

PUBLIC



UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

12 20 2016

BEFORE THE FE

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

585167

SECRETARY

Address: E-mail: Telephone: Fax: Website: 1-800-473-3242

I. INTRODUCTION

Complaint Counsel seek interlocutory appeal

Second, Complaint Counsel have not shown that the Order involves a controlling question of law. And, it does not. It is well settled that “[p]rocedural disputes and discovery disputes do not amount to controlling questions of law.” In re N. Carolina Bd. of Dental Examiners, Docket No. 9343, 2011 WL 822921, at *3 (Mar. 1, 2011) (Chappell, J.). Similarly, “[i]nterlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay.” In re Bristol Meyers Co., Docket Nos. 8917, 8918, 8919, 90 F.T.C. 273, 1977 WL 189043, at *1 (1977). Complaint Counsel has not cited any case permitting interlocutory appeal of an order requiring production of documents not containing confidential or privileged information.

Third, Complaint Counsel have not shown substantial ground for difference of opinion, which “require[s] that the movant show a likelihood of success on the merits.” Daniel Chapter One, 2009 WL 1353465, at *4.

II. THE DISCOVERY ORDER DOES NOT WARRANT INTERLOCUTORY REVIEW

A. Complaint Counsel Have Not Demonstrated that Subsequent Review Would Be An Inadequate Remedy

Complaint Counsel make no showing that “subsequent review will be an inadequate remedy.” 16 C.F.R. § 3.23(b). Cf. In re Rambus Inc., Docket No. 9302, 2003 WL 1866416, at *4 (Mar, 26, 2003) (“t-3(f)-2u(a)1“t4(R)Wo

Clear precedent disfavoring interlocutory review of discovery orders forecloses that result. Subsequent review plainly will be adequate to redress any substantive harm.

B. The Order Does Not Involve Any Controlling Question of Law or Policy

Complaint Counsel also have failed to demonstrate that the Order “involves a controlling question of law or policy.” 16 C.F.R. § 3.23(b). A question of law is deemed controlling only if it may contribute to the termination, at an early stage, of a wide spectrum of cases.” N. Carolina Bd., 2011 WL 822921, at *3 (quotation marks omitted). The legal standard for discovery from the Commission does not meet this test. Procedural disputes and discovery disputes do not amount to controlling questions of law.” See also In re Gillette Co, 1981 WL 389438, at *1; Bristol Meyers Co, 90 F.T.C. 273, 1977 WL 189043, at *1. Rather “resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ.” Gillette Co, 98 F.T.C. 875, 1981 WL 389438, at *1. Accordingly, motions for interlocutory appeal of discovery rulings are regularly denied.

None of Complaint Counsel’s authorities requires a different result here.

“Complaint Counsel’s application” in In re Exxon Corp., Docket No. 91308, 1981 WL 389420, at *2 (1981) (cited Mot. at 1, 4, 6) “raise[d] issues that go beyond the proper exercise of an ALJ’s discretion in ruling upon discovery requests,” namely, whether Complaint

¹ Complaint Counsel do not argue that an immediate appeal materially advance the ultimate termination of the litigation.” 16 C.F.R. § 3.23(b) Such a principle would “make every ruling in every case appealable as to the relevance and propriety of any areas of discovery allowed by an administrative law judge.” N. Carolina Bd.

Counsel could use special reports under Section 6(b) as a discovery device although the Commission's Rules of Practice did not expressly provide for the practice.²⁻³ Here, by contrast, the Rules of Practice expressly authorize discovery of the Commission beyond what Complaint Counsel detected or reviewed in the course of the investigation of the matter or prosecution of the case.¹⁶ 16 C.F.R. § 3.31(c)(2) The only issue was the application of the Rules in particular circumstances which is not appropriate for interlocutory review.

Complaint Counsel's other authorities are inapposite. In re Bristol

1. Discovery from OPP and BCP Under Rule 3.36

There is no “substantial ground for difference of opinion” about whether Rule 3.36 requires a “special showing of need” or “strong justification” for discovery from any Bureau or Office not involved in the matter. Mot. at 7. As the Order holds, Order 3 n.3, Rule 3.36’s text is clear it authorizes a subpoena duces tecum to the Commission upon a showing that the requested discovery is (1) reasonable in scope; (2) “reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or to the defenses of any respondent”; (3) cannot reasonably be obtained by other means; and (4) has been specified with “reasonable particularity.” 16 C.F.R. § 3.36(b) §§ 3.31(c), 3.37(a). The Rule does not refer at all to a “special showing of need” for a document subpoena. That silence is telling given that the Rule does require a “compelling need” for a subpoena compelling testimony at an evidentiary hearing. 16 C.F.R. § 3.36(b)(3). If the Commission had intended to require the same showing for a document subpoena, it would have said so.

The legislative history does not support adding a requirement that the Commission left out of the text. The 2009 amendment to Rule 3.36 made no change to any of the prerequisites that the Order found Respondent satisfied. Instead, the amendment simply added the phrase “any Bureau or Office of the Commission, not involved in the matter, the office of Administrative Law Judges, or the Secretary to the list of entities that cannot be subject to discovery absent a motion under the Rule. Prior to the amendment, the Rule required a motion only for discovery from a governmental agency other than the Commission.”

This puts the legislative history in its proper context: the Commission referred in its commentary to a “special showing of need” and a “strong justification” to explain why the Rule’s existing requirements were being made applicable also to discovery from the Commission, not to require more than the Rule does on its face. 74 Fed. Reg. 1804, 1814 (Jan.

clarify what they contend good cause means.

Complaint Counsel say that the Order could be Rule 3.36 and 3.31(c)(2) “perilously indistinguishable.” Mot. at 6. But Complaint Counsel do not distinguish the two Rules or explain why a respondent that has shown that discovery is relevant, reasonable in scope, reasonably particularized, and unavailable through other means has not demonstrated “good cause” to obtain such discovery. Complaint Counsel’s argument that the two Rules address “very different discovery needs,” Mot. at 6, undercuts their position. Because the Bureau or Offices of the Commission that investigated the matter, including the Bureau of Economic Analysis, 16 C.F.R. § 3.31(c)(2), are more likely to have discoverable information than the Bureau or Office not involved in the matter, 16 C.F.R. § 3.36(a), Rule 3.31’s requirement of “good cause” for discovery from investigating Bureaus and Offices should be less stringent than Rule 3.36’s prerequisite for discovery from the Bureau or Office not involved in the matter.

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, I filed **RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR INTERLOCUTORY APPEAL OF THE COURT'S DECEMBER 20, 2016 ORDER** using the FTC's eFiling System, which will send notification of such filing to counsel of record as well as the following:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm-110
Washington, DC 20580

DATED: December 30, 2016

By: /s/ Justin P. Raphael
Justin P. Raphael

CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

DATED: December 30, 2016

By: /s/ Justin P. Raphael
Justin P. Raphael

Notice of Electronic Service

I hereby certify that on December 30, 2016, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016 Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on December 30, 2016, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016 Order, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney
Federal Trade Commission

nhopkin@ftc.gov
Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates
Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Justin Raphael
Attorney