



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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BY E-MAIL AND COURIER DELIVERY

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Re: *Petition of Samsung Telecommunications America, LLC
To Limit Subpoena Duces Tecum, File No. 111 0163*

Dear Messrs. Huffman and Stoltz and Ms. Williams:

On April 23, 2012, the Federal Trade Commission (“FTC” or “Commission”) received the above Petition filed by Samsung Telecommunications America, LLC (“Samsung”). This letter advises you of the Commission’s disposition of the Petition, effected through this ruling by Commissioner Julie Brill, acting as the Commission’s delegate. ¹

For the reasons explained below, the Petition is denied. You may request review of this ruling by the full Commission.² Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.³ The timely filing of a request for review by the full Commission shall not stay the return dates established by this ruling. ⁴

¹ See 16 C.F.R. § 2.7(d)(4).

² 16 C.F.R. § 2.7(f).

³ *Id.* This ruling is being delivered by e-mail and courier delivery. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by courier delivery.

⁴ *Id.*

I. INTRODUCTION

In 2011, in connection with an investigation of Google, Inc., the FTC issued a resolution authorizing its staff to use compulsory process

[t]o determine whether Google Inc. may be engaging, or may have engaged, in any unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services. ⁵

On February 9, 2012, in furtherance of the investigation, the Commission issued a third-party subpoena *duces tecum* (“subpoena”) to Samsung.⁶ Samsung manufactures and sells mobile phones and devices, many of which are installed with Google’s Android operating system as well as other mobile applications and services developed by Google and Google’s competitors. The subpoena required Samsung to provide the requested documents no later than March 9, 2012.⁷

On or about March 1, 2012, Samsung asked, and received, an extension of the return date to April 9, 2012, conditioned on Samsung producing documents responsive to Specifications 1, 2, and 11, no later than Monday, March 9.⁸ FTC staff also agreed to obviate the requirement that Samsung obtain and produce documents from its corporate parent in Korea.⁹

⁵ Petition of Samsung Telecomm. of America, LLC, to Limit Subpoena Duces Tecum, File No. 111-0163, Google, Inc., Att. 1, Exh. A (Apr. 21, 2012) [hereinafter Petition].

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at Att. 4, Ex. B (E-mail from Gregory Huffman to Melissa Westman-Cherry (Mar. 2, 2012, 12:22 PM); *id.* at Att. 4, Ex. C (Letter from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012)).

⁹ *Id.* at Att. 4, Ex. B (E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012, 10:27 AM); E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar 2, 2012, 11:55 AM)).

On April 5, 2012, Samsung requested a second extension of the return date.¹⁰ In subsequent discussions regarding the need for the extension, Samsung for the first time also asked staff to limit the required response in several respects.¹¹ Specifically, with regard to Specifications 5, 9, and 10, Samsung asked FTC staff to provide a set of keywords that Samsung would then use to search a “limited set” of custodians. Samsung asked staff to offer one set of keywords to reflect Google products and services and a second set of keywords to reflect competing non-Google products and services, both of which it would then run in Boolean searches to find documents containing one or more terms from both sets.¹² Samsung also asked staff to accept other limitations, including foregoing a search for informal agreements between Samsung and Google, and restated its request for an extension of the return date.

FTC staff accepted some of Samsung’s proposals, modified the subpoena pursuant to 16 C.F.R. § 2.7(c), and extended the return date to April 23, 2012.¹³ On April 11, 2012, staff provided 36 keywords related to Google products and services and 15 keywords related to competing non-Google products and services.¹⁴

On April 11, shortly after receiving the requested keywords from FTC staff, Samsung claimed that their proposed search was going to be unduly burdensome.¹⁵ On April 20, 2012, based on the results of the searches it had performed to date, Samsung requested a third extension of time. When staff declined a further extension, Samsung filed the instant petition.

¹⁰ *Id.* at Att. 4, Ex. B (E-mail from Gregory Huffman to Melissa Westman-Cherry (Apr. 5, 2012, 6:15 PM)).

¹¹ *Id.* at Att. 4, Ex. C (Letter from Melissa Westman-Cherry to Gregory Huffman (Apr. 10, 2012)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, at Att. 4, Ex. B (Letter from Melissa Westman-Cherry to Gregory Huffman (Apr. 11, 2012)).

¹⁵ *Id.*, at Att. 4, Ex. B. (E-mail from Melissa Westman-Cherry to Gregory Huffman (Apr. 11, 2012, 4:15 PM); E-mail from Richard Rosalez to Melissa Westman-Cherry and Gregory Huffman (Apr. 11, 2012, at 6:45 PM)).

II. ANALYSIS

Samsung's petition lodges objections to each of the specifications in the subpoena. Among these objections, Samsung claims the specifications: (1) are overly broad or unduly burdensome; (2) seek information not relevant to the investigation or not likely to lead to the discovery of relevant evidence; and (3) include vague terms or fail to seek documents with sufficient particularity.¹⁶ For the following reasons, these objections fail.

A. Samsung has not supported its claims of undue burden and overbreadth.

We conclude that Samsung has failed to support its claims that the subpoena is overly broad and unduly burdensome. As the courts have clearly stated, “[a]ny subpoena places a burden on the person to whom it is directed. Time must be taken from normal activities and resources must be committed to gathering the information necessary to comply.”¹⁷ Thus, the recipient of process bears the burden of demonstrating that this burden is undue.¹⁸ Specifically, a recipient of FTC investigative process must show that compliance threatens to seriously impair or unduly disrupt the normal operations of its business.¹⁹ Likewise, investigative process is not unreasonably broad where the breadth

¹⁶ Samsung objects generally that the subpoena calls for documents in the possession, custody, and control of its corporate parent in Korea, and goes on to assert that it cannot access these documents and therefore should not have to produce them. FTC staff has already agreed that Samsung need not obtain documents from its Korean parent. *Id.* at Att. 4, Ex. B (E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012, 10:27 AM); E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar 2, 2012, 11:55 AM)). As this issue has been resolved, we need not address it here.

¹⁷ *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *accord FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977).

¹⁸ *Texaco*, 555 F.2d at 882; *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998). *See also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (recipients of subpoena must show unreasonableness of the Commission's demand and make a record to show the “measure of their grievance rather than [asking the court] to assume it.”) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 217-18 (1946)).

¹⁹ *Shaffner*, 626 F.2d at 38; *Texaco*, 555 F.2d at 882.

of the inquiry is commensurate with the magnitude or complexity of a recipient's business operations.²⁰

Here, Samsung offers essentially three arguments to support its claim of burden.²¹ First, noting that the subpoena calls for information about mobile phones, Samsung states that it manufactured over 300 different models of mobile phone during the period in question, each with a distinct configuration of software, and that collecting information related to each phone would be unduly burdensome.²² Second, Samsung states that its document searches using the keywords it asked FTC staff to provide may yield more than one million "hits" of possibly responsive documents that would have to be reviewed and produced.²³ Third, Samsung offers a declaration from a litigation support supervisor, who states that this review of the documents identified will require 2000 days of review time, assuming that a single reviewer reviews 500 documents per day (1 reviewer times 500 documents/per day times 2,000 days = 1 million documents).²⁴

These arguments do not establish that the subpoena is overly broad or unduly burdensome. Samsung has not provided facts or details, such as reliable estimates of the costs of compliance, to support these claims. Instead, Samsung's objections to the specifications appear premised on the fact that they may result in many potentially

²⁰ *Texaco*, 555 F.2d at 882.

²¹ The cases Samsung cites for the proposition that requests that ask for "all documents" are overly broad and unreasonable are inapposite. In *McKinley v. F.D.I.C.*, 807 F. Supp. 2d, 1 (D.D.C. 2011), the request at issue was directed to the FDIC under FOIA. The request did not ask for "all documents" but rather "any information available." *Id.* at 6-77. The court found that such requests for records that relate "in any way" did not enable FDIC staff to identify responsive records with reasonable effort. *Id.* In this case, however, FTC staff has not asked Samsung for documents that relate to subjects "in any way."

For the same reason, *Judicial Watch, Inc. v. Ex-Im Bank*, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) is also inapposite. In *Judicial Watch*, the request at issue asked for contacts between two individuals and "companies, entities, and/or persons related or doing or conducting business *in any way* with the People's Republic of China." *Id.* at 26 (emphasis added). None of the requests in the FTC's subpoena to Samsung is similarly broad.

²² Petition, *supra* note 5, at 3-4.

²³ *Id.*, at 5.

²⁴ *Id.*, Att. 5.

responsive documents. But the volume of potentially responsive documents is not dispositive of the question whether a subpoena is unduly burdensome.²⁵ The searches may have resulted in many “hits,” but ultimately it is Samsung’s responsibility to show that the burden of compliance rises to the high threshold set by cases such as *Texaco* and Samsung has not offered solid evidence or even alleged that compliance here meets that standard.²⁶ Moreover, given the magnitude and complexity of the company’s operations and the breadth of its product line, there is nothing unusual about the possibility that the subpoena potentially calls for many documents related to a large number of mobile devices.²⁷

B. Samsung has not shown that the information requested is irrelevant to this administrative investigation.

Samsung has also objected to several specifications on the grounds they fail to seek information relevant to the subject matter of the investigation, or are not likely to lead to the discovery of relevant or admissible evidence.²⁸ As such, Samsung seems to argue that the requirements of the subpoena do not comport with the requirements applicable to discovery requests propounded under the Federal Rules of Civil Procedure.²⁹

However, the Federal Rules of Civil Procedure do not apply to agency investigations. “Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may flow from it.”³⁰ As the D.C. Circuit and

²⁵ *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513-14 (4th Cir. 1996) (“[A] subpoena is not unduly burdensome merely because it requires production of a large number of documents . . .”). *See also F.D.I.C. v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (enforcing subpoena that called for over one million documents where recipients failed to demonstrate the requests were unduly burdensome).

²⁶ *See, e.g., Texaco*, 555 F.2d at 882.

²⁷ *Texaco*, 555 F.2d at 882.

²⁸ *See, e.g.,* Petition, *supra* note 5, at 8-10.

²⁹ One such example is Samsung’s claim that the subpoena calls for irrelevant evidence, or evidence that is not reasonably likely to lead to the discovery of relevant or admissible evidence. These objections are premised on Fed. R. Civ. P. 26(b)(1), which addresses the scope of discovery in a civil action.

³⁰ *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) (citing *EEOC v. Deer Valley Unified Sch. Dist.*, 968 F.2d 904, 906 (9th Cir. 1992); *EEOC v. Univ. of Notre Dame du Lac*, 551 F. Supp. 737, 742

other courts have recognized, “[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* the boundary of which may be defined quite generally, as it was in the Commission’s resolution here.”³¹ Agencies thus have “extreme breadth” in conducting their investigations,³² and “in light of [this] broad deference . . . , it is essentially the respondent’s burden to show that the information is irrelevant.”³³

Samsung’s conclusory assertions³⁴ do not satisfy this standard. As stated in the Commission’s investigatory resolution, the purpose of the investigation is to determine whether Google is engaged in “unfair methods of competition” by, *inter alia*, monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services. Samsung is a manufacturer of mobile devices that are used by consumers for online or mobile search, for using Internet-related goods and services, and on which consumers receive search advertising. Thus, information about the relationship between Google and Samsung as it relates to those topics is plainly relevant to this investigation, and Samsung has offered nothing to challenge this conclusion.

C. The subpoena specifications are not vague and identify the requested documents with sufficient particularity.

Samsung also objects to Specifications 5 and 10 on the grounds that they include terms that Samsung finds vague, such as “business strategy,” “consideration, development and use,” or “competes with.” Samsung claims that it cannot identify which documents might be responsive to these requests.

Samsung has not shown that these terms have multiple meanings that make it difficult to determine which documents are responsive. Terms such as “business strategy,” or “consideration, development and use” are commonly employed by

(N.D. Ind. 1982), *rev’d on other grounds*, 715 F.2d 331 (7th Cir. 1983)).

³¹ *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (emphasis in original; internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980); *Texaco*, 555 F.2d at 874 & n.26)).

³² *Linde Thomsen*, 5 F.3d at 1517 (citing *Texaco*, 555 F.2d at 882).

³³ *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882); *accord FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010).

³⁴ *See, e.g.*, Petition, *supra* note 5, at 8-13.

companies of Samsung's size and complexity. In particular, we expect that Samsung, a global manufacturer of mobile devices, understands the term "competes with" in the context of mobile products and software. Furthermore, these terms appear in the subpoena in the context of specifications that contain additional guidance as to the limits and scope of the requests. For example, specification 5 includes examples of responsive documents, such as "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."³⁵ Instead, it appears that Samsung objects to these terms because they call for many responsive documents, but, as discussed above, without more, this is not a proper basis for an objection.³⁶ For these reasons, Samsung's claim that the subpoena terms are vague or insufficiently particular fails.

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Samsung Telecommunications America LLC's Petition to Limit Subpoena Duces Tecum be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT all other responses to the specifications in the subpoena *duces tecum* must now be produced on or before July 2, 2012. Pursuant to Rule 2.7(c), 16 C.F.R. § 2.7(c), staff has the authority to determine the terms of satisfactory compliance, including allowing Petitioner to abide by previously-reached agreements to limit the production of documents and information responsive to the subpoena *duces tecum*.

By direction of the Commission.

Donald S. Clark
Secretary

³⁵ *Id.*, Att. 1, Ex. A, at 7.

³⁶ *Carolina Food Processors, Inc.*, 81 F.3d at 513-14.