

Respondent asserts that the documents it seeks are directly relevant to the issues raised by the Complaint and that Respondent has no other effective means to obtain information from its non-party competitors necessary for its defense. Respondent argues that simply because Gelson's documents are confidential does not provide a basis for withholding the documents. Respondent further asserts that the Protective Order and the Commission's *in camera* rules adequately protect Gelson's confidential information.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). Discovery may be limited by the Administrative Law Judge if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d). Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

Gelson's states that it has withheld documents responsive to Request Numbers 5 and 9(b). Request Number 5 seeks: all market studies, strategic plans or competitive analyses relating to competition in each Geographic Area, including documents discussing market shares. Request Number 9(b) seeks: documents sufficient to show, or in the alternative, a spread sheet showing the total weekly sales for each week since January 1, 2006 to the current date. The documents Gelson's seeks to withhold are: (1) a site study, containing sales projections, responsive to Request Number 5; and (2) documents evidencing weekly sales for each Gelson's store, responsive to Request Number 9(b).

Gelson's does not make the objection that the documents requested are unduly burdensome or not relevant to the issues raised in the Complaint or the defenses asserted thereto. Instead, Gelson's seeks a protective order or an order quashing or limiting the subpoena on the grounds that: (A) disclosure of commercially sensitive information would be anticompetitive; and (B) the Protective Order does not adequately protect Gelson's confidential, commercially sensitive information.

A. Disclosure of the requested documents pursuant to the Protective Order would not harm competition

Gelson's argues that the subpoena should be quashed or limited because it asks Gelson's to provide confidential and commercially sensitive information to one of its primary competitors, Whole Foods. Gelson's also argues that Whole Foods' subpoena would require Gelson's to provide detailed information regarding the lifeblood of Gelson's business and provide Whole Foods with the blueprint to Gelson's success in the Southern California market. Gelson's charges that Whole Foods has a history of harassing, punishing, and taking business away from competitors. Gelson's states that it has no reason to believe that Whole Foods would

not relish the opportunity to drive Gelson's out of business and that Whole Foods has the size and resources to do it, with the assistance of Gelson's trade secrets and other commercially sensitive information. Respondent asserts that Gelson's accusations of anticompetitive conduct have no bearing on this discovery dispute.

Gelson's has not demonstrated that Whole Foods is seeking these documents merely to gain a competitive advantage, rather than to defend itself in this action. Accordingly, such unsupported allegations fail to provide a reasonable basis to quash the subpoena.

The claim that these documents contain confidential and commercially sensitive information also does not provide a basis to quash or limit the subpoena. *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery."). See also *Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement").

Moreover, the Commission's Rules of Practice do not specifically protect trade secrets or confidential information from discovery. Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public. The Commission's Rules of Practice also do not limit a litigant's ability to obtain confidential information through discovery. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 116 (Jan. 21, 1981) (These provisions do "not absolutely bar disclosure of business data as evidence in [FTC] adjudicatory proceedings."). Accordingly, Gelson's cannot withhold relevant documents based solely on its desire to shield confidential information from a competitor.

B. The requested information is adequately protected by the Protective Order

Gelson's states that the requests seek detailed information including three years' worth of weekly sales information for each of its locations and a site study detailing strategic plans and sales projections in one location. Gelson's further states that it diligently protects its weekly, location specific sales information and does not disclose this information to anyone outside of the company. Gelson's expresses concerns that experts retained in this case may be hired by other competitors in the future and would not be able to unlearn the information learned from Gelson's documents and that Whole Foods could use information from Gelson's to eliminate Gelson's as a competitor.

Gelson's further asserts that the Protective Order does not adequately protect Gelson's information because it places the burden on Gelson's to file a motion for *in camera* treatment to prevent disclosure to the public. Next, Gelson's asserts that the Protective Order fails to provide an adequate disincentive against or remedy for disclosure of Gelson's' confidential information. Gelson's points out that, in another administrative proceeding, the FTC caused discovery material that had been marked by a respondent as confidential to be posted on the FTC's public website and that, in the District Court case *FTC v. Whole Foods Market, Inc.*, the FTC filed

publicly a document that had been redacted by blackening out text electronically in a manner which allowed the trade secret information to be viewed. Gelson's argues that it should not be required to provide information that Gelson's considers to be confidential without a protective order that prohibits the FTC from disclosing such information. Gelson's asserts that the protective order should contain an adequate disincentive that would require the disclosing party to pay a penalty for any violation of the protective order.

Respondent submits that the Protective Order in this case does adequately protect confidential documents of third parties. The Protective Order allows disclosure of confidential documents to a limited group of people and prohibits any Whole Foods employees, including inside counsel, from reviewing confidential documents subject to the Protective Order. Respondent asserts further that Gelson's has provided no authority to support its request that the Commission agree to pay damages in the event of an inadvertent public disclosure of confidential information. Respondent also submits that, in the event the Protective Order is violated, Gelson's can raise the issue with the Commission.

The Protective Order entered by the Commission in this case allows disclosure of confidential documents to an extremely limited group. Such documents may be disclosed only to the Administrative Law Judge and the Commission, and employees assisting them; expert witnesses, who may not be employees of Respondent or a third party which has been subpoenaed; judges and other court personnel of any court having jurisdiction over the appellate proceedings involving this matter; and outside counsel for Whole Foods. The Protective Order, thus, prohibits any Whole Foods employees, including inside counsel, from reviewing the documents produced by non-parties.

Gelson's asserts that providing Gelson's sensitive information to Whole Foods' outside counsel is, in effect, no different from providing that information to Whole Foods itself and that experts or consultants may inadvertently use information they learned in this litigation in future litigation. These assertions are without merit. "[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation (in cases frequently involving experts)." *Coca-Cola Bottling*, 1976 FTC LEXIS 33, *5 (Dec. 7, 1976). Gelson's has failed to demonstrate that the Protective Order will not sufficiently protect the withheld documents.

Gelson's refers to the protective order issued by the United States District Court for the District of Columbia in *FTC v. Whole Foods, Inc.*, July 6, 2007, which included a penalty of \$250,000 to be paid by any person who violated the protective order in that case. Gelson's argues that the Protective Order in this case is inadequate because it does not provide for a fixed monetary penalty on counsel for a violation. However, Gelson's has provided no authority in support of its argument that the Commission has authority to require a disclosing party to pay a penalty for a violation of its protective orders.

In addition to the safeguards of the Protective Order, the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents. Pursuant to Commission Rule 3.45(b), if either party seeks to introduce Gelson's

confidential information into evidence, Gelson's may file a motion for *in camera* treatment for documents it feels should be withheld from the public record. In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). Confidential information is withheld from the public record when this standard is met.

The *in camera* procedures in Part III adjudication and the Protective Order entered by the Commission in this case adequately protect Gelson's confidential information from disclosure.

IV.

For the reasons stated above, Gelson's motion for a protective order or to quash or limit the subpoena is DENIED. Gelson's shall produce all responsive documents no later than December 31, 2008.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: December 23, 2008