UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

[redacted]
Office of the Secretary

May 23, 2011

VIA E-MAIL AND COURIER DELIVERY

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RE: Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011

[1] Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, File No. 101-0207 (Feb. 16, 2011).

[2] See 16 C.F.R. § 2.7(d)(4).

[3] Gore has been in possession of the subpoena for over seven weeks and therefore has had ample opportunity to study and develop a plan for responding.

[4] 16 C.F.R. § 2.7(f). This letter ruling is being delivered by email and courier delivery. The email copy is provided as a courtesy, and the deadline by which an appeal to the full Commission must be filed shall be calculated from the date Petitioners receive the ruling by courier delivery. Id.

request for review of this ruling by the full Commission does not stay the return date established by this ruling.[5]

1. ***PROCEDURAL POSTURE***

The subpoena required Gore to produce the demanded documents by April 1, 2011. At Gore's request, and pursuant to Commission Rules 2.7(c) and 2.7(d)(3), on March 18, 2011, Commission staff extended both the return date on the subpoena and the deadline for the filing of a petition to quash to Friday, April 15, 2011. In early April, Gore made a token production, totaling approximately two boxes of documents.

On April 15, 2011, Gore submitted a petition labeled "Confidential" to limit or quash the subpoena. This version did not comply with Commission Rules 4.2(d)(4) and 4.9(c), because Gore did not simultaneously submit (1) an explicit request for confidential treatment, conforming to the requirements of Rule 4.9(c); (2) a redacted public version; and (3) copies of the exhibits to the petition. Gore's counsel was notified by the Commission's Secretary that a redacted public version of the petition and a request for confidential treatment had to be filed at the same time as the version labeled "confidential."

On April 18, 2011, Gore submitted the exhibits to the petition, and on April 19, 2011, Gore submitted a version of the petition labeled "Public Version" that included as notifi Pub

[5] Id.

[6] 16 C.F.R. §§ 4.2(d)(4), 4.9(c). In particular, Rule 4.2(b) provides that the identity of the petitioner and the matter name – which constitute the title of the action – must be "clearly show[n]" and may not be redacted. 16 C.F.R. § 4.2(b).

will not stay compliance with any applicable obligation imposed by the Commission or the Commission staff * * *[,]" including in particular the obligation to comply with the subpoena or CID at issue[7].

2. ***ANALYSIS***

i. The subpoena is not unduly burdensome

Gore's principal contention is that the subpoena should be quashed because it is unduly burdensome. In support, Gore claims that compliance could require production of documents from over 1,500 employees, requiring a search of over 1.3 terabytes of data that would require possibly hundreds of thousands of hours of personnel time and cost up to ten million dollars. Gore also argues that the time period for relevant documents identified in the subpoena is unduly burdensome because it demands documents dating back to 2001. Gore argues that complying with this requirement would require it to investigate archived storage and dated electronic records, including files of long-departed employees. Gore further argues that the requirement to produce documents current to within 14 days of "full compliance" would also be unduly burdensome because of the volume of documents demanded by the subpoena. Finally, Gore argues that requiring a privilege log is overly burdensome because a large number of documents responsive to the subpoena are likely privileged.

As a preliminary matter, Gore's claims of undue burden are premised on an erroneous reading of the case law relevant to administrative investigations. Indeed, all of the cases cited in Gore's petition involve third party discovery under the Federal Rules of Civil Procedure.

The applicable standard for burden in the context of an administrative investigation is well-established. Over thirty years ago, in FTC v. Texaco, Inc., the D.C. Circuit stated that "the question is whether the demand is unduly burdensome or unreasonably broad[,]" meaning that it "threatens to unduly disrupt or seriously hinder normal operations of a business."[8] The court distinguished "undue burden" from the "expected" and "necessary" costs imposed in any

[7] 16 C.F.R. § 4.2(d)(4).

[8] 555 F.2d 862, 882 (D.C. Cir. 1977) (emphasis in original). Accord Solis v. Food Employers Labor Relations Ass'n. & United Food & Comm'l Workers Pension Fund, No. 10-1687, 2011 U.S. App. LEXIS 9110, *8 (4th Cir. May 4, 2011); FTC v. Invention Submission Corp., 965 F.2d 1086, 1089, 1090 (D.C. Cir. 1992); EEOC v. Maryland Cup Corp., 785 F.2d 471, 479 (4th Cir. 1986); FTC v. Church & Dwight Co., Inc., 747 F. Supp. 2d 3, 8 (D.D.C. 2010).

[9] Texaco, 555 F.2d at 882.

[10] Id.

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Applying the proper standards to this case, it is apparent that Gore has failed to meet them. Gore has the responsibility of establishing undue burden in complying with a Commission subpoena.[17] "[T]he presumption is that compliance [with Commission subpoenas] should be enforced to further the agency's legitimate inquiry into matters of public interest."[18] In order to overcome this presumption and establish undue burden, Gore must show that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business."[19] The target of a subpoena must expect to incur some burden in responding to a subpoena and the evidence required to demonstrate an undue burden increases when the burden is in large part attributable to the magnitude of the recipient's business operations and the comprehensive nature of the investigation.[20]

In particular, in asserting claims of burden, subpoena recipients must consider first how technology may help reduce any burdens associated with review and production of electronically stored information ("ESI"). There are a myriad of "advanced analytical software applications and linguistic tools" available to help reduce any burden of reviewing and producing ESI.[21]

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original); see also Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992) ("[T]he Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of a violation."). To require an agency to identify its specific needs for information before allowing the agency to obtain that information would run contrary to these principles.

[17] In re Nat'l Claims Serv., Inc., 125 F.T.C. 1325, 1328-29 (1998).

[18] FTC v. Shaffner, 626 F.2d 32, 38 (7th Cir. 1980).

[19] FTC v. Church & Dwight Co., Inc., 747 F. Supp. 2d 3, 8 (D.D.C. 2010) (quoting Texaco, 555 F.2d at 882).

[20] See Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) ("There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one – and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations."); In re FTC Corporate Patterns Report Litig., Nos. 76-0126, 76-0127, 1977 WL 1438, at * 16 (D.D.C. July 11, 1977) (concluding that "there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden" and noting that "the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations.").

[21] FED. R. EVID. 502 advisory committee's note (Nov. 28, 2007). See also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, keywords can be run for privilege checks, and the production can be made

Thus, a party who claims burden related to ESI should include in its petition a discussion of the tools or techniques considered and how these have affected or mitigated the burden alleged.

It is not enough for a party to simply say, without more, that a Commission subpoena is broad or unduly burdensome. To the extent a party wishes to reduce its burden, it is incumbent on that party to come forward and present staff with information about the company and how it stores its electronic information and with affirmative suggestions about how the scope of the subpoena might be narrowed in order to focus the inquiry. This responsibility is particularly necessary given the prevalence of ESI and the current realities of e-discovery. Such affirmative suggestions could include limiting the scope to key custodians, narrowing the applicable time periods, proposing search methodologies such as the use of keywords, predictive coding, or concept searches, or utilizing other search and review techniques.

Gore has done none of that in this case. For example, Gore has not demonstrated through concrete evidence or declaration that the costs imposed by this subpoena are outside of the normal costs to be expected in an investigation, that these costs are unduly burdensome in light of the company's normal operating costs, or that these costs would seriously hinder or threaten its normal operations.[22] To the extent that the subpoena requires Gore to review millions of documents collected from hundreds of workers, including laborers, that burden is "in large part attributable to the magnitude of [Petitioners'] business operations" and is not by itself undue.[23] Gore's complaints about searching large numbers of documents or hundreds of custodians, or paying millions of dollars, without more, is insufficient to support a claim of undue burden.[24]

Gore's claim of burden from the production of ESI includes only a token reference in one of its exhibits to the impact of advanced analytical techniques or tools. Gore has claimed that it potentially has a terabyte or more of data, even after de-duplication, but Gore has not demonstrated that it has explored avenues for otherwise meeting staff's investigative demands, or offered the types of affirmative suggestions for reducing its burden described above.

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in electronic form obviating the need for mass photocopying."); John Markoff, Armies of Expensive Lawyers, Replaced by Cheaper Software, NEW YORK TIMES, Mar. 4, 2011, at A1, available at http://www.nytimes.com/2011/03/05/science/05legal.html.

[22] Maryland Cup, 785 F.2d at 479.

[23] Texaco, 555 F.2d at 882.

[24] Shaffner, 626 F.2d at 38 (rejecting as insufficient "conclusory allegation that compliance . . . would 'severely interfere, disrupt and temporarily terminate" recipient's business).