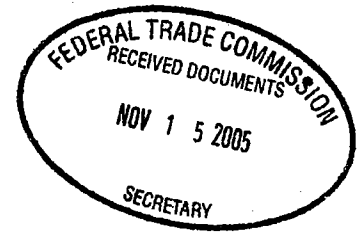


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)
)
BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)
Respondents.)
_____)

Docket No. 9318

PUBLIC DOCUMENT

**NONPARTY YAHOO! INC.'S MOTION IN SUPPORT OF COMPLAINT
COUNSEL'S MOTION TO QUASH RESPONDENTS' TWENTY-FIVE
SUBPOENAS DIRECTED TO THIRD PARTIES AND IN REPLY TO
RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO
QUASH CORPORATE RESPONDENTS' SUBPOENAS**

This motion sets forth Yahoo! Inc.'s endorsement of Complaint Counsel's Motion to Quash Respondents' Twenty-Five Subpoenas Directed to Third Parties ("Motion to Quash") and replies to Respondents' Opposition to the Motion to Quash ("Opposition"). There are at least four major reasons why Respondents' subpoena should be quashed.

First, Respondents' subpoena is untimely.

Second, the Federal Trade Commission ("FTC") already has definitively resolved that the discovery Respondents seek is unwarranted and inappropriate because it will not generate documents relevant to this proceeding.

Third, Respondents' core argument — that the subpoenas are related to this proceeding because any damage caused by Complaint Counsel's release of Respondents'

confidential information “must be weighed against a liability determination, if any, by the hearing officer” in this proceeding (Opposition at 2) — is meritless. Respondents’ liability for alleged FTC Act violations cannot turn on conduct by the FTC in this proceeding. Moreover, to the extent that Respondents argue that the discovery sought is relevant because they will use it to seek to offset damages that the FTC could obtain for consumers, that argument must fail for two reasons. First, because the FTC may only obtain injunctive rather than economic relief in this proceeding,^{1/} there would be nothing to offset. Furthermore, any attempt by Respondents to offset damages with its own asserted economic injury would essentially amount to a counterclaim for damages against the United States Government. An FTC judicial proceeding simply is not the proper forum for Respondents to seek remedies from the United States Government.

Fourth, the subpoena should be quashed because it is overly broad and unduly burdensome, such that it improperly infringes on Yahoo! Inc.’s First Amendment right to receive information and may implicate obligations under the Electronic Communications Privacy Act and other privacy protections.

I. Factual Background

On June 16, 2004, the FTC filed an administrative complaint alleging that Respondents’ advertisements violated the FTC Act by making unsubstantiated claims for fat and weight loss gels and supplements. The Chief Administrative Law Judge Stephen J. McGuire (“ALJ”) issued a Protective Order Governing Discovery Material (“Protective Order”) on August 11, 2004. Notwithstanding the Protective Order, the FTC posted on

^{1/} The FTC must file a subsequent action in a United States district court to obtain monetary redress for consumers. *See* 15 U.S.C. § 57b.

its public website Exhibit R accompanying Complaint Counsel's December 6, 2004, Motion to Compel. Additionally, on February 15, 2005, the FTC posted on its website five exhibits (Exs. 11, 15, 36, 42, and 45) accompanying Complaint Counsel's January 31, 2005 Motion for Partial Summary Decision. Two days later, the FTC removed all of these documents from the website. (Federal Trade Commission Order (June 17, 2005) ("6/17/05 Order") at 2.)

Respondents filed three procedural motions relating to the disclosure of these exhibits. The ALJ issued an order certifying each motion to the FTC and concluding that Complaint Counsel had violated FTC Rule 4.2(c)(3) by e-mailing nonpublic filings and had violated the Protective Order by posting certain exhibits on the FTC website.^{2/} (6/17/05 Order at 4.) On June 17, 2005, the Commission issued an order disposing of Respondents' motions that definitively resolved the discovery issues that Respondents are attempting to relitigate by issuing subpoenas to nonparties.

The following is a discussion of each of Respondents' procedural motions:

- (1) Respondents' Motion for Leave to Take Discovery Regarding Complaint Counsel's Violation of the Protective Order (March 8, 2005) ("Discovery Motion")

The Commission denied Respondents' motion for additional discovery regarding the violation of the Protective Order because the discovery sought — precisely the discovery Respondents now seek from nonparties — is irrelevant to the underlying litigation. As the Commission held, under FTC Rules governing this kind of adjudicatory proceeding, discovery is expressly "limited to matters that are relevant to the allegations

^{2/} The ALJ concluded that five out of the six exhibits that had been emailed appeared to contain information that warranted *in camera* treatment.

of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses, none of which is at issue in this discovery motion." (6/17/05 Order at 8.) The Commission's ruling applies with full force to the subpoena issued to Yahoo! Inc. because this subpoena seeks information about the same events — the publication of Respondents' exhibits on the FTC website — that the Commission has deemed irrelevant to the instant litigation, and therefore outside the scope of discovery.

(2) Respondents' Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt (March 8, 2005)

The Commission concluded that Complaint Counsel violated Rule 4.2(c)(3), which prohibits the FTC from filing confidential exhibits by email, and that this violation warranted a remedy. However, it rejected Respondents' request to dismiss the Commission's complaint because Respondents did not allege or demonstrate how the publication of the exhibits on the FTC's website prejudiced any substantive claims or defenses they might assert in this litigation. Instead, the Commission imposed a requirement that, "for the remainder of the present proceeding, all future public filings by Complaint Counsel under Rule 4.2(c)(3) be reviewed and certified by the Associate Director for the Division of Enforcement, Bureau of Consumer Protection, to ensure that such public filings have been properly redacted, and that they contain no unredacted material that would violate the Rule." (6/17/05 Order at 6.)

(3) Respondents' Emergency Motion Requiring the Commission to Provide Respondents With Electronic Files Showing Who Accessed Respondents' Confidential Information While It Was on the Commission's Website (February 18, 2005)

The Commission granted this motion in part, and denied it in part. The Commission denied Respondents' request for specific Internet Protocol (IP) addresses or

other information that would personally identify specific individuals because such a disclosure would violate the Privacy Act of 1974. Rather, the Commission granted “Respondents access to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received. Disclosure of this information provides Respondents with information regarding the extent of the disclosures and may allow the Respondents to contact these domains to determine to what extent the domain operators themselves, or users of these domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC’s servers.” (6/17/05 Order at 7.) The Commission states that the data would allow Respondents to “determine if those domains might assist in identifying, retrieving, or destroying any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves.” (6/17/05 Order at 7-8.)

The Commission’s Order does not suggest or authorize the use of FTC subpoenas to demand information from third parties. At most, it arguably “allows” Respondents to conduct research under their own auspices — and not to use the coercive power of an FTC subpoena to impose burdens on nonparties with no connection to the underlying proceeding. The Order contemplates that Respondents may use information they obtain from the FTC to “contact” the identified domains to inquire whether the domains might voluntarily provide any relevant information they may possess. Use of the term “contact” clearly refers to an out-of-court, self-help process that would facilitate Respondents’ efforts to assess the potential harm and mitigate any potential resulting economic impact; it does not imply the right to seek discovery or otherwise use governmental power to compel nonparties.

In accordance with the Commission's June 17, 2005 Order, on June 27, 2005, the FTC sent to Respondents redacted FTC website server logs for the exhibits that had been improperly emailed or posted, including Exhibits 11, 15, 36, 42, and 45 accompanying Complaint Counsel's January 31, 2005, Motion For Partial Summary Decision, and Exhibits Q-W accompanying Complaint Counsel's December 6, 2004, Motion to Compel. The FTC's logs list inktomisearch.com^{3/} as a web domain operator that received requests for Exhibits Q-W, 11, 15, 36, 42, and 45.

On October 14, 2005—approximately three and a half months after receiving this information—Respondents issued a subpoena *duces tecum* to Yahoo! Inc. and twenty-four other nonparties who appeared on the FTC server logs. This subpoena demands seven broad categories of documents, including “[a]ll documents relating to your company’s access to the U.S. Federal Trade Commission’s website,” as well as “all information maintained in your company’s databases relating in any way to” Exhibits Q-W, 11, 15, 36, and 42.

The rulings on Respondents’ prior motions make clear that these subpoenas will not lead to relevant evidence, that Respondents’ have already been granted all appropriate related sanctions, and that no further discovery within this proceeding is appropriate or warranted.

II. Yahoo! Inc. Endorses Complaint Counsel’s Motion to Quash.

Yahoo! Inc. supports Complaint Counsel’s Motion to Quash, and its specific arguments that Respondents’ subpoenas are untimely, irrelevant, overbroad and

^{3/} Inktomi, the company related to inktomisearch.com, is owned by Yahoo! Inc. Among other things, Inktomi provides search functions for Yahoo! Inc.

improper.^{4/}

A. The Subpoena Received by Yahoo! Inc. is Untimely.

This Court's Scheduling Order imposed a November 8, 2004 deadline for issuing subpoenas *duces tecum*. Respondents' argument that this deadline should be extended because the FTC published the relevant documents on its website after this date does not advance their cause. Respondents' only option under the Rules would be to petition the ALJ to amend the Scheduling Order and reopen discovery. But that route, though procedurally proper, was closed to Respondents when the Commission denied Respondents' Motion for Leave to Take Discovery Regarding Complaint Counsel's Violation of the Protective Order. Respondents cannot circumvent the Commission's prior determination that additional discovery on this issue is unwarranted; nor should Respondents' violation of the Scheduling Order be permitted.

B. The Discovery Sought by Respondents Is Irrelevant to This Proceeding, as the FTC Has Determined.

The FTC's Complaint alleges that Respondents violated the FTC Act's prohibition against false and misleading advertising. In their Opposition to the Motion to Quash, Respondents argue that the information sought in the subpoenas is relevant to the litigation because any liability finding should be offset by the injury incurred as a result

^{4/} Respondents argue that the FTC lacks authority to file a motion to quash a third party subpoena because Rule of Practice 3.34(c) states: "Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith." In a previous order in this case, dated December 9, 2004, however, the ALJ ruled on Complaint Counsel's motion to deny discovery demanded in twenty-two separate subpoenas sent to non-parties. The ALJ reasoned that, in the interest of judicial efficiency, it was appropriate to rule on the FTC's motion, rather than requiring twenty-two separate motions from the third parties. Based on the same judicial efficiency rationale, the ALJ should rule on and grant Complaint Counsel's Motion to Quash. (December 9, 2004 Order at 5.)

of the FTC's disclosure of their confidential information in violation of the Protective Order Governing Discovery Material. At most, however, the discovery might have an impact on economic remedies — something the FTC cannot recover in this administrative proceeding but must instead seek in a separate action in United States district court.^{5/} Accordingly, the pending discovery request should also be quashed as irrelevant to the current proceeding.

Respondents specifically allege that the “FTC is liable for the trade secret disclosure—a deprivation of property without due process of law, a tort recognizable under the Federal Tort Claims Act, 28 U.S.C. § 2674 *et seq.*, and a crime punishable under federal law, 18 U.S.C. § 1905.” (Opposition at 7) Yet, Respondents fail to provide any support for their conclusory assertion that the FTC has authority to offset a liability or damages ruling in such a manner; nor could they.

Respondents’ argument, if asserted in this proceeding, would effectively constitute a counterclaim for damages against the FTC under the Federal Tort Claims Act.^{6/} However, the FTC lacks authority to resolve economic damages claims against the United States Government. To the extent that such claims are appropriate and viable through a requisite waiver of sovereign immunity, they should be filed separately in another forum with appropriate jurisdiction.

Moreover, any remedies ultimately awarded based on Respondents’ alleged conduct, would be on behalf of consumers. Respondents have not asserted any

^{5/} See 15 U.S.C. § 57b.

^{6/} Needless to say, Respondents’ assertion that the FTC has engaged in criminal conduct could only be addressed in the context of charges brought by the United States Department of Justice.

compelling justification for offsetting such a public remedy based upon subsequent governmental action that allegedly injured Respondents. Injured consumers should receive full redress in this proceeding. Respondents are free in another proceeding before a tribunal with jurisdiction to seek recovery of any injury they may have suffered.

Finally, the Commission already ruled on the question of the relevance of the information sought in the pending subpoenas by denying Respondents' Motion for Leave to Take Discovery Regarding Complaint Counsel's Violation of the Protective Order because, "[d]iscovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses, none of which is at issue in this discovery motion." (6/17/05 Order at 8.)

C. The Subpoena Received by Yahoo! Inc. is Overbroad and Unduly Burdensome.

Each of the seven demands set forth in the subpoena is overbroad and imposes undue burdens on Yahoo! Inc.

The first four categories of documents requested by the subpoena seek documents that are not even related to the particular exhibits that were the subject of the Protective Order violation. For example, Respondents demand all documents relating to Yahoo! Inc.'s access to the entire FTC website and all documents identifying employees, officers, directors, contractors, and/or other agents (collectively "users") who accessed that website. These demands fail to specify a relevant date or subject matter; nor do they have any relation to the issues at stake. It appears that the relevant exhibits that were

improperly posted to the website were only posted for two days^{7/} and comprised only a tiny portion of the vast information contained on the FTC website. Accordingly, the first four categories of documents listed in the subpoena are not tailored to the information Respondents claim to seek.

In addition, with respect to the fifth and sixth categories of documents (which do refer to the relevant exhibits), compliance with the subpoena would be extraordinarily burdensome because Yahoo! Inc. has nearly 10,000 employees, any of whom may have accessed the FTC's website for reasons wholly unrelated to the issues in this matter.

The seventh category in the subpoena, which seeks "[a]ll information maintained in your company's databases relating in any way" to the specified exhibits, imposes untenable burdens as well. In light of Yahoo! Inc.'s numerous global databases, responding to the subpoena would be incredibly burdensome and likely would not produce relevant information.^{8/}

Notably, the significant time and resources that Yahoo! Inc. would have to expend in order to comply with this broad subpoena likely would not yield relevant information for Respondents. Indeed, based on an initial investigation, it appears that Yahoo! Inc. does not have the information that Respondents seek. Even assuming, *arguendo*, that responsive documents exist in Yahoo!'s possession, Yahoo! Inc. would be required to

^{7/} As discussed above, all relevant exhibits were removed from the FTC's website on February 17, 2005. Exhibits 11, 15, 36, 42, and 45 were posted on February 15, 2005. From the Court's June 17, 2005 Order, it is not clear when Exhibits Q-W were posted to the website.

^{8/} Finally, as the Motion to Quash notes, Respondents have demanded documents related to Exhibit 42, even though this court ruled that the exhibit did not meet the standards for *in camera* treatment. (See April 6, 2005 Order at 9.)

conduct extensive and time-consuming technical research to retrieve such information for its nearly 10,000 employees concerning information that was removed from the FTC's website nearly nine months ago. This process would be virtually impossible.

Additionally, given the overbroad language of the subpoena, any responsive information that may exist may be subject to prohibitions on disclosure under the Electronic Communications Privacy Act ("ECPA"). Yahoo! Inc. would be required to analyze the requirements of this Act and other privacy protections that may preclude disclosure of information covered by the subpoena.

Finally, even apart from the specific flaws of the subpoena, enforcement of the subpoena improperly infringes on Yahoo! Inc.'s First Amendment right to receive information. Yahoo! Inc. is a nonparty whose only connection to this proceeding is the fact that it visited a U.S. government website and accessed publicly available information. It is well-established that "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). And the Supreme Court has recognized the special importance of the Internet as a source for that free exchange of information. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (characterizing the Internet as a "vast democratic" forum). Thus, imposing burdens on Yahoo! Inc. simply for exercising its First Amendment right to gather information from publicly accessible sites on the Internet — as this subpoena would do — would chill the exercise of that constitutionally protected activity. Indeed, this concern is further heightened by the fact that the source of the information is a government website. Accordingly, in light of the overbreadth of the requested information, the significant burdens compliance with the subpoena would impose, and

the chilling effect on core First Amendment freedoms, this subpoena should be quashed.

III. Conclusion

For the foregoing reasons, Yahoo! Inc. respectfully requests that the subpoena issued to it be quashed.

Respectfully submitted,

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Counsel for Yahoo! Inc.

Dated: November 14, 2005

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BEFORE THE FEDERAL TRADE COMMISSION**

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DENNIS GAY,)	
DANIEL B. MOWREY, and)	
MITCHELL K. FRIEDLANDER,)	
Respondents.)	
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**ORDER GRANTING NONPARTY YAHOO! INC.'S MOTION IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION TO QUASH RESPONDENTS' TWENTY-FIVE
SUBPOENAS DIRECTED TO THIRD PARTIES AND IN REPLY TO RESPONDENTS'
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO QUASH CORPORATE
RESPONDENTS' SUBPOENAS**

On November 14, 2005, Yahoo! Inc. filed a motion in support of Complaint Counsel's Motion to Quash Respondents' Twenty-Five Subpoenas Directed to Third Parties and in reply to Respondents' Opposition to Complaint Counsel's Motion to Quash Corporate Respondents' Subpoenas.

Upon due consideration, it is apparent that Respondents' subpoena on Yahoo! Inc. is untimely, and that Respondents did not seek leave to serve the subpoena on Yahoo! Inc. The subpoena is directed to topics not within the bounds of available discovery. Discovery in Commission adjudicatory proceedings is limited to matters that are relevant to the allegations of the Complaint, to the relief proposed therein, or to the Respondents' defenses. The posting of one or more exhibits on the FTC's website is not relevant to those issues or this matter. *See* Order of the Commission, June 17, 2005 at 5, 8. Even if the subpoena was within the bounds of permissible discovery, the breadth of the proposed discovery and its attendant burden on Yahoo! Inc. would outweigh any benefit of such discovery in these proceedings. The subpoena is improper. Accordingly, it is hereby ORDERED that Respondents' subpoena on Yahoo! Inc. is quashed. It is further ORDERED that Respondents shall immediately notify Yahoo! Inc. that the subpoena has been quashed.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of November 14, 2005 via Hand Delivery with Donald S. Clark, Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Rachel Shachter

Rachel Shachter