedures to aide the Canadian authorities in an ongoing investigation being conducted within their jurisdiction. As such, Aegis Mobile is not a target of a FTC action, but rather is being asked to provide supporting documentation to the FTC in support of the Canadian authorities' efforts. As the companies named in the specifications of the CID are currently part of a civil lawsuit brought by the Canadian Competition Bureau, Aegis Mobile is concerned about the production of information that may be subject to judicial process. For this reason, Aegis Mobile may not be aware of all of the procedural protections it may wish to seek until actual document review and potential production.
- Request protection of certain information considered proprietary to Aegis Mobile and third parties.
    - As we discussed, there are certain provisions within the FTC Act that require documentation and/or information released in response to a CID to be maintained by the FTC in a confidential manner. Aegis Mobile would also be seeking additional protection for information that contained proprietary or competitive business information concerning its methodologies used in providing services to its client.
- A request of the procedures used by the FTC in receiving, storing and protecting the information produced:

- As discussed, due to the nature of the information requested, Aegis Mobile needs to understand the processes employed by the FTC document custodian, and how protections of further disclosure to third parties would be handled.

Finally, as Aegis Mobile is under a tight timeline in which to respond to the CID, even if only partially, I kindly request that the issue of staying the return date be reconsidered so that Aegis Mobile and the FTC may work through the below issues in a constructive manner. If the FTC agrees to provide more time in which to work through the above, then I believe the additional time would help to avoid the filing and consideration of procedural issues.

It would be very much appreciated if I could receive an answer on the above as soon as possible, but by no later than early afternoon tomorrow.

David J. Lacki
Principal

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240.235.5020 direct | 240.465.2335 fax | 703.244.0812 mobile | www.lackico.com
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE	)	
Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	)	Misc. No. 13-524

~~[PROPOSED]~~ ORDER

Upon application of the Federal Trade Commission ("FTC" or "Commission") for judicial assistance on behalf of the Competition Bureau, Canada ("Competition Bureau") to obtain information from Aegis Mobile LLC, a corporation found in this District, for use in a judicial proceeding in Ontario, Canada, and it appearing that the requirements of 28 U.S.C. § 1782 have been satisfied,

IT IS HEREBY ORDERED, pursuant to the authority conferred by 28 U.S.C. § 1782 and the Court's inherent authority, that Laureen Kapin, FTC Counsel for International Consumer Protection, and Stephanie Rosenthal, attorney in the FTC's Division of Financial Practices, are hereby appointed as Commissioners of the Court and are hereby directed to take such steps as are necessary to collect the evidence requested by the Competition Bureau as follows:

1. the Commissioners may issue commissioner's subpoenas to be served on persons (natural and artificial) within the jurisdiction of this Court ordering them or their representatives to appear and testify and produce documents;

2. the Commissioners shall provide notice with respect to the collection of this information to those persons identified in the requests as parties to whom notice should be given (and no notice to any other party shall be required);

3. the Commissioners, in collecting the information requested, may be accompanied by persons whose presence or participation is authorized by the Commissioner, including, without limitation, representatives of the Competition Bureau who, as authorized by the Commissioners, may direct questions to any witness;

4. the Commissioners may seek such further orders of this Court as may be necessary to execute this request for information;

5. the Commissioners shall submit the evidence collected to the FTC for transmission to the Competition Bureau.

IT IS SO ORDERED.

Dated: Nov. 1, 2013

UNITED STATES DISTRICT JUDGE

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

In re Application of the Federal Trade Commission ~~Plaintiff~~	)	
~~v.~~	)	Civil Action No. 1:13-mc-00524
for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC ~~Defendant~~	)	(If the action is pending in another district, state where:)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Aegis Mobile, LLC.

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
U.S. Attorney's Office, 6406 Ivy Lane, Suite 800, Greenbelt, MD 20770	12/17/2013 8:30 am

The deposition will be recorded by this method: stenographic and audiovisual

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See attached Schedule A. Documents, electronically stored information, or objects must be produced by 11/26/2013.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/08/2013

CLERK OF COURT

OR

Laureen Kapin

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Federal Trade Commission, who issues or requests this subpoena, are:

Laureen Kapin, 600 Pennsylvani Ave. NW, Suite 412, Washington DC 20580; lkapin@ftc.gov; (202) 326-3237

Civil Action No. 1:13-mc-00524

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Schedule A

SUBPOENA FOR PRODUCTION OF DOCUMENTARY MATERIALS AND THINGS

I. DEFINITIONS

As used in this Subpoena, the following definitions shall apply:

A. "**Aegis**" or "**Company**" shall mean Aegis Mobile, LLC. its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

B. "**And**," as well as "**or**," shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.

C. "**All**" shall be construed to include "**any**," and "**any**" shall be construed to include the word "**all**."

D. "**Content Provider or Aggregator**" means any person (natural or artificial) that promotes, supplies, or aggregates Digital Content for any person (natural or artificial). A Content Provider or Aggregator shall include the companies known as 2Way Traffic, Adenyo, Cliq Digital, Echoloft, Gameloft Guild, Impact Mobile, Immediato BV, Infobip, Jesta Digital, LiPSO, Magnet Mobile Media., Mblox, Mobile Media Solutions, Mobile Messenger, MobiDesk, Mobilito, Motime, Motricity, MobiVillage, MyThum Interactive, ooober, OpenMarket, Oxygen8, Payphone, Paymo, PlayPhone, PrizeKing, RD Media, SAP Mobile, SendMe, Sybase 365, Syniverse, TC Media, Time WE, TMG, Ultigame, Vocomo, Voltari and Vortex Mobile.

E. "**CWTA**" means the Canadian Wireless Telecommunications Association.

F. "**Digital Content**" means content that can be accessed by using a mobile device or mobile telephone number, including audio content *(e.g.*, ringtones), video content and images (e.g., mobile device wallpapers, screensavers and themes), information (*e.g.*, trivia, horoscopes, quotations, and alerts), and chances to win contests.

G. **"Document"** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **"Document" shall also include all documents, materials, and information, including Electronically Stored Information, within the meaning of the Federal Rules of Civil Procedure.**

H. "**Each**" shall be construed to include "**every**," and "**every**" shall be construed to include "**each**."

I. "**Electronically Stored Information" or "ESI"** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

J. "**FTC**" or "**Commission**" shall mean the Federal Trade Commission.

K. "**Identify**" or "**the identity of**" shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.

L. "**Person**" or "**Persons**" shall mean all natural persons, corporations, partnerships, or other business associations and all other legal entities, including all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.

M. "**Referring to**" or "**relating to**" shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting on, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

N. "**Representation**" or "**Representations**" means any words, statements, pictorial representations or designs, however made, that are used or appear to be used to promote Digital Content;

O. "**You**" and "**your**" shall mean the person or entity to whom this subpoena is issued and includes the "Company."

P. "**Wireless Company**" means each of Rogers Communications Inc., Bell Canada, TELUS Corporation, and all of their wholly or partially owned affiliates or subsidiaries.

Q. "**Work**" means monitoring, capturing or analyzing Representations that customers of a Wireless Company can access, and any related monitoring or compliance activities. The "**Work**" shall include all captures or screenshots of Representations; the vetting of Content Providers or Aggregators by Aegis; application testing; media monitoring; auditing; message flow testing; and violation notification, enforcement and reporting activities.

II. INSTRUCTIONS

A. **Applicable time-period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from **July 1, 2011 until the date of full and complete compliance with this Subpoena.**

B. Documents covered by this subpoena are those in your possession or under your actual or constructive custody or control, whether or not such documents or materials were received from or disseminated to any other person or entity, including but not limited to attorneys, accountants, directors, officers, employees, agents, affiliates, representatives, and consultants.

C. Documents that may be responsive to more than one specification of this subpoena need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. Number by page all documents in your submission and indicate the total number of documents in your submission.

D. Unless otherwise stated, legible photocopies may be submitted in lieu of original documents, provided that the originals are retained in their current state. Further, copies of original documents may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in a court of law; and provided further that you shall retain the original documents and produce them to Federal Trade Commission staff upon request.

E. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the specification. The document shall not be edited, cut, or expunged in any way and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.

F. If any document covered by the specifications below was in your possession or actual or constructive custody or control and has been lost or destroyed, identify the document in writing as follows: addressee, preparer of document, date of preparation or transmittal, substance of the document and its subject matter, number of pages and attachments, persons to whom distributed, shown, or explained, date of loss or destruction, and, if destroyed, the reason for destruction, the persons authorizing destruction, and the persons who destroyed the document.

G. All objections to the specifications, or to any individual specification, must be raised in the initial response or are otherwise waived.

H. **Electronic Submission of Documents**: The following guidelines refer to the production of any Electronically Stored Information ("ESI") or digitally imaged hard copy documents. Before submitting any electronic production, You must confirm with the Commission counsel named above that the proposed formats and media types will be acceptable to the Commission.

(1) **Electronically Stored Information**: Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:

(a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

(b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (OCR) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (TIFF) or as color JPEG images (where color is necessary to interpret the contents);

(c) Each electronic file should be assigned a unique document identifier ("DocID") or Bates reference.

(2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original

documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

(a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and

(b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and

(c) Documents shall be produced in color where necessary to interpret them or render them intelligible;

(3) For each document electronically submitted to the FTC, You should include the following metadata fields in a standard ASCII delimited file:

(a) **For electronic mail**: begin Bates or unique document identification number ("DocID"), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (AttachIDs) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;

(b) **For email attachments**: begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

(c) **For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.):** begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

(d) **For imaged hard copy documents**: begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.

(4) If You intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in Your computer systems or electronic storage media, or if Your computer systems contain or utilize such software, You must contact the Commission counsel named above to determine

whether and in what manner You may use such software or services when producing materials in response to this Request.

(5) Submit electronic productions as follows:

(a) With passwords or other document-level encryption removed or otherwise provided to the FTC;

(b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;

(c) All electronic media shall be scanned for and free of viruses;

(d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC.

(e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.

(6) All electronic files and images shall be accompanied by a production transmittal letter which includes:

(a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and

(b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine- readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

I. If any document called for by this subpoena is withheld based on a claim of privilege or any similar claim, the claim must be asserted no later than the return date of this subpoena. In addition, submit, together with the claim, a schedule of the items

withheld stating individually as to each item: (a) the type, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only some portion of any responsive document is privileged, all non-privileged portions of the document must be submitted.

J. If you believe that the scope of the required search or any specification can be narrowed consistent with the Federal Trade Commission's need for documents, you are encouraged to discuss such possible modifications of this request, including any modifications of definitions and instructions, with FTC counsel **Laureen Kapin** at **(202) 326-3237**.

K. **In lieu of service at the location identified in the attached subpoena, service of the documents requested may be made by overnight mail delivery (e.g., FedEx or UPS) on Stephanie Rosenthal, Federal Trade Commission, Division of Financial Practices, 601 New Jersey Ave., N.W., Washington, D.C. 20001. If your production consists entirely of ESI, please contact FTC counsel Laureen Kapin at (202) 326-3237 to discuss how you may deliver the production via electronic means.**

L. Certification of Records of Regularly Conducted Activity: Attached is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena the Company to testify at future proceedings in order to establish the admissibility of documents produced in response to this Subpoena. You are asked to execute this Certification and provide it with your response.

NOTE: This subpoena is issued in conformance with Sections 2702 and 2703 of Title 18 of the United States Code (the Electronic Communications Privacy Act). To the extent you are a provider of electronic communication service or remote computing service, your response to this CID should not divulge a record or information pertaining to a subscriber or customer of your electronic communication service or remote computing service, other than that allowed pursuant to 18 U.S.C. § 2703(c)(2). If you have any questions, please contact FTC staff attorney **Laureen Kapin at (202) 326-3237** before providing responsive information.

III. SPECIFICATIONS

1. Produce all agreements between Aegis and the CWTA and between Aegis and each Wireless Company relating to the Work;

2. Produce all Documents and Electronically Stored Information that describe the nature and scope of the Work Aegis performed for the CWTA and each Wireless Company, and all policies and procedures Aegis relied upon in performing the Work;

3. Produce all Documents and Electronically Stored Information relating to Aegis' actual or proposed Work for the CWTA and each Wireless Company;

4. Produce all Documents and Electronically Stored Information containing communications between Aegis and the CWTA, between Aegis and each Wireless Company, and between Aegis and each Content Provider or Aggregator relating to the Work;

5. Produce all memoranda, reports, presentations, analyses, appraisals and assessments in which Aegis describes, expresses an opinion about, or analyses Representations or other marketing practices used to promote Digital Content; and

6. Produce all memoranda, reports, presentations, analyses, appraisals and assessments in which Aegis describes, expresses an opinion about, or analyses how or why customers are charged for the purchase of Digital Content that they did not authorize, including through practices that are commonly known as "stacking" or "cramming"; or how marketing practices facilitate charges for Digital Content that customers did not authorize.

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY
Pursuant to 28 U.S.C. § 1746

1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:

2. I have authority to certify the authenticity of the records produced by AEGIS MOBILE, LLC and attached hereto.

3. The documents produced and attached hereto by AEGIS MOBILE, LLC are originals or true copies of records of regularly conducted activity that:

   a) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

   b) Were kept in the course of the regularly conducted activity of AEGIS MOBILE, LLC; and

   c) Were made by the regularly conducted activity as a regular practice of AEGIS MOBILE, LLC.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2013.

_____
Signature

ACKNOWLEDGMENT OF SERVICE OF SUBPOENA

I, _____, for Aegis Mobile, LLC, (the subpoenaed party), acknowledge receipt of service of the attached subpoena dated November 8, 2013 and affirm the acceptance of such service as valid and binding upon the subpoenaed party as if personally served in accordance with the applicable Federal Rules of Civil Procedure. The subpoenaed party waives any right that it may have to require personal service of the attached subpoena.

Executed on *(date)*_____

Signature _____

Printed Name _____

Title of Records Custodian _____

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OF COUNSEL
JAMES W. BERARD

Laureen Kapin, Esq.
UNITED STATES FEDERAL TRADE COMMISSION
600 Pennsylvania, Ave., N.W., Suite 412
Washington, DC 20580

November 22, 2013

VIA Email & U.S. Mail

Re: ***In re Application of Federal Trade Commission For An Order Pursuant to 28 U.S.C. § 1782 To Obtain Information From Aegis Mobile LLC On Behalf of the Competition Bureau, Canada, For Use By Foreign Judicial Proceedings, 1:13-mc-00524, D. Md.***

Objections to Subpoena Duces Tecum On Aegis Mobile, LLC & Other Matters

Dear Ms. Kapin:

On behalf of Aegis Mobile, LLC ("Aegis"), I submit this letter, pursuant to Federal Rule of Civil Procedure 45(c)(2)(B), to note Aegis's objections to the *duces tecum* portion of the subpoena that the FTC, on behalf of the Canadian Competition Bureau (the "Bureau"), served on Aegis on November 8, 2013 (the "Subpoena").

This letter also outlines Aegis's objections to the *ad testificandum* portion of the Subpoena, as well as to the order that the FTC applied for *ex parte*, and received, in the above-captioned action (the "Order"). As you know, the Order, among other things, appoints you and another FTC attorney as commissioners to obtain evidence from Aegis that is to be conveyed to the Bureau, ostensibly for use in the action pending before the Ontario captioned *Commissioner of Competition v. Rogers Communications, Inc.*, et al (the "Canadian Proceeding").

Thus, in addition to discharging Aegis's obligations under Rule 45(c)(2)(B), this letter is a continuance of the good faith efforts that Aegis has made to confer with the FTC on the issues noted herein for the purpose of trying to resolve those without court intervention. I note that I emailed you on Wednesday, November 20, 2013 to arrange a phone call to discuss these issues with you. At my prompting, I had a teleconference with some attorneys in your office (Stacy Feuer, Michelle Arrington, and Guilherme

Roschke) on Thursday, November 21 in which we discussed some of the issues noted in this letter.

I. AEGIS'S OBJECTIONS TO THE *DUCES TECUM* PART OF THE SUBPOENA

Aegis objects to the *duces tecum* portion of the Subpoena in its entirety and to each of the individual instructions, definitions, and specifications for the production of documents in the Subpoena (all of which are collectively referenced as the "SDT") for reasons set forth below.

A. The SDT Is Not Limited To Seeking Records That Contain Information Pertinent To The Canadian Proceeding

Aegis objects to the SDT as overly broad and not reasonably calculated to lead to the discovery of evidence in the Canadian Proceeding and because the SDT seeks documents, electronically stored information ("ESI") and tangible things (collectively, "Records") that are irrelevant to the claims and defenses in the Canadian Proceeding. This is the case because, by way of example and without limitation:

1. The time period covered by the SDT, *i.e.*, July 1, 2011 to "the date of full and complete compliance with the Subpoena," exceeds any sort of time period relevant to the Canadian Proceeding. First, Aegis and CWTA did not enter into a contract until March 2012, *i.e.*, well after July 1, 2011, and, second, the Statement of Claim in the Canadian Proceeding covers conduct only to September 14, 2012. (Aegis also objects to the open-ended closing date of the SDT's time period as vague and ambiguous.)

2. The SDT seeks information pertaining to entities other than those involved in the Canadian Proceeding and to activity other than that which is at issue in the Canadian Proceeding, or even activity occurring in Canada, and, as a result, the SDT is overly broad. For instance, the SDT's definition of "Content Provider or Aggregator" includes aggregators that we understand are not identified in the Bureau's Statement of Claim in the Canadian Proceeding.

3. The scope of Specifications 5 and 6, respectively, exceeds what is relevant to the Canadian Proceeding. Ms. Feuer, *et al.* conceded this and that, as a result, these two Specifications needed to be modified in the telephone conversation that I had with them on Thursday, November 21.

4. Specification No. 4 asks for all Records containing communications between Aegis and CWTA; three other entities, including "all of their wholly or partially owned affiliates or subsidiaries;" and/or all "Content Providers or Aggregators" "relating to" work Aegis performs. The SDT defines "Content Providers and Aggregators" to "include" some 39 named entities – but the

definition is not limited to those named entities. Thus, Specification 4 commands Aegis to produce all communications that it had with no fewer than ***forty-four*** entities concerning work Aegis performed at any time period covering almost three years (and still expanding). Thus seen, Specification 4 is unquestionably over-broad, irrelevant, and unduly burdensome.

5. Specifications 1 through 3 are also patently over-broad, irrelevant and unduly burdensome because they ask for "*all*" documents and ESI "*relating to*" either agreements Aegis may have had with CWTA or three other entities and actual or proposed work that Aegis performed for CWTA or those three other entities. The over-breadth of these Specifications is exacerbated because the definition of the three entities includes "all of their wholly or partially owned affiliates or subsidiaries." (Similarly problematic is that those definitions fail to identify whom those affiliates or subsidiaries are.)

B. The SDT Seeks Records Containing Confidential, Proprietary, And/Or Trade Secret Information Of Aegis And/Or Of Its Clients, And Third Parties

Aegis objects to the SDT because it commands Aegis to produce Records containing confidential, proprietary, and/or trade secret information. The rights to such information may belong to Aegis, its clients, and/or third parties, notwithstanding that the information is in Aegis's possession, custody, or control.

Accordingly, Aegis will not produce any Records unless and until protective orders are entered by both the Court and the tribunal in the Canadian Proceeding with terms that are satisfactory to Aegis. Among other things, these orders should: (a) provide that no Records or information produced by Aegis shall be used for any purpose other than litigating the Canadian Proceeding, regardless of whether such Record or information contains or consists of confidential, trade secret, or proprietary information; (b) establish reasonable safeguards to protect against unauthorized use and further disclosure of confidential, proprietary, and trade secret information, or Records that may contain the same, that Aegis may produce in response to the Subpoena; and (c) provide for two-tier confidentiality designations, *e.g.*, "Confidential" and Highly Confidential-Attorney & Expert Witness Eyes Only." In addition, these protective orders, if permitted by law, should include terms permitting Aegis to "claw back" inadvertently privileged information or Records that it might produce in response to the Subpoena.

C. The SDT Seeks Records That Are Protected By A Privilege From Disclosure

Aegis objects to the SDT because it seeks Records that are, in whole or in part, protected by a privilege from disclosure (including but not limited to the attorney-client privilege or work product doctrine). Those privilege(s) may belong to Aegis or to its clients, including CWTA. The process for addressing privileges that Aegis's clients may

have in the sought-after Records will be a particularly burdensome task, should Aegis have to engage in that.

D. Aegis Objects To The SDT's Instruction Regarding The Electronic Submission of Documents (Instruction H)

Aegis objects to the SDT's instruction regarding the electronic submission of documents (Instruction H) because it seeks to impose requirements on Aegis that are inconsistent with and/or not required by the Federal Rules of Civil Procedure nor the Local Rules for the District of Maryland or that will impose an undue burden on Aegis, if they have to be satisfied. This is the case because, by way of example and without limitation:

1. The instruction (at part 1) commands Aegis to produce ESI in its native format. Neither the Federal nor the Local Rules require production in that format. Plus, production of ESI in native format, as opposed to in a static image format (*e.g.*, TIFF or pdf) will impose an undue burden on Aegis in terms of, *inter alia*, time and costs to conduct a privilege review of ESI. For this reason, among others, the default production format for ESI in litigation is static image. *See, e.g.*, D. Md. "Suggested Protocol For Discovery Of Electronically Stored Information," at 16-17.

2. The electronic meta-data file that the instruction (at part 3) commands Aegis to provide again, is not required by the Federal or Local Rules, and providing those will impose an undue burden on Aegis. This is particularly the case because this instruction would require Aegis to create an electronic file with the requested meta-data fields for hard copy documents, when no such electronic file or fields exist for such documents originally, because they are in hard copy.

3. The instruction (at part 2) commands that Aegis produce hard copy documents in an electronic format that has been processed to provide for optical character recognition (OCR). Along with this not being required by either the Federal or Local Rules, Aegis objects on the grounds of undue burden because producing hard copy documents in the requested electronic format, particularly the costs to OCR the hard copy documents, will in all likelihood be more costly and time consuming than producing hard copy documents in hard copy format.

E. Aegis Objects To The SDT's Instruction Regarding The Submission of A Privilege Log (Instruction I)

Aegis objects to the SDT's instruction regarding the submission of a privilege log (Instruction I) because it seeks to impose requirements on Aegis that are inconsistent with and/or not required by the Federal Rules of Civil Procedure nor the Local Rules for the

District of Maryland and will impose an undue burden on Aegis, if the instruction has to be satisfied. First, this instruction requires that Aegis submit its privilege log no later than the return date of the SDT. Such timing is not required by the Federal Rules of Civil Procedure nor the Local Rules for the District of Maryland, and, furthermore, it would impose an undue burden on Aegis were it have to go to the effort to meet that unreasonable and arbitrary deadline. In addition, Aegis objects to having to provide a privilege log in the particular form required by this instruction. Neither the Federal nor Local Rules mandate the particular form that is required for substantiating a claim of privilege. *See, e.g.*, Fed. R. Civ. P. 26(b)(5)(A); *id.*, Adv. Comm. Note to 1993 amendment. Providing a privilege log along the lines required by this instruction can be unduly burdensome and costly, and, therefore, a privilege log in that format may not be warranted. *See id.*, Adv. Comm. Note to 1993 amendment.

F. Compliance With The SDT Will Impose An Undue Burden on Aegis

Aegis objects to the SDT because compliance with it will impose an undue burden on Aegis, not to mention a burden that is disproportionate to any need the Bureau could have for the Records or for obtaining them from Aegis. This is the case because, by way of example and without limitation:

1. The Bureau should be able to obtain most, if not all, of the Records that it seeks in the SDT from the parties in the Canadian Proceeding pursuant to discovery processes available to the Bureau in that proceeding. The discovery sought from Aegis through the SDT should not be permitted unless and until the Bureau is unsuccessful after diligent efforts to obtain the sought-after Records from the parties in the Canadian Proceeding through the discovery devices available to the Bureau in that proceeding. *See, e.g.*, Fed. R. Civ. P. 26(c) ("the court must limit the frequency or extent of discovery otherwise allowed by these rules or local rule if it determines that: (i) the discovery sought. . . can be obtained from some other source that is more convenient, less burdensome, or less expensive").

2. The SDT fails to include any list, much less a reasonable one, of custodians and search terms to facilitate a reasonable search for ESI that might be relevant to the Canadian Proceeding. Aegis will not search for ESI unless and until it and the FTC come to an agreement on such custodian and search terms that yield a volume of ESI that will not impose an undue burden on Aegis to review and produce.

3. The SDT is unduly burdensome to the extent that it would require Aegis to search for ESI in sources that are not reasonably accessible because of undue burden or cost, such as, for example and without limitation, backup tapes and disaster recovery systems.

4. The SDT is unduly burdensome due to its over-breadth and because it seeks Records that are irrelevant to the Canadian Proceeding. *See* Section I, A, *supra*. *See also Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995) ("[I]f the sought-after [information] [is] not relevant … then *any burden whatsoever* imposed upon the [subpoenaed non-party] would be by definition 'undue.'") (quashing a document subpoena in part; emphasis in original).

5. Aegis cannot reasonably produce the requested Records in less than three weeks, as the SDT requires, particularly in light of the expansive breadth of the SDT. It would impose an undue burden on Aegis were it even required to try and meet that deadline.

6. The SDT will require Aegis to incur a substantial amount of costs in both money and time to, among other things, retrieve Records, process them so they can be reviewed, review those for privilege and responsiveness, and prepare those for production. These costs are grossly disproportionate to the Bureau's need, if any, and the limited relevance of the sought-after Records. In this vein, for instance, Aegis's staff size is relatively small, and, thus, Aegis would suffer a substantial negative impact if had to dedicate even just a few staff to address compliance with the SDT.

7. The SDT fails to provide that the FTC will reimburse Aegis for any of its costs, expenses and lost earnings resulting from Aegis's compliance with the SDT. Aegis will not search for or produce any Records in response to the SDT unless and until the Court enters an order, by stipulation or otherwise, providing that the FTC shall reimburse Aegis for all of its costs, expenses, and lost earnings resulting from compliance with the SDT. *See, e.g.*, Fed. R. Civ. P. 45(c)(2)(B)(ii); *In re Subpoena Of American Nurses Association*, 2013 WL 5741242 (D. Md. Aug. 8, 2013) (affirming magistrate's order shifting, to the subpoenaing party, a third-party's ESI vendor costs and attorney's fees incurred in complying with the subpoena). In this regard, Aegis's costs and expenses to be reimbursed must include, without limitation, the fees of Aegis's counsel associated with Aegis's production of Records in response to the SDT (*e.g.*, reviewing for privilege and responsiveness) and fees of copying and ESI vendors used by Aegis to facilitate compliance with the SDT.

By submitting the SDT to Aegis, the FTC has violated Rule 45's command that the proponent of a subpoena take reasonable steps to avoid imposing an undue burden or expense on a person subject to that subpoena, in light of the undue burden that the SDT imposes on Aegis.

G. Additional Objections To The SDT

Aegis also objects to the SDT because the FTC failed to comply with the notice requirement in Fed. R. Civ. P. 45(b)(1), and to the extent that the SDT seeks to impose obligations inconsistent with or beyond those of any Court order or the Federal or Local Rules of Civil Procedure.

* * * * * * *

In light of these objections, Aegis will not produce any Records as commanded by the Subpoena, at least not until all of Aegis's objections are resolved to its satisfaction.

II. AEGIS'S OBJECTIONS TO THE SUBPOENA'S *AD TESTIFICANDUM* PART

Aegis objects to the *ad testificandum* portion of the Subpoena in its entirety ("SAT") for the following reasons:

1. The Bureau can and should be able to get any information that it seeks from Aegis that would be relevant to the Canadian Proceeding from the parties to the Canadian Proceeding through discovery devices available to the Bureau in that proceeding. Accordingly, a deposition of Aegis is unnecessary, and, thus, would impose an undue burden on Aegis. *See also* this letter, § I.F.1, *supra.*

2. The SAT names Aegis as the witness. Because Aegis is an LLC, the SAT was required "to describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). The SAT, however, fails to do that; indeed, there is no attempt in the SAT to do that. Should the FTC properly serve a listing of matters for examination for the deposition of Aegis, Aegis reserves all rights to object to the matters, as well as its rights to object to the deposition date (*e.g.*, because it fails to provide Aegis with sufficient time to prepare a representative for the deposition).

3. Aegis objects to sitting for a deposition unless and until the protective orders described above are entered. *See* this letter, § I.B., *supra.*

4. Aegis objects to sitting for a deposition because the issues concerning privilege that are likely to arise in such deposition will make preparation for, and the conduct of, the deposition unduly burdensome. *See also* this letter, § I.C., *supra.*

5. Aegis objects to no more than one person being permitted to interrogate Aegis at a deposition. *Compare* Order, ¶ 3 *with* Fed. R. Civ. P. 30(c)(1) ("The examination and cross-examination of a deponent proceed as they would under the Federal Rules of Evidence") *and* Md. Local Rule No. 107-10 ("Only

one (1) attorney for each party may conduct the examination of any witness [at trial].").

6. Aegis objects to anyone being present at a deposition of Aegis, other than the court reporter and videographer, Aegis and its counsel, the two Commissioners named in the November 1, 2013 Order in this Action, an attorney and representative of the Bureau, and representatives and attorneys from the named defendants in the Canadian Proceeding. *Compare* Order, ¶ 3.

7. Fees for 1 day's attendance and mileage as required by law were not served with the SAT as required by Fed. R. Civ. P. 45(b)(1) (nor have they ever been served).

Unless Aegis's objections to the SAT are resolved to its satisfaction, Aegis intends to move to quash the SAT, and it will ask the Court to order that the FTC reimburse Aegis for its costs and fees associated with its efforts in that regard.

III. AEGIS'S OBJECTIONS TO THE ORDER

Aegis objects to the Order, and intends to move to have it vacated unless it and the FTC can agree to the reasonable modifications to the Order described below, and those are adopted by the Court. With respect to Aegis's objections, it, among other things, does not believe that the FTC would be able to satisfy the mandatory and discretionary requirements necessary for the issuance of a § 1782 order, were Aegis to raise a challenge to those. Most notably in this regard, it does not appear that the Order is for the purpose of obtaining evidence for use before a tribunal *in a foreign proceeding*. Rather, it seems that the FTC is using the § 1782 process to obtain Records and information from Aegis for its own use, if not exclusively than at least substantially. I submit that, either way, that does not satisfy the aforementioned § 1782 prerequisite. Quite telling in this regard are the gross over-breadth of the Subpoena and the requirement in the Order that the commissioners provide the evidence that they obtain, not to the Bureau, but to the FTC; the FTC is then responsible for conveying that to the Bureau. If, as the FTC's § 1782 application purports, it was seeking discovery on behalf of the Bureau and for use in the Canadian Proceeding, there would be no reason for the commissioners to first send evidence to the FTC.

In a good faith effort to resolve Aegis's objections to the Order, Aegis can forego moving to vacate the Order if the FTC will agree to the following modifications to the Order and these are adopted by the Court:

1. *Clarification That The FTC Has No Authority To Rule On Objections,* etc. The Order should be modified to clarify that any objection, issue, or dispute regarding a subpoena issued pursuant to the Order or at a deposition taken pursuant to any such subpoena shall be resolved only by (a) the Court or (b) agreement between/among the commissioners, Aegis, and the entity(ies)

raising such objection, issue, or dispute, and (c) that the commissioners have no authority to rule on or resolve any such objection except by agreement as provided in (b). I cannot see why the FTC would reasonably take issue with this modification. Indeed, Ms. Feuer noted that the commissioners do not have power in this regard in my call with her on November 21.

2. *Clarification and Limitation On Who May Attend And Speak At Depositions.* The Order should be modified to replace the terms currently in ¶ 3 with terms providing that, for any deposition taken pursuant to a subpoena issued under the Order:

   (a) the only persons who may attend the deposition are: (i) the witness and its counsel; (ii) the commissioners; (iii) counsel and one representative for the Bureau and (iv) counsel and one representative for each of the respective parties in the Canadian Proceeding, and, of course, a court reporter and videographer;

   (b) absent agreement of all the parties attending the deposition or leave of the Court upon a showing of good cause by motion, the only persons, aside from the witness, who may speak at the deposition, including questioning the witness, are: (i) one attorney for the witness; (ii) one commissioner or one attorney from the Bureau, but not both; and (iii) one attorney for each of the respective parties in the Canadian Proceeding; and,

   (c) notwithstanding the foregoing terms, the Court may issue, upon motion or *sua sponte*, an order further restricting, including excluding, who may attend a deposition taken pursuant to a subpoena issued under the Order.

3. *Notice of Subpoenas.* Replace the terms currently in ¶ 2 in the Order with terms requiring that the commissioners, before serving a deposition or document subpoena issued pursuant to the Order, serve a notice of the subpoena, along with a copy of the subpoena, to each named party in the Canadian Proceeding.

4. *Only One Deposition Subpoena May Be Issued.* Add terms to the Order providing that, absent leave of Court made upon showing by motion for good cause, the commissioners shall be limited to issuing, in total, only one subpoena for a deposition pursuant to the Order and that deposition shall be of Aegis pursuant to Fed. R. Civ. P. 30(b)(6).

5. *Witness Fees Required.* Add terms to the Order clarifying that any deposition subpoena issued pursuant to the Order shall be served with the fees for mileage and 1 day's attendance.

IV. CLOSING MATTERS

Aegis's recitation of the objections set forth above is without prejudice to its right to amend or supplement those objections, and Aegis expressly reserves all of its right to amend or supplement those objections.

While Aegis is steadfast in its resolve to assure that its rights and interests are reasonably protected with respect to the Order and the Subpoena, I am confident that, with the FTC's cooperation and reasonableness, that can be done and that we will not have to engage the Court to resolve any issues concerning the Order or Subpoena. To that end, you may contact me at your convenience to talk about the matters discussed above.

Sincerely,

David J. Lacki
Counsel for Aegis Mobile, LLC

cc: Stacy Feuer, Esq.
Michelle Arrington, Esq.
Guilherme Roschke, Esq.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Laureen Kapin
Office of International Affairs
Phone: (202) 326-3237
Email: lkapin@ftc.gov

December 6, 2013

David J. Lacki, Esq.
2 Wisconsin Circle, Suite 700
Chevy Chase, MD 20815

Re: *In re Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. §1782 to Obtain Information from Aegis Mobile LLC on behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings*

Dear Mr. Lacki:

This letter responds to your December 5, 2013 letter seeking withdrawal of the FTC's subpoena for testimony served on November 8, 2013 and your November 22, 2013 letter setting forth Aegis Mobile, LLC's (Aegis) objections to the FTC's subpoena in its entirety. We appreciate your efforts to confer with the FTC to resolve issues regarding the subpoena without the need for court intervention. The FTC shares the same goal and this letter constitutes our good faith efforts to confer with you on the issues raised in your letter, following the initial phone call between you and my colleagues (Stacy Feuer, Guilherme Roschke, and Michele Arington) on November 21, 2013.

We are concerned that although Aegis has been on notice of the nature of the FTC's document request since at least September 4, 2013 (the date of service of our original Civil Investigative Demand which contained similar document requests), Aegis has not identified a subgroup of documents that it could produce on a rolling basis. This failure to suggest and execute a rolling production is even more puzzling in light of the fact that on September 5, 2013, "Aegis Mobile commenced the identification and collection of potentially responsive documents" and sought agreement for "a rolling production schedule for the documents and information requested." *See* September 17, 2013 e-mail from David J. Lacki to Guilherme Roschke (Attachment 1). Now, almost three months later, Aegis has asserted general objections to our discovery request in its entirety. Moreover, although many of Aegis's objections invoke burden concerns, Aegis has provided no specific information about the volume of documents responsive to the FTC's discovery or the ease with which Aegis can retrieve those documents. Given the fact that Aegis has already identified and collected some, if not all, the responsive information, and that most of the FTC's discovery relates to specific work Aegis performed under contract, Aegis's refusal to produce any documents and burdensome arguments are not reasonable.

In response to your December 5, 2013 letter and in the interest of efficiency, we will confine our discussion to your objections to the document requests (the *duces tecum* part of subpoena). If we can resolve the document issues, then we would be willing to postpone the testimonial portion of the subpoena and postpone the demand for testimony until after we have an opportunity to review the documents. At that point, we can turn our attention to resolving disputes regarding the demand for testimony. As to your objections, regarding the Court's Order, the FTC has already demonstrated to the Court that a § 1782 Order is warranted. We will clarify certain misconceptions raised in your letter, but the majority of your objections are more properly raised in the context of a motion for a protective order, if you deem that necessary, rather than a motion to vacate the § 1782 Order.

I. FTC Responses to Specific Document Specification Objections

After consulting with my colleagues at the FTC who participated in the November 21, 2013 teleconference with you, and our colleagues at Canada's Competition Bureau, we set forth our responses to your objections. At the outset, we note that your general objection to the Subpoena "in its entirety" is without merit and that such overbroad objections are disfavored. *See e.g., In re Folding Carton Litigation*, 83 F.R.D. 260, 263 (N.D. Ill 1979). We also note that many of your objections are speculative and more in the nature of general objections rather than specific objections, a practice that is also disfavored. We will respond to only those objections with the sufficient level of specificity required under the Federal Rules of Civil Procedure. Nevertheless, we have seriously considered the concerns raised in your specific objections and are prepared to revise our subpoena for documents in the following manner:

A. Proposed Revisions

1. **Scope of Specifications. The capitalized references in this discussion referred to defined terms in the subpoena Definitions.** We intend specifications 1, 2 and 4 to relate to Aegis's Work for the Wireless Companies and the Canadian Wireless Telecommunications Association (CWTA). Specification 3 relates to Work and proposed Work. We intend the reference in Specification 3 to proposed Work to include, for example, information relating to the monitoring activities Aegis recommended to the CWTA and any Wireless Company, the reasons for such monitoring, the reasons the CWTA and any Wireless Company accepted or rejected Aegis Mobile's recommendations, and any communications or assessments relating to the scope of proposed Work. Specification 4 includes reference to a "Content Provider or Aggregator" but this is also limited by the reference to the Work. To the extent specifications 5 and 6 can be interpreted to go beyond the Work performed for the Wireless Companies and the CWTA, we agree to limit specifications 5 and 6 to the marketing of the Digital Content in Canada, to include comparisons with the marketing practices of other countries or comparisons to other telecommunications companies or associations. Your other general assertions about the over breadth of the specifications appear to misconstrue the actual language of the specifications.

2. **Time-Period.** Your objections and remarks during the November 21, 2013 teleconference indicate that you interpret certain specifications (particularly Specification 4) to call for the production of information outside the specified time-period of July 1, 2011 until the date of compliance with the subpoena. We do not intend any of the six specifications to call for information that falls outside the specified time-period.

3. **Protective Order.** As indicated by my colleague Ms. Feuer during the November 21, 2013 teleconference, we will facilitate negotiations between Aegis and the Canada Competition Bureau for a protective order consistent with Fed. R. Civ. P. 26(c) and the Local Rules, applicable to trade secret or other confidential research, development or commercial information to the extent that the subpoena requests such information.

4. **Electronic Evidence.** In response to your objections to our instruction to produce the documents in native format, we will accept electronic evidence in either TIFF or PDF format. Also in response to your objection regarding additional cost, we will not require Aegis to produce hard copy documents in an electronic format that has been processed to provide for optical character recognition.

5. **Privilege Issues.** As to the timing of the privilege log, we agree that the privilege log will be due at the same time as the documents. In the event of a rolling production, the privilege log applicable to the categories of documents produced will be due at the same time as those documents.

6. **Timing of Production.** We will negotiate a reasonable time-period for Aegis to produce documents. Aegis has been aware of the general nature of our request since September 5, 2013 and was served with this subpoena on November 8, 2013. Your correspondence has not identified a sufficient reason why Aegis could not have produced at least some of the requested documents by the November 26 due date. Hence, we request a rolling production beginning on December 13, 2013. While the parties negotiate a protective order, the FTC and Canada Competition Bureau agree to maintain the confidentiality of trade secret or other confidential research, development or commercial information contained in documents that are marked "Confidential." In the event of challenges to designations of confidentiality, the burden will remain on Aegis to justify the designation under Fed. R. Civ. P. 26(c).

B. Reply to Specific Objections

1. Re: Information you contend is not pertinent to the Canadian Proceeding. As you are aware, discovery under the Federal Rules is "broad in scope" and freely permitted. *AG-Innovations v. United States,* 82 Fed. Cl. 69, 77 (2008). Moreover, relevance is broadly construed "to encompass any matter that

bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be open in the case." *Freeman v. Dal-Tile Corp.*, 2012 WL 4577718 (E.D.N.C.) *quoting Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 4340, 351 (1978), and *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). In this matter, the Canada Competition Bureau's September 14, 2012 Statement of Claim named three Canadian companies offering wireless telephone services, Rogers Communications, Bell Canada, and Telus Corporation, and the CWTA, as Defendants in its claim concerning misleading advertising that promotes costly premium texting services. *See Statement of Claim* (Attachment 2).

As indicated in the Statement of Claim, Defendants' misleading representations convey the general impression that consumers are able to receive premium content for free when in fact, consumers are charged for this content. The issues in Canada's Statement of Claim included: 1) Defendants' role in making and permitting others to make these deceptive representations; 2) Defendants' representations that they could safeguard consumers from such practices; and 3) the fact that Defendants generated revenue as a result of the misleading representations made to the public. The statement of claim also describes the relationship between the Defendants and certain aggregators and/or content providers. In conjunction with the Defendant wireless companies, these entities provide and/or aggregate premium text messaging and rich content services and offer them to Canadian consumers. As viewed through the lens of Canada's Statement of Claim and the broad scope of discovery, the specifications as modified clearly meet the relevance standard set forth under R. 26(b). The specifications are both relevant to Canada's claims and are "reasonably calculated to lead to the discovery of admissible evidence."

2. Time Period. The specified time-period is not overbroad. Although Aegis objects to the time period as both too early (prior to the January 2012 contract date) and too late (after the date of Canada's Statement of Claim) neither objection is justified. Aegis identifies March 12, 2012 as the date of a formal contract. However, you stated during the November 21, 2013 teleconference that discussions regarding the Aegis contract began in January 2012. The specified starting time-period (only 6 months prior) is limited by the already narrowed and relevant specifications, which are generally tailored to either Aegis's Work performed for the Defendants or the marketing of Digital Content in Canada. Aegis's objection to the end of the time period (the date of full compliance with the FTC subpoena) is also not justified because it is based on a misconception that Canada's claim only runs until the date of its Statement of Claim.

3. Privileges. Our instruction is consistent with both the Federal Rules and the Local Rules. To the extent the request calls for privileged material, we merely instructed you to produce a privilege log with the specified information to enable us to assess the bases and sufficiency of any privilege claims. You also appear to argue that the discovery request is burdensome because you will need to engage in a privilege review. The manner in which you engage in a privilege review is

primarily a matter for you to determine with your client. Moreover, any qualms about the privilege log do not justify refusing to make any production whatsoever.

4. Burden. The burden arguments presented are general and speculative and do not rise to the level needed to defend against a motion to compel where Aegis would have the burden of showing its objections are valid by providing specific explanations or factual support to show how each discovery request is improper. Aegis's assertions regarding the need to identify document custodians and search terms for electronic evidence are particularly baseless given that 1) Aegis has already started "the identification and collection of potentially responsive documents" (*see* Attachment 1, September 17, 2013 Lacki email); 2) the FTC request concerns specific work that Aegis performed under contract; and 3) Aegis, itself, is in the best position to identify the relevant document custodians. Our specifications, as revised, relate to a very specific time-period and subject matter and hence are not likely to be unduly burdensome.

5. Cost. Although R. 45 (c) contemplates shifting costs under certain circumstances, it is unlikely that that the court would impose such cost shifting in this situation where the underlying case involves a matter of public interest and the third-party has an interest in the outcome of the proceeding. *See In re First American Corporation*, 184 F.R.D. 232, 241-44 (S.D.N.Y. 1998) (where the non-party was the auditor of the defendant corporation accused of bank fraud, the non-party was properly ordered to produce the documents at its own expense). *See also In re Seroquel Products Liability Litigation*, 2007 WL 4287676 (M.D. Fla. Dec. 6, 2007) (requiring nonparty to bear costs of production where it performed work for and analyzed marketing campaigns at issue). Moreover, Aegis has not identified either the volume of responsive documents or the type of production contemplated. We anticipate that most of not all of the response to our request will involve electronic evidence. In the event that hard copies must be produced, we will agree to discuss a reasonable rate for copying costs consistent with the Local Rules.

II. FTC Response to "Objections" to District Court Order

As stated earlier, the FTC has already demonstrated to the Court that a § 1782 Order is warranted. Most of your discussion relates to the demand for testimony, which I suggest we discuss after we resolve the document issues. However, your speculation that this §1782 proceeding is really a way for the FTC to obtain records and information from Aegis for its own use, is baseless. If the FTC wishes to obtain information from Aegis, we have sufficient authority and means to pursue that information under our procedures for compulsory process.

III. Conclusion

We appreciate your stated willingness to engage in a good faith effort to resolve these issues without the need for the court to intervene. To that end, we would appreciate hearing from you no later than December 10, 2013 either in writing or via telephone, so we can resolve the remaining issues and move forward with the document production.

Sincerely,

Laureen Kapin

Laureen Kapin,
Counsel for International Consumer Protection

From: David Lacki [mailto:djlacki@lackico.com]
Sent: Friday, December 13, 2013 8:17 AM
To: Kapin, Laureen
Subject: Re: Aegis Mobile, LLC - U.S. Dist Ct Subpoena Civ Action No. 1:13-mc-00524

Laureen - I may be available today after 2:30, as I will see if I can move my schedule around.

The terms of the withdrawal of the subpoena for testimony is acceptable, please confirm at your earliest.

Sent from my iPad

On Dec 12, 2013, at 4:21 PM, "Kapin, Laureen" <LKAPIN@ftc.gov> wrote:

David –

Your correspondence mischaracterizes both the facts and my prior correspondence. Further, your offer to discuss Aegis's response "the week of December 16th", is not reasonable given the delays. Rather than engage in additional written colloquy, please let me know whether you are available to discuss the substantive issues regarding the document production tomorrow, Friday, December 13, 2013. We are available between 9 and 10:30 am or after 2:30 pm.

Given the scheduling delays, we will agree to withdraw our subpoena for testimony, without prejudice to reissuing the subpoena at a future date. We currently intend to seek testimony in this matter, however, our preference is to take testimony after receipt of documents. I would appreciate your reply by 6:00 pm tonight.

Regards,
Laureen Kapin
Counsel for International Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave, NW, Suite HQ-485

Washington DC 20580
+1 (202) 326-3237
lkapin@ftc.gov

From: David Lacki [mailto:djlacki@lackico.com]
Sent: Thursday, December 12, 2013 2:00 PM
To: Kapin, Laureen
Subject: Aegis Mobile, LLC - U.S. Dist Ct Subpoena Civ Action No. 1:13-mc-00524

Laureen - please see the attached.

David J. Lacki
Principal

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240.235.5020 direct | 240.465.2335 fax | 703.244.0812 mobile | www.lackico.com
Lacki & Company, LLC is a legal services and business consultancy firm.

AFFIDAVIT

I, Magalie Marie Plouffe, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am a Senior Competition Law Officer with the Fair Business Practices Branch of the Competition Bureau, Canada (Competition Bureau).

2. The Competition Bureau assists Canada's Commissioner of Competition (the Commissioner) in carrying out the statutory responsibility he has to administer and enforce the *Competition Act*, R.S.C. 1985, c. C-34 (the Act). With the assistance of the Competition Bureau, the Commissioner investigates anti-competitive conduct. Where necessary, the Commissioner also brings legal proceedings to stop anti-competitive conduct and obtain remedies for non-compliance with the Act.

3. I have participated in the inquiry the Commissioner commenced under the Deceptive Marketing Practices provisions of the Act into the marketing practices of various companies and individuals, including, but not limited to, Rogers Communications Inc. (Rogers), Bell Canada (Bell), TELUS Corporation (TELUS) and the Canadian Wireless Telecommunications Association (the CWTA) (the Inquiry) since October 2012. I served as lead investigator for the Inquiry since February 2013. Since September 23, 2013, I have acted as the Special Advisor to the Deputy Commissioner of the Fair Business Practices Branch of the Competition Bureau. In my present role, I provide advice and guidance to the Deputy Commissioner on the work of the Fair Business Practices Branch, including inquiries and investigations. I have remained involved in the Inquiry and continue to advise the Deputy Commissioner on the conduct of the Inquiry. Accordingly, I have personal knowledge of the facts and matters described below.

4. **Inquiry.** The Commissioner commenced the Inquiry on April 24, 2012. The Commissioner had and continues to have reason to believe that various companies and individuals have engaged in deceptive marketing practices that are reviewable under the Act. In particular, the Commissioner had and continues to have reason to believe that:

    a. Rogers, Bell and TELUS sell digital content to their customers that third parties develop. These third parties are described as content providers and aggregators (Content Providers and Aggregators);

    b. Rogers, Bell, TELUS and the CWTA permit Content Providers and Aggregators to make false or misleading representations that convey the general impression that consumers are able to receive certain digital content without cost when in fact Rogers, Bell and TELUS charge their customers for acquiring the content (Call-to-Action Representations); and

c. Rogers, Bell, TELUS and the CWTA make false or misleading representations that convey the general impression that wireless customers are safeguarded or protected from receiving and having to pay unauthorized charges when in fact these entities benefit financially from the practices that cause Rogers, Bell and TELUS' customers to incur these charges.

5. During the Inquiry, the CWTA disclosed to the Bureau that it had contracted with Aegis Mobile LLC (Aegis Mobile) to record and analyse the advertising that is being used to promote the digital content. In particular, CWTA's counsel stated in a letter to the Bureau:

[T]he CWTA launched its Common Short Code Program Online Advertisement Monitoring Initiative by contracting the services of Aegis Mobile. The vendor completes daily online monitoring of Common Short Code programs to ensure that these programs are aligned with the [CWTA's] *Canadian Common Short Code Guidelines. ... This monitoring initiative relies on automated capture of advertising which ensures that more material can be collected than would occur through a manual process. However, the actual review and audit of the advertising is done by an Aegis employee ...*

6. An excerpt from this to letter the Competition Bureau dated May 25, 2012 is attached as **Exhibit A.**

7. **Ontario Proceeding.** On September 14, 2012, the Commissioner commenced a proceeding against Rogers, Bell Canada, TELUS and CWTA (collectively, the Defendants) before the Ontario Superior Court of Justice. The Commissioner alleges that the Defendants: (a) make, or permit Content Providers and Aggregators to make, false or misleading Call-to-Action Representations and (b) make the false or misleading Safeguarding Representations. A copy of the Commissioner's Statement of Claim is attached as **Exhibit B.**

8. In November 2012, the Defendants jointly brought a motion requesting further particulars regarding the Commissioner's claim. On June 12, 2013, Regional Senior Justice Hackland dismissed the Defendants' Motion. At paragraph 14 of his Reasons for Decision, the Regional Senior Justice stated that the Call-to-Action Representations were "the proper subject of discovery" in the Ontario proceeding. A copy of the Regional Senior Justice's Reasons for Decision is attached as **Exhibit C.**

9. **Request for U.S. Assistance.** Further to the Inquiry and Ontario proceeding, on June 18, 2013 the Competition Bureau, submitted a request for assistance with the U.S. Federal Trade Commission (FTC), pursuant to 15 U.S.C. §§ 41 U.S.C. *et. seq.*, to obtain information from Aegis Mobile, an entity located in Columbia, Maryland.

10. **Information Requested.** The Competition Bureau seeks information from Aegis Mobile relating to: (a) Aegis Mobile's work for the Defendants and (b) the marketing of digital content in Canada. The FTC granted the Competition Bureau's request for assistance and issued a Civil Investigative Demand, attached as **Exhibit D.**

11. **Competition Bureau Has Not Received the Information it Requests.** The Competition Bureau has not obtained the information it now seeks from Aegis Mobile in connection with our request for assistance from the FTC. Further, the Competition Bureau has not obtained the information it seeks from Aegis Mobile in the course of the Inquiry or the Ontario proceeding.

12. **Information is Relevant.** The excerpt from the CWTA letter attached as Exhibit A demonstrates that Aegis Mobile collects and analyses the very advertising that the Commissioner alleges is false or misleading in the Ontario proceeding. The information requested by the Bureau is accordingly relevant in evaluating the number of deceptive Call-to-Action Representations that the Defendants make or permit Content Providers and Aggregators to make. The information requested by the Competition Bureau is also relevant to whether the Safeguarding Representations made by the Defendants are false or misleading in a material respect. As the CWTA has retained Aegis Mobile to collect and analyse Call-to-Action Representations on a daily basis, I believe Aegis Mobile will possess detailed evidence regarding false or misleading Call-to-Action Representations and the nature and extent of deceptive marketing practices in Canada.

13. **U.S. Assistance is Needed in Obtaining Documents from and Testimony on behalf of Aegis Mobile.** Aegis Mobile is located in Columbia, Maryland and the Competition Bureau has no evidence or reason to believe that the company is located in Canada. The Commissioner therefore requires U.S. assistance to obtain documents from and testimony on behalf of Aegis Mobile relevant to the Ontario proceeding.

14. **Were Aegis Mobile Located in Canada, the Commissioner Would Have the Means Under the Act to Obtain the Testimony and Documents he Seeks.** Were Aegis Mobile located in Canada, the Commissioner would have the ability to apply to either the Federal Court or a provincial superior court under section 11 of the Act – whether or not he had commenced a proceeding – for an order requiring: (a) employees of Aegis Mobile to be examined under oath or solemn affirmation by the Commissioner or his authorized representative; (b) for Aegis Mobile to produce records and other things to the Commissioner; and (c) for Aegis Mobile to make and deliver written returns of information to the Commissioner. A copy of section 11 of the Act is attached as **Exhibit E.**

15. **Use of the Information by the Competition Bureau.** The Commissioner is requesting U.S. assistance in obtaining documents from and testimony on behalf of Aegis Mobile for use in the Ontario proceeding. As the Inquiry is ongoing, the Commissioner may also use the information he obtains in the Inquiry.

16. **Receptivity of Ontario Courts to Evidence Obtained Under 28 U.S.C. §1782.** I am advised by the Commissioner's legal counsel and believe that the courts of Ontario permit parties to Ontario proceedings to seek evidence under 28 U.S.C. §1782. I am further advised that the leading Ontario decision in this regard is the decision of the Court of Appeal for Ontario in *Ford v. F. Hoffmann-La Roche Ltd.* (2003), 223 D.L.R. (4th) 445 (C.A.). In this decision, the Court of Appeal for Ontario adopted the reasons of the judge at first instance, including the following:

> *49 The plaintiffs' action in seeking access to the U.S. discovery* [pursuant to 28 U.S.C. §1782] *is not oppressive or unfair to the defendants in the Canadian proceedings. To the contrary. Such access is consistent with the three policy objectives underlying the CPA* [*Class Proceedings Act, 1992*, S.O. 1992, c. 6] – *facilitating access to justice, judicial efficiency and behaviour modification. In particular, there will be significant savings in litigation costs through such access.*
>
> *50 The plaintiffs' request for access to discovery evidence which they believe necessary to prepare their case in Canada, a request made through means lawful in the United States, does not violate the rules and procedure of this court. There is no consequential unfairness to the defendants in the Canadian class proceedings.*

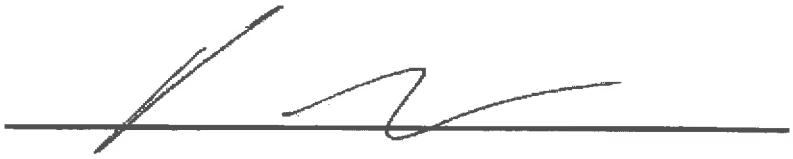
17. Copies of the decision of the Court of Appeal and the decision at first instance are attached as **Exhibit F**.

18. The excerpt from the CWTA letter attached as Exhibit A establishes that Aegis Mobile undertook to collect and analyse daily representations the Commissioner has reason to believe are false or misleading in material respect. As such, I believe Aegis is a repository for information that is relevant to the Ontario proceeding.

Sworn before me at the City of Ottawa in the Province of Ontario on October 25, April 2013.

Derek Leschinsky (L.S.U.C.# 48095T)
A Commissioner for Taking Affidavits

Magalie Marie Plouffe



This is Exhibit A to the Affidavit of
Magalie Marie Plouffe
sworn October 25, 2013

Response to Specification #4

4. ***Provide a description of:***
   a. ***the audit or any other applicable review process used during the Relevant Period by the Respondent to assess compliance with the Respondent's Canadian Common Short Code: Application Guidelines and the CSC Code of Conduct, including what circumstances may trigger such an audit or other review and what communications take place between the Respondent and the Wireless Companies concerning the practices of those using Short Codes related to such audits or other reviews; and***
   b. ***any changes in the audit or any other applicable review process referred to in Specification 4(a), including related changes made to the Respondent's Canadian Common Short Code: Application Guidelines and the CSC Code of Conduct during the Relevant Expanded Period, and the rationale for such change(s).***

Response to Specification 4(a) – Description of the Compliance Audit Process

Audit/Review of Application

As noted in the ***Response to Specification #***3, New and Revised Applications are reviewed against the elements included in the relevant version of the Canadian Common Short Code Application Guidelines (the "Guidelines").

The CWTA evaluation is intended to ensure that only complete Applications are provided to the carriers on the Short Code Council (the "SCC") for their review.

If all required elements are contained within the Application, the Application is considered to be compliant.

Once the Application is reviewed and approved by the SCC and a Short Code is assigned, the aggregator provides a Ready for Testing document either to the CWTA or directly to the carriers participating in its program. This document is not used by the CWTA in any way. Any Short Code testing that occurs at this point is done by each carrier, at their discretion, and is meant to validate that the Short Code is operational on the respective carrier network.

Compliance Audit of Approved Short Code Program

After a Short Code launches, regular audits are conducted to ensure that the program complies with the approved Application and current Guidelines.

These audits are conducted using CWTA employees simulating real-world experiences. That is, CWTA employees will sign up for the Short Code services and assess whether the Short Code service offered is compliant with the requirements of the Guidelines.

Compliance audits are intended to confirm that all Common Short Code campaigns comply with the requirements of the current Guidelines. These compliance audits may include, but are not limited to, testing such requirements as the five mandatory keywords (STOP, ARRET, HELP, AIDE and INFO)[1], double opt-in[2], and pricing term disclosures[3] on Call to Actions. The specifics of each Application are taken into consideration when Compliance audits are conducted; the audit is conducted to verify that individual elements contained in the Application are compliant with the Guidelines. It is also important to note that certain elements contained in an Application are not auditable. For example, it is not feasible to determine compliance to the $40 cap; CWTA will take steps to ensure that price-point and frequency are in alignment and support the notion of the cap but cannot check when the cap is reached.

Copies of process documents that outline how the audit is conducted are included within the enclosed CD (please see documents titled "Auditing Process old" and "SCAudit_Full Process").

Circumstances That Trigger an Audit or Review

CWTA regularly performs Compliance Audits with respect to all Common Short Code programs, on a rotating basis. Each Short Code is audited, at a minimum, once a year. The Auditing process is tracked internally to ensure that each Short Code has gone through the exercise.

If CWTA becomes aware of consumer complaints or inquiries, CWTA may initiate an audit on a specific program to determine whether the complaints are founded.

If inquiries are made by other stakeholders (carriers, aggregators, or content providers) concerning particular programs, CWTA may initiate an audit.

Communication between CWTA and Carriers Concerning Practices of Companies Being Reviewed

Results from the Compliance Audits are communicated directly to the aggregator responsible for the program. This communication directs the aggregator to remedy any and all elements that were noted as being non-compliant with their approved Application or the Guidelines. The CWTA communicates with the aggregator as opposed to the applicant because the aggregators are ultimately responsible for the program. Also, the CWTA does not have the resources to correspond with each individual applicant separately. The aggregator coordinates the process of rectifying all outstanding compliance issues between the CWTA and the applicant.

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[1] For the specific requirements for the five mandatory keywords, please refer to section IV.2 of the Canadian Common Short Code Application Guidelines.

[2] For the specific requirements for the double opt-in message, please refer to section IV.6.2 of the Canadian Common Short Code Application Guidelines.

[3] For the specific requirements for pricing term disclosures, please refer to section IV.1 of the Canadian Common Short Code Application Guidelines.

During the interim (between the initial communication and rectification of the problem), CWTA directs the aggregator to supply a Root Cause Analysis (RCA) to identify the number of impacted consumers, and to suspend traffic on the Short Code. Once received, the RCA is circulated to the carriers for their review and feedback. While there are no official timelines for the provision of this information, the requirement to suspend traffic on the Short Code is seen as very punitive by the aggregator so best efforts are made to provide the information in a timely fashion. In general the information is provided in less than a week given the impact to the aggregator's business.

If the identified issue is not remedied, or remedied inadequately, the issue is brought to the carriers for their attention. Carriers can then direct the CWTA as to what actions the CWTA is to take on their behalf. While carriers must come to a consensus as to the severity level and sanctions for a given Short Code infraction in order to allow CWTA to perform duties on their behalf – they are able to determine the timing of their individual actions and whether other sanctions are required on their carrier's behalf.

In instances where the issue is deemed severe (e.g. in cases of cramming[4]), the CWTA will immediately advise the carriers who will then direct the CWTA as to what actions the CWTA is to take on their behalf. Details related to the process for suspension and revocation of a Short Code is addressed in the ***Response to Specification #6.***

Response to Specification 4(b) – Changes to Compliance Audit Process

Audit/Review of Application

As noted in the ***Response to Specification #3,*** New and Revised Applications are reviewed against the elements included in the relevant version of the Guidelines.

The Guidelines have from time to time been modified or adjusted to capture and address what is occurring within the Short Code environment. As technology evolves, and as programs evolve, items within the Guidelines have been clarified or added to address these changes. Draft changes are developed by the CWTA based on discussions occurring with the SCC; these changes are then incorporated into the Guidelines for review and approval by the SCC.

Please note that the document titled "Auditing Process old" is simply an earlier version of the description on how audits are conducted. It explains the process at a higher level than the most current version of the auditing process document, "SCProcess_Full Process". The overall process to conduct an Audit/Review of an Application has not changed.

[4] "Cramming" means the fraudulent adding of unauthorized charges to a consumer's phone bill.

Compliance Audit of Approved Short Code Program

The Compliance Audit process itself has been consistently applied over time.

With the exception of the Compliance Audit exercise that occurred from September to December 2011, the focus of the Compliance Audit is on a Short Code Program's compliance with relevant Guidelines.

During the last part of 2011, new Guidelines were implemented which required Aggregators to make changes to their programs to come into compliance with the more stringent requirements that came into effect in December 2011. All aggregators with existing Premium Subscription programs in market were required to submit Revised Applications for any existing programs and to ensure that these programs complied with the new Guidelines. In addition, all new Applications were reviewed against the revised Guidelines to ensure compliance.

Standard procedure would have required the Compliance Audit to be conducted using the Guidelines that were effective during this time; however, given that the aggregators were working toward meeting the requirements outlined in the next version and all new programs were being vetted against the next version, it was decided that auditing to older Guidelines was not a useful exercise . As such, the focus of the audit changed to one where a pro-active search of the Internet was conducted by CWTA staff to find non-compliant affiliate marketing. Short Code programs are often actively marketed on the Internet and on Social Media and this auditing process focused on the representations made in those venues.

As noted above in response to 4(a), issues identified during the Audit Review are immediately communicated to the aggregator. Over time the communication process has also improved in order to provide more details as to what was non-compliant, as well as the required remedy and penalties attributed for the violation.

CWTA has also worked with carriers to standardize the approach it takes in determining the proposed course of action that is recommended to the Short Code Council. This has been a natural outflow from the development of the Infractions Grid. Draft versions of the Infraction Grid were used as a guide by carriers since September 2011. The Infractions Grid[5] came into effect on March 15, 2012 and outlines each element that is required within the Guidelines, as well as the course of action and penalty for non-compliance. Carriers provide feedback on each non-compliance issue and CWTA administers the appropriate actions on their behalf. Aggregators are aware of the Infraction Grid and the repercussions for non-compliance since the CWTA has shared this information with them.

[5] A copy of the Infractions Grid is included as part of the response to Specification #6. Each Infraction is given a set ranking which then requires a specific course of action to be applied. In instances where the infraction is a repeat occurrence, the issue gains a higher level severity. For example, if the aggregator is given a Severity 3 offence on Short Code 12345, the next violation of an identical nature on this Short Code becomes a Severity 2, and then with another repeat violation a Severity 1.

In addition, in April 2012, the CWTA launched its Common Short Code Program Online Advertisement Monitoring Initiative by contracting the services of Aegis Mobile. The vendor completes daily online monitoring of Common Short Code programs to ensure that these programs are aligned with the Canadian Common Short Code Application Guidelines. The media monitoring service complements the CWTA's compliance audits, specifically focusing on affiliate, social media, and WAP marketing of Common Short Code programs. This monitoring initiative relies on an automated capture of advertising which ensures that more material can be collected than would occur through a manual process. However, the actual review and audit of the advertising is done by an Aegis employee since it is not possible to determine compliance using an automated process.

The initial phase (April to now) has focused on ensuring the portal works as expected, that all Guideline elements are understood and being attributed properly, and that participants in the process (Aegis, CWTA and aggregators) understand the process.

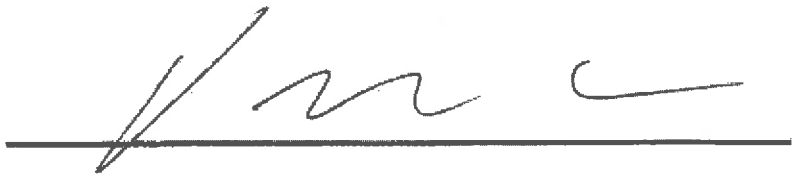
When the initial phase of the Online Advertisement Monitoring is complete, Aegis will send daily notifications to the aggregators when non-complaint issues are found. The aggregators will be asked to log-in to the portal to view the details of the non-compliant Short Code and to take action to rectify the issues with the applicant. When the aggregator has rectified the issue(s), they will log-in to the portal and prompt Aegis to re-test the Short Code program. If the Short Code program is deemed to be compliant with the Guidelines, the issue(s) will be closed. If the aggregator failed to make the correct changes to the Short Code program, Aegis will notify the aggregator that there are still outstanding issues that must become compliant with the Guidelines. The process identified in the ***Response to Specifications #6*** as it applies to suspensions and revocations also applies to the Online Advertisement Monitoring with Aegis.

Changes to Guidelines

The various versions of the Canadian Common Short Code: Application Guidelines (and the Code of Conduct contained within) were included with the CWTA's ***Response to Specification 3.***

Please refer to the PDF document titled "Guideline Versions and Change History", which is contained within the enclosed CD, for an outline of the various modifications to the Guidelines during the Relevant Expanded Period. Copies of the two documents referenced within the PDF document ("Highlight of Changes in Canadian Common Short Code Application Guidelines" and "Notable Changes in Canadian Common Short Code Application Guidelines") are also contained within the enclosed CD.

All changes made to the Guidelines are intended to clarify and strengthen the contents so that all parties understand exactly what is required in advance, thereby heading off potential issues of non-compliance where possible.



This is Exhibit B to the Affidavit of
Magalie Marie Plouffe
sworn October 25, 2013

Court File No. 12-55497

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Plaintiff

- and -

ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, and the CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION

Defendants

IN THE MATTER OF an action for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, for conduct reviewable pursuant to paragraph 74.01(1)(a).

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: 14 September 2012 Issued by:

Ottawa Court House
161 Elgin St.
Ottawa, Ontario
K2P 2K1

TO: **ROGERS COMMUNICATIONS INC.**
333 Bloor Street East
Toronto, Ontario
M4W 1G9

AND TO: **BELL CANADA**
Suite 1900, 1050 Beaver Hall Hill
Montreal, Quebec
H2Z 1S4

AND TO: **TELUS CORPORATION**
8-555 Robson Street
Vancouver, British Columbia
V6B 3K9

AND TO: **CANADIAN WIRELESS TELCOMMUNICATIONS ASSOCIATION**
Suite 1110, 130 Albert Street
Ottawa, Ontario
K1P 5G4

CLAIM

1. The Commissioner of Competition (the "**Commissioner**") claims as follows pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"):

(a) a Declaration that each of the Defendants has engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) of the Act by:

(i) making, and permitting others to make, representations to the public that were false or misleading in a material respect for the purpose of promoting the supply or use of: (a) text messaging services, charged at rates in excess of standard text messaging rates, that offer, among other things, a chance to win a contest or prizes, or provide news, advice, alerts, trivia, quotations or horoscopes; and (b) other goods and services, including ringtones, electronic wallpaper, or other content, programs or applications designed for wireless communications devices ("**Premium Text Messaging and Rich Content Services**");

(ii) making representations to the public that were false or misleading in a material respect for the purpose of promoting the supply or use of wireless communications products, including wireless communications devices and services ("**Wireless Products**"); namely, that each of the Defendants made representations that conveyed the general impression that wireless customers were

safeguarded or protected from receiving and having to pay for unwanted Premium Text Messaging and Rich Content Services when, in fact, the Defendant wireless companies actively facilitated and collected unauthorized charges from their customers for such Premium Text Messaging and Rich Content Services, retaining a significant portion for themselves;

(b) in respect of the Defendant Bell, a Declaration that it has engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) of the Act, by making representations to the public that were false or misleading in a material respect for the purpose of promoting the supply or use of its Wireless Products; namely, that Bell made representations that conveyed the general impression that the risk of being charged for unwanted Premium Text Messaging and Rich Content Services was low when it was not;

(c) an Order that each of the Defendants:

(i) not make, or permit others to make, representations to the public that fail to clearly and conspicuously disclose the price and other material terms and conditions applicable to Premium Text Messaging and Rich Content Services that result in charges via wireless networks, or engage in other substantially similar reviewable conduct; and

(ii) not make representations to the public that convey the general impression that consumers are safeguarded or protected from receiving and having to pay unauthorized charges for Premium

Text Messaging and Rich Content Services when consumers are not so safeguarded or protected;

(d) in respect of the Defendant Bell, an Order that Bell not make representations to the public that convey the general impression that the risk of its wireless customers receiving and being charged for unwanted Premium Text Messaging and Rich Content Services is low when it is not;

(e) an Order requiring that each of the Defendants publishes or otherwise disseminates notices of the determinations made herein in such a manner and at such times as the Commissioner may advise and this Honourable Court permit;

(f) an Order requiring each of the Defendant wireless companies to fully reimburse its current and former wireless customers for all charges incurred pursuant to the reviewable conduct that is the subject of this proceeding;

(g) an Order requiring that:

(i) each of the Defendant wireless companies pays administrative monetary penalties in the amount of $10,000,000;

(ii) the Defendant CWTA pay an administrative monetary penalty in the amount of $1,000,000; and

(iii) for each Defendant against whom an order has previously been made, $15,000,000, pursuant to section 74.1 of the Act;

(h) costs of investigation and this proceeding on a substantial indemnity basis (including disbursements and H.S.T.) payable by the Defendants on a joint and several basis; and

(i) such further and other relief as the Commissioner may advise and this Honourable Court shall permit.

THE PARTIES

2. The Commissioner is appointed under section 7 of the Act and is responsible for the administration and enforcement of the Act.

3. Rogers Communications Inc. and its wholly-owned subsidiary Fido Solutions Inc. (collectively "**Rogers**") supply Wireless Products to consumers in Canada, including wireless voice, data and messaging services. Rogers is the largest wireless communications service provider in Canada with approximately 9.3 million wireless subscribers nationwide.

4. Bell Canada directly and through its wholly-owned indirect subsidiary Bell Mobility Inc., and Virgin Mobile Canada, a partnership between Bell Mobility Inc. and 4458737 Canada Inc., a wholly owned subsidiary of BCE Inc. (collectively "**Bell**"), supply Wireless Products to consumers in Canada, including wireless voice, data and messaging services. BCE Inc. is the largest communications company in Canada and Bell is the second largest wireless communications service provider with approximately 7.4 million wireless subscribers nationwide.

5. TELUS Corporation and its wholly-owned indirect subsidiaries TELUS Communications Inc. and TELE-MOBILE Company (collectively "**TELUS**") supply Wireless Products to consumers in Canada, including wireless voice, data and messaging services. TELUS is the third largest wireless communications service

provider in Canada with approximately 7.4 million wireless subscribers nationwide.

6. The Canadian Wireless Telecommunications Association (the **"CWTA"**) is an industry association representing Canadian cellular, fixed wireless and mobile satellite carriers, as well as companies that develop and produce products and services for those industries. The Defendant wireless companies are members of the CWTA.

OVERVIEW

7. Since at least 1 December 2010, the Defendants have made, are making, have permitted and are permitting others to make false or misleading representations to the public that are contrary to paragraph 74.01(1)(a) of the Act. The false or misleading representations are targeted at users of wireless communications devices and internet users, including persons who are credulous, inexperienced, and vulnerable, such as children.

8. This action concerns two related issues; in particular, that:

a. the Defendants make and permit to be made false or misleading representations to the public online and via wireless networks for the purposes of promoting the supply or use of Premium Text Messaging and Rich Content Services (the **"Call-to-Action Representations"**). The Call-to-Action Representations convey the general impression that consumers are able to receive

Premium Text Messaging and Rich Content Services for free when customers are, in fact, charged for the content; and

b. the Defendants make false or misleading representations to the public, that consumers are safeguarded or protected from having to pay unauthorized charges for Premium Text Messaging and Rich Content Services for the purpose of promoting the supply or use of Wireless Products (the "**Safeguarding Representations**"). The Safeguarding Representations convey the general impression that wireless customers are safeguarded or protected from receiving and having to pay such unauthorized charges when, in reality, the Defendant wireless companies collected and facilitated such charges, keeping a share for themselves.

9. The Defendants generate revenue from the aforementioned false or misleading representations made to the Canadian public.

10. The CWTA has permitted the Call-to-Action Representations by establishing, facilitating and exercising control over the mechanism by which the Defendant wireless companies profit from the Call-to-Action Representations. The CWTA also makes independent false or misleading Safeguarding Representations that convey the general impression that wireless customers are safeguarded or protected from receiving and having to pay such unauthorized

charges when, in reality, the CWTA established and administers the mechanism by which the Call-to-Action Representations are made.

THE INTEGRATED BUSINESS MODEL

11. A mechanism known as a Common Short Code is at the heart of the reviewable conduct. A Common Short Code is a four to six digit number leased out by the CWTA in conjunction with Canadian wireless companies. Common Short Codes are leased to persons who provide and/or create Premium Text Messaging and Rich Content Services ("**Content Providers**") and persons who connect Content Providers to wireless companies ("**Aggregators**") to allow for the delivery of Premium Text Messaging and Rich Content Services and the billing and collection of associated charges from customers of the Canadian wireless companies.

12. While Premium Text Messaging and Rich Content Services can be free to a wireless customer or billed at standard text messaging rates, Common Short Codes can also be used to deliver charges at rates that are in excess of the rates ordinarily applicable for standard text messages (a "**Premium Short Code**").

13. The CWTA has established for the Canadian wireless industry the mechanism by which Common Short Codes, including Premium Short Codes, are assigned to Content Providers / Aggregators and made available to use in partnership with wireless companies, including the Defendant wireless companies. The CWTA purports to administer guidelines for Common Short Codes that address, among other things, requirements it has established on

behalf of its members for the promotion and advertising of Common Short Code programs. The CWTA also administers a Common Short Code registry on behalf of the industry, including the Defendant wireless companies. The CWTA has been influenced in its approach to Common Short Codes by the business interests of the Defendant wireless companies which have a combined market share of approximately 93% of the Canadian wireless market, and each of which is a member of and participates in the decisions of the Short Code Council.

14. Once the CWTA leases a Premium Short Code to a Content Provider / Aggregator, the Content Provider / Aggregator, alone or in conjunction with others, may use that code to deliver Premium Text Messaging and Rich Content Services and related charges to the customers of participating wireless companies. These charges appear on the invoice the customer receives from his or her wireless company. Wireless companies participating in Premium Short Codes enforce the payment of liabilities generated via these codes by billing their customers in respect of the Premium Text Messaging and Rich Content Services, and collecting the associated billings from their wireless customers.

THE DEFENDANTS' BUSINESS WITH JESTA AND MOBILE MESSENGER

15. Jesta Digital, LLC and Jesta Digital North America, Inc. and their related companies (collectively "**Jesta**") are Aggregators and/or Content Providers. Jesta is the successor to various companies, including Fox Mobile Distribution, Inc., and has at all material times carried on business in Canada from locations outside Canada.

16. Mobile Messenger North America, Inc., Mobile Messenger Americas, Inc. and their related companies (collectively "**Mobile Messenger**") are Aggregators and/or Content Providers. Mobile Messenger is the successor to various companies including Verisign, Inc. and m-Qube, Inc. Mobile Messenger has at all material times carried on business in Canada from locations outside Canada.

17. The Defendant wireless companies have each entered into agreements with Jesta and Mobile Messenger to arrange for Jesta and Mobile Messenger to provide and/or aggregate Premium Text Messaging and Rich Content Services. The Defendant wireless companies provide Jesta and Mobile Messenger with access to their respective networks and the necessary infrastructure to enable Jesta and Mobile Messenger to deliver digital content and to charge the Defendant wireless companies' customers.

18. Jesta and Mobile Messenger, in conjunction with the Defendant wireless companies, offer Premium Text Messaging and Rich Content Services to Canadians pursuant to these agreements. Under these arrangements, the Defendant wireless companies charge their customers for Jesta and Mobile Messenger Premium Short Codes by way of either text message or direct billing arrangements between Jesta and the Defendant wireless companies.

19. The agreements concluded between each of the Defendant wireless companies and Jesta and Mobile Messenger are revenue-sharing agreements that provide for the Defendant Wireless Companies to share the revenues

generated from Premium Text Messaging and Rich Content Services supplied by Jesta and Mobile Messenger.

20. The percentage of revenue retained by the Defendant wireless companies typically ranges between 27% and 60% of the monthly revenues generated from the Premium Text Messaging and Rich Content Services of Jesta / Mobile Messenger. Bell and Rogers also collect additional network-specific fees in respect of some Premium Short Code transactions.

21. But for the participation of the Defendants in these arrangements, the revenue from the Call-to-Action Representations would not be collected. The participation of the Defendants is integral to the making of Call-to-Action Representations and the collection of revenue from the Defendant wireless companies' customers.

22. Far from being passive conduits for the distribution of the Call-to-Action Representations, the Defendant wireless companies provide Jesta and Mobile Messenger with privileged access to their network and necessary infrastructure, and collect the revenues generated by the Call-to-Action Representations. The Defendants' business interests are then furthered by the Safeguarding Representations, which the Defendants make for the purpose of promoting the supply or use of Wireless Products and their business interests in receiving revenues from same. The entire model formulated, established and administered by the Defendants depends on the active participation of each Defendant and, in particular, the Defendant wireless companies.

FALSE OR MISLEADING CALL-TO-ACTION REPRESENTATIONS

23. The Defendants enable Jesta to promote Premium Text Messaging and Rich Content Services under the brand name "Jamster". Since at least 1 December 2010, the Defendants' Jesta Call-to-Action Representations have appeared and continue to appear in advertisements, including banner advertisements that are displayed during the operation of free applications on wireless communication devices. Selecting these advertisements takes consumers to Jesta's mobile Jamster website where consumers are invited to download the digital content being advertised.

24. The Defendants' Jesta Call-to-Action Representations are false or misleading in a material respect in that they convey the general impression that consumers are able to download and receive certain Premium Text Messaging and Rich Content Services, such as a ringtone, for free, when they are not. Rather, once a customer of the Defendant wireless company confirms he or she wants the purportedly free digital content offered, the customer is unknowingly subscribed and charged. Subsequently, the Defendant wireless company invoices its customer on the customer's monthly wireless bill, and collects the undisclosed charges.

25. The Defendants' Jesta Call-to-Action Representations are distributed widely to Canadians and appear in banner advertisements through some of the most popular free wireless applications, including, but not limited to, the "Angry Birds" game.

26. Similarly, the Defendants' integrated business model has enabled Mobile Messenger to advertise Premium Text Messaging and Rich Content Services. From at least December 2010 to April 2012, Mobile Messenger provided and/or aggregated Premium Text Messaging and Rich Content Services promoted through online advertising that conveyed the general impression that consumers were able to receive Premium Text Messaging and Rich Content Services, such as a chance to win a contest or prizes, or provide news, advice, alerts, trivia, quotations or horoscopes, without cost or for fees that were inadequately disclosed.

27. The Defendants' Mobile Messenger Call-to-Action Representations are false or misleading in a material respect in that consumers could not receive such information, services or advice without cost. Rather, once a customer of the Defendant wireless company responds to the Call-to-Action Representation, the customer is unknowingly subscribed and charged. Subsequently, the Defendant wireless company invoices their customer on the customers' monthly wireless bill and collects the inadequately disclosed charges.

28. The Defendants' Mobile Messenger Call-to-Action Representations were distributed widely online, including through pop-up advertisements and social media websites.

29. The Defendants facilitate the Call-to-Action Representations of Jesta and Mobile Messenger. Indeed, the Defendants are well aware of the effects on consumers of misleading advertising in the Premium Text Messaging and Rich

Content Services industry in Canada. The Defendant wireless companies have each received thousands of calls annually from their customers complaining about charges associated with Premium Short Codes. The Defendant wireless companies have refunded only a subset of complaining customers. Notwithstanding the above, the Defendant wireless companies continue to permit the same or similar Call-to-Action Representations to be made via their respective networks, and to profit from that activity.

30. The Commissioner pleads that the Defendants make the Call-to-Action Representations and relies on section 74.01 and subsection 52(1.2) of the Act.

FALSE OR MISLEADING SAFEGUARDING REPRESENTATIONS

31. For the purpose of promoting the supply or use of Wireless Products, Rogers makes the following representation to the public that is false or misleading in a material respect:

> "For protection against unsolicited and unwanted 'spam' text messages, send us a text message with the 10-digit wireless number of the spam message to 7726 (SPAM). We will credit your account $0.15 for each reported SPAM message and it's free to report SPAM. Premium messages (i.e. alerts, contests and promotions) that you have prompted will not be credited."

32. This representation appears on Roger's website, https://www.rogers.com.

33. The Rogers Safeguarding Representation conveys the general impression that it safeguards or protects consumers from receiving unwanted Premium Text Messaging and Rich Content Services and having to pay related charges. The representation is false or misleading in a material respect in that Rogers'

customers are not so safeguarded or protected; rather, Rogers actively facilitates such unauthorized charges, collects the charges from its customers and retains for itself a significant portion of the revenue derived from Premium Text Messaging and Rich Content Services.

34. For the purpose of promoting the supply or use of Wireless Products, Bell makes the following representation to the public that is false or misleading in a material respect:

> "As a Bell Mobility customer, your risk of receiving and having to pay for unwanted text messages (or spam) is very low because Bell Mobility does not give out customers' mobile numbers to any third-party sources unless we have prior consent from you. Furthermore, Bell Mobility employs rigorous spam filters.
>
> However, if you notice you've been charged for unsolicited messages, you can call 1 800 667-0123 or email us at mobilespam@bell.ca. We will review and remove any related text messaging charges that are invalid."

35. This representation appears on Bell's website, http://support.bell.ca.

36. The Bell Safeguarding Representation conveys the general impression that it safeguards or protects consumers from receiving unwanted Premium Text Messaging and Rich Content Services and having to pay related charges. The representation is false or misleading in a material respect in that Bell's customers are not so safeguarded or protected; rather, Bell actively facilitates such unauthorized charges, collects the charges from its customers and retains for itself a significant portion of the revenue derived from Premium Text Messaging and Rich Content Services.

37. The Bell Safeguarding Representation also conveys the general impression that the risk of its customers being charged for unwanted Premium Text Messaging and Rich Content Services is very low. Bell's Safeguarding Representation is false or misleading in a material respect in that the risk that Bell will charge a customer for unwanted Premium Text Messaging and Rich Content Services is not low; rather, Bell actively facilitates unauthorized charges, collects the charges from its customers and retains for itself a significant portion of the revenue derived from Premium Text Messaging and Rich Content Services.

38. For the purpose of promoting the supply or use of Wireless Products, TELUS makes the following representation to the public that is false or misleading in a material respect:

> "Spam free guarantee – TELUS maintains a stringent spam filter system and will continue to protect you against these unsolicited types of text messages. In case you do receive an unwanted message, we are pleased to offer our TELUS Spam Free Guarantee. Send any SPAM messages to 7726 with the word SPAM in the body and we will adjust your bill. No questions asked."

39. This representation appears on TELUS' website, http://www.telusmobility.com.

40. The TELUS Safeguarding Representation conveys the general impression that it safeguards or protects consumers from receiving unwanted Premium Text Messaging and Rich Content Services and having to pay related charges. The representation is false or misleading in a material respect in that TELUS' customers are not so safeguarded or protected; rather, TELUS actively facilitates

such unauthorized charges, collects the charges from its customers and retains for itself a significant portion of the revenue derived from Premium Text Messaging and Rich Content Services.

41. For the purpose of promoting the supply or use of Wireless Products, the CWTA makes the following representation to the public that is false or misleading in a material respect:

> "The wireless service provider members of the Canadian Wireless Telecommunications Association (CWTA) subscribe to a code of conduct to underscore our commitment to providing the highest standards of service and support to our customers. This Code ensures that our customers have the information they need to make informed purchasing decisions. It also safeguards their rights as customers and assures that their concerns are addressed."

42. This representation appears on the CTWA's website, http://www.cwta.ca.

43. The CWTA Safeguarding Representation conveys the general impression that users of wireless communications devices will not be billed unauthorized charges and will be safeguarded and protected. The representation is false or misleading in a material respect in that users of wireless communications devices are not so safeguarded; rather the CWTA, Rogers, Bell and TELUS actively facilitate unauthorized charges, collect the charges from their customers and retain a significant portion of the revenue derived from Premium Text Messaging and Rich Content Services. The CWTA code of conduct does not ensure, as represented, that consumers have the information they need to make informed purchasing decisions.

AGGRAVATING FACTORS

44. The aforesaid conduct is aggravated pursuant to Section 74.1(5) of the Act by:

(a) its national reach and the number of consumers who comprise the market for Wireless Products and Premium Text Messaging and Rich Content Services;

(b) the Call-to-Action Representations were and are made frequently and over an extended duration;

(c) the vulnerability of the persons affected by the conduct, including children, or otherwise vulnerable individuals because of disability, linguistic ability, or a lack of awareness of the underlying commercial arrangements between the Defendant wireless companies and Jesta and Mobile Messenger;

(d) self-correction in the relevant market is unlikely to adequately or at all remedy the conduct;

(e) the Defendant wireless companies collected and retained millions of dollars in gross revenue in accordance with the revenue-sharing agreements with Jesta and Mobile Messenger;

(f) the financial position of the Defendant wireless companies; and

(g) any other relevant factor.

45. The effect of the false or misleading representations on consumers is further exacerbated because the unauthorized charges for Premium Text Messaging and Rich Content Services often go undetected by consumers, who remain unaware, sometimes for months, that they have incurred these charges.

RELIEF SOUGHT

46. The Commissioner claims the relief set out in paragraph 1.

The Commissioner proposes that this action be tried in Ottawa.

DATED: 14 September 2012.

DEPARTMENT OF JUSTICE CANADA
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Attn: David R. Wingfield (LSUC: 28710D)
Derek Leschinsky (LSUC: 48095T)
Parul Shah (LSUC: 55667M)

Tel: (819) 994-7714
Fax: (819) 953-9267

Lawyers for the Commissioner of Competition

FORM 4C Courts of Justice Act – BACKSHEET (Rule 4.02(3))

12-55497

THE COMMISSIONER OF COMPETITION	AND	ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, AND THE CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION
Plaintiff		Defendants

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Ottawa

STATEMENT OF CLAIM

David Wingfield
Executive Director and Senior General Counsel
Industry Canada
Competition Bureau Legal Services
50 Victoria Street, Gatineau, QC K1A 0C9

Per: **David R. Wingfield (LSUC 28710D)**
Derek Leschinsky (LSUC 48095T)
P. Shah (LSUC 5567M)
Tel: (819) 953-3889
Fax: (819) 953-9267

Solicitors for the Plaintiff, The Commissioner of Competition

This is Exhibit C to the Affidavit of Magalie Marie Plouffe
sworn October 25, 2013

CITATION: The Commissioner of Competition and Rogers et al, 2013 ONSC 3224
COURT FILE NO.: 12-55497
DATE: 20130612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE COMMISSIONER OF COMPETITION Plaintiff	David R. Wingfield, Derek Leschinsky and Parul Shah for the Commissioner of Competition
– and –	
ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, and the CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION Defendants	Sean Campbell and Anita Banicevic for Rogers Communications Inc. Donald B. Houston for Bell Canada Christopher P. Naudie and Lauren Tomasich for TELUS Corporation William L. Vanveen, for Canadian Wireless Telecommunications Association
	ARGUED: April 23-25, 2013 (Ottawa)

HACKLAND R.S.J.

REASONS FOR DECISION

[1] The defendants seek an order requiring the plaintiff, the Commissioner of Competition (the Commissioner), to provide particulars of the allegations contained in the Commissioner's Statement of Claim.

[2] The defendants TELUS, Rogers and Bell are companies engaged in the business of providing wireless services and products to the public, including text messaging services. The

other defendant, the Canadian Wireless Telecommunications Association (CWTA) is an industry association that represents wireless service providers, including the named defendants.

[3] In the Statement of Claim, the Commissioner alleges that each of the defendants has engaged in anti-competitive conduct contrary to paragraph 74.01(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34 as amended (the "*Act*"). In particular, the Commissioner alleges that the defendants "made" or "permitted" misleading representations to the public, and the Commissioner identified two categories of misleading representations:

> (i) The defendants make and permit to be made false and misleading representations to the public online and via wireless networks for the purpose of promoting the supply and use of Premium Text Messaging and Rich Content Services (the "Call-to-Action Representations") (para. 8(a) of the Claim); and
>
> (ii) The defendants make false or misleading representations to the public, that consumers are safeguarded or protected from having to pay unauthorized charges for Premium Text Messaging and Rich Content Services for the purpose of promoting the supply or use of Wireless Productions (the "Safeguarding Representations") (para. 8(b) of the Claim).

[4] By way of factual background, I quote the following paragraphs from the defendants' Notice of Motion:

> (d) Within the wireless industry, a number of third parties have independently developed their own services, content and applications for users of wireless services. These third parties are known as "Content Providers" and "Aggregators". These third parties develop, promote and offer a range of text messaging services and programs to consumers of wireless services, including but not limited to mobile games, voting applications, alerts, trivia contests, ringtones, electronic wallpaper and other content and application services. Given that the content associated with such text messaging

is typically more expensive relative to standard text messages, these services are commonly referred to as "Premium Text Message Programs";

(e) The Premium Text Message Programs that are at issue in these proceedings are ones that are purchased using what are known as "Common Short Codes" (namely, five or six digit codes that are leased from the CWTA by Content Providers or Aggregators). Typically, Content Providers or Aggregators will lease a Common Short Code from the CWTA to allow subscribers of more than one Wireless Service Provider to use the same five or six-digit code to sign up for Premium Text Message Programs, once the Wireless Service Providers have activated the Common Short Code. For example, if an Aggregator leases the Common Short Code "12345", the Aggregator can advertise the same sign-up procedure to all customers of the Wireless Service Providers who have agreed to carry Common Short Code 12345 (e.g., "Text Sign-up" to the number "12345" to sign up for the Premium Text Program);

(f) The Content Providers and Aggregators promote the sale of Premium Text Message Programs through a variety of mediums including the use of banners and/or advertisements that are accessible on the Internet or banners and/or advertisements appearing in certain third-party mobile applications (such as games) and television commercials. In order to access Premium Text Message Programs, a consumer must specifically "click through" such banners and/or advertisements. Such banners and advertisements are commonly referred to as "Call-to-Action" promotions, as they are intended to encourage consumers to sign up for, or purchase, a Premium Text Message Program;

[5] The defendants complain that beyond the general description of these two broad categories of statements ("Call-to-Action Representations" and "Safeguarding Representations"), the Commissioner did not identify the specific Call-to-Action Representations and Safeguarding Representations that are said to constitute misleading consumer representations. The defendants' position is that further particulars of the alleged misrepresentations which are the subject of the

claim are required in order to allow them to prepare their statements of defence and properly defend the action.

[6] The defendants delivered lengthy demands for particulars. By way of response, the Commissioner provided "screen shot" examples of 61 Call-to-Action Representations made or communicated by 2 content providers. The content providers are not parties to this action. The defendants complain that in the particulars provided, the Commissioner did not provide any other particulars as to how, when or where these statements or representations were made, including: the date of each alleged representation, the name of the mobile application in which the alleged misrepresentation appeared, and whether the mobile application, and thus, the alleged misrepresentation, was accessible on a wireless device operating on any of the defendants' networks.

Position of the Defendants

[7] The defendants submit that they need to know the specific alleged misrepresentations that are the subject of the Commissioner's complaint in this proceeding, as well as, at a bare minimum, the basic details relating to the time, place, content and forum of the alleged misrepresentations, and the associated Common Short Code with respect to each alleged misrepresentation, so that each of the Defendants can investigate the alleged misrepresentation and assess their response to the Commissioner's allegations.

[8] The defendants TELUS, Rogers and Bell point out that they each provide wireless services to millions of consumers who may choose to access any one of the hundreds of thousands of different mobile applications that are available or visit any one of the millions of web pages available on any given day. It would seem to be common ground that there were and are at present a very large number of Call-to-Action Representations running on some 350 short codes. The defendants assert that they cannot identify "all of" the specific representations that the Commissioner intends to pursue in this proceeding. In argument counsel suggested that they are being required to search out "a needle in a haystack".

Position of the Commissioner

[9] The Commissioner argues that the defendants' claims that they need the particulars of each representation are disingenuous and are an attempt to narrow the inquiry into the defendants' conduct, to discrete misrepresentations with the purpose of precluding the Commissioner from addressing the entirety of the defendants' deceptive marketing practices. They say the Commissioner's objective, as contemplated by the legislation, is to remedy the harm caused by the deceptive marketing practices for the benefit of the public at large. To that end, the Commissioner intends to seek a remedy (and to pursue) discovery with respect to the conduct in issue and not merely to canvass a discrete set of misrepresentations. The Commissioner also argues that the defendants are in essence seeking evidence and the information sought should be the subject of examination for discovery.

[10] The Commissioner submits that the defendants select the digital content they wish to offer to consumers, in relation to premium text messaging, and to that end they enter into contracts with content providers who create or make the digital content available. The defendants evaluate and then select the digital content they wish to distribute to their customers and they charge their customers for this content by using the short code system. Through this system, the defendant wireless companies engage in their business of selling premium text messages. This is a lucrative business in which the defendants Bell, Rogers and TELUS keep between 27% and 60% of the gross revenue they collect (usually via the monthly billing statement) from their customers from premium text message charges.

[11] The documentation reveals, according to the Commissioner, that the CWTA also receives millions in revenues from overseeing and controlling the short code system. The Commissioner alleges that defendants are in a position to control the misleading representations which they make to the public. Furthermore, the Commissioner alleges that the defendants have the means to track each customer complaint to a specific short code and thereby to stop or at least investigate the misrepresentations. In short, the Commissioner alleges that there is a close working relationship between the defendant wireless companies and certain content providers to put out digital Call-to-Action Representations which they know to be false and they (the

defendant wireless companies and the content providers) then share the revenues collected through the billing process utilized by the defendants to their customers.

Analysis

[12] Each of the defendant wireless companies filed an affidavit of a senior executive deposing that the respective companies require the Commissioner to identify the specific representations which are relied on and these affidavits also at least imply that the companies are not aware of the particulars or the scope of any significant problems with respect to the misleading consumer representations in question. Counsel for the Commissioner cross-examined on these affidavits with a view to determining or obtaining admissions about what the defendants knew about these representations and with a view to exploring the relationship between the defendants and the content providers, in order to establish that the particulars sought were not required for pleading and were within the defendants' knowledge or ability to identify and investigate.

[13] On my review of the transcripts, excerpts of which were filed in evidence, the efforts of the Commissioner's counsel to pursue legitimate cross-examination were significantly and inappropriately objected to. The objections were not that the questions were irrelevant, but that they were the proper subject matter for discovery. I would observe that an exploration of the evidence is indeed a proper subject for discovery, but evidence going to the defendants' knowledge or potential knowledge about their premium text messaging business and the consumer complaints directed to the companies concerning this business, is relevant to the companies alleged need for the specifics of the misleading consumer representations, in order to plead. Objections which unduly limit a proper inquiry into the moving parties genuine need for particulars in order to plead, serves to undermine the proposition that such particulars are needed.

[14] In my view, the Commissioner's Statement of Claim adequately describes the activity which gives rise to the misleading misrepresentations in such a way that the defendants are well able to respond. The so-called Safeguarding Representations are clearly spelled out and the necessary particulars are provided in the Statement of Claim. As for the more contentious "Call-to-Action Representations", which are apparently the essence of the Commissioner's

action, and of this motion for particulars, these number apparently in the hundreds or perhaps thousands and are properly characterized as evidence. As evidence they are the proper subject of discovery but are not required for the purposes of pleading.

[15] The court is not at this stage in a position to sort out the remarkably conflicting factual submissions from counsel on the subject of what knowledge and information the defendants have concerning their premium text messaging business and the misrepresentations to the public that have apparently become a significant problem, generating huge volumes of complaints from the defendants' customers. In essence, the Commissioner says the defendants are well aware of the nature and scope of the problem, have significant information about the problem and have deliberately avoided doing anything about it because the business is highly lucrative for them. Defendants' counsel deny this on behalf of their clients.

[16] In my opinion what is required in the present circumstances are examinations for discovery relating to all aspects of the allegedly misleading Call-to-Action Representations in the defendants premium text messaging business. I agree that the discoveries should not simply consist of a review of a discrete number of allegedly misleading consumer representations. The Commissioner is entitled to explore whether these alleged misrepresentations are generically the product of a close business or working relationship between the defendant wireless companies and the content providers who create the products in question and who, the Commissioner argues, are in effect partners with the defendant wireless companies in the premium text messaging business.

[17] It is well settled that an important function of particulars to a Statement of Claim is to define the claim sufficiently to all a defendant to respond intelligently to it. I respectfully adopt these observations from the judgment of Perell J. in *Brigaitis v. IQT Ltd. (c.o.b. IQT Solutions),* 2012 ONSC 6584:

> 37 An order for particulars is a discretionary order, and the court must be satisfied that the order is just in the circumstances of each case: *Fairbairn v. Sage, supra* at p. 471; *Obonsawin v. Canada,* [2001] O.J. No. 369 (S.C.J.) at para. 42; *Reichmann v. Koplowitz,* 2012 ONSC 5063 at para. 11(Master). Particulars for pleadings are normally ordered only if: (a) they are not within the knowledge

> of the party demanding them; and (b) they are necessary to enable the other party to plead his or her response: *Fairbairn v. Sage, supra; Physicians' Services Inc. v. Cass, supra.*
>
> **38** The ability to plead is the focus of the need for particulars, and particulars will be refused if the demand for particulars is being used instead as a way to discover evidence before the examinations for discovery: *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (S.C.J.) at para. 23. As evidence is not to be pleaded; it is not to be ordered by way of particulars: *Caputo v. Imperial Tobacco Ltd.*, [1996] O.J. No. 1396 at para. 8 (Master).

[18] It has been observed that: "Broadly speaking, particulars are to explain what one party is going to try to prove against the other: how a party intends to prove his or her case is a matter of evidence", see *Premakurran v. Canada*, 2003 F.C.T. 635 at para. 9.

[19] The Commissioner has indicated in its response to the defendants' demand for particulars that certain of the Call-to-Action Representations referred to in specified paragraphs of the Statement of Claim are those created by one of the content providers "Jesta" and in other specified paragraphs, those created by "Mobile Messenger". With respect to most of the demands for particulars, the Commissioner has pleaded:

> To the extent these demands request detail beyond that which is pleaded, they are requests for evidence, including evidence within the knowledge of the defendants.

[20] As stated above, I am persuaded that the defendants are indeed, for the most part, seeking particulars that are properly viewed as evidence and indeed evidence of facts and data, procedures and relationships that are apparently within their own knowledge.

[21] The issues raised in this motion are similar to those discussed in the recent decision of Rennie J. sitting on the Canada Competition Tribunal in *Canada (Commissioner of Competition) v. Reliance Comfort Ltd. Partnership,* [2013] C.C.T.D. No. 4 (Comp. Trib. 4). In that case the defendant sought an order requiring the Commissioner to amend the application to more clearly define the geographic and product markets at issue as well as the exact conduct that was alleged to constitute the alleged anti-competitive acts. Alternatively, the defendants sought an order requiring the Commissioner to provide further and better particulars. As in the present case, the Commissioner argued that the defendant was seeking, through its demand for particulars, to limit

artificially and at an early stage of the case, the Commissioner's case against it. The defendant sought particulars concerning the Commissioner's definition of geographic market including details of which cities, towns or regions formed part of the relevant market. Rennie J. held at paragraph 48:

> I find it difficult to conceive that Reliance cannot identify the local markets within Ontario where Union Gas Ltd. supplies natural gas and the local rural markets in Ontario that are not supplied natural gas. Further, Reliance has failed to establish, through proper evidence, why these particulars were not within its knowledge and were necessary to reply intelligently to the Application. No affidavit was filed by an officer of the corporation detailing the limitations of its knowledge in respect of these matters. While such evidence is not determinative of the outcome, its absence, in this context, is sufficient.

[22] I note that the judgment of Rennie J. in the *Reliance Comfort* case was recently upheld by the Federal Court of Appeal (May 14, 2013), in which Noel J.A. observed at paragraphs [8] and [9]:

> [8] Rennie J. also held that these open-ended pleadings did not entitle the respondent to further and better particulars. He did so because he was satisfied that whether additional items should be included as a result of these open-ended pleadings is a matter within the knowledge of the appellant. Thus, the open-ended terminology does not prevent the appellant from knowing the case it has to meet (reasons, para. 46).
>
> [9] Given the limited evidence filed by the respondent in support of its motion for particulars, we can detect no error in this reasoning. The issue on a motion for particulars is whether the particulars are necessary for the purpose of allowing the other party to respond, and it was open to the Federal Court judge to hold that the appellant knows the case to which it must respond.

[23] As the *Reliance Comfort* decision illustrates, a motion judge has a considerable discretion in deciding whether to order particulars and this is dependent on the defendant satisfying the court that it lacks the essential information required to plead. In circumstances where the defendants have sufficient information or, in any event, have failed to satisfy the court that they lack sufficient information, or have obstructed a proper inquiry by way of cross-examination on that issue, the court is entitled to exercise its discretion to refuse to order particulars.

[24] The defendants rely on Rule 25.06 (8) of the *Rules of Civil Procedure* which requires that when fraud or misrepresentation are pleaded, "the pleading shall contain full particulars..." and they argue that this applies to any civil action in the Ontario courts including consumer protection statutes such as the deceptive marketing provisions under Part VII of the *Competition Act*. The defendants state that to the extent that the Commissioner has pleaded the existence of a misrepresentation under section 74.01(1)(a) for the purpose of his enforcement proceeding against TELUS, Bell, Rogers and the CWTA, the Commissioner is subject to the ordinary pleadings rules of the Ontario Superior Court. More specifically, the Commissioner is required to deliver basic particulars regarding the identity of the misrepresentation at issue, including "when, where, how, by whom and to whom it was made".

[25] While I accept the foregoing submissions in general terms, in a proceeding such as this which is focused on allegedly widespread and numerous false or misleading representations to the public, possibly numbering in the hundreds or more, the "full particulars" required need not include the details of each and every misrepresentation. Instead what is required is a full description of the alleged deceptive marketing practice. The details of each representation are more properly characterized as evidence. This is particularly so when the details of the alleged practices relate to the operation of the defendants' businesses, a matter which common sense would dictate is within the knowledge of those directing the operation of the businesses and their trade association (the CWTA).

[26] In summary, the defendants have not persuaded the court that the particulars sought are necessary to allow them to prepare their respective Statements of Defence, or that such particulars are not within their knowledge or ability to investigate. Accordingly the motion for particulars is dismissed.

[27] In concluding I would note that in the course of argument, counsel for the Commissioner advised the court that he had agreed with counsel for the defendants to specify in writing the exact time period within which the alleged misrepresentations occurred and the calculation of the monetary amounts sought against each defendant in the prayer for relief. Counsel also agreed to

attempt a resolution of the issue of the need for a sealing order for certain of the commercially sensitive documentation filed in the court record.

[28] The court's ruling on this motion does not of course preclude the parties from seeking further direction on disclosure issues if the information made available on discovery or pursuant to proper requests for undertakings, does not allow the defendants to fully appreciate the case they have to meet at trial.

[29] If the plaintiff is seeking costs of this motion, the court will require a written submission within 14 days of the release of these reasons and the defendants are to reply within 14 days of receiving the plaintiff's submissions.

"Hackland, R.S.J."

Mr. Justice Charles T. Hackland

Released: June 12, 2013

CITATION: The Commissioner of Competition and Rogers et al, 2013 ONSC 3224
COURT FILE NO.: 12-55497
DATE: 20130612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Plaintiff

– and –

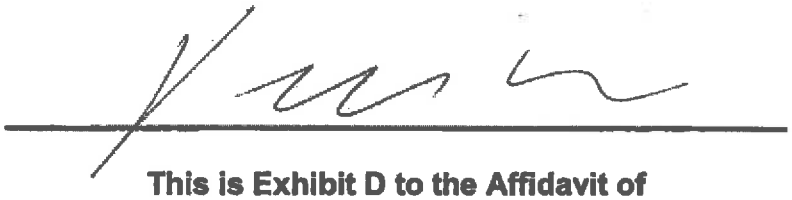
ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, and the CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION

Defendants

REASONS FOR DECISION

HACKLAND R.S.J.

Released: June 12, 2013



This is Exhibit D to the Affidavit of
Magalie Marie Plouffe
sworn October 25, 2013

CIVIL INVESTIGATIVE DEMAND

1. TO
Aegis Mobile, LLC
c/o John Brunner
6518 Meadowridge Road
Suite 124
Columbia MD, 21075

2. FROM
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This demand is issued pursuant to Sections 6(j) and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46(j), 57b-1, in connection with a request for investigative assistance by a foreign law enforcement agency conducting an investigation or engaged in enforcement proceedings involving possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices substantially similar to those prohibited by laws administered by the Commission, other than federal antitrust laws.

3. ACTION REQUIRED

☐ You are required to appear and testify.

LOCATION OF HEARING	YOUR APPEARANCE WILL BE BEFORE
	DATE AND TIME OF HEARING OR DEPOSITION

☒ You are required to produce all documents described in the attached schedule that are in your possession custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

☐ You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME MATERIALS MUST BE AVAILABLE
SEP 2 3 2013

4. SUBJECT OF INVESTIGATION
See Attached Resolutions

5. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	6. COMMISSION COUNSEL
Duane Pozza / Patrick Eagan-Van Meter 601 New Jersey Avenue, NW NJ-3158 Washington, DC 20001	Guilherme Roschke -- Federal Trade Commission 600 Pennsylvania Ave NW Washington, DC 20580 202-326-3877

DATE ISSUED	COMMISSIONER'S SIGNATURE
8/29/13	Julie Brill

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documentary material or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action. The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCRulesofPractice. Paper copies are available upon request.

FTC Form 145 (rev. 12/2009)

Form of Certificate of Compliance*

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature: _____

Title: _____

Sworn to before me this day

_____ _____

_____
Notary Public

_____

*In the event that more than one person is responsible for submitting documents responsive to this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN NON-PUBLIC INVESTIGATION OF TELEPHONE-BILLED SERVICES, AUDIOTEXT SERVICES, VIDEOTEXT SERVICES AND MOBILE TELEPHONE-BILLED SERVICES

File 052 3139

Nature and Scope of Investigation:

To determine whether unnamed persons, partnerships, corporations, and others engaged in the advertising, promotion, operation, offering for sale, or sale of telephone-billed services, audiotext services, videotext services, mobile telephone-billed services, or billing or collection for such services, have been or are engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or the Commission's Trade Regulation Rule pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50 and 57b-1, as amended; FTC Procedures and Rules of Practices, 16 C.F.R. Part 1.1 et seq. and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: August 10, 2010

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS TO PROVIDE INVESTIGATIVE ASSISTANCE TO CANADIAN LAW ENFORCEMENT AGENCIES

File No. 112-3026

Nature and Scope of Investigative Assistance:

To provide investigative assistance at the request of any of the following Canadian Law Enforcement agencies: the Competition Bureau Canada, the Royal Canadian Mounted Police, the Canadian Radio-Television and Communications Commission, the Office of the Privacy Commissioner, and any member agencies of the Toronto Strategic Partnership, the Alberta Partnership, the Vancouver Strategic Alliance, the Atlantic Partnership, Project COLT, and Project Emptor in determining whether unnamed persons, partnerships, corporations, or others have or are engaged in violations of Canadian laws prohibiting fraudulent or deceptive commercial practices or other practices substantially similar to practices prohibited by any provision of the laws administered by the Federal Trade Commission, other than federal antitrust laws.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with requests for investigative assistance by any of the designated Canadian law enforcement agencies for a period not to exceed three years from the date of issuance of this resolution. The expiration of this three-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the three-year period. The Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the three-year period.

This resolution authorizes the use of compulsory process in connection with requests for investigative assistance by the designated Canadian law enforcement agencies in any subject matter area that falls within any Commission resolution authorizing the use of compulsory process in Commission investigations, other than investigations with respect to the federal antitrust laws. A copy of this resolution and the applicable subject matter resolution shall be attached to any compulsory process issued pursuant to this resolution.

Authority:

Sections 6(j), 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46(j), 49, 50, 57b-l; FTC Procedures and Rules of Practice, 16 C.F.R. §1.1 et seq., and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: December 28, 2010

CIVIL INVESTIGATIVE DEMAND
SCHEDULE FOR PRODUCTION OF DOCUMENTS

I. DEFINITIONS

As used in this Civil Investigative Demand, the following definitions shall apply:

A. **"And,"** as well as **"or,"** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.

B. **"Any"** shall be construed to include **"all,"** and **"all"** shall be construed to include the word **"any."**

C. **"CID"** shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.

D. **"Company"** shall mean **Aegis Mobile, LLC**, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

E. **"Document"** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **"Document" shall also include all documents, materials, and information, including Electronically Stored Information, within the meaning of the Federal Rules of Civil Procedure.**

F. **"Each"** shall be construed to include **"every,"** and **"every"** shall be construed to include **"each."**

G. **"Electronically Stored Information" or "ESI"** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks;

computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

H. **"FTC" or "Commission"** shall mean the Federal Trade Commission.

I. **"Identify" or "the identity of"** shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.

J. **"Referring to" or "relating to"** shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting on, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

K. **"You" and "your"** shall mean the person or entity to whom this CID is issued and includes the "Company."

II. INSTRUCTIONS

A. **Confidentiality:** This CID relates to an official, nonpublic, law enforcement investigation currently being conducted by the Federal Trade Commission. You are requested not to disclose the existence of this CID until you have been notified that the investigation has been completed. Premature disclosure could impede the Commission's investigation and interfere with its enforcement of the law.

B. **Meet and Confer:** You must contact **Guilherme Roschke at 202-326-3677** as soon as possible to schedule a meeting (telephonic or in person) to be held within fourteen (14) days after receipt of this CID, or before the deadline for filing a petition to quash, whichever is first, in order to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted, and the submission of ESI and other electronic productions as described in these Instructions. Pursuant to 16 C.F.R. § 2.7(k), you must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with this CID, including but not limited to personnel with knowledge about your information or records management systems, relevant materials such as organizational charts, and samples of material required to be produced. If any issues relate to ESI, you must make available a person familiar with your ESI systems and methods of retrieval.

C. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from **July 1, 2011 until the date of full and complete compliance with this CID.**

D. **Claims of Privilege:** If any material called for by this CID is withheld based on a claim of privilege, work product protection, or statutory exemption, or any similar claim (*see* 16 C.F.R.

§ 2.7(a)(4)), the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Submit the log in a searchable electronic format, and, for each document, including attachments, provide:

1. Document control number(s);

2. The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);

3. A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

4. The date the material was created;

5. The date the material was sent to each recipient (if different from the date the material was created);

6. The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

7. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;

8. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

9. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

10. The factual basis supporting the claim that the material is protected; and

11. Any other pertinent information necessary to support the assertion of protected status by operation of law.

16 C.F.R. § 2.11(a)(1)(i)-(xi).

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction D.6. 16 C.F.R. § 2.11(a)(2). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest to the log. 16 C.F.R. § 2.11(a)(1).

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. Otherwise, produce all responsive information and material without redaction. 16 C.F.R. § 2.11(c). The failure to provide information sufficient to support a claim of protected status may result in denial of the claim. 16 C.F.R. § 2.11(a)(1).

E. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. *See* 15 U.S.C. § 50; *see also* 18 U.S.C. §§ 1505, 1519.

F. **Petitions to Limit or Quash:** Any petition to limit or quash this CID must be filed with the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.10(a)(1). Such petition shall not exceed 5,000 words as set forth in 16 C.F.R. § 2.10(a)(1) and must include the signed separate statement of counsel required by 16 C.F.R. § 2.10(a)(2). **The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process. 16 C.F.R. § 2.7(k); *see also* § 2.11(b).**

G. **Modification of Specifications:** If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with **Guilherme Roschke at 202-326-3677.** All such modifications must be agreed to in writing by the Bureau Director, or a Deputy Bureau Director, Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(l).

H. **Certification:** A responsible corporate officer shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.

I. **Scope of Search:** This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.

J. **Document Production:** You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to

Duane Pozza
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, D.C. 20001.

Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by email or telephone to Guilherme Roschke, groschke@ftc.gov, 202-326-3677 at least five days prior to the return date.

K. **Document Identification:** Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

L. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this CID. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request. Copies of marketing materials and advertisements shall be produced in color, and copies of other materials shall be produced in color if necessary to interpret them or render them intelligible.

M. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information ("ESI") or digitally imaged hard copy documents. Before submitting any electronic production, You must confirm with the Commission counsel named above that the proposed formats and media types will be acceptable to the Commission.

(1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:

(a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

(b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (OCR) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (TIFF) or as color JPEG images (where color is necessary to interpret the contents);

(c) Each electronic file should be assigned a unique document identifier ("DocID") or Bates reference.

(2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

(a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and

(b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and

(c) Documents shall be produced in color where necessary to interpret them or render them intelligible;

(3) For each document electronically submitted to the FTC, You should include the following metadata fields in a standard ASCII delimited file:

(a) **For electronic mail:** begin Bates or unique document identification number ("DocID"), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and

complete attachment identification, including the Bates or DocID of the attachments (AttachIDs) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;

(b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

(c) **For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.):** begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

(d) **For imaged hard copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.

(4) If You intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in Your computer systems or electronic storage media, or if Your computer systems contain or utilize such software, You must contact the Commission counsel named above to determine whether and in what manner You may use such software or services when producing materials in response to this Request.

(5) Submit electronic productions as follows:

(a) With passwords or other document-level encryption removed or otherwise provided to the FTC;

(b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;

(c) All electronic media shall be scanned for and free of viruses;

(d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC.

(e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.

(6) All electronic files and images shall be accompanied by a production transmittal letter which includes:

(a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and

(b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine- readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

A Bureau of Consumer Protection Production Guide is available upon request from the Commission counsel named above. This guide provides detailed directions on how to fully comply with this instruction.

N. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact us before sending those materials to discuss ways to protect such information during production If that information will not be redacted, contact us to discuss encrypting any electronic copies of such material with encryption software such as SecureZip and provide the encryption key in a separate communication.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth; Social Security number; driver's license number or other state identification number or a foreign country equivalent; passport number; financial account number; credit card number; or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

O. **Certification of Records of Regularly Conducted Activity:** Attached is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena the Company to testify at future proceedings in order to establish the admissibility of documents produced in response to this CID. You are asked to execute this Certification and provide it with your response.

NOTE: This CID is issued in conformance with Sections 2702 and 2703 of Title 18 of the United States Code (the Electronic Communications Privacy Act). To the extent you are a provider of electronic communication service or remote computing service, your response to this CID should not divulge a record or information pertaining to a subscriber or customer of your electronic communication service or remote computing service, other than that allowed pursuant to 18 U.S.C. § 2703(c)(2). If you have any questions, please contact FTC staff attorney **Guilherme Roschke at 202-326-3577** before providing responsive information.

III. SPECIFICATIONS

Produce all Documents and Electronically Stored Information relating to

The Canadian Wireless Telecommunications Association ("CWTA");
Bell Canada;
Rogers Communications Inc.; and
TELUS Corporation
(Collectively, the **"Canadian Companies"**)

from **July 1, 2011 to the present**, including Documents and Electronic Stored Information that

(a) relate to the Company's dealings with and work for or/and on behalf of any of the Canadian Companies, including:
   a. Documents and Electronically Stored Information relating to actual, proposed or potential monitoring and compliance activities for or/and on behalf of any of the Canadian Companies, including captures of representations promoting premium text messages and rich content;
   b. communications between the Company and any other person or entity regarding the Company's dealings with and work for or/and on behalf of any of the Canadian Companies, including communications between the Company and content providers, aggregators, and the Canadian Companies; and
   c. Documents and Electronically Stored Information the Company relied upon in performing work for any of the Canadian Companies; and

(b) discuss the marketing of premium text messages and rich content in Canada, including Documents and Electronically Stored Information that:
   a. compare the marketing practices in Canada to marketing practices in any other country; and
   b. compare the Canadian Companies to any other telecommunication company, or any other company or association that performs a similar role to the CWTA.

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY
Pursuant to 28 U.S.C. § 1746

1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:

2. I have authority to certify the authenticity of the records produced by AEGIS MOBILE, LLC and attached hereto.

3. The documents produced and attached hereto by AEGIS MOBILE, LLC are originals or true copies of records of regularly conducted activity that:

   a) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

   b) Were kept in the course of the regularly conducted activity of AEGIS MOBILE, LLC; and

   c) Were made by the regularly conducted activity as a regular practice of AEGIS MOBILE, LLC.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2013.

_____
Signature

This is Exhibit E to the Affidavit of
Magalie Marie Plouffe
sworn October 25, 2013

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to October 1, 2013

À jour au 1 octobre 2013

Last amended on March 12, 2010

Dernière modification le 12 mars 2010

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to October 1, 2013. The last amendments came into force on March 12, 2010. Any amendments that were not in force as of October 1, 2013 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 1 octobre 2013. Les dernières modifications sont entrées en vigueur le 12 mars 2010. Toutes modifications qui n'étaient pas en vigueur au 1 octobre 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

that person or cause that person to be informed as to the progress of the inquiry.

ticle 9, le commissaire instruit ou fait instruire cette personne de l'état du déroulement de l'enquête.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

(3) Les enquêtes visées au présent article sont conduites en privé.

Enquêtes en privé

R.S., 1985, c. C-34, s. 10; R.S., 1985, c. 19 (2nd Supp.), s. 23; 1999, c. 2, ss. 7, 37, c. 31, s. 45.

L.R. (1985), ch. C-34, art. 10; L.R. (1985), ch. 19 (2e suppl.), art. 23; 1999, ch. 2, art. 7 et 37, ch. 31, art. 45.

Order for oral examination, production or written return

11. (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

(*a*) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;

(*b*) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(*c*) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Ordonnance exigeant une déposition orale ou une déclaration écrite

11. (1) Sur demande *ex parte* du commissaire ou de son représentant autorisé, un juge d'une cour supérieure ou d'une cour de comté peut, lorsqu'il est convaincu d'après une dénonciation faite sous serment ou affirmation solennelle qu'une enquête est menée en application de l'article 10 et qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question, ordonner à cette personne :

a) de comparaître, selon ce que prévoit l'ordonnance de sorte que, sous serment ou affirmation solennelle, elle puisse, concernant toute question pertinente à l'enquête, être interrogée par le commissaire ou son représentant autorisé devant une personne désignée dans l'ordonnance et qui, pour l'application du présent article et des articles 12 à 14, est appelée « fonctionnaire d'instruction »;

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l'ordonnance fait mention;

c) de préparer et de donner au commissaire ou à son représentant autorisé, dans le délai que prévoit l'ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l'ordonnance.

Records in possession of affiliate

(2) Where the person against whom an order is sought under paragraph (1)(*b*) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

Documents en possession d'une affiliée

(2) Lorsque, en rapport avec une enquête, la personne contre qui une ordonnance est demandée en application de l'alinéa (1)*b*) est une personne morale et que le juge à qui la demande est faite aux termes du paragraphe (1) est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'une affiliée de cette personne morale a des documents qui sont pertinents à l'enquête, il peut, sans égard au fait que l'affiliée soit située au Canada ou ailleurs, ordonner à la personne morale de produire les documents en question.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(*a*), or return made by an individual pursuant to an order made under paragraph (1)(*c*), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

Nul n'est dispensé de se conformer à l'ordonnance

(3) Nul n'est dispensé de se conformer à une ordonnance visée au paragraphe (1) ou (2) au motif que le témoignage oral, le document, l'autre chose ou la déclaration qu'on exige de lui peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais un témoignage oral qu'un individu a rendu conformément à une ordonnance prononcée en application de l'alinéa (1)*a*) ou une déclaration qu'il a faite en conformité avec une ordonnance prononcée en application de l'alinéa (1)*c*) ne peut être utilisé ou admis contre celui-ci dans le cadre de poursuites criminelles intentées contre lui par la suite sauf en ce qui concerne une poursuite prévue à l'article 132 ou 136 du *Code criminel*.

Effect of order

(4) An order made under this section has effect anywhere in Canada.

R.S., 1985, c. C-34, s. 11; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 8, s. 126, c. 16, s. 1.

Effet de l'ordonnance

(4) Une ordonnance rendue en application du présent article a effet partout au Canada.

L.R. (1985), ch. C-34, art. 11; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 8, art. 126, ch. 16, art. 1.

Witness competent and compellable

12. (1) Any person summoned to attend pursuant to paragraph 11(1)(*a*) is competent and may be compelled to give evidence.

Personnes habiles à rendre témoignage

12. (1) Toute personne assignée sous le régime de l'alinéa 11(1)*a*) est habile à agir comme témoin et peut être contrainte à rendre témoignage.

Fees

(2) Every person summoned to attend pursuant to paragraph 11(1)(*a*) is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which the person is summoned to attend.

Honoraires

(2) Toute personne assignée aux fins de l'alinéa 11(1)*a*) a droit aux mêmes honoraires et allocations pour ce faire que si elle avait été assignée à comparaître devant une cour supérieure de la province où elle doit comparaître aux termes de l'assignation.

Representation by counsel

(3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(*a*) and any person whose conduct is being inquired into to be represented by counsel.

Représentation par avocat

(3) Un fonctionnaire d'instruction doit permettre que soit représentée par avocat toute personne interrogée aux termes d'une ordonnance rendue en application de l'alinéa 11(1)*a*) de même que toute personne dont la conduite fait l'objet d'une enquête.

Attendance of person whose conduct is being inquired into

(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(*a*) and that person's counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would

(*a*) be prejudicial to the effective conduct of the examination or the inquiry; or

Présence de la personne dont la conduite fait l'objet d'une enquête lors des interrogatoires

(4) La personne dont la conduite fait l'objet d'une enquête lors d'un interrogatoire prévu à l'alinéa 11(1)*a*) et son avocat peuvent assister à cet interrogatoire à moins que le commissaire, le représentant autorisé de ce dernier, la personne interrogée ou l'employeur de cette dernière ne convainque le fonctionnaire d'instruction que la présence de la personne dont la conduite fait l'objet d'une enquête :

a) entraverait le bon déroulement de l'interrogatoire ou de l'enquête;

b) entraînerait la divulgation de renseignements de nature commerciale confidentiels

(*b*) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.

R.S., 1985, c. C-34, s. 12; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

se rapportant à l'entreprise de la personne interrogée ou de son employeur.

L.R. (1985), ch. C-34, art. 12; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37.

Presiding officer

13. (1) Any person may be designated as a presiding officer who is a barrister or advocate of at least ten years standing at the bar of a province or who has been a barrister or advocate at the bar of a province for at least ten years.

13. (1) Peut être nommé fonctionnaire d'instruction quiconque est membre en règle du barreau d'une province depuis au moins dix ans ou l'a été pendant au moins dix ans.

Fonctionnaire d'instruction

Remuneration and expenses

(2) A presiding officer shall be paid such remuneration, and is entitled to be paid such travel and living expenses, and such other expenses, incurred in the performance of his duties under this Act, as may be fixed by the Governor in Council.

R.S., 1985, c. C-34, s. 13; R.S., 1985, c. 19 (2nd Supp.), s. 24.

(2) Les fonctionnaires d'instruction reçoivent la rémunération que fixe le gouverneur en conseil et ils sont, également selon ce que fixe ce dernier, indemnisés des frais, notamment de séjour et de déplacement, qu'ils engagent dans l'exercice des fonctions qui leur sont confiées en application de la présente loi.

L.R. (1985), ch. C-34, art. 13; L.R. (1985), ch. 19 (2e suppl.), art. 24.

Rémunération et frais de déplacement

Administration of oaths

14. (1) The presiding officer may administer oaths and take and receive solemn affirmations for the purposes of examinations pursuant to paragraph 11(1)(*a*).

14. (1) Le fonctionnaire d'instruction peut recevoir les serments et les affirmations solennelles dans le cadre des interrogatoires visés à l'alinéa 11(1)*a*).

Prestation des serments

Orders of presiding officer

(2) A presiding officer may make such orders as he considers to be proper for the conduct of an examination pursuant to paragraph 11(1)(*a*).

(2) Un fonctionnaire d'instruction peut rendre toutes les ordonnances qu'il juge utiles pour la conduite des interrogatoires prévus à l'alinéa 11(1)*a*).

Ordonnance des fonctionnaires d'instruction

Application to court

(3) A judge of a superior or county court may, on application by a presiding officer, order any person to comply with an order made by the presiding officer under subsection (2).

(3) Un juge d'une cour supérieure ou d'une cour de comté peut, à la demande d'un fonctionnaire d'instruction, ordonner à toute personne de se conformer à une ordonnance rendue par le fonctionnaire d'instruction en application du paragraphe (2).

Demande à la cour

Notice

(4) No order may be made under subsection (3) unless the presiding officer has given to the person in respect of whom the order is sought and the Commissioner twenty-four hours notice of the hearing of the application for the order or such shorter notice as the judge to whom the application is made considers reasonable.

R.S., 1985, c. C-34, s. 14; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 8, s. 127.

(4) Une ordonnance ne peut pas être rendue en application du paragraphe (3) à moins que le fonctionnaire d'instruction n'ait donné à la personne à l'égard de laquelle l'ordonnance est demandée ainsi qu'au commissaire soit un avis de vingt-quatre heures de l'audition de la demande, soit un avis plus bref jugé raisonnable par le juge à qui la demande est faite.

L.R. (1985), ch. C-34, art. 14; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 8, art. 127.

Avis

Warrant for entry of premises

15. (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation

15. (1) À la demande *ex parte* du commissaire ou de son représentant autorisé et si, d'après une dénonciation faite sous serment ou affirmation solennelle, un juge d'une cour supérieure ou d'une cour de comté est convaincu :

Mandat de perquisition

This is Exhibit F to the Affidavit of
Magalie Marie Plouffe
sworn October 25, 2013

Case Name:

Ford v. F. Hoffmann-La Roche Ltd.

Between
Glenn Ford, Vitapharm Canada Ltd., Felming Feed Mill Ltd. and Marcy David, (respondents (plaintiffs)), and
F. Hoffmann-La Roche Ltd., et al., (appellants (defendants))

[2003] O.J. No. 868

223 D.L.R. (4th) 445

30 C.P.C. (5th) 107

23 C.P.R. (4th) 454

121 A.C.W.S. (3d) 425

Docket Nos. C38626, C38625, C38620 and C38615

Ontario Court of Appeal
Toronto, Ontario

Catzman, Carthy and Moldaver JJ.A.

Heard: February 26, 2003.
Judgment: March 13, 2003.

(7 paras.)

Practice -- Discovery -- When available -- Production and inspection of documents -- Respecting foreign actions.

Appeal by F Hoffmann-La Roche and others from the dismissal of their appeal from an order refusing to enjoin Ford and the other respondents from pursuing a motion in the United States. Pursuant to the motion, the respondents were seeking access to testimony and documents obtained through the discovery process in that country. Ford and the others were attempting to gather evidence.

HELD: Appeal dismissed. The facts and circumstances of the case did not give rise to comity concern. There were no overriding policy or fairness issues that would warrant the injunctive or declaratory relief sought by Hoffmann-La Roche and the other appellants.

Prior History: On appeal from the order of the Divisional Court (Farley, Matlow and Roy JJ.) dated April 20, 2002 and the order of Cumming J. dated January 26, 2001.

Counsel:

David Kent, for the appellants, BASF Corp. and BASF Canada Inc.
Don Houston and Jennifer Roberts-Logan, for the appellants, Lonza A.G.
Derek J. Bell, for the appellants, Takedo Chemical Industries Ltd. and Takedo Canada Vitamin & Food Inc.
F. Paul Morrison, for the appellants, Degussa-Hulls AG, Degussa Corp. and Degussa Canada Inc.
Brent Olthuis, for the appellants, Hoffmann-La Roche Ltd.
John Callaghan and Ben Na, for Sumitomo Chemical Ltd.
C. Scott Ritchie, Mike Eizenga and Andrea DeKay, for the respondents.

The following judgment was delivered by

1 THE COURT (endorsement):-- The appellants appeal from the order of the Divisional Court dismissing their appeal from the order of Cumming J., who refused to enjoin the respondents from pursuing their motion in the United States seeking access to testimony and documents obtained through the discovery process in that country. The facts surrounding the dispute between the parties are fully set out in the reasons of Cumming J. and need not be repeated.

2 These brief reasons are designed to address particular concerns raised by the appellants in their argument. They should be read in conjunction with the reasons of Cumming J., with which we substantially agree.

3 In our assessment, the facts and circumstances of this case do not give rise to comity concern, nor are there any overriding policy or fairness issues that would warrant the injunctive or declaratory relief sought by the appellants.

4 Properly characterized, the respondents are attempting to gather evidence in a foreign jurisdiction in accordance with the rules of that jurisdiction. The appellants challenge that characterization. They submit that the respondents are not "evidence-gathering" but are instead attempting to obtain, prior to certification, discovery of evidence given under compulsion of the United States discovery rules. The fallacy in this demarcation between the permissible and the impermissible is revealed by considering the circumstance if there was no protective order. Then the productions would be freely available and no complaint could be made if the respondents sought them out. Yet, they would have been produced under compulsion. So, compulsion cannot be the hallmark of improper conduct.

5 With respect to the appellants' submission that Judge Hogan has requested information about the governing rules of practice and procedure in Ontario and that this court should provide him with such information, we are respectfully of the view that this can and should be done through expert evidence adduced by the parties before him. As for the other concerns raised by the appellants, in-

cluding the timing of the respondents' motion, the nature and breadth of the information they seek, the fact that some of the documents might be subject to public interest privilege in Canada and the need to ensure that the respondents will abide by the terms of any amended protective order, these are best left to Judge Hogan. In our view, he is in the best position to make an order that is both fair and just and that takes into account the competing interests of the parties. In the end, we believe it is for Judge Hogan to determine when, if at all, to what extent and upon what terms and conditions, if any, the protective order should be varied as requested by the respondents.

6 To the extent that Judge Hogan is concerned about the type of order that a Canadian court could make to ensure compliance in Canada with his protective order, we see no impediment to his making any variation of his order conditional upon it being matched by an order of similar nature from the Superior Courts of the provinces in which the Canadian litigation is proceeding.

7 The appeal is dismissed with costs to the respondents. Counsel are invited to make written submissions with respect to the quantum of such costs in the usual manner.

CATZMAN J.A.
CARTHY J.A.
MOLDAVER J.A.

cp/e/nc/qw/qlhcc

Indexed as:

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.

PROCEEDING UNDER The Class Proceedings Act, 1992
Between
Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Roger Awad and Mary Helen Awad, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Inc., Roche Vitamins Inc., Hoffmann-La Roche Limited, Rhone-Poulenc S.A., Rhone-Poulenc Canada Inc., Basf Aktiengesellschaft, Basf Corporation, Basf Canada Inc., Lonza A.G., Lonza Inc., Alusuisse Lonza Canada Inc., Chinook Group Ltd., Chinook Group Inc., DCV Inc. and Ducoa L.P., defendants
And between
Glen Ford, plaintiff, and
F. Hoffmann-La Roche Ltd., Rhone-Poulence S.A., Lonza Inc., Basf AG, Eisai Co. Ltd., Takeda Chemical Industries Ltd., Merck KgaA, Chinook Group Ltd., DCV Inc., Ducoa L.P., Akzo Nobel NV, Daiichi Pharmaceutical Company Ltd., Bioproducts Inc., Degussa-Huls AG, Degussa Corporation, Reilly Chemicals S.A., Vitachem Company, Hoffmann-La Roche Ltd., Rhone-Poulenc Canada Inc., and Basf Canada Inc., defendants
And between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd., and Marcy David, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Ltd., Merck KgaA, Lonza A.G., Alusuisse-Lonza Canada Inc., Sumitomo Chemical Co. Ltd., Sumitomo Canada Alusuisse-Limited/Limitee and Tanabe Seiyaku Co., Ltd. defendants
And between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., Roger Awad and Mary Helen Awad, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Limited/Limitee, Rhone-Poulenc S.A., Rhone-Poulenc Canada Inc., Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Inc., Basf Aktiengesellschaft, Basf Corporation, Basf Canada Inc., Eisai Co. Ltd., Takeda Chemical Industries Ltd., Takeda Canada Vitamin and Food Inc., Merck KgaA, Daiichi Pharmaceutical Company, Ltd., Reinhard Steinmetz, Dieter Suter, Hugo Strotmann, Andreas Hauri, Kuno Sommer and Roland Bronnimann,

defendants
And between
Glen Ford, Fleming Feed Mill Ltd., Aliments Breton Inc., and Kristi cappa, plaintiffs, and
Rhone-Poulenc S.A., Rhone-Poulenc Canada Inc., Degussa-Huls AG, Degussa Corporation, Novus International Inc., Aventis Animal Nutrition S.A., defendants
And between
Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., and Kristi Cappa, plaintiffs, and
Degussa-Huls AG, Degussa Corporation, Reilly Industries Inc., Reilly Chemicals S.A., Vitachem Company, Alusuisse-Lonza Canada Inc., Lonza A.G., Nepera Incorporated, Roger Noack and David Purpi, defendants
And between
Fleming Feed Mill Ltd., Aliments Breton Inc., Glen Ford and Marcy David, plaintiffs, and
Basf Aktiengesellschaft, Basf Corporation, Basf Canada Inc., Chinook Group Ltd., Chinook Group Inc., DCV Inc., Ducoa L.P., Bioproducts Inc. Akzo nobel NV, Bioproducts Inc., Russell Cosburn, John Kennedy, Robert Samuelson, Lindell Hilling, John L. ("Pete") Fischer and Antonio Felix, defendants

[2001] O.J. No. 237

[2001] O.T.C. 47

6 C.P.C. (5th) 245

11 C.P.R. (4th) 230

102 A.C.W.S. (3d) 656

Court File Nos. 771/99, 00-CV-198647CP, 00-CV-200044CP,

00-CV-20173CP, 00-CV-200045CP and 00-CV-222080CP

Ontario Superior Court of Justice

Cumming J.

Heard: January 12, 2001.
Judgment: January 26, 2001

(52 paras.)

Practice -- Discovery -- When available -- Court, jurisdiction to make directions -- Production and inspection of documents -- Respecting foreign actions.

Motion by the defendants, various corporations, for an order preventing the plaintiffs in a proposed class proceeding from gaining access to discovery material in related United States litigation. The defendants faced actions in the U.S., British Columbia and Ontario alleging that they had engaged in conspiratorial price-fixing regarding vitamins and related products. The Canadian actions were not certified, and only one of the defendants was named in the U.S. and Canadian actions. Some of the defendants pleaded guilty to criminal price-fixing charges. To gain discovery, the plaintiffs had applied to the U. S. court to intervene in the U.S. action. They argued here that the Ontario courts did not have jurisdiction to make orders regarding the U.S. action, and that a protective order in the U.S. prevented them from obtaining discovery in any other fashion than through intervention in the proceedings. The defendants contended that the plaintiffs' participation in the U.S. litigation was contrary to the class proceedings legislation in Canada and would violate their proprietary rights to confidentiality.

HELD: Motion dismissed. The court had jurisdiction, particularly considering that in an era of increasing globalization of markets, both the U.S. and Canada had a vested interest in expeditious, fair and efficient dispute resolution. Only the U.S. judge had jurisdiction over the protective order, but the United States Code provided assistance for discovery by foreign litigants. This cooperative approach was based on considerations of comity and allowed recourse to Canadian procedural rules. On its face, the plaintiffs' U.S. motion was meant to save considerable time and money. It was not oppressive or unfair to the defendants in the Canadian proceedings, but promoted efficiency in the judicial process. It was procedurally sound and fair.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 101.

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12.

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 34.07(2), 36.03.

U.S. Code, 28, s. 1782.

Counsel:

C. Scott Ritchie, Michael Eizenga and Charles Wright, for the plaintiffs.
David W. Kent, for BASF Canada.
William Vanveen, for Hoffmann-La Roche Ltd.
Sandra Forbes, for Rhone-Poulenc Canada Inc.
Donald Houston and Jennifer Roberts-Logan, for Alusuisse-Lonza Canada Inc.
Derek J. Bell, for Takeda Chemical Industries Ltd.
James Doris, for Bioproducts Inc.

CUMMING J.:--

The Motion

1 This motion raises a matter of first impression. The moving party defendants seek an order preventing plaintiffs from gaining access to documentary and deposition evidence from discovery in United States' litigation dealing with claims analogous to those seen in this Canadian action.

2 There are seven Ontario class actions which allege price fixing of vitamins and vitamin products. Parallel actions are taking place in British Columbia and Quebec.

3 The defendants BASF Canada Inc. ("BASF Canada"), Takeda Chemical Industries Ltd. ("Takeda Chemical"), Takeda Canada Vitamin & Food Inc. ("Takeda Canada"), F. Hoffmann-La Roche Ltd. and Alusuisse-Lonza Canada Inc.(collectively, the "moving defendants") move for an order declaring that the plaintiffs in these class proceedings are acting contrary to the purposes and provisions of the Class Proceedings Act, 1992 S.O. 1992, c. 6 ("CPA") and the Rules of Civil Procedure R.R.O. 1990, Reg. 194 ("rules").

4 The plaintiffs in action #771/99 Glen Ford v. F. Hoffmann-La Roche Ltd. et al. (the "Ford" action) and #99-GD-46719 VitaPharm Canada Ltd. et al. v. F. Hoffmann Ltd. et al. (the "VitaPharm" action) have moved to intervene in United States' litigation (In re: Vitamins Anti-Trust Litigation, MDL No. 1285) to obtain discovery evidence being given by defendants in that litigation (the "U.S. Motion"). The moving defendants ask for an order requiring the plaintiffs to discontinue their motion before the American court.

5 Some background is necessary.

Background

6 The plaintiffs in the class actions at issue sue various combinations of defendants. The plaintiffs in the Canadian class proceedings assert that the defendants entered into conspiracies to fix prices with respect to the distribution and sale of vitamins and related products manufactured by some of the corporate defendants.

7 The claims assert that the worldwide vitamin industry was dominated by certain groupings of defendants who controlled a significant percentage of the world vitamin market for many of the main types of vitamins. Some defendants have pled guilty in the United States and Canada to price fixing charges concerning vitamins. The Canadian class proceedings are based upon the impact of the alleged global conspiracies upon residents in Canada.

8 Generally, vitamins are manufactured and marketed for one or the other of three specific uses: for direct human consumption, as food and beverage additives for human consumption and as an agricultural feed supplement for animal consumption.

9 The Ontario and British Columbia class proceedings allege that different combinations of the defendants fixed the prices of various vitamins having one or more of the mentioned three uses. There is a broad spectrum of plaintiffs because of the different users. The proposed representative plaintiffs in each action bring the action on their own behalf and on behalf of similarly situated persons who purchased, used or received a particular vitamin and/or purchased products containing a certain vitamin or products derived from animals that consumed a particular vitamin.

The Canadian Class Proceedings

10 A number of class proceedings have been commenced in Canada. The seven Ontario actions are to be dealt with in the Toronto Region. See VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2000), 48 O.R. (3d) 21 (S.C.J.). Plaintiffs' counsel (the "Strosberg/Siskind counsel group") has been named lead counsel for the Ontario class actions, as a result of a "carriage motion". See VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. [2000] O.J. No. 4594 (S.C.J.). Four other Ontario class actions have been stayed as a result of the carriage motion. The current Ontario class actions seek certification for national classes, covering all Canadians other than those plaintiffs in the British Columbia and Quebec class actions.

11 There is a class action commenced in British Columbia-C994010 Ritchie-Smith v. F. Hoffmann et al. ("Ritchie-Smith"). Counsel for the British Columbia plaintiffs has entered into cooperative arrangements with the Strosberg/Siskind counsel group. The intent is for the litigation to proceed primarily in Ontario. The plaintiffs in Ritchie-Smith have joined with the plaintiffs in the Ford and VitaPharm actions in bringing the U.S. Motion. Counsel for the British Columbia plaintiffs in Ritchie-Smith has not agreed that this Ontario court's disposition of the motion at hand will in any way govern the B.C. plaintiffs in respect of the U.S. Motion. This court does not, of course, have jurisdiction over the Ritchie-Smith case.

12 There are also two class proceedings commenced in Quebec which relate to the alleged conspiracies -#500-06-000090-999 Quebec Option Consommateurs et al. v. Roche Holding et al. and #500-06-000090-999 Quebec Auger et al. v. Hoffmann LaRoche et al. It is noted parenthetically that in Quebec a class action may only include individuals as class members and not corporations. The Ontario actions include corporate plaintiffs, and embrace Quebec corporations as putative class members.

13 For ease of convenience and simplicity, I shall refer to the Ontario and British Columbia class actions as the "Canadian class proceedings". The Canadian class proceedings continue to be re-engineered because of the complexities. Thus, the seven current Ontario class actions include five new, so-called reconstituted class actions - #00-CV-200045CP (relating to an alleged conspiracy in respect of "Bulk Vitamins"), #00-CV-222090CP (relating to an alleged conspiracy in respect of "Biotin"), #00-CV-201723CP (relating to an alleged conspiracy in respect of "Methionine"), #00-CV-200044CP (relating to an alleged conspiracy in respect of "Niacin") and #00-CV-19867CP (relating to an alleged conspiracy in respect of "Choline Choride".) The pleadings for some of these five actions have not yet been served on all defendants. Jurisdiction motions are pending by defendants. No class proceeding has yet been certified.

The United States' Litigation

14 A myriad of plaintiffs have commenced actions in the United States in respect of alleged price fixing in the distribution and sale of vitamins and related products manufactured by some of the corporate defendants in the Canadian actions. All federal court civil litigation in the United States, class and non-class, has been consolidated before Judge Thomas F. Hogan in the United States District Court for the District of Columbia under the style In re: Vitamins Anti-Trust Litigation, MDL No. 1285 ("U.S. Litigation").

15 The U.S. Litigation includes some 48 defendants, 29 of whom who are not parties to the Ontario or British Columbia vitamins cases. Conversely, many of the defendants in the Canadian class proceedings are not defendants in the U.S. Litigation. Of the five parties who are moving defendants, only Takeda Chemical is a named defendant in the U.S. Litigation.

16 Documentary and oral discovery of both parties and non-parties is already underway in the U.S. Litigation. Collectively, the defendants in the U.S. Litigation have produced over two million documents with perhaps another two million documents being anticipated. Another 250,000 documents are anticipated from non-parties. Hundreds of depositions, including non-party depositions, are probable.

17 The U.S. Litigation discovery process is governed in part by a Protective Order entered on November 3, 1999 (the "Protective Order"). The Protective Order limits access to and dissemination of all documents and information disclosed during the discovery process.

18 The U.S. Litigation is using an Internet based system called Verilaw to serve interlocutory papers and to schedule depositions. More than 600 papers (plus related confidential materials and documents) relating to the U.S. Litigation have been posted on the Verilaw site.

The Plaintiffs' U.S. Motion

19 On October 26, 2000 the plaintiffs in the Ford, VitaPharm and Ritchie-Smith actions brought the U.S. motion in the U.S. Litigation seeking modification of the Protective Order and access to the evidence from the discovery of certain of the U. S. corporate defendants who allegedly participated in the manufacture and sale of Niacin and Niacinamide ("corporate Niacin defendants"). Six of the eight corporate Niacin defendants in the U.S. Litigation reportedly are named as defendants in the Ontario actions. None of these six corporate Niacin defendants have pleaded guilty to conspiracy charges in Canada. Three of the six have pleaded guilty in the U.S. to charges of conspiracy to fix prices in the U.S. and elsewhere.

20 The plaintiffs seek an order by Judge Hogan to modify the Protective Order, whereby plaintiffs' counsel would be granted access to all documents, interrogatory responses, admissions and other discovery papers produced by the corporate Niacin defendants. Counsel would also be granted permission to attend depositions of the corporate Niacin defendants and plaintiffs' counsel would be added to the Verilaw system for both service and deposition scheduling. To enable the access, the plaintiffs seek to be deemed "Parties" and to have their counsel deemed to be "Counsel" in the U.S. Litigation.

21 The defendants say that the effect of the requested order of Judge Hogan would be to give the plaintiffs unfettered access to discovery evidence and the documents of all defendants to the U.S. Litigation, not just the corporate Niacin defendants. However, the plaintiffs advise they are prepared to limit their access to discovery of the corporate Niacin defendants.

22 The plaintiffs' purpose through the U.S. Motion is to obtain evidence in support of their claims in the Canadian class proceedings. They rely upon "comity" in proposing the intervention in the U.S. Litigation for discovery sharing. The plaintiffs' U.S. Motion is grounded upon their status as litigants in the Canadian class proceedings.

23 The moving defendants submit that the plaintiffs' U.S. Motion is inconsistent with the CPA. In addition, the defendants characterize the motion at hand as a "practice motion" which relates to the control by the court over the manner in which litigants conduct litigation. It is in the nature of injunctive relief. The moving defendants seek an order from this court requiring the plaintiffs to discontinue and withdraw the U.S. motion.

The Issues

24 There are three issues:

1) Does this Court have jurisdiction to grant the relief sought by the moving defendants' motion?
2) Does this Court have any role in respect of the U.S. Motion? and
3) Should this Court require the plaintiffs to discontinue and withdraw the U.S. Motion?

First Issue: Does this Court have jurisdiction to grant the relief sought by the moving defendants' motion?

25 This court has jurisdiction to deal with the moving defendants' motion under s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 and s. 12 of the CPA. More generally, the Superior Court of Justice has plenary jurisdiction to control its own process. See Amchem Products v. British Columbia (Workers Compensation Board), [1993] 1 S.C.R. 897 where the Supreme Court of Canada recognized the power to issue an anti-suit injunction. If this Court has the power to issue an anti-suit injunction the court necessarily has the power to take the lesser steps sought in the defendants' motion.

26 The House of Lords considered a similar issue in South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" NV, [1987] 1 A.C. 24 (H.L.). The defendants in a court action in the High Court of England sought pre-trial discovery of business associates of the plaintiffs by an application under 28 U.S.C. ss. 1782 before the United States district court. The plaintiffs sought an injunction from the English court. Lord Brandon pointed out that a party to an action in England can not compel pre-trial discovery as against a non-party to the action. (p. 492) However, Lord Brandon then stated (p. 497):

> I cannot see that the defendants, by seeking to exercise a right potentially available to them under the Federal Law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case.

27 As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross-border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.

28 For the reasons given, in my view this court has jurisdiction to grant the relief sought by the moving defendants' motion.

Second Issue: Does this Court have any role in respect of the U.S. Motion?

29 The U.S. Motion ultimately will be determined under United States' law. Nevertheless, United States' courts have made it clear that they welcome foreign courts' comments on the propriety of

crossborder motions by foreign litigants seeking U.S. discovery. See In re Bayer A.G., 146 F.3d 188 (3d Cir. 1988) and Euromepa S.A. v. R. Esmerian Inc., 51 F.3d 1095 (2d Cir. 1995).

30 The moving defendants say that the plaintiffs have not applied for early or non-party discovery in the Canadian class proceedings before this court. The moving defendants request this court to exercise control over its process by preventing the plaintiffs from gaining access to U.S. discovery. The moving defendants rely upon s. 12 of the CPA which provides that this court "may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination ..."

31 The plaintiffs are not seeking discovery in the U.S. through their U.S. Motion. Rather, they are only seeking access to the discovery of the litigants in the U.S. Litigation. From a legal standpoint, the U.S. Motion is only necessary because of the Protective Order.

32 If there was no Protective Order and the plaintiffs were simply given access to discovery documents and depositions generated in the U.S. Litigation, the defendants could not take objection. It is only Judge Hogan who has jurisdiction to vary the terms of the Protective Order. Accordingly, the plaintiffs can only gain access by being successful in respect of their U.S. Motion.

33 There appears to be no precedent for the intervention by a Canadian litigant in foreign proceedings for the purposes of having access to the discovery evidence generated by the litigants in the foreign action. However, pursuant to 28 U.S.C. ss. 1782, United States statutory federal civil procedure facilitates foreign litigants by providing assistance when they wish to conduct discovery in the U.S. in aid of foreign litigation. This cooperative approach is based upon "... considerations of comity and sovereignty [sic] that pervade international law." John Deere Ltd. v. Sperry Corp. 754 F. 2d 132 (3d Cir. 1985) ("John Deere") at 135. Reciprocity by the foreign court is not a precondition for this assistance. John Deere, supra at 135.

34 Section 1782 provides two routes to the Canadian litigant seeking discovery through testimony or documents in the United States in aid of Canadian litigation. First, the Canadian litigant may obtain a letters rogatory or request from the Canadian court and then move in the appropriate federal district court for an order compelling discovery. (Rules 34.07(2) and 36.03 provide for such letters of request in Ontario.)

35 Alternatively, the Canadian litigant may simply apply directly to the appropriate U.S. federal district court for an order compelling discovery. The litigant need not go through the Canadian court as a prerequisite to making the request of the U.S. court. John Deere, supra.

36 Section 1782 represents unilateral U.S. legislation not dependent on reciprocity with the other country. Nevertheless, U.S. courts have taken the position they should not "countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals." John Deere, supra at 136. United States' courts will have regard to the foreign country's laws that address evidence gathering. Permission to take U.S. discovery "that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." John Deere, supra at 135.

37 English judges have noted the U.S. courts' invitation to foreign courts to provide guidance. English courts have observed that the domestic court will always be in the best position to both describe and act upon its own discovery practice and the question of whether the proposed U.S. dis-

covery is appropriate in the context of the English proceedings. Bankers Trust International plc v. P.T. Dharmal Sakti Sejahtera, [1996] C.L.C. 252 (Q.B.) at 262, 263 ("Bankers Trust").

38 None of the Canadian class proceedings have been certified. The plaintiffs are simply putative representative plaintiffs to this point in time. The plaintiffs are not normally entitled to discovery until the close of pleadings (rules 30.03 (1) 31.03, 30.04, 31.04), they may not examine more than one officer of a corporate defendant without leave (rule 31.03 (2), (3)) and discovery of a non-party is dependent upon leave of the court (rules 30.10, 31.10). See for example Stern v. Imasco (1999), 38 C.P.C. (4th) 347 (Ont. S.C.J.). Ontario has enacted a rule that is narrower in scope than the American approach. See generally Ontario (Attorney General) v. Stavro (1995), 26 O.R. (3d) 39 (C.A.) at 47-48. The moving defendants submit that to allow the plaintiffs to continue with the U.S. Motion would be inconsistent with the Ontario rules of civil procedure.

39 The Ontario limitations with respect to pre-trial discovery of a non-party without leave is intended to protect non-parties. Its purpose is not to protect parties to the action.

40 A U.S. federal district court hearing an application for an order under s. 1782 considers whether permitting discovery would offend the foreign tribunal. There is a particular concern that the discovery provisions of the foreign jurisdiction are "not circumvented by procedures authorized in American courts" when the request for discovery assistance does not arise from letters rogatory but rather comes directly from the foreign litigant. John Deere, supra at 136.

41 The district court hearing an application for discovery assistance under s. 1782 will normally allow for the discovery of relevant evidence unless the opposing party can raise a justifiable objection.

42 In making this determination the district court in its discretion may consider statutes or case law from the foreign jurisdiction. In Re Bayer AG, supra at 8; Euromepa S.A. v. R. Esmerian, Inc. supra, at 1099, 1100.

43 The English courts have restrained a party to English proceedings from pursuing an application in the United States under s. 1782. In Bankers Trust, supra, Mance J. held that this can be done where the application is unconscionable, such as when the conduct is vexatious or oppressive or interferes with the due process of the English court (at 254, 262, 263).

44 In that case the defendant sought discovery in the United States after completion of the trial in England but before judgment. In determining whether or not the applicant's intended application in the United States was unconscionable, Mance J. took into account not only the "potential injustice to the one party if the other is allowed to pursue" the proceeding in the U.S. but also "the potential injustice to the latter if he is not so allowed ...." (at 254)

45 A Canadian court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts. Penty v. Law Society of British Columbia (1999), 68 B.C.L.R. (3d) 159 (S.C.) at 162; (1999), 69 B.C.L.R. (3d) 97 (B.C.C.A.) at 107-108; application for leave to appeal dismissed with costs, [1999] S.C.C.A. No. 616.

Should this Court require the plaintiffs to discontinue and withdraw the U.S. Motion?

46 The moving defendants submit that the plaintiffs should not have access to discovery in the United States until the jurisdiction of this court in respect of the Canadian proceedings is decided through the hearing of the pending motions by the defendants in this court. I disagree. If this court is

ultimately found to lack jurisdiction, then the Ontario actions will fall away and the defendants will be free of them. In such event, the plaintiffs' access to discovery in the United States will be of no import.

47 The moving defendants also profess to have a concern about a loss of confidentiality if access is given to the U.S. discovery. They express a concern about an invasion of privacy. (It is noted incidentally that Takeda Chemical is the only moving defendant who is a party to both the U.S. and Canadian proceedings. No other moving defendant has produced documents in the U.S.) The maintenance of confidentiality is, of course a matter for Judge Hogan in his consideration of the U.S. Motion. The plaintiffs have stated that if Judge Hogan grants the plaintiffs access to U.S. discovery they will consent to an order of this court if the defendants see that to be of assistance in maintaining confidentiality and the sanctity of the Protective Order.

48 The plaintiffs' U.S. Motion prima facie has the purpose of saving considerable time and money in the Canadian proceedings. If successful in gaining access to U.S. discovery in the U.S. Litigation, the plaintiffs can determine earlier and with greater certainty the nature and extent of the precise evidence available that is relevant to the Canadian proceedings. To deny access to the present U.S. discovery could conceivably mean that the plaintiffs over time would have to pursue separately s. 1782 orders in respect of the corporate Niacin defendants in the U.S. Litigation. At the least, success in obtaining access to the present U.S. discovery means that the plaintiffs can much more easily determine and discard what is not relevant for the purpose of the Canadian proceedings.

49 The plaintiffs' action in seeking access to the U.S. discovery is not oppressive or unfair to the defendants in the Canadian proceedings. To the contrary. Such access is consistent with the three policy objectives underlying the CPA - facilitating access to justice, judicial efficiency and behaviour modification. In particular, there will be significant savings in litigation costs through such access.

50 The plaintiffs' request for access to discovery evidence which they believe necessary to prepare their case in Canada, a request made through means lawful in the United States, does not violate the rules and procedure of this court. There is no consequential unfairness to the defendants in the Canadian class proceedings.

51 Therefore, in my view, this court should not require the plaintiffs to discontinue and withdraw the U.S. Motion.

Disposition

52 For the reasons given the motion of the moving defendants is dismissed. I may be spoken to as to costs.

CUMMING J.

cp/d/qlfwb/qlmjb

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	
	)	**File No. 132 3247**
AUGUST 29, 2013 CIVIL INVESTIGATIVE DEMAND ISSUED TO AEGIS MOBILE, LLC	)	**October 24, 2013**

ORDER STAYING PETITION TO QUASH PROCEEDINGS

On September 24, 2013, Petitioner, Aegis Mobile, LLC ("Aegis") filed a petition to quash a civil investigative demand ("CID") issued by the Commission to Aegis in response to a request by the Competition Bureau Canada ("Competition Bureau") for investigative assistance.[1] The CID requested materials needed by the Competition Bureau in connection with its enforcement litigation in Canada against Bell Canada, Rogers Communications Inc., Telus Corporation, and the Canadian Wireless Telecommunications Association (collectively, the "Canadian Companies"). In the Canadian proceeding, currently pending in Ontario Superior Court, the Competition Bureau alleges that the Canadian Companies engaged in the deceptive marketing of premium text messaging and digital content services. The FTC's CID in aid of the Canadian proceedings sought materials from Aegis regarding the marketing of premium text messages and rich content in Canada, as well as Aegis's work for and on behalf of the Canadian Companies.

The Commission issued the CID pursuant to its authority under Section 6(j) of the Federal Trade Commission Act ("FTC Act"), which was added to the FTC Act by the U.S. SAFE WEB Act of 2006.[2] Specifically, the statute authorizes the Commission to assist foreign law enforcement agencies in their investigations of, or enforcement proceedings against, "possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices substantially similar to practices prohibited by any provision of the laws administered

[1] Pursuant to Section 2.10(5)(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.10(5)(b), the timely filing of a petition to quash a CID stays the remaining period of time permitted for compliance.

[2] Pub. L. No. 109-455, 120 Stat. 3372 (2006).

by the Commission." 15 U.S.C. § 46(j). Section 6(j) gives the Commission two routes to provide such assistance. Under Section 6(j)(2)(A), the Commission may "conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance, using all investigative powers authorized by [the FTC Act]; . . ." 15 U.S.C. § 46(j)(2)(A). Under Section 6(j)(2)(B),the Commission may also – "when the request is from an agency acting to investigate or pursue the enforcement of civil laws" – "seek and accept appointment by a United States district court of Commission attorneys to provide assistance to foreign and international tribunals and to litigants before such tribunals on behalf of a foreign law enforcement agency pursuant to section 1782 of Title 28." 15 U.S.C. § 46(j)(2)(B).

Due to the recent interruption in U.S. government operations, considerable time has elapsed since the Commission received the request for assistance in obtaining access to materials that are highly relevant to the Competition Bureau's pending litigation in Canada. Accordingly, the Commission finds that greater expedition is warranted and, therefore, has determined to stay the instant petition to quash proceedings while it exercises its authority under Section 6(j)(2)(B) of the FTC Act, 15 U.S.C. § 46(j)(2)(B), to institute a proceeding under 28 U.S.C. § 1782. In that proceeding, the Commission will seek an appointment of Commission attorneys by the United States District Court for the District of Maryland to obtain information needed by the Competition Bureau for use in the Canadian enforcement proceedings.[3] In staying the instant proceedings, the Commission expresses no views on the substantive issues raised by Aegis's petition to quash. Accordingly,

IT IS HEREBY ORDERED THAT consideration of the Petition of Aegis Mobile, LLC is **STAYED** pending the federal courts' disposition of an application by the Commission pursuant to 28 U.S.C. § 1782.

By the Commission.

Donald S. Clark
Secretary

ISSUED: October 24, 2013

[3] Aegis's obligation to comply with the Commission's CID shall remain stayed pending disposition of the petition to quash. *See supra* note 1.

Court File No. 12-55497

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Plaintiff

– and –

ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, and the CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION

Defendants

IN THE MATTER OF an action for an Order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, for conduct reviewable pursuant to paragraph 74.01(1)(a).

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL

FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: 14 Sept. 2012 Issued by: "M. Rynedrak"

Ottawa Court House
161 Elgin St.
Ottawa, Ontario
K2P 2K1

TO: **ROGERS COMMUNICATIONS INC.**
333 Bloor Street East
Toronto, Ontario
M4W 1G9

AND TO: **BELL CANADA**
Suite 1900, 1050 Beaver Hall Hill
Montreal, Quebec
H2Z 1S4

AND TO: **TELUS CORPORATION**
8-555 Robson Street
Vancouver, British Columbia
V6B 3K9

AND TO: **CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION**
Suite 1110, 130 Albert Street
Ottawa, Ontario
K1P 5G4

CLAIM

1. The Commissioner of Competition (the "**Commissioner**") claims as follows pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"):

   a. a Declaration that each Defendant has engaged in and is engaging in reviewable conduct contrary to paragraph 74.01(1)(a) of the Act;

   b. an Order prohibiting each Defendant from engaging in the reviewable conduct or substantially similar reviewable conduct for a period of ten years from the date of such Order;

   c. an Order requiring each Defendant to publish or otherwise disseminate notices of the determinations made herein in such manner and at such times as the Commissioner may advise and this Honourable Court shall permit;

   d. an Order requiring each Defendant Wireless Company to reimburse its current and former customers for all charges these customers incurred on or after 12 March 2009 pursuant to the reviewable conduct that is the subject of this proceeding;

   e. an Order requiring:

      i. Rogers Communications Inc. to pay an administrative monetary penalty in the amount of $10,000,000;

      ii. TELUS Corporation to pay an administrative monetary penalty in the amount of $10,000,000;

      iii. Bell Canada to pay an administrative monetary penalty in the amount of $10,000,000; and

iv. the Canadian Wireless Telecommunications Association to pay an administrative monetary penalty in the amount of $1,000,000;

f. an Order requiring the Defendants to pay jointly and severally the costs of the Commissioner's investigation and the costs of bringing this proceeding; and

g. such further and other relief as the Commissioner may advise and this Honourable Court shall permit.

I. THE PARTIES

2. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.

3. Rogers Communications is a corporation organised pursuant to the laws of British Columbia. Directly, or through its subsidiaries including Fido Solutions Inc., Rogers Communications (collectively, "**Rogers**") supplies wireless voice, messaging and data products and services throughout Canada. Rogers is one of the three largest wireless companies in Canada with approximately 9.5 million wireless subscribers.

4. Bell Canada is a corporation organised pursuant to the laws of Canada and is a subsidiary of BCE Inc., a corporation organised pursuant to the laws of Canada. Directly, or through its subsidiaries including Bell Mobility Inc. and Virgin Mobile Canada (which is a partnership between Bell Mobility Inc. and 4458737 Canada Inc.), Bell Canada supplies wireless voice, messaging and data products and services to customers throughout Canada. Directly, or through its affiliate Bell Media Inc., Bell Canada also operates systems, known as ad servers, which it uses to display advertisements on WebPages and on its customers' mobile devices. Bell Canada is collectively referred to hereinafter as "**Bell**". Bell is one of the three largest wireless companies in Canada with approximately 7.8 million wireless subscribers.

5. TELUS Corporation is a corporation organised pursuant to the laws of British Columbia. Directly, or through its subsidiaries including TELUS Communications Inc. and TELE-MOBILE Company, TELUS Corporation (collectively, "**TELUS**") supplies wireless voice, messaging and data products and services to customers throughout Canada. TELUS is one of the three largest wireless companies in Canada with approximately 7.8 million wireless subscribers.

6. Rogers, Bell and TELUS are collectively the "**Defendant Wireless Companies**" or singularly a "**Defendant Wireless Company**". The Defendant Wireless Companies carry on business and have customers in Ontario and throughout Canada. The wireless voice, messaging and data products and services they supply to their customers are "**Wireless Services**".

7. The Canadian Wireless Telecommunications Association ("**CWTA**") is a not-for-profit corporation organised pursuant to the laws of Canada that is located in Ottawa, Ontario. The CWTA is an industry association that represents the interests of Canadian wireless companies and the companies that develop and produce products and services for those wireless companies. The Defendant Wireless Companies are members of the CWTA. Representatives from each of the Defendant Wireless Companies are Vice Chairs of the CWTA's Board of Directors.

II. OVERVIEW

8. The Defendants have been engaged in the deceptive marketing practices described herein since July 2003 or thereabouts. As a result of these deceptive marketing practices, the Defendant Wireless Companies have been charging their customers for services their customers did not intend to purchase or for which they did not agree to pay.

9. Together, the Defendants have received more than a million complaints from customers of the Defendant Wireless Companies who complain that their

Defendant Wireless Company is charging or has charged them for services they did not intend to purchase or for which they did not agree to pay.

10. The deceptive marketing practices that mislead customers of the Defendant Wireless Companies are known to the Defendants. Since at least 2009 the Defendants have studied the deceptive marketing practices described herein. The Defendants nevertheless permit these deceptive marketing practices to continue because it is in their financial interest to do so.

11. The Commissioner brings this action to stop the Defendants' deceptive marketing practices and to remedy the harm these practices have caused to the Canadian public and the Canadian economy.

12. This action concerns two types of false or misleading representations that are reviewable under paragraph 74.01(1)(a) of the Act: (i) "Call-to-Action Representations" and (ii) "Safeguarding Representations".

(i) The false or misleading Call-to-Action Representations

13. A Call-to-Action Representation that is the subject of this proceeding is a representation that conveys the general impression either that customers of a Defendant Wireless Company can obtain without cost audio, video, applications or still images, information, or chances to win contests ("**Content**"), or can terminate at will the services pursuant to which a Defendant Wireless Company charges them for the Content without any further financial obligation.

14. These representations are known as Call-to-Action Representations because they solicit customers of the Defendant Wireless Companies to take an action on their mobile devices or otherwise to use their mobile numbers to obtain Content for which their Defendant Wireless Company charges them for "**Premium Services**".

15. Premium Services are wireless services that a Defendant Wireless Company provides to its customers beyond the services it provides in its basic rate plans.

The Defendant Wireless Companies charge their customers for Premium Services as additional charges beyond the charges they impose pursuant to their basic rate plans.

16. The Call-to-Action Representations that are the subject of this proceeding are false or misleading in a material respect because (i) once customers respond to a Call-to-Action Representation by taking the solicited action to obtain the Content without cost the Defendant Wireless Company charges its customers on either a one time or recurring basis for Premium Services, or (ii) the Defendant Wireless Company continues to charge its customers for Premium Services after its customers have taken an action that is represented as being sufficient to stop the Premium Services and associated charges.

17. The Call-to-Action Representations are part of an integrated business activity between the Defendant Wireless Companies, the CWTA, and third parties who produce and together with the Defendants market the Content for which the Defendant Wireless Companies charge their customers.

18. The Defendants exercise both economic and legal control over the deceptive marketing practices at issue herein. The Defendants exercise economic control by determining whether customers of the Defendant Wireless Companies must pay their Defendant Wireless Company for Premium Services the Defendants promote though Call-to-Action Representations. The Defendants exercise legal control pursuant to the contractual arrangements they have with the third parties who partner with the Defendant Wireless Companies in making the false or misleading representations.

19. Accordingly, each Defendant has made, is making, has permitted and is permitting others to make false or misleading Call-to-Action Representations to the public that are reviewable under paragraph 74.01(1)(a) of the Act.

(ii) The false or misleading Safeguarding Representations

20. The Safeguarding Representations that are the subject of this proceeding are representations that convey the general impression that customers of a Defendant Wireless Company will not receive, and hence that their Defendant Wireless Company will not charge them for, Premium Services that those customers did not agree to receive or for which they did not agree to pay.

21. The Safeguarding Representations that are the subject of this proceeding are false or misleading in a material respect because customers of the Defendant Wireless Companies are not protected from these charges at all. Rather, the Defendant Wireless Companies operate their Wireless Services businesses in such a manner as to cause or permit charges to be imposed on their customers for Premium Services that their customers neither intended to nor agreed to receive or for which they did not agree to pay.

22. Accordingly, each Defendant has made and is making false or misleading Safeguarding Representations to the public that are reviewable under paragraph 74.01(1)(a) of the Act.

III. THE DEFENDANTS' PREMIUM SERVICES BUSINESS

(i) The Defendant Wireless Companies charge their customers for Premium Services when their customers' mobile numbers are used to obtain Content

23. As part of their business of supplying Wireless Services the Defendant Wireless Companies provide, for a cost, Premium Services to their customers.

24. Customers of a Defendant Wireless Company receive Premium Services when they respond to Call-to-Action Representations and seek to obtain Content that is offered to them – e.g., a ringtone, an IQ score, etc. When a customer responds to a Call-to-Action Representation, the customer's Defendant Wireless Company records and uses the customer's mobile telephone number to charge the customer for Premium Services – i.e., to impose extra charges customers have

to pay in addition to the charges that form part of their basic rate plans. A Defendant Wireless Company may also impose other additional charges on its customers for the use of its mobile network when the Defendant Wireless Company supplies Premium Services to that customer's mobile device.

25. The Defendant Wireless Companies describe charges for Premium Services in different ways. The manner in which the Defendant Wireless Companies present and describe Premium Services charges to their customers are known to each Defendant Wireless Company.

26. Notwithstanding any differences between the Defendant Wireless Companies' charging and invoicing practices, the Defendant Wireless Companies describe the Premium Services charges to their customers in such a way that the existence of the charges, the nature of the charges, or the reasons for these charges, are not readily apparent to their customers.

27. Customers have to pay the charges a Defendant Wireless Company imposes on them because the contracts they have with their respective Defendant Wireless Company require them to do so. Frequently, the Defendant Wireless Companies are able automatically to charge their customers' credit cards or debit their customers' bank accounts or prepaid wireless accounts for all the charges invoiced to their customers during the billing period, including charges for the Premium Services.

28. If a customer fails to pay for the Premium Services, the Defendant Wireless Company charges the customer interest on the unpaid amounts in accordance with the terms of his or her contract with a Defendant Wireless Company. The interest charges the Defendant Wireless Companies impose on their customers range between 26.82% and 42.58% per year. If a customer does not pay the charges for the Premium Services and any associated interest, the Defendant Wireless Company may terminate the customer's Wireless Services.

29. Many customers are unaware that the Defendant Wireless Companies can and do charge them for Premium Services when they – wittingly or unwittingly – obtain Content on their mobile devices. As a result, customers are particularly vulnerable to being misled by false or misleading representations promoting Premium Services and to incurring charges for Premium Services they did not intend to obtain or for which they did not intend to pay.

30. Since July 2003 or thereabouts, the Defendant Wireless Companies have been charging their customers for Premium Services that their customers did not agree, or asserted to their respective Defendant Wireless Company that they did not agree, to purchase.

31. The Defendant Wireless Companies know, or through their own business activities and technologies have the means of knowing, how often since July 2003 their customers have complained about being charged for Premium Services these customers assert they did not agree to purchase. The Defendant Wireless Companies know, or through their own business activities and technologies have the means of knowing, how often since July 2003 they have refunded or arranged to have their customers be reimbursed for charges for Premium Services that these customers assert they did not agree to purchase.

(ii) The Defendants have a business interest in the Content that customers of the Defendant Wireless Companies obtain through Premium Services

32. The Defendants have a business interest in the Content that customers of the Defendant Wireless Companies obtain through Premium Services. This business interest arises through the contractual and economic relationships that the Defendants have with so-called "content providers" and "aggregators".

33. "Content providers", as the name implies, create and, along with the Defendant Wireless Companies, market and supply Content to the Defendant Wireless Companies' customers.

34. "Aggregators" provide assistance to content providers in establishing the necessary business and technical relationships with the Defendant Wireless Companies to enable Content created by content providers to be marketed and supplied to the Defendant Wireless Companies' customers.

35. Each Defendant Wireless Company has contractual arrangements with one or more content providers or aggregators. The terms and conditions of the contractual arrangements of each Defendant Wireless Company are known to that Defendant Wireless Company.

36. These contractual arrangements give the content providers or aggregators access to the Defendant Wireless Companies' respective networks and the necessary infrastructure to enable the content providers or aggregators to promote Premium Services and the Defendant Wireless Companies' business interests in the Content.

37. Further, these contractual arrangements, amongst other things:

a. permit a content provider or aggregator to access the technical infrastructure of a Defendant Wireless Company;

b. permit a content provider or aggregator to use a Defendant Wireless Company's Short Codes, as agreed to by the Defendant Wireless Company;

c. specify the Content that is appropriate to market and supply to a Defendant Wireless Company's customers;

d. require a content provider or aggregator to comply with a Defendant Wireless Company's standards and guidelines, including standards and guidelines incorporated by reference, such as the CWTA's guidelines;

e. require a content provider or aggregator to disclose to a Defendant Wireless Company information about proposed programs and advertising campaigns promoting the Premium Services so that a Defendant Wireless

Company can assess whether (i) the marketing activities are likely to generate revenue for the Defendant Wireless Company and (ii) the Defendant Wireless Company should approve and permit the marketing activities as proposed;

f. provide a Defendant Wireless Company with the right to collect all revenue from its customers who obtain Content by acquiring Premium Services; and

g. require a Defendant Wireless Company to share with the relevant content provider or aggregator some of the revenue that the Defendant Wireless Company collects from its customers who acquire Premium Services.

38. While these contractual arrangements state that the business relationships between the Defendant Wireless Companies and content providers or aggregators are not partnerships as a matter of contract, the Defendant Wireless Companies nevertheless describe the content providers and aggregators with whom they have business relationships as their "partners" in their Premium Services business.

39. Each Defendant Wireless Company has developed or adopted standards or guidelines for promoting Premium Services to its customers. These standards or guidelines concern matters such as the type of Content a Defendant Wireless Company will supply to its customers, and the practices that may and may not be used to promote the Premium Services that allow its customers to obtain the Content. Each Defendant Wireless Company knows what its standards or guidelines are.

40. Furthermore, each Defendant Wireless Company has processes for reviewing and approving the marketing and supply of Content to its customers and ensuring that any Content supplied to its customers complies with its standards or guidelines. Each Defendant Wireless Company knows what its processes are

and whether these processes ensure that the company's standards or guidelines for Premium Services and Content are met.

(iii) The Call-to-Action Representations are made as part of the Defendant Wireless Companies' business of providing Premium Services to their customers

41. Although it is not apparent from the Call-to-Action Representations themselves, the Call-to-Action Representations are made as part of the Defendant Wireless Companies' business of providing Premium Services to their customers.

42. The Call-to-Action Representations are disseminated in different ways and on different forms of media. Through whatever media these representations are disseminated, the customer is prompted by a Call-to-Action Representation to obtain Content and thereby to incur a Premium Service charge. The Call-to-Action Representation describes the action the customer must take to obtain the Content (e.g., to tap an icon or hyperlink) and thereby to incur a Premium Service charge.

43. The action that the Call-to-Action Representation solicits a customer to perform may take one of several different forms. Amongst other forms of action, all of which are known to the Defendants, a customer may be required to type a particular number from his or her mobile device, may be required to input his or her mobile telephone number on a web site, or may be given direct access to the means of downloading the Content to the customer's mobile device. Whatever action is selected, however, the customer's mobile telephone number is used as the means by which the customer receives and the Defendant Wireless Company charges its customer for the Premium Services.

44. The Defendants control the Content or influence the meaning or purpose of the Call-to-Action Representations. They do so at times and in ways known to them.

(iv) The Defendant Wireless Companies oversee and control the marketing and supply of Content to their Customers, including the Call-to-Action Representations

45. The Defendant Wireless Companies each and collectively oversee and control the marketing and supply of Content to their customers, including the Call-to-Action Representations. In particular, but without limitation, the Defendant Wireless Companies:

a. obtain records and information about marketing campaigns and Call-to-Action Representations;

b. test the Call-to-Action Representations, and the associated payment processes, to make sure they function properly on their networks and can charge their customers;

c. evaluate, approve and monitor the content of the marketing materials, including the Call-to-Action Representations;

d. evaluate, approve (or reject) and monitor the information that is disclosed to their customers about the price and other terms applicable to the Premium Services;

e. reduce or increase the percentage of revenue the Defendant Wireless Companies share with content providers and/or aggregators, at their discretion; and

f. suspend or terminate advertising campaigns promoting Premium Services, and hence the charges for Premium Services.

46. The details and technical aspects of all the technologies that the Defendant Wireless Companies use to charge their customers for the Premium Services are known to them.

47. Beginning in or around July 2003 and continuing through to the present, the Defendant Wireless Companies have authorised and do authorise their customers to obtain Content, and to be charged for Premium Services, through the use of a technology known as a "Short Code" or "Common Short Code" (collectively, a "**Short Code**"). Short Codes are numbers that the Defendant Wireless Companies or the CWTA assign to particular content providers or aggregators. These numbers are often four or five digits in length.

48. A given Short Code is associated with a particular Premium Service. Communications between a customers' mobile device and a Short Code authorise the customer to obtain Content associated with that Short Code and trigger a one time or recurring Premium Services charge from a Defendant Wireless Company.

49. The Short Code system is overseen, controlled and administered by the Defendant CWTA for both its own benefit and on behalf of the Defendant Wireless Companies. The Defendant Wireless Companies have significant influence over how the CWTA operates the Short Code system.

50. The CWTA accepts applications from content providers and aggregators to assign Short Codes to enable the Defendant Wireless Companies to supply particular Content to their customers and to charge their customers for the Premium Services associated with supplying the Content.

51. The CWTA reviews and vets these applications against standards and guidelines relating to the marketing and supply of Content through Premium Services. In particular, the CWTA:

    a. reviews Short Code applications against its standards and guidelines relating to Content;

    b. reviews the user experience for obtaining Content through Premium Services and the Content;

c. assesses whether the proposed Call-to-Action Representations are in accordance with its standards and guidelines;

d. provides recommendations to the applicable content provider or aggregators about proposed Call-to-Action Representations, at its discretion; and

e. recommends to the Defendant Wireless Companies that they approve (or reject) relevant marketing campaigns, including Call-to-Action Representations.

52. Applications that pass the CWTA's review process are then sent to the Defendant Wireless Companies for their independent evaluation and approval as pleaded in paragraph 45, above.

(v) The Defendants monitor the Call-to-Action Representations for compliance with the guidelines

53. The CWTA alone, or in conjunction with one or more of the Defendant Wireless Companies, also monitors, and has engaged third parties to monitor, on a regular basis, whether the Call-to-Action Representations comply with standards and guidelines that the Defendants have collectively developed. The CWTA provides the results of this monitoring activity to the Defendant Wireless Companies. These third parties have extensive knowledge about the extent to which the business practices promoting Content, and hence Premium Services, mislead consumers, including customers of the Defendant Wireless Companies. This knowledge is available to the Defendants.

54. The monitoring activity reveals high levels of non-compliance with the Defendants' standards and guidelines, particularly with respect to representations concerning the cost of the Premium Services (e.g., not disclosing that there is a cost for Premium Services to obtain Content, not clearly and conspicuously disclosing the price of the Premium Services to obtain Content, and not disclosing that texting the word "STOP" will not stop Premium Services

charges). The details of the results of the monitoring are known to the CWTA and the Defendant Wireless Companies.

55. When the Call-to-Action Representations fail to comply with the standards and guidelines that the Defendant Wireless Companies have adopted and endorsed, such as providing truthful and accurate information about the price and other material terms applicable to obtaining Content through Premium Services, the CWTA can take the following measures on behalf of the Defendant Wireless Companies, in respect of the Short Codes the CWTA assigns to particular content providers and aggregators:

a. require the content provider or aggregator to modify or stop using particular Call-to-Action Representations;

b. require the content provider or aggregator to stop Premium Services transactions using particular Short Codes; and

c. recommend that a Defendant Wireless Company take further action, such as temporarily or permanently suspending a content provider or aggregator from using a Short Code or prohibiting a content provider or aggregator from using Short Codes.

56. Furthermore, when the Call-to-Action Representations fail to comply with the Defendant Wireless Companies' standards and guidelines, including the CWTA's standards and guidelines, each Defendant Wireless Company can take the following measures, either alone or in conjunction with the CWTA, in respect of the Short Codes a Defendant Wireless Company assigns to particular content providers and aggregators:

a. require the content provider or aggregator to modify or stop using particular Call-to-Action Representations;

b. require a content provider or aggregator to stop delivering Premium Services to its customers via a particular Short Code;

c. temporarily or permanently suspend a content provider or aggregator from using a Short Code;

d. prohibit a content provider or aggregator from using one or more Short Codes;

e. reduce the percentage of revenue a Defendant Wireless Company shares with a content provider or aggregator for the Premium Services; and

f. terminate the contracts a Defendant Wireless Company has with the content provider or aggregator.

(vi) The Defendant Wireless Companies share the revenue they receive from Premium Services with content providers and aggregators

57. The Defendant Wireless Companies share a portion of the revenue they generate from the charges they impose on their customers for the Premium Services with the content providers and aggregators.

58. The amount of the revenue the Defendant Wireless Companies share with these third parties varies. Nevertheless a Defendant Wireless Company may retain the majority of the revenue it generates from the charges it imposes on its customers for Premium Services.

59. Each Defendant Wireless Company generates tens of millions of dollars in revenue per year from charging its customers for the Premium Services. Each Defendant Wireless Company has received over a hundred million dollars in revenue from charging customers for Premium Services. The CWTA has also received more than ten million dollars in fees from content providers and aggregators that partner with the Defendant Wireless Companies in promoting the Defendant Wireless Companies' Premium Services.

(vii) The Defendant Wireless Companies make the Safeguarding Representations as part of their Wireless Services business

60. As part of their business of promoting the supply or use of Wireless Services, including their business of promoting and selling Premium Services, the Defendant Wireless Companies make the Safeguarding Representations.

61. The Defendants make these Safeguarding Representations knowing that they are engaged in the business activities described herein pursuant to which the Defendant Wireless Companies charge their customers for Premium Services that these customers did not agree, or asserted to their respective Defendant Wireless Company that they did not agree, to purchase.

62. The Defendants make these Safeguarding Representations knowing the Defendant Wireless Companies require their customers to pay the Defendant Wireless Companies for Premium Services even when these customers did not agree, or asserted to their respective Defendant Wireless Company that they did not agree, to purchase the Premium Services for which the Defendant Wireless Companies are charging them.

63. Furthermore, the Defendants make these Safeguarding Representations knowing that they permit or approve marketing activities for Premium Services and Content that require customers to provide their mobile numbers to content providers or aggregators or other third parties who have contractual arrangements with the Defendant Wireless Companies.

64. The Defendants' own business practices thus contradict or undermine the Safeguarding Representations they have made to the public.

IV. THE CALL-TO-ACTION REPRESENTATIONS ARE FALSE OR MISLEADING IN A MATERIAL RESPECT

65. Since approximately July 2003, for the purpose of promoting the supply of Premium Services and their business interests in the Content, each Defendant

has made, is making, has permitted others to make, and is permitting others to make, Call-to-Action Representations to the public that are false or misleading in a material respect.

66. The Defendants make or permit false or misleading Call-to-Action Representations to be made on various media, including software applications running on customers' mobile devices, WebPages, and other media.

67. The Call-to-Action Representations convey the general impression that if customers take a particular action they can acquire Content without cost, thereby materially influencing customers to take the particular action on the basis of the representations.

68. In times, places and in other ways known to the Defendants, the Call-to-Action Representations are false or misleading in a material respect. In circumstances known to the Defendants, customers cannot acquire the Content without cost. Rather, once a customer responds to a Call-to-Action Representation by taking the solicited action to acquire the Content without cost, the customer's Defendant Wireless Company charges that customer on either a one time or recurring basis for Premium Services the customer did not agree to purchase.

69. The Defendants also fail to disclose, or fail to disclose adequately, to customers that if a customer responds to the Call-to-Action Representations by taking the solicited action the customer will be charged by his or her Defendant Wireless Company for Premium Services, either at all or on terms that the customer did not agree to pay.

70. At times and in circumstances known to the Defendant Wireless Companies, customers of the Defendant Wireless Companies taking an action in response to a Call-to-Action Representation receive text messages.

71. These text messages contain phrases such as "To end txt STOP" or "To stop txt STOP". The Defendants developed or approved these phrases or approved the use of the word "stop" in these text messages.

72. The text messages and phrases used therein convey the general impression that the customers can terminate a Premium Service without further financial obligation by taking a specified action, for example by texting the word "STOP" to a Short Code.

73. The representations are false or misleading in a material respect because the Defendant Wireless Companies continue to charge their customers for Premium Services after their customers take the specified action to stop the Premium Services. The Premium Services that could not be terminated in the manner represented are known to the Defendants, and the CWTA has advised the Defendant Wireless Companies on many occasions that texting words such as "STOP" or "HELP" does not work, as represented.

74. Furthermore, and without limitation:

a. at times and in circumstances known to the Defendants, the Defendant Wireless Companies' customers frequently assert that the Defendant Wireless Companies charge them for Premium Services that they did not agree to purchase, and hence that these customers were misled; and

b. at times and in circumstances known to the Defendants, the Defendant Wireless Companies have each received many complaints from their customers. Together, the Defendant Wireless Companies have received at least a million complaints from their customers asserting that the Premium Services charges the Defendant Wireless Companies imposed on their customers were unsolicited, unwanted or unauthorised and hence that their customers were misled.

75. Notwithstanding the above, the Defendants continue to make or to permit the same or similar false or misleading Call-to-Action Representations to be made to customers and to generate revenue from their deceptive marketing practices.

V. EXAMPLES OF THE DEFENDANTS' DECEPTIVE CALL-TO-ACTION REPRESENTATIONS

(i) Jesta (a content provider) and Mobile Messenger (an aggregator)

76. Jesta Digital, LLC, including its affiliated and predecessor companies ("**Jesta**"), is a content provider.

77. Mobile Messenger North America, Inc., including its affiliated and predecessor companies ("**Mobile Messenger**"), is an aggregator.

78. At all material times, Jesta and Mobile Messenger have carried on business in Canada from locations outside Canada.

79. The Defendant Wireless Companies have each entered into agreements with Jesta and Mobile Messenger:

a. that permit the Defendant Wireless Companies to charge their customers Premium Services charges for Content Jesta and Mobile Messenger supply;

b. that give Jesta and Mobile Messenger access to the Defendant Wireless Companies' respective networks and the necessary infrastructure to enable Jesta and Mobile Messenger to deliver Content to customers; and

c. whereby the Defendant Wireless Companies share the revenue that they generate from their customers with Jesta and Mobile Messenger.

80. On a monthly basis, the Defendant Wireless Companies retain between 27% and 60% of the revenue they generate from these Premium Services.

(ii) The Defendants' Jesta Call-to-Action Representations

81. Since approximately 2007 or such earlier time known to the Defendants, the Defendant Wireless Companies have partnered with Jesta for the purpose of promoting their Premium Services and their business interest in the Content

through Call-to-Action Representations (the "**Defendants' Jesta Call-to-Action Representations**").

82. The Defendants' Jesta Call-to-Action Representations appear in advertisements, including banner advertisements, that are displayed in free applications that appear on their customers' wireless communication devices and other media, such as television commercials.

83. The Defendants' Jesta Call-to-Action Representations solicit customers to acquire Content without cost by taking easy and ostensibly innocuous actions. For example, customers are solicited to tap on a banner or hyperlink that appears on their wireless devices or they are asked to send text messages to particular Short Codes to acquire the Content.

84. The Defendants' Jesta Call-to-Action Representations convey the general impression that customers can take the solicited action without cost.

85. The Defendants' Jesta Call-to-Action Representations are false or misleading in a material respect. Customers cannot take the solicited action and acquire the Content without cost. Rather, once a customer takes the solicited action, the Defendant Wireless Company charges the customer on a one-time or recurring basis for Premium Services that the customer did not agree to purchase.

(iii) The Defendants' Mobile Messenger Call-to-Action Representations

86. Since approximately July 2003, the Defendant Wireless Companies have partnered with Mobile Messenger for the purpose of promoting their Premium Services through Call-to-Action Representations (the "**Defendants' Mobile Messenger Call-to-Action Representations**").

87. The Defendants' Mobile Messenger Call-to-Action Representations appear in advertisements, including pop-up advertisements and on social media websites.

88. The Defendants' Mobile Messenger Call-to-Action Representations solicit customers to acquire Content without cost by taking easy and ostensibly

innocuous actions. For example, customers are solicited to provide their mobile numbers in order to acquire Content, such as a chance to win a contest or prizes, or receive news, advice, alerts, trivia, quotations and horoscopes.

89. The Defendants' Mobile Messenger Call-to-Action Representations convey the general impression that customers can take the solicited action without cost.

90. The Defendants' Mobile Messenger Call-to-Action Representations are false or misleading in a material respect. Customers cannot take the solicited action without cost. Rather, once a customer takes the solicited action, the Defendant Wireless Company charges the customer on a one-time or recurring basis for Premium Services that the customer did not agree to purchase.

VI. THE CALL-TO-ACTION REPRESENTATIONS ARE REVIEWABLE UNDER PART VII.1 OF THE ACT

91. The Commissioner pleads that each Defendant makes the Call-to-Action Representations pleaded herein and relies on section 74.01 and subsection 52(1.2) of the Act.

92. The Commissioner also pleads and relies on section 74.03 of the Act, including without limitation subsections 74.03(2) and (3).

93. The Defendants' marketing practices are reviewable under paragraph 74.01(1)(a) of the Act.

VII. THE SAFEGUARDING REPRESENTATIONS ARE FALSE OR MISLEADING IN A MATERIAL RESPECT

(i) The Safeguarding Representations

94. Each Defendant, for the purpose of promoting the supply or use of, and its business interests in Wireless Services, has made and is making Safeguarding Representations to the public that are false or misleading in a material respect, thereby materially influencing consumers of Wireless Services to acquire or

continue acquiring Wireless Services from a Defendant Wireless Company on the basis of the representations.

a. Rogers' Safeguarding Representation

95. For the purpose of promoting the supply or use of, and its business interests in the Wireless Services it sells to its customers, Rogers makes and has made the following representation to the public that is false or misleading in a material respect:

> For protection against unsolicited and unwanted 'spam' text messages, send us a text message with the 10-digit wireless number of the spam message to 7726 (SPAM). We will credit your account $0.15 for each reported SPAM message and it's free to report SPAM. Premium messages (i.e. alerts, contests and promotions) that you have prompted will not be credited.

96. This representation appears on Rogers' website, https://www.rogers.com.

97. Rogers' Safeguarding Representation conveys the general impression that Rogers protects and safeguards its customers from receiving unsolicited and unwanted text messages and from having to pay related charges.

b. Bell's Safeguarding Representation

98. For the purpose of promoting the supply or use of and its business interests in the Wireless Services it sells to its customers, Bell makes and has made the following representation to the public that is false or misleading in a material respect:

> As a Bell Mobility customer, your risk of receiving and having to pay for unwanted text messages (or spam) is very low because Bell Mobility does not give out customers' mobile numbers to any third-party sources unless we have prior consent from you. Furthermore, Bell Mobility employs rigorous spam filters.
>
> However, if you notice you've been charged for unsolicited messages, you can call 1 800 667-0123 or email us at mobilespam@bell.ca. We will review and remove any related text messaging charges that are invalid.

99. This representation appears on Bell's website, http://support.bell.ca.

100. Bell's Safeguarding Representation conveys the general impression that Bell safeguards and protects its customers from receiving unwanted text messages and from having to pay related charges, and that Bell will protect and safeguard its customers' mobile numbers. Bell's Safeguarding Representation also conveys the general impression that there is essentially no risk that Bell will charge its customers for unwanted text messages.

c. TELUS' Safeguarding Representation

101. For the purpose of promoting the supply or use of, and its business interests in the Wireless Services it sells to its customers, TELUS makes the following representation to the public that is false or misleading in a material respect:

> Spam free guarantee – TELUS maintains a stringent spam filter system and will continue to protect you against these unsolicited types of text messages. In case you do receive an unwanted message, we are pleased to offer our TELUS Spam Free Guarantee. Send any SPAM messages to 7726 with the word SPAM in the body and we will adjust your bill. No questions asked.

102. This representation appears on TELUS' website, http://www.telusmobility.com.

103. TELUS' Safeguarding Representation conveys the general impression that TELUS safeguards and protects its customers from receiving unsolicited and unwanted text messages and from having to pay related charges.

d. CWTA's Safeguarding Representation

104. For the purpose of promoting the supply or use of, and its business interests in Wireless Services, including Premium Services, the CWTA makes the following representation to the public that is false or misleading in a material respect:

> The wireless service provider members of the Canadian Wireless Telecommunications Association (CWTA) subscribe to a Code of Conduct to underscore our commitment to providing the highest standards of service and support to our customers. This Code

> ensures that our customers have the information they need to make informed purchasing decisions. It also safeguards their rights as customers and assures that their concerns are addressed.

105. This representation appears on the CWTA's website, http://www.cwta.ca.

106. The CWTA Safeguarding Representation conveys the general impression that the Defendants safeguard and protect wireless customers, and that the Defendants ensure that customers have the information they need to make informed purchasing decisions.

(ii) The Safeguarding Representations are False or Misleading

107. The Defendants' Safeguarding Representations convey the general impression that the Defendants safeguard or protect wireless customers from messages and other charges customers did not solicit, did not want, did not authorise, or for which customers did not agree to pay (collectively "**Unauthorised Messages**").

108. The Defendants' Safeguarding Representations are false or misleading in a material respect. Each Defendant has generated and is generating revenue from Unauthorised Messages from which the Defendants claim to protect and safeguard wireless customers.

109. In particular but without limitation:

a. the Defendant Wireless Companies charge their customers for Unauthorised Messages;

b. the Defendants approve marketing activities that are designed to cause wireless customers to divulge their wireless numbers to content providers, aggregators or other third parties who use these numbers to send Unauthorised Messages to these customers or to cause these customers to incur a Premium Services charge;

c. the Defendant Wireless Companies charge their customers for Premium Services the customers did not agree to buy and did not receive. This practice is known as "cramming";

d. the Defendant Wireless Companies add additional unauthorised charges for Premium Services to other Premium Services charges the Defendant Wireless Companies impose on their customers. This practice is known as "stacking";

e. the Defendants have created and operate a Short Code system that permits third parties to send Unauthorised Messages to the Defendant Wireless Companies' customers; and

f. the Defendant Wireless Companies charge new customers, without their consent, for recurring Premium Services charges that carry on from when a former customer had the same mobile telephone number.

110. The Safeguarding Representations are further contradicted or undermined by the results of the Defendants' monitoring of the Call-to-Action Representations referred to at paragraphs 53 to 56, above.

VIII. THE DEFENDANTS' SAFEGUARDING REPRESENTATIONS ARE REVIEWABLE UNDER PART VII.1 OF THE ACT

111. Each of the Defendants' Safeguarding Representations are reviewable under paragraph 74.01(1)(a) of the Act.

VIII. AGGRAVATING FACTORS

112. Pursuant to section 74.1(5) of the Act the foregoing deceptive marketing conduct is aggravated by:

a. the national reach of the Defendants' conduct and the number of consumers acquiring Wireless Services, including Premium Services;

b. the Call-to-Action Representations having been made frequently and over an extended duration;

c. the vulnerability of the class of persons likely affected by the Defendants' conduct, including children or persons who are vulnerable because of disability, linguistic ability, or a lack of awareness of the underlying commercial arrangements between the Defendant Wireless Companies and content providers and aggregators;

d. self-correction being unlikely to remedy adequately or at all the Defendants' conduct;

e. each Defendant Wireless Company having collected over a hundred million dollars in revenue further to its revenue-sharing agreements with content providers and aggregators;

f. the CWTA having collected approximately ten million dollars in fees from content providers and aggregators in connection with the promotion of Premium Services;

g. the CWTA having used the majority of these fees it collects from content providers and aggregators, not for the Short Code system, but to finance other activities for its own benefit and the benefit of its members, including the Defendant Wireless Companies;

h. each Defendant having continued to engage in the deceptive marketing practices described herein while knowing of extensive complaints by wireless customers about the unsolicited, unwanted or unauthorised charges the Defendant Wireless Companies collect from their customers;

i. each Defendant having deflected complainants to content providers and aggregators to avoid financial and other responsibility for its deceptive marketing practices;

j. Bell, Rogers and TELUS being Canada's three largest wireless companies, each having generated more than ten billion dollars a year in revenue from its overall business activities;

k. the charges that the Defendant Wireless Companies impose on their customers for Premium Services that the customers did not agree to pay often remaining undetected by customers for extensive periods of time and sometimes customers do not detect such charges at all; and

l. any other relevant factor.

IX. RELIEF SOUGHT

113. The Commissioner claims the relief set out in paragraph 1.

The Commissioner proposes that this action be tried in Ottawa.

14 Sept. 2012 – issued

DATED: 17 January 2014. – Amended

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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

THE COMMISSIONER OF COMPETITION

Plaintiff

- and -

ROGERS COMMUNICATIONS INC., BELL CANADA, TELUS CORPORATION, and the CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION

Defendants

Fresh as Amended Statement of Claim

AMENDED THIS 17th DAY / JOUR
MODIFIÉE DE
OF / DE January 20 14
PURSUANT TO RULE 26.02(a)
CONFORMÉMENT A LA REGLE
OR ORDER
OU A L'ORDONNANCE
DATED THIS / FAIT CE
DAY / JOUR OF / DE 20
REGISTRAR, SUPERIOR COURT OF JUSTICE
GREFFIER, COUR SUPÉRIEURE DE JUSTICE

REGISTRAR, SUPERIOR COURT OF JUSTICE
GREFFIER, COUR SUPÉRIEURE DE JUSTICE
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AMENDED THIS DAY / JOUR

FILED SUPERIOR COURT OF JUSTICE AT OTTAWA
JAN 17 2014
DÉPOSÉ À LA COUR SUPÉRIEURE DE JUSTICE À OTTAWA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	Case No. 1:13-mc-00524

MEMORANDUM OF LAW IN SUPPORT OF FEDERAL TRADE COMMISSION'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA ISSUED PURSUANT TO 28 U.S.C. § 1782

INTRODUCTION

On June 18, 2013, the Competition Bureau, Canada ("Bureau") formally asked the U.S. Federal Trade Commission ("FTC") for help in obtaining documents and information from a U.S.-based company – Aegis Mobile LLC – in support of a Canadian law enforcement proceeding. *See Commissioner of Competition v. Rogers Communications Inc., et al.*, Court File No. 12-55497 (Ontario Superior Court of Justice) [hereinafter, "Canadian Proceeding"]. The Bureau sought this information because Aegis provides services to the Canadian defendants and maintains records in the United States relating to those defendants' contacts with Canadian consumers. In particular, Aegis has information showing the extent to which Canadian telecommunications providers may be liable to consumers for the appearance of unauthorized charges on their mobile phone bills (a practice known as "cramming"). On November 1, 2013, this Court authorized the FTC to issue a subpoena to Aegis under 28 U.S.C. § 1782, a discovery provision that facilitates U.S. assistance in foreign proceedings.

Almost three months have elapsed, and Aegis still has not produced any documents or information requested by the subpoena, despite efforts by the FTC to address any concerns it has. At Aegis's request, the FTC has agreed to limit the subpoena specifications and temporarily withdraw its subpoena for testimony. Nevertheless, Aegis continues to assert baseless objections that contradict long-accepted principles of discovery. This Court should issue an order compelling Aegis to comply with the subpoena as issued.

FACTUAL BACKGROUND

The SAFE WEB Act authorizes the FTC to provide investigative assistance to certain foreign law enforcement agencies. 15 U.S.C. § 46(j). Upon receiving a written request, the FTC may either "conduct such investigation as the Commission deems necessary . . . using all investigative powers authorized by this subchapter"[1] or may "seek and accept appointment by a United States district court of Commission attorneys to provide assistance to foreign and international tribunals and to litigants before such tribunals on behalf of a foreign law enforcement agency pursuant to [28 U.S.C. § 1782]." 15 U.S.C. § 46(j)(2).

In June 2013, the Canadian Bureau submitted a written request for the FTC's assistance. *See* Affidavit of Magalie Marie Plouffe (Exh. 1 to the FTC's Application, Dkt. 1), ¶ 9

[1] The term "all investigative powers authorized by this subchapter" refers to the FTC's authority to issue a "civil investigative demand" – a type of administrative compulsory process – under Section 20 of the FTC Act, 15 U.S.C. § 57b-1. In fact, the FTC initially issued a CID to Aegis, but Aegis then filed with the FTC a petition to quash the CID. The FTC determined that, due to delays caused by the October 2013 interruption in U.S. government operations, it would be more expeditious to seek the information through a proceeding pursuant to 28 U.S.C. § 1782. *See* Order Staying Petition to Quash Proceedings (Oct. 24, 2013), FTC No. 12 3247 (Exh. 2 to the FTC's Application). Thus, the FTC has been seeking documents from Aegis since September 2013, yet Aegis has provided nothing in response.

[hereinafter "Plouffe Aff."].[2] The Bureau has instituted an enforcement action against four entities: Rogers Communications, Inc., Bell Canada, TELUS Corporation, and CWTA, the industry association representing these wireless product providers. The Bureau has alleged that these defendants made or permitted others to make false or misleading representations that consumers can acquire premium text messages and digital content for free, when in fact consumers are charged for the content. And the Bureau has further alleged that these defendants made false or misleading representations that consumers are safeguarded or protected from receiving and having to pay for unauthorized charges for premium text messaging and digital content services, whereas in fact the defendants facilitate such charges and keep a share for themselves. Plouffe Aff., ¶ 4 & Exh. B at 8-9. The appearance of such unauthorized charges on phone bills is commonly known as "cramming."

In the course of its investigation, the Bureau learned that CWTA had contracted with Aegis, a U.S.-based company that specializes in mobile fraud detection and compliance, to record and analyze the potentially deceptive advertising at issue. The material that CWTA asked Aegis to collect and analyze consists of the very communications that the Bureau has alleged were false or misleading. Plouffe Aff., ¶¶ 5, 12. The Bureau thus has an obvious need for access to that material.

Accordingly, pursuant to the SAFE WEB Act, the Bureau asked the FTC to obtain documents and testimony from Aegis regarding (1) its monitoring and compliance activities for and on behalf of the defendants, including specifically its capture of representations promoting

[2] Exhibits 1 and 2 to the FTC's Application were filed in hard copy paper and do not appear on the ECF docket. For this reason, we have attached them to the Motion to Compel as Att. 9, for the Court's convenience.

the digital content at issue and the information it relied upon in performing this work; and (2) the marketing of this digital content in Canada, including comparisons with the marketing practices of other countries or comparisons to other telecommunications companies or associations. Plouffe Aff., ¶ 10.

The FTC responded to this request by applying to this Court for an order appointing FTC attorneys as Commissioners empowered to take evidence pursuant to 28 U.S.C. § 1782. 15 U.S.C. § 46(j)(2). The FTC submitted its application on November 1, 2013, and this Court granted the application the same day, appointing Laureen Kapin and Stephanie Rosenthal, two FTC attorneys, as Commissioners of Court with the powers to issue subpoenas to obtain documents or information and to seek further orders of Court as necessary to execute the Bureau's request for information. Dkts. 1, 2. On November 8, 2013, Ms. Kapin sent a subpoena for testimony and documents to Aegis via its counsel David Lacki. Att. 5. On November 21, 2013, counsel for the FTC and Aegis met and conferred by telephone. On November 22, 2013, Aegis submitted several objections, asserting that the subpoena was overbroad, called for privileged and confidential documents, and imposed an undue burden. Att. 6. On December 6, 2013, the FTC responded by clarifying the scope of the subpoena, agreed to facilitate entry of protective orders to preserve the claimed confidentiality, agreed to the format of electronic production, and offered to reimburse Aegis's costs in copying paper documents at a reasonable rate. Att. 7. Further, on December 12, 2013, the FTC agreed to Aegis's request to withdraw the

subpoena for testimony conditionally and without prejudice to renewing the request for testimony after the production of documents.[3] Att. 8.

Despite the FTC's response, Aegis did not produce any documents. The parties again met and conferred by telephone on December 13, 2013, and Aegis's counsel confirmed then that Aegis has responsive documents. Att. 2, ¶ 10. He indicated that Aegis considered the documents to be the property of CWTA and that it was awaiting instructions on whether to assert any privilege claims. Att. 2, ¶ 11. However, he was unable to identify any privilege that might apply to the requested documents. *Id.* He also reiterated the company's concerns about confidentiality. Att. 2, ¶ 12. The FTC requested that counsel for Aegis consult with CWTA to determine whether any subset of the documents could be produced immediately, and counsel offered to respond by December 18. Att. 2, ¶ 13. In an e-mail exchange on that day, counsel for Aegis stated that he was still awaiting a response from CWTA. Att. 2, ¶ 14. The FTC made further inquiry by e-mail on January 2, 2014, *see* Att. 1, at 2, but has received no additional information or the documents required.

Since then, Aegis has not produced a single document in response to the subpoena. Att. 2, ¶ 15. Aegis's failure to respond has thwarted the Canadian law enforcement proceeding and prevented the FTC from assisting its foreign counterpart. *Id*.

[3] The FTC did so in an attempt to expedite production. Att. 2, ¶ 8. As Aegis has not cooperated and has produced no documents, the FTC therefore seeks an order directing Aegis to comply with the subpoena in full, including the provisions requesting testimony.

ARGUMENT

THE FTC IS ENTITLED TO PRODUCTION OF THE INFORMATION SPECIFIED IN THE SUBPOENA THIS COURT AUTHORIZED.

I. The Standards for Discovery Under the Federal Rules of Civil Procedure Apply to this Proceeding.

Section 6 of the FTC Act authorizes the FTC to assist a foreign law enforcement agency by means of the procedure established in 28 U.S.C. § 1782. 15 U.S.C. § 46(j)(2)(B). Section 1782(a) provides in relevant part that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." The statute further provides that, "To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." *See also In re Letters of Request from Supreme Court of Hong Kong*, 821 F. Supp. 204, 209 (S.D.N.Y. 1993). The applicable standards in this case are therefore identical to those the Court applies in third-party discovery pursuant to Fed. R Civ. P. 45.

As the Fourth Circuit has recognized, the scope of discovery under the Federal Rules of Civil Procedure is "broad" and discovery is "freely permitted." *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 239 (M.D.N.C. 2010) (citing *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003). Parties may obtain discovery relevant to any parties' claims or defenses, and discovery is not limited to admissible evidence. Fed. R. Civ. P. 26(b)(1); *see also Kinetic*, 268 F.R.D. at 238-40. These broad standards apply equally to non-parties: "The non-party witness is subject to the same scope of discovery under [Rule 45] as

that person would be as a party to whom a request is addressed pursuant to Rule 34." Fed. R. Civ. P. 45 advisory committee's notes, 1991 Amendment, Subdivision (a).

II. Aegis Has Not Justified Its Failure to Comply.

A party (or non-party) resisting discovery bears the burden of explaining precisely why its objections are proper. *United Oil Co., Inc. v. Parts Associates, Inc.* 227 F.R.D. 404, 411 (D. Md. 2005). For example, a party asserting the burdensomeness of search and production must allege specific facts that indicate the nature and extent of the burden, usually by affidavits or other reliable evidence. *Id.* at 413 (citing *Tucker v. Ohtsu Tire and Rubber Co.*, 191 F.R.D. 495, 498 (D. Md. 2000); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997)). Similarly, although a subpoena recipient need not produce privileged materials, *see* Fed. R. Civ. P. 26(b)(1), it may not withhold such materials on the basis of generalized assertions of privilege. Instead, the party must expressly claim privilege and provide specific factual support to establish the claim – typically through preparation of a privilege log. Fed. R. Civ. P. 26(b)(5); *Mezu v. Morgan State University*, 269 F.R.D. 565, 577 (D. Md. 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263-265, 267 (D. Md. 2008); *see also United States v. Bornstein*, 977 F.2d 112, 115-16 (4th Cir. 1992); *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 750-51 (E.D. Va. 2007). Aegis has done nothing to meet its burden here.

First, although Aegis objected that compliance with the subpoena will be burdensome, Att. 6, it has not submitted evidence to support this claim of burden and instead has made only broad and unsubstantiated objections as to potential burdens. Of course, such generic objections are inadequate to excuse noncompliance because otherwise *any* subpoena recipient could invoke them and no subpoena would ever be enforced. In any event, Aegis has no credible basis for

asserting an undue "burden" in the first place because, after consultation with Aegis, the FTC has already limited and clarified the subpoena in order to assist the company in meeting its production obligations. Att. 2, ¶¶ 6, 8; Att. 7. And the FTC has agreed to reimburse Aegis for its reasonably incurred costs in copying paper documents (Att. 7), even though the FTC has no obligation to do so. *See In re First American Corp.*, 184 F.R.D. 234, 241-44 (S.D.N.Y. 1998) (holding that non-parties may be required to bear costs where they have "an interest in the outcome of the case, whether the nonparty can more readily bear the costs than the requesting party, and whether the litigation is of public importance."); *In re Seroquel Prods. Liability Litig.*, 2007 WL 4287676 (M.D. Fla Dec. 6, 2007) (same).

Similarly, Aegis has no basis for objecting to production on the theory that CWTA may have some unspecified type of "privilege" that would prevent Aegis, as CWTA's vendor, from producing the documents. Att. 2, ¶ 11; Att. 6. Aegis has not asserted any recognizable privilege of its own in these documents. It claims instead that CWTA may hold *some* type of privilege, but it does not say what type of privilege that could be. Att. 2, ¶ 11. Such empty speculation about another party's unspecified privilege fails entirely to meet the standard for asserting privilege established by Fed. R. Civ. P. 26(b)(5) and myriad cases. *See, e.g.*, *Mezu*, 269 F.R.D. at 577; *Victor Stanley*, 250 F.R.D. at 263-265, 267. In any event, even if Aegis could articulate a valid privilege claim on CWTA's behalf, an assertion of privilege does not discharge the obligation of a subpoena recipient to respond. Under Fed. R. Civ. P. 26(b)(5), Aegis would need to assert any privilege claim with specificity and produce a log that is sufficient to enable counsel and this Court to evaluate it.

Finally, Aegis has also asserted that the requested documents are "confidential," Att. 6; Att. 2, ¶ 12, but it does not explain how "confidentiality" concerns could justify withholding documents altogether from law enforcement authorities. If Aegis means that some or all of the responsive documents contain competitively sensitive material, that would not be a basis for withholding the materials; at most, it would justify a court-imposed protective order. Indeed, the FTC offered to facilitate negotiations between Aegis and the Bureau for a protective order that would address any legitimate confidentiality concerns that Aegis – and the CWTA – might have in the U.S. and Canada. Att. 7, at 3. Moreover, the FTC and the Bureau have committed to maintaining the confidentiality of the documents pending such negotiations, and the Bureau agreed, as part of its request for assistance, to notify Aegis in the event the Bureau intended to disclose any information so that Aegis could seek appropriate relief. *Id.;* see also Att. 2, ¶ 7. In view of the steps to protect the alleged confidentiality of Aegis's information, there is no basis for Aegis to continue to resist its discovery obligations.

III. The FTC Is Lawfully Entitled to the Information Specified in the Subpoena.

The FTC is entitled to the information requested because the subpoena is "authorized by Congress ... for a purpose Congress can order," "relevant to the inquiry," and not "excessive[ ] for the purposes of the relevant inquiry." *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000) (affirming denial of motion to quash subpoenas *duces tecum* issued by United States Attorney's Office pursuant to 18 U.S.C. § 3486) (quoting *Oklahoma Press Publ'g Co. v. Walling,* 327 U.S. 186, 209 (1946)). Indeed, that point is now law of the case. This Court already concluded that the request for information was lawful and justified when it granted the

FTCs application and authorized it to seek discovery of information from Aegis on behalf of the Canadian Competition Bureau. Dkt. 2.

Additionally, the information sought is plainly relevant to the Canadian Proceeding. All of the subpoena specifications, definitions, and instructions relate directly to the issues and time frame set forth in the Bureau's Statement of Claim. As described in the Statement of Claim in effect at the time the subpoena was issued,[4] the Bureau has alleged that defendants' representations convey the claim that consumers are able to receive premium content for free when, in fact, consumers are charged for this content. The Bureau's Statement of Claim further alleged that: 1) defendants participated in making and permitting others to make deceptive representations; 2) defendants represented that they would safeguard consumers from such practices; and 3) defendants generated revenue as a result of misleading representations made to the public.

Consistent with this Statement of Claim, the subpoena defines "Wireless Company" to include the three telecommunications companies named as defendants in the Canadian Proceeding: Rogers Communications, Inc, Bell Canada, and TELUS Corporation. Att. 5, at 2. The subpoena defines "Work" to mean "monitoring, capturing, or analyzing any Representations that customers of a Wireless Company can access, and any related monitoring or compliance

[4] On January 17, 2013, the Bureau issued a "Fresh as Amended" Statement of Claim. This amended claim contains substantially the same allegations as the original Statement of Claim, but contains more factual detail based on discovery in the Canadian Proceeding to date. *See* Att. 10. This amended Claim further confirms the relevance of the subpoena by alleging that CWTA and/or the other defendants contracted with third parties to monitor their compliance with standards and guidelines the defendants developed for representations to consumers and that these third parties have information revealing "high levels of non-compliance" with these standards and guidelines. Att. 10, ¶¶ 53-54. As discussed above, Aegis is a third party that provides compliance monitoring to CWTA, and thus the information it has is directly relevant to

activities." *Id.* at 3. Using these definitions, the subpoena calls for, among other things, "all agreements between Aegis and the CWTA and between Aegis and each Wireless Company related to the Work," "all Documents and Electronically Stored Information that describe the nature and scope of the Work Aegis performed for the CWTA and each Wireless Company, and all policies and procedures Aegis relied on in performing the Work," and "all Documents and Electronically Stored Information relating to Aegis' actual or proposed Work for the CWTA and each Wireless Company." *Id.* at 8. Indeed, this information is not only related but critical to the Canadian Proceeding because Aegis's role was to monitor and evaluate the very communications at issue in the litigation. Plouffe Aff., ¶ 12. Specifications 5 and 6 relate to the marketing of the digital content at issue in the Canadian Proceeding and analyses of cramming practices. Att. 5, at 8. Both specifications relate to the claims described in the Canadian Proceeding.

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the allegations in the amended Claim.

CONCLUSION

For the reasons stated above, this Court should direct Aegis to comply with the outstanding subpoena in full.

Respectfully submitted,

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Dated: January 28, 2014

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	Case No. 1:13-mc-00524

[PROPOSED] ORDER

Pursuant to 28 U.S.C. § 1782, the Federal Trade Commission ("FTC" or "Commission") applied to this Court for an Order authorizing the FTC to issue a subpoena to Aegis Mobile, LLC ("Aegis") in order to obtain information requested by the Canadian Competition Bureau for an ongoing enforcement proceeding in Canada. *See Commissioner of Competition v. Rogers Communications Inc., et al.*, Court File No. 12-55497 (Ontario Superior Court of Justice) [hereinafter, "Canadian Proceeding"]. On November 1, 2013, this Court granted the FTC's application, authorizing the issuance of a subpoena and further directing that the FTC "may seek such further orders of this Court as may be necessary to execute this request for information."

Before the Court now is the FTC's Motion to Compel Compliance with Subpoena Issued Pursuant to 28 U.S.C. § 1782. The Court has considered this Motion and the papers filed in support thereof; and the Court has determined that the FTC has shown good cause for the entry of an Order directing Aegis to comply with the subpoena.

Accordingly, it is ORDERED that Aegis Mobile, LLC, comply in full with the FTC's subpoena dated November 8, 2013 and produce, within ten (10) days of the date of this Order, all responsive documents and information specified by the subpoena.

SO ORDERED:

Dated: _____, 2014
Baltimore, Maryland

_____
UNITED STATES [DISTRICT]
[MAGISTRATE] JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. § 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings.	Case No. 1:13-mc-00524

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, a copy of the foregoing Motion to Compel Compliance with Subpoena Issued Pursuant to 28 U.S.C. § 1782 and all attachments, which were electronically filed in this case on January 28, 2014, was e-mailed and sent via FedEx delivery service to David Lacki, Esq., counsel for Aegis Mobile LLC, at Lacki & Company, LLC, 2 Wisconsin Circle, Suite 700, Chevy Chase, MD 20815, djlacki@lackico.com.

/s/ Burke W. Kappler
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