

Interlocutory Order

94 F.T.C.

IN THE MATTER OF

UNNAMED DEBT COLLECTION AGENCIES, CREDITORS OR OTHERS

*File No. 782 3078. Interlocutory Order, Aug. 31, 1979*ORDER DENYING MOTION TO REIMBURSE COSTS OF COMPLYING
WITH SUBPOENA DUCES TECUM

Creditors Service Bureau of El Paso, Inc. (CSB), moves that it be reimbursed for expenses incurred in complying with a subpoena duces tecum issued on January 22, 1979, which required the production of documents relating, *inter alia*, to the practices used by CSB to collect consumer debts. The instructions appended to the subpoena provided for the submission of verified copies in lieu of originals for any of the responsive documents.

A subpoena respondent is not automatically entitled to the reimbursement of expenses incurred in complying with Commission process. Rather, subpoenaed parties are expected to absorb reasonable expenses of compliance as a cost of doing business. *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1033 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979); *FTC v. Texaco, Inc.*, 555 F.2d 862, 881-82 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (modification of investigative subpoenas is not justified "unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business").

To justify its claim for reimbursement, CSB must demonstrate that the costs of complying with the Commission subpoena are unreasonable (see *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979); *United States v. Tivian Labs, Inc.*, 589 F.2d 49, 55 (1st Cir. 1978); *United States v. Davey*, 543 F.2d 996, 1000 (2d Cir. 1976)), and in determining whether a subpoena respondent has met that burden, we consider chiefly the costs of compliance in relation to the size and resources of the producing party. *E.g.*, *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *appeal docketed*, No. 79-1331 (D.C. Cir. Mar. 27, 1979). The costs incurred by CSB in responding to the subpoena—\$847.37—seem minor in relation to the financial position of the firm. Moreover, we note that the subpoena calls in substantial part for the production of corporate, operating, and other business records which are incident to the conduct of CSB's business and under such circumstances, a claim for reimbursement is difficult to sustain. See *FTC v. Rockefeller*, *supra*, 591 F.2d at 191. Finally, CSB has not shown that its decision to incur copying expenses (\$100.00) was based on a business need for continued access to

the originals. See *SEC v. Arthur Young & Co.*, *supra*, 584 F.2d at 1033-34.¹

It is ordered, That the motion be, and it hereby is, denied.

By order of the Commission.

¹ The cases cited by CSB, *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418 (C.D. Cal. 1975), and *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976), provide no support for CSB's reimbursement claim. In *Farmers & Merchants Bank*, the court's decision to require reimbursement was based on the fact that the Internal Revenue Service subpoena was directed not to the target of an investigation (as here) but to the target's wholly uninvolved bank (a "mere [repository] of information performing a service for the government in complying with the [subpoena]", *FTC v. Rockefeller*, 591 F.2d 182, 191 (2d Cir. 1979)), and that compliance with the subpoena was "not predictably part of the banking business." 397 F. Supp. at 420. Moreover, other courts which have considered a bank's entitlement to reimbursement for costs incurred in complying with an IRS summons have disallowed such claims based on the reasonableness of the expenditures and the duty to comply with agency process. *E.g.*, *United States v. Continental Bank & Trust Co.*, 503 F.2d 45, 48 (10th Cir. 1974); *United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352, 354-356 (E.D. Ky. 1977); *United States v. Mellon Bank*, 410 F. Supp. 1065, 1069-70 (W.D. Pa. 1976); *United States v. Bremicker*, 365 F. Supp. 701, 703 (D. Minn. 1973); *United States v. Jones*, 351 F. Supp. 132, 134 (M.D. Ala. 1972); *cf. California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 50 (1974). In *Friedman*, the court stated that such claims require findings on the extent of the burden of the record search and observed: "A bank, whose business is the facilitation of financial transactions, and which keeps records of all customer dealings as a matter of course, if not law [footnote omitted], may be required [as part of the cost of doing business, to make an unreimbursed record search]." 532 F.2d at 937.

CSB also relies on 5 U.S.C. § 503 (1977), and Fed. R. Civ. P. 45 and 81(a)(3), none of which is applicable here. 5 U.S.C. § 503 applies only to allowances (*e.g.*, for the cost of travel) for witnesses who appear at agency hearings pursuant to subpoena, and not to the costs of searching for and reproducing subpoenaed materials. The Federal Rules of Civil Procedure apply only to proceedings in United States district courts and not to proceedings before administrative agencies. See *FTC v. Kujawski*, 298 F. Supp. 1288, 1289 (N.D. Ga. 1969); Fed. R. Civ. P. 1.

Complaint

94 F.T.C.

IN THE MATTER OF
LIQUID AIR CORPORATION OF NORTH AMERICA, ET
AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-2990. Complaint, Sept. 5, 1979 — Decision, Sept. 5, 1979

This consent order, among other things, requires a San Francisco, Calif. producer and seller of industrial gases, to divest as a unit within two years, specified air separation plants and other operations located in the areas of major competitive overlap between the firm and Chemetron Corporation, a Chicago, Ill. subsidiary of Allegheny Ludlum Industries, Inc. To promote the viability of the divested package and completely eliminate any possible overlap in the Southeast, the firm must also divest Chemetron's Knoxville acetylene plant and Chemetron's Chattanooga hydrogen plant. Liquid Air is further required to divest its Texas carbon dioxide operations and certain Chemetron retail stores, together with the distribution equipment; customer, dealer and distributor contracts; and customer lists associated with these enterprises. Additionally, the three companies are prohibited from acquiring any air separation production facilities for ten years.

Appearances

For the Commission: *Kenneth G. Starling, Stephen C. Garavito and Peter L. Feldman.*

For the respondents: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an agreement which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and that said agreement therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and having found that a proceeding with respect to said violation is in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions