

by Commission's Counsel¹ as one of twenty-five that accessed Corporate Respondents' trade secret and confidential materials that were improperly posted because the FTC unlawfully and without justification² disclosed the same on its docket and on its Web site. Corporate Respondents have a right to ascertain the extent of harm caused by the unlawful FTC disclosure. Corporate Respondents' Counsel issues the following

[REDACTED]

discovery in its decision of June 17, 2005 (*see* Order at 7-8) (explaining that the data on the Web log it ordered its lawyers to produce “provides Respondents with information regarding the extent of the disclosures and will enable Corporate Respondents to contact

those domains may have retrieved, stored, used, shared, or disclosed. 147-11-1100

FTC posted Corporate Respondents' trade secrets³ and confidential material on its website on December 6, 2004 and on January 31, 2005.⁴ The January 31 motion was posted on FTC's public docket for this case on February 15, 2005. The December 8th motion was posted earlier.⁵ Both sets of exhibits were removed on February 17th, after Respondents' Counsel discovered and informed Complaint Counsel of the unlawful publication.

The contents of the published exhibits were designated as highly confidential financial information because Corporate Respondents are not publicly traded companies. Specifically, their sales figures and financial records (appended in Exhibits R, 15, and 42 to December 6 and January 31st filings, respectively) are not public and consist of

confidential information.

Cause, Declaration of Carla Fobbs at 4-6.⁶ In addition, the product formulations detailed within (Exhibit 11 to January 31st filing) are closely guarded trade secrets, and their

dissemination schedule (Exhibit 45 to the January 31st filing) is another vital trade secret, developed over a 13 year period, at a business cost of over 13 million dollars. In addition to constituting a major investment for Corporate Respondents, the advertising schedule also defines the best marketing, promotion channels, and strategies for all of respondents' products.

unlimited commercial advantage. *See* Fobbs Declaration at 7-8. Had FTC followed the protective order provisions contained in the Presiding Officer's orders concerning discovery and FTC Rules of Practice, this highly confidential information would not have been exposed to poaching by Respondents' competitors. *See* Fobbs Declaration at 8. I

4 (citing *FTC v. MacArthur*, 532 F.2d 1135, 1143 (7th Cir. 1976); *FTC v. Owens-Corning
Fiberglass Corp.*, 626 F.2d 966, 970 n.6 (D.C. Cir. 1978)).

In the course of his analysis

disclosed, the Presiding Officer noted that the disclosure of

advertising expenditures by year for all six products at issue and the advertising

dissemination schedule are confidential business records and that the D.C. Circuit

[D]isclosure of aggregate data would allow Respondents to contact the operators of the Web domains from which requests for the exhibits originated, and determine if those domains might assist in identifying

retained by users of those domains or by the domain operators themselves [...]. *Id.* at 7-8.⁷

On July 25, 2005 ETC released redacted⁸ web server logs to Complaint Counsel

completed the subpoena forms with their service information but did not serve them before being replaced by new counsel. Because of the substitution of counsel, we seek to have new copies created because these will not be served.

new counsel. We became counsel for the corporate respondents on September 8, 2005.

Upon receipt of the subpoena forms, the subpoenas were prepared and served on October 21, 2005 on each of the twenty-five parties identified in subpoenas attached to Complaint Counsel's Motion to Quash.

II. PERTINENT RULES

Rule 3.34(b) states in pertinent part:

A subpoena *duces tecum* may be used by any party for purposes of discovery for obtaining documents for use in evidence, or for both

purposes, and shall specify with reasonable particularity the materials to be produced.

constitute an inalienable constitutional right. [REDACTED]

overbroad. Yahoo! Inc. lacks standing to challenge the subpoenas on their merits.

Yahoo! Inc.'s arguments also fail to raise appropriate grounds for quashing the subpoenas from the perspective of a recipient party.⁹ Corporate Respondents have acted reasonably;

and timely following the [REDACTED] of 2005 [REDACTED]

fact access the trade secret and confidential financial information. Yahoo! Inc.'s

restatement of the timeliness argument made by Complaint Counsel concerning the

deadline for issuing subpoenas *duces tecum* in discovery¹¹ (November 8, 2004) ignores the fact that the disclosures of the trade secrets took place **after** that date.

Corporate Respondents first received the web contact information from FTC on July 25, 2005. They then received expert counsel on how to fashion subpoenas to acquire information based on the contact information and acquired executed copies for service on

has happened and the damages are accruing. The destruction of the trade secrets and confidences has resulted in a clearly defined, serious competitive injury to Corporate Respondents. The Presiding Officer acknowledged that "numerous statutes and

prohibit and punish the unauthorized disclosure of confidential information obtained by the Commission." *Id.* at 4. There has been no punishment meted out in this case. The perpetrators are free and the injured parties' damages have not been recompensed.

Equity requires that the injury FTC has inflicted on Corporate Respondents by disclosing their trade secrets offset any potential finding of liability or for consumer redress in this case. Without such an equitable assessment, Corporate Respondents

would be doubly penalized, in fact penalized far in excess of any remedy available to the Commission under its statutes. The disclosure of the trade secrets and confidential

relevance inquiry, the court must be satisfied merely that the material sought is 'reasonably relevant'; there need be no showing that the subpoenaed material is clearly or unquestionably relevant [...]" *Id.* at *9 (citations omitted). The subpoenas seek documents that Corporate Respondents' trade secrets and confidential financial information were disseminated to additional [REDACTED]

downloaded, or otherwise used. Those documents would be used in evidence to offset any potential finding of liability against the Corporate Respondents [REDACTED]

contemplated in its Order. Corporate Respondents must be given the opportunity to

mitigate the damages inflicted by the [redacted]

notifying third parties with potential access to the information of its confidential status.

Corporate Respondents cannot adequately mitigate the damages without [redacted]

the opportunity to explore the identities of all entities that were granted access to the FTC

may be imposed on the Corporate Respondents precludes the pursuit of information discovery via the subpoena process. As an initial matter, Yahoo! Inc. does not have standing to challenge the issuance of subpoenas on substantive grounds such as merit claims. Instead, Yahoo! Inc. has an obligation to provide Corporate Respondents with relevant information and materials responsive to the requests posed by the subpoena, not interpose unrelated arguments concerning the merits of the underlying case.

The extent of financial loss caused by FTC's unlawful publication of the Corporate Respondents' trade secrets and confidences has a direct equitable bearing on any assessment of damages in this case. One cannot achieve an equitable result without

taking into account fully the economic interests of the Corporate Respondents.

conduct within this very proceeding. All equitable factors that bear on the ability to pay and the propriety of redress are fair game. *See FTC v. International Diamond Corp./Full*

overbroad and constitutes an unreasonable burden in the scope of their business practices.

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Government Document

following standard of burden assessment:

Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless

Respondents' confidential and trade secret information, a factor no doubt contemplated by the Commission before it issued its Order. Failing to allow Corporate Respondents that opportunity compounds the harm they suffer and affords them no discovery to ascertain the extent of damages.¹⁶ Without access to full and complete dissemination information, Corporate Respondents are left with only the July 25th letter identifying the companies that accessed the information. They are denied the ability to determine whether those companies used, copied, republished, downloaded, printed or otherwise further disseminated the trade secret and confidential financial information. The Commission clearly stated in its June 17, 2005 Order that the Respondents were expected to use that web log information to further elucidate the dissemination of their trade

secrets. *Id.* at 7-8. Because the Corporate Respondents' trade secrets are 11

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Date submitted: November 23, 2005

**FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC**

IN REPLY TO

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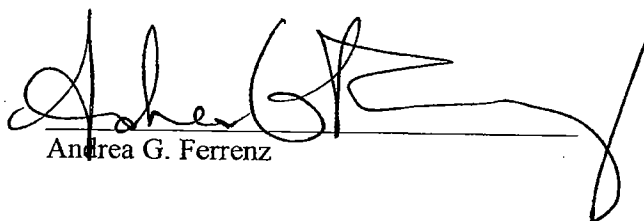

Andrea G. Ferrenz

EXHIBIT A

Service: Get by LEYSEE@

Citation: 1977 us dist lexis 16178

*1977 U.S. Dist. LEXIS 16178, *; 1977-1 Trade Cas. (CCH) P61,400*

Federal Trade Commission (on relation of Kaiser Aluminum & Chemical Corp.) v. Dresser

Misc. No. 77-44.

United States District Court for the District of Columbia.

1977 U.S. Dist. LEXIS 16178; 1977-1 Trade Cas. (CCH) P61,400

April 26, 1977, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff Federal Trade Commission (FTC) filed a petition for enforcement of a subpoena against defendant chemical corporation. The subpoena originated in a case pending before the FTC, in which an aluminum corporation applied to the FTC's Administrative Law Judge (ALJ) for issuance of subpoenas duces tecum to other chemical manufacturers. The chemical corporation objected to the subpoenas.

enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity. In the usual

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subpoena: the question is whether the demand is unduly

unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.

matter on April 7, 1977, only Dresser remained in noncompliance, the other companies
having elected to obey the substance.

At the April 7 hearing, the Commission stated:

no discovery as they involve purely local issues.

(1) Application for issuance of a subpoena requiring a person to appear and depose as a witness



Federal Trade Commission v. Texaco, Inc., supra at 39-40.

Based on an unpermeated affidavit of the

[REDACTED]

* Signal Legend:

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⚠ - Caution: Possible negative treatment

◆ - Positive treatment is indicated

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EXHIBIT B

Service: **Get by LEXSEE®**
Citation: **1983 us dist lexis 15504**

*1983 U.S. Dist. LEXIS 15504, *; 1983-2 Trade Cas. (CCH) P65,506*

Federal Trade Commission v. International Diamond Corp./Full Service Import Brokers, Inc.,

No. 82-0878 WAT (JSP)

United States District Court for the Northern District of California

1983 U.S. Dist. LEXIS 15504; 1983-2 Trade Cas. (CCH) P65,506

July 12, 1983

CASE SUMMARY

PROCEDURAL POSTURE: Defendant diamond corporation brought suit to

HN2 Section 13(b) of the Federal Trade Commission Act (FTC), 15 U.S.C.S. § 53(b), gives the FTC two options. The Commission can, under normal circumstances, seek:

The plaintiff Federal Trade Commission (FTC) ...

inference. In particular, Congress thereby gave the district court the power to order

See *Porter v. Warner Holding Co.*, 397 U.S. 205, 208 (1970).

FTC v. H.N. Singer, Inc., 1982-83 TRADE CASES (CCH) P65,011 (N.D. Cal. 1982). An individual may be held liable for the conduct of a corporation which the individual controlled

and authority to control, or when the individual knew or should have known of the

In securities cases, stock purchasers have been restored to the status quo by salesmen and brokerage houses regardless of the defendant's degree of enrichment. [*11] In Gordon v. Perry, the court held that rescission was available against an individual who was not in

privity with the defrauded purchaser but was a party to the fraud. The court explained that in the interest of justice it might be appropriate to restore the customer to the status quo by salesmen and brokerage houses regardless of the defendant's degree of enrichment. In

Defendants' final contention -- that restitution is available only when the goods purchased are essentially worthless -- rests upon administrative cases which were decided prior [*14] to *Heater v. FTC*, supra. These decisions reflect self-imposed restraints by the Commission in

its efforts to develop standards under Section 5 in order to justify administratively ordered redress. The Ninth Circuit in *Heater*, held that the Commission lacked authority to order administrative redress, which rendered the Commission's self-imposed standards inoperative.

For the above reasons, the Motion for Partial Summary Judgment is granted.