

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,:

:

Petitioner, :

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: 7/15/2015 10:15 AM - 7/15/2015 10:15 AM in accordance with the subpoena's dema

I. Background

a search of all the backup tapes from January 2003 to October 2010 would cost over \$25 million dollars. Id. at 21. This estimate did not include the cost of searching hard drives, which also fell under the FTC's request that BIPI search "all" databases and archives. Id. at 19-20. During oral argument, however, the FTC conceded that it is "willing to forgo the F&G drive at this point, in favor of the backup tapes." See Transcript of Status Hearing [#59] at 70. The FTC also noted that the relevant period for which backup tapes must be searched is February through August, 2008, [#59] at 70, and that a search of four tapes would be sufficient, rather than the 24 originally subpoenaed, id. at 52.

Despite the concessions at oral argument, the FTC retains its position that BIPI did not conduct an adequate search of its records, in that it declined to search any server back-up tapes for responsive documents. See Status Report of the Federal Trade Commission [#41] at 12-13. BIPI, on the other hand, contends that it has done a full and thorough search and that the FTC's request for additional electronic searches remains "unnecessary and unduly burdensome." Response of Boehringer Ingelheim Pharmaceuticals, Inc. to the Federal Trade Commission's Status Report [#44] at 13.

Fueling this disagreement is a debate among the parties regarding the standard of review for the FTC's request. The FTC asserts that its request for a search of the backup tapes should be analyzed under the standards of FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir. 1977). [#41] at 13. BIPI, on the other hand, points to the "good cause" standard set forth in Federal Rule of Civil

II. Legal Standard

Under Federal Rule of Civil Procedure 26(b)(2)(B), “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). If the producing party can make such a showing, the court may “nonetheless order discovery from such sources if the requesting party shows good cause.” Fed. R. Civ. P. 26(b)(2)(B). It follows, therefore, that the court will not consider a requesting party’s “good cause” unless the producing party has first met her burden of showing “undue burden or cost.”

In the administrative subpoena context, however, a much stronger showing of “undue burden” is required. 4(s)ou-6(g)h not dis

hands are tied to the exact terms of the subpoena request; indeed, “in formulating protective conditions for administrative subpoenas, courts may resort analogously to techniques conventional to judicial subpoenas.” Sec. & Exch. Comm'n v. Arthur Young & Co., 584 F.2d 1018, 1033 (D.C. Cir. 1978) (citing the Federal Rules of Civil Procedure as one such technique).

III. Analysis

There is no doubt that the breadth of the search requested in the FTC’s original subpoena would have consumed much of BIPI’s time and money. Many of the status updates and other submissions to the Court on this issue addressed whether the search, as requested, constituted an undue burden on BIPI. Although both sides raised interesting arguments in this regard, the request as it stands today is on a different scale. Developments between the parties, both on their own and before me during the last status conference, indicate that the scope of the search requested by the FTC has been narrowed significantly, and as a r

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE