

Interlocutory Orders, Etc.

IN THE MATTER OF

**POM WONDERFUL LLC,
ROLL INTERNATIONAL CORP.,
STEWART A. RESNICK,
LYNDA RAE RESNICK,
AND
MATTHEW TUPPER**

Docket No. 9344. Order, November 27, 2012

Order extending the timetable to issue the Decision of the Commission and Final Order until January 18, 2013.

**ORDER EXTENDING THE TIMETABLE FOR ISSUING FINAL DECISION
AND ORDER**

In order to ensure that it can give full consideration to the many issues presented by the cross-appeals in this matter, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend until January 18, 2013 the timetable for issuing a final decision and order.

IT IS SO ORDERED.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

GOOGLE, INC.

FTC File No. 111 0163 – Decision, September 7, 2012

RESPONSE TO SAMSUNG TELECOMMUNICATIONS AMERICA, LLC'S REQUEST FOR FULL COMMISSION REVIEW OF ITS PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED FEBRUARY 9, 2012

Dear Messrs. Huffman and Stoltz and Ms. Williams:

This letter advises you of the Commission's disposition of Samsung Telecommunications America, LLC's ("STA's") request dated June 26, 2012, for full Commission review of the denial of its petition to limit a subpoena *duces tecum* ("subpoena").

The Commission issued the subpoena to STA on February 9, 2012. STA filed its petition to limit the subpoena on April 21, 2012. On June 18, 2012, Commissioner Brill directed the issuance of a letter denying the petition in its entirety and directing STA to comply by July 2, 2012. This ruling was delivered to STA by mail on June 22, 2012. STA timely filed this request for full review by the Commission on June 27, 2012.

The Commission has considered STA's request for full review, STA's initial petition to limit, and Commissioner Brill's letter ruling dated June 18, 2012. For the following reasons, the Commission hereby affirms Commissioner Brill's letter ruling and directs STA to comply with the subpoena no later than September 14, 2012.

I. Background

The Commission issued the subpoena to STA as part of an ongoing investigation of Google, Inc. The purpose of this investigation is to determine whether Google has engaged in unfair methods of competition "by monopolizing, attempting to monopolize, or restraining competition in online or mobile search,

Responses to Petitions to Quash

search advertising, or Internet-related goods or services.”¹ STA is a manufacturer of devices, including smartphones and tablet computers that are used by consumers for online or mobile searching and Internet-related goods and services. Many of these devices are installed with Google’s Android operating systems, as well as other software and applications developed by Google and its competitors.

The Commission issued the subpoena on February 9, 2012. STA did not respond by the initial return date of March 9, 2012. Instead, STA requested two extensions and requested that staff modify the subpoena in several respects.

STA also asked staff to limit the number of custodians whose records would be searched using this method, forego the production of informal agreements as required by specification 8, and extend the return date.

.² Staff further agreed to limit the searches for these specifications to a list of six custodians. Finally, staff agreed to extend the return date to April 23, 2012.

On April 20, 2012, STA requested a third extension of the return date. Because STA had produced only 31 documents at that point, staff did not agree to a further extension and STA filed its petition to limit.

As of June 26, 2012, STA had not responded to specification 4, and had only partially responded to specifications 5, 6, 7, 8, 9,

1 Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 111-0163 (June 13, 2011) [hereinafter “Resolution”].

2 Staff later agreed that STA could use the same methodology to search for documents responsive to specification 12.

Responses to Petitions to Quash

10, and 12.³ Some of these productions were extremely limited. For instance, STA produced a total of seven contracts in response to specifications 6, 7, and 12.⁴ In discussions with staff occurring since the filing of this request for review by the full Commission, STA indicated that it has collected approximately 361,000 documents responsive to the keywords, but it has not reviewed or produced these documents.

II. Analysis

A. The materials requested by the subpoena are reasonably related to the Google investigation.

In support of its petition, STA argues that the scope of the investigation is narrower than the description in the authorizing resolution—limited to decisions to install (or not install) programs from Google or Google’s competitors on STA’s mobile devices—and that as a result, it does not possess responsive materials. STA claims that such decisions are made by mobile wireless carriers like Verizon and AT&T and that STA is generally not involved.⁵ Thus, STA appears to claim it lacks the types of documents relevant to the FTC’s investigation, as STA characterizes it.

It is well-established that the scope of an administrative investigation is determined by the authorizing resolution.⁶ Moreover, when determining the relevance of the information requested by an agency, courts look to the scope of the investigation with broad deference to the requesting agency, and

3 Samsung Telecommunications America, LLC’s Request for Full Commission Review of its Petition to Limit Subpoena *Duces Tecum*, and Request for Hearing, at 2 (June 26, 2012) [hereinafter “Request”]. We understand that staff and STA have continued to discuss STA’s compliance and that STA has produced additional materials since the filing of this petition, but has not certified that its compliance with the subpoena is complete.

4 *Id.*

5 Request, at 1 (“In short, for purposes of the FTC’s investigation the relevant internal considerations and external discussions would seem to be those between the carrier and Google or Google’s competitors . . . generally not involving STA.”).

6 *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992).

Responses to Petitions to Quash

place the burden on subpoena recipients to show that the requests are irrelevant.⁷ Here, a review of the Commission process resolution plainly shows that the scope of the investigation is broader than STA asserts – whether Google is or was “monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services.”⁸ By its very terms, the investigation is not confined to software installation, but includes other types of conduct as well. STA has not sufficiently shown that the documents requested in the subpoena are beyond the scope of this investigation.

B. The subpoena requests are sufficiently specific to enable STA to comply.

STA further claims that specifications 5, 9, and 10 are vague and overly broad because they use “complex and ambiguous terms” such as “relating to Samsung’s business strategy,” or “relating to Samsung’s consideration, development, or use of any product or service that competes with a Google Product or Service on any mobile device or smart phone.”⁹

A subpoena request may be vague where it lacks reasonable specificity,¹⁰ or is too indefinite to enable a responding party to comply.¹¹ It may be overbroad where it is “[o]ut of proportion to the ends sought,” and “[o]f such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”¹²

⁷ *Id.* at 1090.

⁸ Resolution.

⁹ Request, at 2-3, 4.

¹⁰ See, e.g., *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982).

¹¹ See, e.g., *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

¹² *United States v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, among others, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

Responses to Petitions to Quash

We do not agree that these specifications are vague, or that, as STA claims, “there is no clear way to identify responsive documents[.]”¹³ Contrary to STA’s representations about the breadth of specification 5, the specification provides sufficient information to identify responsive documents.¹⁴ The specification does not call for documents related to *any* business strategy of STA, as STA suggests, but rather is limited to documents about two strategies relating to Google and Google products in particular, the precise subject of the Commission’s investigation. Further, the specification itself provides examples of the types of documents that would be responsive.

For many of the same reasons, we find that specification 9 is sufficiently defined. The specification identifies the documents at issue clearly and specifically, calling for documents relating to “any policy, practice, contract, or technological mechanism that restrains or restricts any person from licensing, removing, replacing, or modifying any Google Products or Services on Samsung’s mobile devices or smart phones.”¹⁵ We find this specification sufficiently detailed to enable STA to locate responsive information particularly because, like specification 5, specification 9 also provides examples of types of responsive documents.

Specification 10 too is sufficiently specific. It calls for documents relating to STA’s “consideration, development, or use of any product or service that competes with a Google Product or

¹³ Request, at 4.

¹⁴ Specification 5 reads in full:

All documents relating to Samsung’s business strategy for (i) placing the Android operating system on its mobile devices or smart phones, or (ii) pre-loading any Google Products or Services on its mobile devices or smart phones, including but not limited to: all strategic plans; business plans; marketing plans; advertising plans; pricing plans; technology plans; forecasts, strategies, and decisions; market studies; and presentations to management committees, executive committees, and boards of directors.

¹⁵ Request, Ex. A.

Responses to Petitions to Quash

Service on any mobile device or smart phone employing the Android operating system.”¹⁶ This specification does not call for documents about the consideration, use or development of *any* product, but only those products that (1) compete with Google products or services on (2) devices employing the Android operating system. Given these qualifications, we find this specification sufficiently detailed to enable STA to identify responsive documents.

STA’s claims also overlook the modifications staff made at STA’s request. Specifically, staff agreed to allow STA to use a keyword search process to narrow the universe of potentially-responsive documents and to limit the number of custodians to only six individuals. Thus, rather than a broad search involving “the vast majority” of STA employees, as STA suggests could be required,¹⁷ these specifications, as modified, only require STA to search the documents of a small number of custodians.

STA claims the subpoena is overbroad because it calls for information not reasonably related to staff’s inquiry. This claim is akin to the relevance argument we addressed and rejected above and we reject it here for the same reasons. STA also claims that the subpoena specifications are overbroad because they could potentially sweep up a large number of documents.¹⁸ But as Commissioner Brill observed in her letter ruling, a subpoena may properly call for many documents and this fact alone does not provide a basis for limiting a subpoena’s scope.¹⁹ And, given staff’s modifications to accommodate STA, the number of responsive documents should be substantially smaller than STA suggests.

¹⁶ *Id.*

¹⁷ Request, at 6.

¹⁸ Request, Ex. D, ¶ 5.

¹⁹ Letter ruling, at 8 n.36 (citing *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513-14 (4th Cir. 1996)).

Responses to Petitions to Quash

C. STA fails to show that the subpoena is unduly burdensome.

STA also argues the challenged specifications are unduly burdensome. In support of its claim, STA submits a declaration from Tim Sheppard, its Vice President, Finance and Operations.²⁰ Mr. Sheppard claims that the “undefined” and “impossibly vague” requests in specifications 5, 9, and 10 could be read to require production of a “massively broad swath of the documents that STA routinely generates in the course of its day-to-day business.”²¹ Similarly, he states that specifications 6, 7, and 8, which call for “agreements,” would likewise require another “massively broad swath” of documents if “agreements” were interpreted to include understandings outside of those in written formal contracts.²²

According to STA, compliance with the subpoena would seriously impair and unduly disrupt its normal operations because STA only has two employees in its legal department.²³

But these conclusory accusations by Mr. Sheppard, most of which merely repeat STA’s legal arguments, fail to provide the factual detail needed to satisfy a claim of undue burden.²⁴ Furthermore, Mr. Sheppard also ignores the significant accommodations that staff have made to limit the specifications in an effort to address STA’s concerns about burden.

In addition, STA overlooks that specifications 6, 7, and 8 call for agreements with specific entities, including Google and

20 Request, Ex. D. STA’s request for full review also refers to the declaration of Justin Denison that was attached to the initial petition to limit. Request, at 5. However, Denison’s declaration indicates that it was executed on April 10, 2012, on or before staff modified the subpoena at STA’s request. See Request, Ex. A, Att. 1. Accordingly, Denison’s testimony does not relate to the most current, modified version of the subpoena and is not relevant to this analysis.

21 Request, Ex. D, ¶ 5.

22 *Id.*, Ex. D, ¶ 7.

23 *Id.*, Ex. D, ¶ 8.

24 See, e.g., *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

Responses to Petitions to Quash

wireless service providers. Thus STA should know which of its employees are communicating with these entities and what the most effective way would be to locate these documents, whether they be formal agreements or informal understandings.²⁵ Thus STA's claim that those specifications would require search and review of an extremely large number of documents is unavailing.

STA's final argument is that by calling for "all documents," the specifications are inherently overboard and unduly burdensome. But, as noted above, the specifications are reasonably defined and tailored to the specific subjects related to the investigation. And staff has made modifications to the specifications, and permitted STA to use keywords for some specifications. Yet STA has not produced the more limited set of documents which should result from these accommodations.

To summarize, STA's claims of burden arise from STA's own misperceptions of the subpoena requests and staff's modifications, and are compounded by STA's failure to engage collaboratively with staff to define the terms of the document production.²⁶ Therefore, we find that STA's claims of undue burden are without merit.

D. The Commission and its staff have acted reasonably.

STA also alleges that staff has not responded its claims of vagueness or burden reasonably, and that staff should identify for STA "searches which are specific enough to focus on a finite, reasonable volume of documents"²⁷

25 STA's argument that it should only have to produce formal agreements also fails because it would thwart the investigation. If Google were engaging in anticompetitive behavior, and if STA was involved to some degree, it would be odd for these parties to enter into a formal agreement reflecting that.

26 For cases describing the requisite level of collaboration, see, e.g., *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135-36 (S.D.N.Y. 2009); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-262 (D. Md. 2008).

27 Request, at 3.

Responses to Petitions to Quash

STA's argument disregards both the modifications to the subpoena that staff made at STA's request and STA's own obligations as a subpoena recipient.

Consequently, STA must now either produce the documents that it has collected based on the proposed key word searches, or justify why the proposed key words are not working and offer alternatives based on a reasoned analysis of the documents it has collected. STA has done neither. Instead, STA has insisted that staff further modify the subpoena without providing any substantive information about the universe of documents it has collected.²⁸ In essence, STA's insistence that staff narrow the subpoena without information about the documents generated thus far from the key word search is merely a demand that staff engage in a guessing game.²⁹ This is not a proper way to respond to an administrative subpoena. We recognize that STA is a third party to this investigation. However, even third parties are obliged to respond to government compulsory process.³⁰

E. STA's other requests are also denied.

STA has requested full Commission review of every issue raised in its petition to limit. After review of that petition and Commissioner Brill's letter ruling, we affirm Commissioner Brill's rulings on all issues not specifically addressed in this ruling by the full Commission.

28 We acknowledge that STA has been forthcoming with some information, as shown in Exhibit C to the Request. Yet while STA provided information about numbers of hits to search terms, it provided no substantive information about the quality of those hits and whether the documents identified were actually responsive to the terms of the subpoena specifications. Thus, while STA again complains in Exhibit C that the FTC's search terms are overbroad, STA provides no further information that the FTC could use to narrow the terms, assuming of course that the FTC – as the requesting party – had any obligation to do so.

29 See *Da Silva Moore v. Publicis Groupe*, No.11 Civ. 1279 (ALC) (AJP), 2012 WL 607412, *10 (S.D.N.Y. Feb. 24, 2012) (comparing this process to the child's game of "Go Fish").

30 See, e.g., *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977).

Responses to Petitions to Quash

STA has asked for a hearing on the matter raised in the petition and request for full Commission review. The Commission's Rules of Practice do not provide for such a hearing, and we see no reason to hold one based on the arguments presented by STA. Accordingly, this request will be denied.

STA has also requested a stay of the compliance date. The FTC issued the subpoena to STA in February 9, 2012 and, five months later, STA has yet to provide more than a token production of responsive materials. STA's approach has delayed this investigation substantially. Accordingly, STA's request for a stay of compliance is denied, and STA must produce responses to all the specifications in the subpoena no later than September 14, 2012.

IV. Conclusion and Order

For the forgoing reasons,

IT IS ORDERED THAT the June 18, 2012, letter ruling is **AFFIRMED**;

IT IS FURTHER ORDERED THAT STA must produce responses to all the specifications in the Subpoena *Duces Tecum*, as modified on April 10, 2012, no later than 5 p.m. Eastern Daylight Time on September 14, 2012;

IT IS FURTHER ORDERED THAT STA's request for a hearing is **DENIED**; and

IT IS FURTHER ORDERED THAT STA's request for a stay of the compliance date is **DENIED**.

By direction of the Commission, Commissioner Ohlhausen recused.