

Order

IN THE MATTER OF
CHOCK FULL O'NUTS CORPORATION, INC.*Docket 8884. Interlocutory order, March 2, 1973.*

Order quashing a subpoena directed to the Secretary of the Commission on the grounds that respondent's failed to comply with the provisions of Rule 3.36 and in view of the traditionally privileged character of the documents which the subpoena demands.

ORDER QUASHING SUBPOENA DUCES TECUM

This matter is before the Commission on its own motion. Respondent applied to the administrative law judge, pursuant to Section 3.36 of the Commission's Rules of Practice, for a subpoena *decus tecum* directed to Charles A. Tobin, Secretary, Federal Trade Commission, to produce certain documents from the Commission's records. The administrative law judge, on October 12, 1972, granted the motion and on October 16, 1972 issued the subpoena. By order of October 25, 1972, the Commission, on its own motion, stayed the return date of the subpoena, and, by order of this date, placed the subpoena on its docket for review pursuant to Section 3.23(a) of the Commission's rules.

The subpoena demands:

All charts, graphs, tables, written descriptions or summaries relating in whole or in part, to exclusive buying, quality control and pricing practices in franchise operations, prepared by or for the Commission or staff members in conjunction with the Report of the Ad Hoc Committee on Franchising, June 2, 1969, and in conjunction with any subsequent investigation of the franchise industry or any part thereof, pursuant to paragraph (1) of the attached Order.

Respondent alleges that the information sought above may be relevant to a showing that its challenged practices are not "unfair methods of competition or unfair acts or practices" stating:

* * * When complaint counsel depart from the more conventional guidelines afforded by the antitrust laws and invoke the "unfairness" provisions of Section 5, they necessarily implicate not only the practices of a particular respondent, but also similar trade practices generally. It obviously is relevant to the question whether a practice of Chock's is an unfair method of competition, whether or not the same practice is widely relied upon by other franchisors and its proscription would substantially interfere with business arrangements that enable thousands of small businessmen to become successful entrepreneurs. ("Reply to Answer in Opposition to Respondent's Motions to Produce Documents," October 11, 1972, p. 2).

The administrative law judge has determined that the infor-

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mation sought by the subpoena is relevant for discovery purposes; that is, it "might lead to the discovery of data which would be relevant at an evidentiary trial." While we are not inclined, at this stage in the case at least, to quarrel with this bare-bones finding of relevancy, that finding alone cannot be determinative of the issue in the face of important countervailing considerations.

Initially, it should be noted that Section 3.36 of the Rules of Practice, which authorizes subpoenas to Commission officials provides in part that the application for the subpoena:

shall specify as exactly as possible * * * the general relevance of the material * * * together with a showing that such material, information, or testimony is not available from other sources by voluntary methods or pursuant to Sections 3.33-3.34.

If, as respondent alleges, the complaint in this case threatens industry practices which are both widespread and necessary to serve legitimate functions, it would seem that testimony concerning the ubiquity and value of the challenged practices could be readily obtained from other industry members or experts, without resort to the general search of Commission files authorized here. Certainly no showing has been made, as the rule requires, that the sort of information which the motion seeks is not readily obtainable by other means.

The sorts of documents whose disclosure would be compelled by scrupulous compliance with this broad-gauged subpoena are numerous. They range from staff memoranda summarizing results of investigations of particular companies wholly unrelated to the instant case, and recommending Commission action, to intra-agency communications in which staff, based on study of franchising practices, recommend policy to the Commission. Surely documents whose principal function is to communicate to the Commission advice by the staff concerning policy are highly privileged, and discovery is not warranted absent the most compelling circumstances, which have not been demonstrated here.

A further category of documents falling within the arguable ambit of the above characterization, is written summaries of individual 6(b) reports made by the staff. In point of fact, no industry-wide tabulation of 6(b) returns relating to the franchising practices here at issue has been made. However, staff have transcribed company-by-company responses to a 6(b) questionnaire dealing with the practices here in question and others.

These questionnaires and the staff transcriptions contain highly confidential information, which the Commission has indicated to the providing parties, it will not disclose to any nonemployee, without first notifying them and providing them an opportunity to object to disclosure.

Perhaps respondent would characterize the company-by-company descriptions as mere "raw data" not yet summarized which they state they do not desire. To the extent, however, that the documents may be considered to fall within the flexible terms of the subpoena, the Commission does not believe that the interests of free discovery warrant initiation of the laborious notification process necessary before the Commission may disclose the documents in question.

By provisions 2-5 of the judge's order granting discovery, respondent has already been granted extensive inquiry into complaint counsel's files. No material from the documents covered by the first paragraph of the order pursuant to which the subpoena was issued, is to be used in litigation of the case.

In view of respondent's failure to comply with the provisions of Rule 3.36, and in view of the traditionally privileged character of the documents which the subpoena demands, the Commission has determined that it must be quashed.

It is hereby ordered, That the subpoena to Secretary Tobin be, and it hereby is, quashed.

Commissioner MacIntyre abstaining.

IN THE MATTER OF
WARNER-LAMBERT COMPANY

Docket 8891. Order and Opinion, March 2, 1973.

Denial of respondent's appeal from ruling of administrative law judge striking portions of respondent's answers as irrelevant to the issues raised by the complaint.

OPINION OF THE COMMISSION

This matter is before the Commission on respondent's application for review of an order by the administrative law judge granting complaint counsel's motion to strike portions of certain