

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION, ET AL.*Docket 9000. Interlocutory Order, March 13, 1981*

ORDER DENYING REQUEST FOR REIMBURSEMENT OF EXPENSES

By a brief filed with the Commission on September 29, 1980, Interstate Brands Corporation ("Interstate") seeks to appeal the denial by Administrative Law Judge Brown of its motion of July 24, 1980, for payment of costs incurred in the production of documents in response to a subpoena *duces tecum*. The subpoena, issued on September 19, 1979, at respondents' request as part of their deferred discovery of nonparties, called for the production of certain documents in Interstate's possession for inspection and copying by respondents. On October 4, 1979, Interstate filed a motion to quash the subpoena on several grounds. Limiting the subpoena somewhat, the ALJ otherwise denied the motion to quash on October 17, 1979. Interstate thereafter complied fully with the subpoena. On August 26, 1980, the ALJ denied Interstate's request for reimbursement of its costs of compliance, stating that "in [his] opinion, the Administrative Law Judge does not have authority to issue an enforceable order granting a money judgment against a respondent on behalf of a nonparty."*

Although Judge Brown's language is ambiguous, his order appears to state that while the Commission may exercise such authority in its discretion, the ALJ may not. If this holding was intended, then Interstate's motion of July 24 should have been certified under Section 3.22(a) of the Commission's Rules of Practice.¹ See *Crush International Limited*, 80 F.T.C. 1023, 1024 (1972). In view of the ambiguity, and in order to provide guidance to ALJs on the appropriate treatment of such reimbursement requests, the Commission will treat the present motion as having been certified.²

An ALJ does have the authority, in proper cases, to condition issuance of a subpoena upon an agreement to reimburse expenses of

* Order Denying Motion of Interstate Brands Corporation for Compensation for the Production of Documents Subpoenaed as Part of Respondents Discovery, at 2.

¹ Rules of Practice Section 3.22(a) provides, in pertinent part:

"Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation where he deems it appropriate."

² In their response to the present motion, respondents correctly point out that Interstate has not requested or obtained certification of this question by the ALJ, a prerequisite to interlocutory Commission review of the ALJ's August 26, 1980, order under Rule 3.23(b) of the Commission's Rules of Practice. However, as discussed above, we shall treat the matter as properly before us under Rule 3.22(a).

compliance, or to deny a motion to quash on the condition that reimbursement be made. This authority is integral to the ALJ's general authority to "deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rules of Practice Section 3.31(c)(1). See also Fed. R. Civ. P. 45(b)(2).

The standards applicable to reimbursement requests in adjudicative proceedings are essentially the same as those previously announced by the Commission with respect to investigative subpoenas.³ A subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable.⁴ To determine whether expenses are "reasonable," the ALJ should compare the costs of compliance in relation to the size and resources of the subpoenaed party. See, e.g., *SEC v. OKC Corp.*, 474 F.Supp. 1031 (N.D. Tex. 1979).

As to the timing of a subpoenaed party's request for reimbursement of costs of compliance, the Commission's Rules of Practice provide that a motion to quash or limit a subpoena in an adjudication "shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate argument, affidavits and other supporting documentation." Rules of Practice Section 3.34(c). A request for the costs of compliance based on the burdensomeness of the subpoena should be raised at the same time the subpoenaed party files its motion to quash with the ALJ, because a request for reimbursement must be predicated upon the "factual and legal objection" that the costs of compliance with the subpoena would be unreasonable. If the ALJ finds such an objection to be merited, he should require the proponent of the subpoena to cure the unreasonable burden, either by conditioning his denial of the motion to quash upon the proponent's agreement to reimburse the recipient so as to reduce compliance costs to a reasonable level,⁵ or (absent such an agreement) by granting the motion to quash.

Of course, compliance costs may not be fully foreseen. A subpoena recipient may undertake compliance with a subpoena on the belief,

³ See Order Denying Motion to Reimburse Costs of Complying With Subpoena Duces Tecum, File No. 782 3078, August 31, 1979 (Creditors Service Bureau of El Paso, Inc.).

⁴ See *SEC v. Arthur Young*, 504 F.2d 1013 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); see also *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 130 (2d Cir. 1967) (recipient of a summons has a duty of cooperation and at least up to some point must shoulder the financial burden of cooperation).

⁵ The provision of the Operating Manual (Chap. 10, Section 13.6.4.7.8) relating to ALJ reimbursement orders and the proponent's obligation to tender payment, refers to this situation, in which the proponent obtains enforcement of its subpoena only because it agrees to reimburse the costs of compliance. Once the proponent elects to ameliorate the otherwise undue burden of its subpoena in this way, it is bound by that election.

which turns out to be incorrect, that the costs will be reasonable. Therefore, the ALJ should afford the producing party the opportunity, even after compliance begins, to file a motion for a protective order conditioning further compliance upon an agreement for reimbursement of anticipated costs. The producing party may be able to show that its experience with partial compliance reveals the unreasonableness of the costs of remaining compliance. If so, the ALJ may act to relieve the undue burden in either of the ways available to him were a motion to quash filed: by conditioning further compliance upon the proponent's agreement to reimburse such compliance costs, or, if the subpoena proponent will not agree, by terminating the obligation for further compliance.

However, requests for reimbursement for compliance costs already incurred are untimely and inconsistent with the Commission's rules, because they deprive the ALJ and the proponent of the subpoena of the choice of means by which to ameliorate unreasonable burdens.

Interstate did not request reimbursement in its motion to quash, nor did it do so at any time during compliance. It suggests that the extent of its expenses could only be known after compliance. Brief at 4. Perhaps the exact dollar amounts could only be known after the fact, but we cannot credit the contention that Interstate was incapable of bringing to the ALJ's attention a reasonable approximation of anticipated expenses prior to their being incurred. Accordingly, Interstate's after-the-fact request is denied as untimely.

It is ordered, That Interstate's request for reimbursement be denied in light of the standards set out in this order.

IN THE MATTER OF

SORGA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3058. Complaint, March 13, 1981—Decision, March 13, 1981.*

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Semicid, or similar over-the-counter vaginal contraceptive suppository products, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly" or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose, in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and to maintain business records for a period of three years.

Appearances

For the Commission: *Shirley F. Sarna and Paula K. Stein.*

For the respondent: *Evan A. Davis, Clearly, Gottlieb, Steen & Hamilton, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sorga, Inc., a corporation, (hereinafter "respondent") has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Sorga, Inc. is a New York corporation with its principal place of business at 300 East 42nd St., New York, New York. Sorga, Inc. previously did business under the name of Kelly, Nason-Univas, Inc. The name change to Sorga, Inc. was accomplished by amendment to the certificate of incorporation on June 29, 1979.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

1. A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus.