

IN THE MATTER OF

TRANS UNION CORPORATION

*Docket 9255. Interlocutory Order, Feb. 11, 1997*ORDER DIRECTING GENERAL COUNSEL
TO ENFORCE THIRD-PARTY SUBPOENA

On February 5, 1997, pursuant to Section 3.38(c) of the Commission's Rules of Practice, 16 CFR 3.38(c) (1996), Administrative Law Judge Lewis F. Parker certified to the Commission a motion by Trans Union Corporation ("Trans Union") for enforcement of a third-party subpoena to First National Bank of Omaha ("FNBO"). Judge Parker's certification included a recommendation that the Commission grant the motion. Also before the Commission were the subpoena, the motion to quash, Trans Union's response thereto and the Judge's order denying the motion to quash.

On October 29, 1996, the respondent Trans Union served on FNBO a *subpoena duces tecum* seeking deposition testimony of "a person or persons with knowledge to respond to questions regarding . . . (1) the factors that influence [the bank's] decisions regarding a consumer's eligibility for credit;" and "(2) if and how [the bank] use[s] credit scorer data in [its] decisions regarding credit eligibility." The subpoena directed that documents pertaining to those topics be made available at the deposition.¹

On December 16, 1996, FNBO filed a motion to quash the subpoena, stating that Trans Union "is attempting to use the Subpoena as a means for gaining an advantage in an unrelated multi-million dollar litigation brought by FNBO against Trans Union in the State of Nebraska ('Nebraska Litigation')." Motion at 1. The bank also argued that the subpoena should be quashed because "the discovery sought is obtainable from other sources that are less burdensome and is otherwise overly broad." *Id.* at 5. FNBO contended further that "the information sought by Trans Union is oppressive to FNBO in that it will permit Trans Union to evade a discovery order in the Nebraska Litigation" (*Id.* at 7) and that the subpoena "unnecessarily commands disclosure of confidential information at the heart of FNBO's

¹ Trans Union also served subpoenas seeking similar or identical information from nine other banks. Order Denying Motin To Quash at 1.

business." *Id.* at 9. The bank urged the Administrative Law Judge to "enter an appropriate order allowing Trans Union to select another bank from whom to take the discovery it seeks from FNBO." *Id.* at 10.

Trans Union supported its subpoena to FNBO arguing that the information sought is relevant to Trans Union's defenses in the instant proceeding (Response at 2-4), that negotiations between Trans Union and FNBO have limited the scope of the request and irrelevance are vastly overblown." *Id.* at 6. Trans Union also noted its willingness to negotiate "a protective order to guard against unnecessary disclosure of [the bank's] proprietary information" (*Id.* at n.2). Finally, Trans Union argued that the motion to quash should be denied because even if the subpoena "seeks out-of-time-discovery in connection with the Nebraska litigation[,] . . . this should not serve as a basis for quashing the Subpoena" because "federal courts as a general matter will not limit the use of discovery obtained in one forum from use in another forum, or proceeding, provided the discovery being sought is relevant." *Id.* at 7.

Citing Section 3.31(c) of the Commission's Rules, the Administrative Law Judge denied the motion to quash. He stated that FNBO's motion "does not establish that respondent has fashioned its discovery request in this proceeding solely to gain an advantage in the Nebraska litigation." Order at 1. Judge Parker concluded that FNBO had not shown that Trans Union "should be forced to withdraw the subpoena and issue one to another bank, simply to avoid inconvenience to FNBO," that the subpoena "seeks relevant information, is not too broad or excessively burdensome, and was not designed to harm FNBO or to gain an unfair advantage in the Nebraska litigation." *Id.* at 2. He, therefore, recommends that the Commission direct enforcement of the subpoena.

The Commission has a strong interest in ensuring the integrity of its adjudicative process. In addition, the Commission is satisfied that the information and documentation specified in the subpoena are relevant for discovery purposes in the current proceeding, and that the burden on FNBO is not unreasonable. That the respondent might have obtained, or be able to obtain, from another banking institution the same or similar information to that which it seeks from FNBO is not reason to deny the respondent the right to conduct its defense in this matter as it deems best. Accordingly,

It is ordered, That, the General Counsel promptly take appropriate action to enforce Trans Union's subpoena to FNBO.

IN THE MATTER OF

PHASEOUT OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3716. Complaint, Feb. 12, 1997--Decision, Feb. 12, 1997

This consent order requires, among other things, the New York-based firms to send a postcard to identifiable past purchasers of PhaseOut, a purported stop-smoking device, notifying them of the Commission's action. The order also requires the respondents to have scientific substantiation for claims that PhaseOut or any other smoking-cessation product reduces the amount of nicotine, tar, and carbon monoxide smokers receive. In addition, the consent order prohibits the respondents' misrepresentations concerning any test, study or endorsement.

Appearances

For the Commission: *Shira D. Modell, Lesley Anne Fair and Michael Ostheimer.*

For the respondents: *David Clanton, Baker & McKenzie, Washington, D.C. and David Levy, Kraver & Levy, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Phaseout of America, Inc. and Products & Patents, Ltd., corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Phaseout of America, Inc. is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

2. Respondent Products & Patents, Ltd., is a Delaware corporation with its principal office or place of business at 140 Broadway, Lynbrook, New York.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the PhaseOut device ("PhaseOut"), which punches one or more small holes in cigarettes and is intended to reduce the amount of tar,