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United States District Court; S.D. New York.

In the Matter of the Application of J.A. FRATES,
ROBERT E. MERRICK and CHARLES S.
HOLMES, to quash subpoenas issued in aid
of an action currently pending in the federal
court for the District of Delaware (Civ. No.
85-497) entitled REVLON, INC., Plaintiff,
v.
PANTRY PRIDE, INC., et al., Defendants.

No. M8-85.

|
September 25, 1985.

Attorneys and Law Firms

Thomas McGanney **Alice K. Jump** 1155 Avenue of the
Americas New York, New York 1036 Attorneys for
J.A. Frates, Robert E. Merrick and Charles S. Holmes,
petitioners White & Case.

Stuart L. Shapiro, Janice M. Lee, Andrew J. Turezyn 919
Third Avenue New York, New York 10022 Attorneys
for Pantry Pride, Inc., respondents Skadden, Arps, Slate,
Meagher & Flom.

MEMORANDUM OPINION AND ORDER

MOTLEY Chief Judge.

*1 Petitioners, J.A. Frates, Robert E. Merrick, and
Charles S. Holmes (collectively, the 'Frates Group'), move
to quash subpoenas issued in connection with a suit now
pending in the federal district court for the District of
Delaware. The members of the Frates Group are non-
parties to the Delaware action which is a suit by Revlon,
Inc. against Pantry Pride, Inc. alleging violations of the
federal securities laws during the course of a tender offer.
The subpoenas duces tecum served by Pantry Price, Inc.
upon petitioners, allegedly for the purpose of acquiring
information relevant to the valuation of Revlon stock,
demand the depositions of the three members of the Frates
Group named above, as well as the production of '[a]ny
and all documents in [their] possession, custody or control
relating or referring, directly or indirectly, to Revlon, Inc.'

Respondents cross-move to compel compliance with the
subpoenas. Both sides move that the costs and attorney's
fees incurred in making this motion be awarded.

Discussion

Under F. R. Civ. P. 45 this court is permitted to
quash or modify a subpoena if it is 'unreasonable
or oppressive.' Rule 26(b) permits the court to deny
discovery that is 'unduly burdensome.' Determination
of the reasonableness or burdensomeness of a discovery
request is left to the court's broad discretion. See Kaufman
v. Edelstein, 539 F.2d 811 (2nd Cir. 1976). The subpoenas
at issue in this motion are unreasonable in more ways than
one, and accordingly, this court exercises its discretion to
quash [modify] them.

On their face the subpoenas that Pantry Pride have served
upon the members of the Frates Group are overbroad
simply by virtue of the fact that they request any and
all documents relating in any imaginable way to Revlon,
Inc., the plaintiff in the underlying suit. Pantry Pride
contends in its briefs to this court that its interest is only in
information relating to discussions between Revlon, Inc.
and the Frates Group that may have affected Revlon's
self-valuation. Such limitation, however, does not appear
in the subpoenas themselves. Moreover, Pantry Pride has
not made any showing either in its brief or upon the
hearing that its actual broad request is in fact relevant
to the federal suit in any but the most general way.
Furthermore, the lack of any time-frame limitation in
respondent's subpoenas is an additional mark of their
patent overbreadth.

The court also finds that the expert, proprietary nature
of the information sought by Pantry Pride renders its
requests unreasonable. This is all the more clear in light
of Pantry Pride's meagre showing as to the particular
relevance of the information sought. The Frates Group is
an investment organization whose analyses and valuations
of companies are its stock in trade. While there is no
general privilege against discovery on the grounds that
the subpoenaed party has some proprietary interest in
the targeted information, it is within this court's sound
discretion to determine whether the service of a subpoena
on a non-party expert would constitute an unreasonable
or burdensome misuse of the discovery process. See

[Kaufman v. Edelstein](#), 539 F.2d at 822 (2nd Cir. 1976).

The district courts have repeatedly resisted efforts to utilize the liberal federal discovery rules for the purpose of gaining access to proprietary, confidential business information from third parties who have no interest in the litigation. See [In the Matter of the Application of Consumers Union of the United States, Inc.](#), 32 Fed. Rules Serv. 2d 1373 (S.D.N.Y. 1981); [In re New York City Municipal Securities Litigation](#), 30 Fed. Rules Serv. 2d 842 (S.D.N.Y. 1980); [Hecht v. Pro-Football, Inc.](#), 46 F.R.D. 605 (D.D.C. 1969); [United States v. Serta Associates, Inc.](#), 29 F.R.D. 136 (N.D.Ill. 1961). To the extent that expert information about the value of Revlon stock in recent years is relevant to Pantry Pride in its defense against Revlon's charges of securities law violations, Pantry Pride cannot expect to get a free ride at petitioners' expense.

*2 Accordingly, for reasons both of their overbreadth and of their unjustified intrusiveness in the confidential affairs of the Frates Group, petitioners' motion to quash the subpoenas is granted.

Respondent, Pantry Pride's, cross-motion to compel compliance with the subpoenas is denied. The applications by both sides for costs and attorney fees are also denied.

So ordered.

All Citations

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