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VIA EMAIL
November 7, 2018

Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: November 7, 2018
CT-2018-005

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. # 43

Dear Madam, Dear Sir,

Re: *Commissioner of Competition v. Live Nation Entertainment Inc., et al.*
Competition Tribunal File. CT-2018-005

This is the Commissioner's response to the Respondents' informal request of November 2, 2018, asking for a case conference to vary the order of the Tribunal (Phelan J.) of October 17, 2018, which ordered the Respondents to provide a further and better affidavits of documents (copy attached as Annex A to this letter).

The Commissioner does not agree with the request as framed. First, the Tribunal should not endorse the Respondents' attempt to unilaterally narrow the scope of the Commissioner's data request. Second, even if the Tribunal was of the view that an extension of time is appropriate, the Commissioner should be accorded a reasonable period of time to review the Respondents' late disclosures and prepare for oral discoveries. As well, sanctions should be imposed on the Respondents including a special award of costs for their failure to comply with the Tribunal's order and their disclosure obligations generally.

By delaying the disclosure of a substantial number of important documents (including approximately 30 000 new documents which have only now been disclosed), the Respondents have hampered the Commissioner's ability to obtain proper discovery of

their documents and to adequately prepare for oral discoveries within the established schedule.

We will first review the terms of the Tribunal's order of October 17, 2018, the correspondence exchanged between the parties since then, and set out the Commissioner's concerns flowing from the Respondents' substantial non-compliance with the Tribunal's order and their disclosure obligations generally.

The Tribunal's order of October 17, 2018

In his decision of October 17, 2018, Phelan J. ordered the Respondents to prepare further and better Affidavits of Documents. More particularly, the Respondents were ordered to do the following by November 2, 2018:

1. list the documents in the possession, power or control of each Respondent;
2. produce the clickstream and transactional data the Commissioner requested, subject to any further narrowing agreed to by the Commissioner;
3. produce testing materials;
4. produce relevant testing videos;
5. make inquires and produce forthwith relevant documents of Michael Rapino, the President and CEO of Live Entertainment Inc., the Respondents having agreed before the motion was heard to produce relevant documents of Jared Smith and Amy Howe, respectively President and Chief Operating Officer of Ticketmaster;
6. provide more fulsome descriptions concerning the subject matter of the Respondents' privilege claims.

With respect to the Commissioner's request for the Respondents to conduct further and better searches, Phelan J. delayed ruling on this issue until after the Respondents each delivered Affidavits of Documents listing the documents in their power, possession or control.

The correspondence exchanged between the parties after October 17, 2018

On October 27, 2018, the day of the Tribunal's decision, the Commissioner - pursuant to the Tribunal's guidance - provided a narrowed data request to the Respondents (Annex B).

The Respondents did not write back until October 26 and October 30, 2018 and, even then, they provided information on the production of only two types of materials pursuant to the Court's Order: the clickstream and transactional data (no 2 above) and testing videos (no 4 above) (Annexes C and D).

In brief, the Respondents advised they would give the Commissioner online access to their clickstream data, but that their transactional data would not be provided until November 16, 2018. Moreover, the Respondents' incorrectly suggested the

Commissioner agreed during his Reply at the hearing of the motion to limit data production to certain fields referred to in our letter of August 24.

The Respondents also advised that they had devised a process for searching relevant videos using certain types of information – despite their assertion at the hearing that there was no way this could be done – but that, again, such information would not be provided until November 16, 2018.

In respect of the balance of the order of Phelan J., the Respondents waited until November 1, 2018 - the day before the deadline fixed by Tribunal – to send a letter advising that [redacted]

[redacted]

We can confirm now that the November 2 disclosure amounts in fact to around 30 000 documents. Regardless, to put this in perspective, the Respondents' original production consisted of around 55 000 records.

The Respondent did not advise the Commissioner or the Court this substantial new production would be forthcoming. Nor did they attempt to provide these documents in tranches. If the Respondents were aware of their ongoing disclosure obligations as they suggested in their motion materials, they must have known the impact that delayed disclosure of such a substantial volume of new information so close to oral discoveries would have.

The Commissioner's concerns flowing from the Respondents' failure to comply with the Tribunal's order and their disclosure obligations generally

The Commissioner submits the Tribunal should dismiss the Respondents' request as framed. Indeed, several concerns arise from the Respondents' failure to comply with the Tribunal's Order and their disclosure obligations generally. We will deal first with the request to vary the terms of the Order concerning the Commissioner's data request. Second, we will deal with the request for an extension of time.

The Respondents' request to vary the Order regarding the Commissioner's data request

The Tribunal should refuse to endorse the Respondents' attempt to unilaterally narrow the scope of the data sought by the Commissioner as it is based on a flawed understanding of the Tribunal's decision and the Commissioner's position.

In its decision of October 17, 2018, the Tribunal held that the transactional and clickstream were relevant. The Tribunal did not limit the scope of the data that ought to be produced, but did invite the Commissioner if possible to further define his request, which he did.

The Respondents now are attempting to unduly limit the scope of the data that should be provided by the Commissioner, by restricting it to certain fields that were mentioned in an earlier letter to the Respondent dated August 24, 2018 (Annex F).

These fields were cited as *examples* of information that would be found in the data sought by the Commissioner. This was necessary since the Respondents have not provided the Commissioner with a list of fields or associated data dictionaries or engaged in any discussion regarding the portions of the Respondents' data that would be responsive to the Commissioner's request. Nor have they done so to date.

The Commissioner's position with respect to clickstream and transactional data has always been that the Respondents should produce *all* such data because, among other things, the Respondents should not be permitted to set up an objection about the dataset being too big, when at the same they were depriving the Commissioner of information that he could use to put forward a more focused request.

The *Sedona Database Principles* insist on the importance of the meet and confer principle, noting that it is "especially applicable in the context of database discovery because of the complicated technical and logistical questions raised by the storage of information in database systems" and that "[i]t may be in the best interests of the parties to meet and confer regarding the specific fields that contain relevant information".[1]

The Tribunal's decision of October 17, 2018 validates the Commissioner's position. The Commissioner having narrowed his request to certain specific fields, the Respondents should now abide by the Tribunal's decision, and produce the data *containing the fields requested by the Commissioner.*

Further, and contrary to the contention that the Commissioner "agreed to receive production without additional information", at no point did the Commissioner's counsel ever agree that the Respondents should not "provide unique software", which would of course be a document for the purpose of the *Competition Tribunal Rules*. Among other

[1] *Sedona Database Principles*, Commissioner's Book of Authorities (motion for further and better affidavits of documents), Tab 32, Part II A, p. 186.

things, we specifically requested data dictionaries and a description of the relevant software during our discussions with Respondents' counsel at the hearing of the motion.

In addition, while the Respondents' letter of October 26 indicates that the Respondents' "data is not sorted by domain name" and "seating charts are not collected as part of transactional data", the Respondents have still not disclosed the fields of data they maintain and whether any additional data could serve as a substitute. The Respondents' documents indeed indicate this data exists and is used by the Respondents in their operations (see Annex G).

The Respondents' request for an extension of time

The Respondents, who have been given a lot of time already to produce their documents, have failed to properly discharge their disclosure obligations. Their conduct has a material impact on the orderly conduct of the proceedings and is unfair to the Commissioner.

In ordering the Respondents to provide additional disclosure on several points, the Tribunal's decision of October 17, 2018 underscored the underdeveloped and deficient nature of their initial documentary production.

The Respondents now seek an extension of time to November 16, 2018, to comply with the Tribunal's order, at a time when documentary productions should have been compete and the parties in a position to start engaging in oral discoveries. Under the Tribunal's current scheduling order, the examinations for discovery are to be completed by the end of November 2018.

The Respondents' lateness affects several categories of important materials which were ordered to be produced by the Tribunal, including the transactional data, Michael Rapino's documents, and the testing videos, [redacted]

What is more, the Respondents have now just disclosed around 30 000 additional relevant documents, more than half the size of their initial production. For context, under the Tribunal's Scheduling Order, the Commissioner benefitted from a two-month period to review the Respondents' original production of July 20, 2018.

This new production includes documents from Jared Smith and Amy Howe, the disclosure of which was requested by the Commissioner on August 24, 2018 and announced by the Respondents on September 27, 2018. Along with those of Michael Rapino, which will come later, these are indeed potentially important documents for oral discoveries.

There is no question that the Respondents' actions, whether deliberate or not, prejudice the Commissioner's ability to obtain proper discovery of their documents and to adequately prepare for oral discoveries of their deponents.

At this juncture, the Commissioner is not in a position to fully assess the prejudice he faces as a result of the Respondent's actions. As of the date of this letter, the Commissioner's review of the documents has barely just begun and will surely take some time given the volume of documents provided. What is sure is that the Respondents' delayed disclosure impacts the time window which the parties initially agreed upon for conducting discoveries.

The problems created by the Respondents' non-compliance with their disclosure obligations is compounded by the fact that the Respondents [redacted] The Commissioner expressly reserves his right to seek further relief from the Tribunal in this regard.

For these reasons, even if the Tribunal was of the view that an extension of time is appropriate, the Commissioner submits he should be given a reasonable period of time to review the Respondents' *completed* production of documents and prepare for oral discoveries, on the basis that the end of November is not a realistic and achievable target for completing oral discoveries given the Respondent's conduct.

As well, sanctions should be imposed on the Respondents including a special award of costs. This is a matter of preserving the fairness of the Tribunal's proceedings and upholding the compelling public interest in getting at the truth (*Rhodia UK Ltd. v. Jarvis Imports (2000) Ltd.*, 2005 FC 1628, paras 38-39 – Annex I).

Beyond this, it is premature to say if other dates in the schedule should be changed. Upon receiving assurances by the Respondents that they have complied with their disclosure obligations, we would propose that the parties reengage in scheduling discussions, with a view to finding a satisfactory solution to the delays they have created, and minimizing their impact on the current schedule.

Yours very truly,

François Joyal

Fj/jc
cc. Derek Leschinsky, Paul Klippenstein (*Department of Justice Canada*)

Annex A

Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2018 Comp Trib 17
File No: CT-2018-005
Registry Document No: 35

IN THE MATTER OF an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

AND IN THE MATTER OF a motion filed by the Commissioner of Competition for further and better affidavits of documents and other relief.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and Tnow Entertainment Group, Inc
(respondents)

Date of hearing: October 12, 2018
Before Judicial Member: M. Phelan J.
Date of Reasons for Order and Order: October 17, 2018

REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S MOTION FOR FURTHER AND BETTER AFFIDAVITS OF DOCUMENTS AND OTHER RELIEF

I. NATURE OF PROCEEDING

[1] The Commissioner of Competition ("**Commissioner**") made a motion for the production of further and better affidavits of documents ("**AODs**") from the Respondents and other such relief stemming from the alleged failure to properly search for and produce relevant documents.

[2] The motion arises in the context of an Application by the Commissioner alleging conduct prohibited under s 74.01(1)(a) and s 74.05 of the *Competition Act*, RSC 1985, c C-34 ("**Act**") in that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public at prices that are not in fact attainable.

[3] The Tribunal has established a schedule through to a hearing date which provided for the delivery of AODs. As time is critical, it is necessary to quickly decide the Commissioner's motion.

[4] Five of the Respondents (Live Nation Entertainment, Inc., Live Nation Worldwide, Inc., Ticketmaster Canada Holdings ULC, The V.I.P. Tour Company and Ticketsnow.com, Inc.) provided AODs which did not list any documents ("**nil AODs**"). These five and the remaining three Respondents are inter-related companies with Live Nation Entertainment, Inc. at the top of the corporate ladder.

[5] In the nil AODs, the affidavit contained the following explanation:

> This affidavit discloses, to the full extent of my knowledge, information and belief, all of the documents relevant to the matters in the application that are in (name of Respondent)'s possession, power or control. The documents listed herein, if any, were located through the use of technology-assisted review and in the possession, power or control of a custodian primarily employed by (name of Respondent).

[6] The Commissioner raised the following points:

(a) that the search for documents was clearly inadequate as it has produced fewer documents than expected; that it was simply implausible that these Respondents did not have relevant documents. In some cases, documents which the Commissioner had from the particular Respondent were not listed in the applicable AOD.

(b) that the AODs failed to list the documents which were actually in the possession, power and control of the relevant Respondent even if the document's existence was disclosed in some other AOD.

(c) that several categories of documents going to issues of marketing practice, consumer conduct and impact of the Respondents' advertising were not produced.

(d) that certain legal privilege claims were either insufficiently detailed or unsubstantiated on their face.

[7] The Commissioner requests that the Respondents conduct a further and better search for documents, and that they produce further and better AODs curing the deficiencies noted or failing to do so, the right to cross-examine the affiant of the AODs.

II. SUMMARY OF FACTS

[8] The Respondents have explained away the various deficiencies on the basis that they conducted searches in a more modern manner using computer assisted technology aided by a litigation support company – the technology assisted review ("**TAR**"). The result was the identification of 2.5 million documents which were then vetted through the TAR and lawyers trained in the TAR system and who trained the TAR system, and ultimately approximately 55,000 relevant documents were identified. All of this was accomplished in a relatively short period of time.

[9] The first step in document collection had been interviews with "custodians" – people likely to have some of the relevant documents. There were 28 original custodians who had documents and who were said to be able to identify others who might have relevant documents. If any individual was not so identified, even if at the most senior levels where decisions on corporate policy and practice were made, no one asked if that individual had any potentially relevant documents. In fact, the Respondents even refused to ask for documents from a Mr. Rapino – the chief executive officer of the parent Live Nation Entertainment, Inc.

[10] Ultimately the Respondents sorted the relevant records in these AODs without attribution as to which documents were in the possession, power or control of which of the Respondents. The Respondents say that the relevant documents were produced just not identified and listed in the manner required by the *Competition Tribunal Rules*, SOR/2008-141 ("**Rules**"). The general explanation is that the documents were identified in accordance with the Sedona Principles and dealt with in accordance with the Respondents' view of what was "proportionate" in terms of the legal requirement to produce.

[11] The Respondents had initially proposed delivering a single AOD covering all of the Respondents. The Commissioner objected and required separate AODs from each Respondent. The Respondents then delivered three AODs based on the fact that all of the custodians were primarily employed by that Respondent (although some custodians were employed by more than one Respondent). However, the eight AODs were signed by the same corporate officer – the Vice President, Legal Affairs – Litigation for Live Nation Entertainment, Inc.

[12] This manner of proceeding and the resultant disclosures led to this motion.

III. MATTERS TO BE RESOLVED

A. Further and Better Searches

[13] The Commissioner's request in this regard is premature. Two senior officials whose documents have yet to be produced but whom the Respondents agree will be produced may shed

further light on what is no more than suspicion that the search was inadequate – but it is not an unreasonable suspicion given the way in which the Respondents produced their AODs.

[14] However, there has been no attack on the Respondents' use of TAR, and other computer technology to assist in the identification and collection of documents. At this point the major problem is the attribution of documents to each of the Respondents.

[15] The Tribunal encourages the use of modern tools to assist in these document-heavy cases where they are as or more effective and efficient than the usual method of document collection and review.

[16] The issue of further and better searches should await the delivery of further and better AODs in form and content complying with the Rules.

B. Further and Better AODs

[17] The Respondents' defence to what are clearly non-compliant AODs is that in the end all the relevant documents were produced and that the way in which the Respondents proceeded is consistent with s 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19, to the effect that proceedings are to be dealt with "informally and expeditiously" and consistent with the principle of proportionality. The Respondents also rely on Rule 2(1) which permits the Tribunal to vary the application of any rule.

[18] Firstly, the Tribunal notes that Rule 60(1) requires that each respondent in a case is to serve an affidavit of documents within the time prescribed by the Tribunal. In this case, Justice Gascon set the time for such service of the AODs but no mention was made of the Respondents' different approach to producing AODs.

[19] Rule 60(2) sets out the specifics for an affidavit of documents. The requirements are more than formalities; the requirements are to elicit a listing of the relevant documents held by each relevant party.

[20] A party's unilateral view of the operation of the principle of proportionality is not a waiver of the Rules. Where a party wishes to depart from a rule on the basis of proportionality, they are required to seek the concurrence of the judicial member responsible for case management of the matter. *Ex post facto* variation of the operation of a rule should be a rare exception and I am not prepared to grant such variation.

[21] In addition to the principle of compliance with the Rules and obtaining prior approval of exception to the operation of a rule, there is good reason for the Commissioner's insistence on the service of proper affidavits of documents.

[22] Section 69(2), in particular s 69(2)(c), contains provisions, relevant to civil proceedings, for the authority of documents created and the presumptions of proof based upon possession of documents in the hands of a "participant".

69 (2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and,

69 (2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :

(i) que le participant connaissait le document et son contenu,

(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par

where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.	**l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.**

[Emphasis added by the Tribunal]

[23] The presumptions are important. Despite the Respondents' desire to serve a single AOD for all Respondents, the Respondents are insisting on being treated separately, defending separately and in some cases pleading that they are not proper parties to the action.

[24] The issue of knowledge within the related corporations and how high up and how far out knowledge of the alleged deceptive advertising extended can be important to liability, and damages or other relief.

[25] Therefore, each Respondent will prepare a further and better AOD listing the documents required in respect of that Respondent. These proper AODs may give rise to the need for further and better searches for relevant documents.

C. Missing Documents

[26] There are three categories of documents which have not been produced for various reasons – transactional and clickstream data; testing documents; and videos.

a. Transactional and Clickstream Data

[27] As a result of the motion, during argument, the Respondents agreed to produce the clickstream data – a record of the computer "clicks" made by potential purchasers of tickets. It includes data collected while consumers interact with the Respondents' websites and mobile apps. It is recognized that this data may be relevant to consumer behaviour in response to the alleged deceptive advertising. Absent the Respondents' concession, the Tribunal would have ordered production.

[28] Transactional data is similar to clickstream and it captures detailed information collected on each ticket purchase concluded on the Respondents' websites and mobile apps.

[29] This data is relevant to how the computer display of ticket prices affects the purchasing conduct and may assist in quantifying the overcharging amount in the alleged "drip pricing" conduct of one or more of the Respondents.

[30] It is to be produced. To the extent that the Commissioner can further define what part of this relevant data set he requires, he should do so.

b. Missing Testing Materials

[31] The Respondents have not provided any substantial reason for not producing the tests of test consumers' reaction to various display alternatives. The evidence presented on this motion establishes its potential relevance in terms of the impact of fees as presented as well as the impact on revenue of such displays.

[32] It should be produced except to the extent that some 2010 tests have already been produced.

c. Videos

[33] There are 436 hours of videos, some of which apparently relate to fee displays. The videos have been identified through the Respondents' own document collection process. What is not known is how many videos are relevant to the litigation because the Respondents have refused to review the videos due to cost and time constraints.

[34] The Respondents have an obligation to make reasonable efforts to obtain and determine relevancy (see *Eli Lilly and Co v Apotex Inc*, 2000 CarswellNat 185, 94 ACWS (3d) 1193 at para 6). The principle of proportionality does not eliminate hard work.

[35] The fact that the Respondents either do not now have or did not create documents, such as contracts, scripted questions and similar material, which would assist in this relevancy exercise, is not a reason to deprive the Commissioner of the relevant videos.

[36] The alternative is for the Respondents to turn all 7,000 videos over to the Commissioner for his review and relevancy determination.

[37] The relevant videos are to be produced. The Respondents will have 10 days to advise the Commissioner how and when the relevant videos will be produced; failing which the Commissioner may seek an order requiring the delivery to him of all videos for his relevancy review.

D. Mr. Rapino

[38] As indicated earlier, Rapino is the senior executive of Live Nation Entertainment, Inc. The Commissioner has requested that the Respondents produce any relevant documents that he may have. Two other senior officers' documents are, as requested by the Commissioner, being produced.

[39] The Respondents have expressed reluctance bordering on refusal to even inquire of Rapino on the basis that he has not previously been identified as a person likely to have relevant documents. They simply do not know and have not made reasonable inquiry.

[40] Given his position within the Respondent's organization, it is more than reasonable to make inquiries of Rapino. Whether he has any documents or which documents he may have is

potentially telling evidence of the extent of involvement of the various Respondents in the alleged misleading activities.

[41] As indicated at the hearing, the Respondents are to inquire of Rapino as to relevant documents he may have and, if any, to produce them forthwith.

E. Privileged Documents

[42] The Commissioner complains that the Respondents' claim of privilege does not comply with Rule 60 in respect to a number of documents. The Commissioner asks that the Tribunal inspect the documents in question to determine the privilege claim.

[43] The search for privileged documents was somewhat different than the TAR search. The privileged documents search was a key word search. It appears that there has been some shifting of documents from one category of privilege to another as the review of these documents settles out.

[44] Before the Tribunal would make an order for individual privilege document review or even a sampling, the Respondents should provide further and better privilege details.

[45] With respect to litigation privilege, the Respondents are to identify the particular litigation over which the privilege is claimed.

[46] With respect to the Respondents' claim of solicitor-client privilege, the fact that the communication was not between a solicitor and a client is not determinative but it is *prima facie* evidence of the privilege. Several of the documents listed have no description of the basis of the claim; this is particularly important where the communication is not with a lawyer.

[47] The Respondents, in the further and better AODs to be served, are to provide a more fulsome description of the subject matter of the claim without disclosing the privilege. Such descriptions as "re: employment claim" or "re: contract interpretation" and similar type descriptions should be sufficient to *prima facie* satisfy the disclosure obligation.

[48] Following compliance with these instructions, should there be problems with the privilege claim, the matters may be raised with the Tribunal.

IV. TIMING

[49] The Respondents have indicated that revised AODs to record new documents produced will be served on November 2, 2018. Given the forthcoming discoveries, absent agreement with the Commissioner, the Respondents' new AODs shall by that same date incorporate the instructions in these Reasons.

THE TRIBUNAL ORDERS THAT:

[50] The Respondents are to comply with these Reasons.

[51] The Commissioner is to have his costs of this motion in any event of the cause.

DATED at Ottawa, this 17th day of October 2018.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) Michael Phelan

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

François Joyal
Derek Leschinsky
Ryan Caron
Katherine Rydel
Paul Klippenstein

For the respondents:

Live Nation Entertainment, Inc et al

Mark Opashinov
David W. Kent
Guy Pinsonnault
Adam D.H. Chisholm
Joshua Chad

Annex B

From: Leschinsky, Derek (CB) <derek.leschinsky@canada.ca>
Sent: Wednesday, October 17, 2018 3:58 PM
To: Mark Opashinov; David Kent; adam.chisholm@mcmillan.ca
Cc: Joyal, Francois; Klippenstein, Paul (IC); Caron, Ryan (IC); Rydel, Katherine (IC)
Subject: Commissioner of Competition v. Live Nation Entertainment Inc., et al. Competition Tribunal File. CT-2018-005
Attachments: Commissioner of Competition v. Live Nation Entertainment Inc -Data Request.pdf

Counsel,

Further to the decision of the Competition Tribunal, please find a data request specifying the part of the relevant data the Commissioner requires.

Derek Leschinsky

Counsel, Competition Bureau Legal Services
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DATA REQUEST

Transactional Data

1. Please provide detailed transaction-level ticket sales data for transactions with persons located in Canada (including in Quebec) in respect of ticketmaster.ca, ticketweb.ca and ticketsnow.com, as well as each of the Respondents' mobile applications (an "**Online Ticketing Platform**") from January 1, 2017 through October 17, 2018 (the "**Relevant Period**"). The relevant data elements should include at a minimum:

a. Site/platform ID and name (e.g., ticketmaster.ca, ticketweb.ca, ticketsnow.com)

b. Channel (e.g., desktop web, mobile web, mobile application)

c. Sale date and time (i.e., timestamp)

d. Invoice date, invoice number, and line item for each transaction

e. Price of ticket

f. Type of sale (e.g., primary ticket, verified resale ticket)

g. Original face value / list price of ticket

h. Currency

i. Quantity of tickets

j. Service fee

k. Facility charge

l. Order processing fee

m. Delivery fee

n. Other fees

o. Discounts (e.g., 2 for 1 tickets, Me+3, % off)

p. Adjustments (e.g. credits, debits, returns)

q. Taxes

r. Non-ticket charges (e.g., parking, meals, upsells)

s. Payment method

t. Ticket type (e.g., Standard adult, senior, student, child)

u. Ticket level (e.g. floor, 100 level, 200 level, balcony)

v. Ticket category (e.g., General admission, premium, VIP package, Platinum)

w. Seat (section and seat number)

x. Wheelchair accessible

y. Event ID

z. Event name

aa. Event category (e.g., music, sports, family, arts & theatre)

bb. Event subcategory (e.g., classical, rock and pop, jazz and blues)

cc. Event date and time (i.e., timestamp)

dd. Venue/facility ID

ee. Venue/facility name

ff. Venue/facility street address

gg. Venue/facility province

hh. Venue/facility region (e.g., Calgary & Southern Alberta, Toronto, Hamilton & Area)

ii. Venue/facility capacity for event

jj. Customer ID

kk. Customer address (Postal Code, City, province, country)

2. For each *Customer ID* who had visited an Online Ticketing Platform, please provide the following data:

a. All visits to the platform during the previous year;

b. All searches and purchases from the platform during the previous year; and

c. Postal code (when available).

3. For each *Event ID* and *Venue/Facility ID* for which a ticket was sold via a Relevant Platform during the Relevant Period, please provide a detailed listing of the type and number of seats that were made available for sale in each category, level, and sector.

4. For each *Event ID* and *Venue/Facility ID* for which a ticket was sold during the Relevant Period, please provide a seating chart reflecting the general layout for the venue and event.

Clickstream Data

5. Please provide all clickstream data for each Online Ticketing Platform. Clickstream data refers to data collected while consumers navigate a website, which includes all pages and user visits and the sequential stream of clicks they create as they move across the web. The path a visitor takes through a website is called the clickstream. This includes, but is not

limited to, user logins, user queries, links the user clicked on while on one of Ticketmaster's webpages, user actions such as sort-by-price or other sorting methods, etc.

Depending on the specific web hosting and data warehouse solutions, the data fields, tag names, and format of the data might vary. Generally, clickstream data includes, among other things, information about:

a. visitor identification (e.g., ID, IP address, login, cookies, daily/weekly visits)

b. browser and device information

c. geo information (e.g., language, country, region)

d. page information (e.g., page URL and name, referrer, page events, queries)

e. click information (e.g., actions (e.g., sort), type, context, source, tag)

f. timestamp of all clicks and events

General

For all requested data, please include sufficient documentation of the organization and structure of the databases or data sets, including i) a general description; ii) a list of data field names; iii) a definition for each data field, and iv) a description of the meanings of all possible data field values.

Annex C

mcmillan

Reply to the Attention of: Adam D.H. Chisholm
Direct Line: 416.307.4209
Email Address: adam.chisholm@mcmillan.ca
Our File No.: 251233
Date: October 26, 2018

EMAIL

Derek Leschinsky
Counsel, Competition Bureau Legal Services
Department of Justice / Government of Canada

Dear Mr. Leschinsky,

Re: Live Nation et al ats The Commissioner of Competition
Data Request made October 17, 2018

We write further to your email dated October 17, 2018 attaching a data request relating to both "Transactional Data" and "Clickstream Data".

At the outset, we can indicate our client's intention to comply with both the Tribunal's order made October 17, 2018 and the agreement reached between counsel on clickstream data during the hearing on October 12, 2018.

During your Reply submissions to the Tribunal on October 12, 2018, you indicated that the transactional data which you were requesting was outlined in the August 24, 2018 letter from Commissioner's counsel.

In that letter, the Commissioner sought 13 categories of transactional data.

The Data Request you delivered on October 17, 2018 requests information beyond the transactional data which you indicated to the Tribunal in Reply that you were seeking. Instead of 13 categories of data, you have listed 37 categories of data. In addition, you have asked for three entirely new categories of transactional data.

We have set out below the data that is available and responsive to your requests and the Order as well as the timing for the Respondents to produce it.

mcmillan

Data Request Item 1. The Respondents are able and willing to provide you with the vast majority of the 37 categories of data requested in Data Request Item 1, subject to the following two exceptions: the data is not sorted by domain name, which is articulated as your subcategory 1(a); and "discounts" are not an available field of data, which is articulated as your subcategory 1(o).

Data Request Item 2. Through the provision of the foregoing information, the Commissioner would also be receiving the information he seeks for a portion of Data Request Item 2(b) (insofar as it concerns purchases from the platforms during the previous year) and all of Data Request Item 2(c). With respect to Data Request Item 2(a) and Data Request Item 2(b) (insofar as it concerns searches on the sites), such information is not routinely collected by "Customer ID" in the form of transactional data, and we are unable to provide same.

Data Request Item 3. The Respondents are also able to deliver the information requested as Data Request Item 3 so long as they may do so by stating the "seats made available" at a particular point in time (such as on-sale date), as seat availability very commonly changes between the on-sale date and the date of show for a number of reasons.

Data Request Item 4. Seating charts are not collected as part of transactional data and are not routinely collected at all. To the extent that the Commissioner wants "general layouts" of any particular venue, the Respondents do not have more ready access to those than the Commissioner – i.e. they can be downloaded from the Respondents' various websites in graphic form. In any event, it is not clear to us how venue general layouts are relevant to the matters in issue.

Data Request Item 5. With respect to Data Request Item 5, clickstream data, the parties reached agreement at the October 12th hearing that the burden of the Respondents in providing clickstream data would be limited to providing the raw clickstream data without additional steps. You were advised that this was raw data. The parties expressly discussed and agreed that the Respondents would not interpret the data, provide unique software or train representatives of the Commissioner. You agreed to receive that production without additional information. We can confirm that no "handbook" is available. We will produce the clickstream data as agreed.

Timing. Our clients have already commenced processing the foregoing requests. It will, however, take time to produce so much information. Our clients require until **November 16, 2018** to produce the transactional and clickstream data requested. Please confirm that you are willing to consent to receipt of the transactional data on or before that date or whether we should deliver a motion to vary Mr. Justice Phelan's order made October 17, 2018 to reflect such timing.

mcmillan

Yours truly,

Adam D.H. Chisholm

mcmillan

Reply to the Attention of: Adam D.H. Chisholm
Direct Line: 416.307.4209
Email Address: adam.chisholm@mcmillan.ca
Our File No.: 251233
Date: October 26, 2018

EMAIL

Competition Bureau Legal Services
Place du Portage, Phase I
22nd Floor
50 Victoria Street
Gatineau QC K1A 0C9
Attn : Derek Leschinsky, Francois Joyal and
Paul Klippenstein

Dear Sirs,

Re: Live Nation ats CCB - Respondent Video Review and Production

We write further to the Honourable Justice Phelan's Order made October 17, 2018 and the Respondents' production of relevant videos.

The Respondents have devised a workflow relating to the production of videos. The workflow involves:

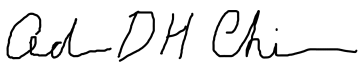
- review of file paths;
- review of file names;
- consideration of the provenance of the videos by reference to the custodians from whom they were collected; and
- manual review of samples of the collected videos.

We note that the Respondents ran voice-to-text conversion on a sample of the videos in the Respondents' possession for use in conjunction with predictive coding or word searches; however, the quality of transcription generated by the technology was inadequate and this option is not viable.

This process has commenced. We anticipate being in a position to provide the videos to you by **November 16, 2018**.

mcmillan

Yours truly,



Adam D.H. Chisholm

Annex D

Annex E

Annex F

Ministère de la Justice Canada | Department of Justice Canada

PROTÉGÉ B – PROTECTED B

Bureau de la concurrence
Services juridiques

Competition Bureau Legal
Services

Place du Portage, Tour I
22e étage
50 rue Victoria
Gatineau QC K1A 0C9

Place du Portage, Phase I
22nd Floor
50 Victoria Street
Gatineau QC K1A 0C9

Téléphone/Telephone
(819) 953-3884

Télécopieur/Fax
(819) 953-9267

VIA E-MAIL

24 August 2018

David Kent
Mark Opashinov
Guy Pinsonnault
Adam Chisholm
Joshua Chad
McMillan LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

Dear Counsel,

Re: *Commissioner of Competition v Live Nation et al.* – CT2018-005

We have commenced our review of your productions. There appear to be various deficiencies and areas for which information is missing. We are writing to you to advise of these deficiencies in order to give you an opportunity to address them. The following lists our areas of concern at this stage:

i. **No documents have been produced by five (5) of the Respondents**

1. Live Nation Entertainment, Inc.
2. Ticketsnow.com, Inc.
3. The V.I.P. Tour Company
4. Live Nation Worldwide, Inc.
5. Ticketmaster Canada Holdings ULC

The pleadings refer to the various roles played by the above entities. Based on these allegations and admissions, we would expect there to be relevant documents in possession of these corporate entities.

ii. Custodians are missing

It is apparent from the productions that officers such as Michael Rapino, Jared Smith and Amy Howe are involved in discussions about fee display. Curiously, none of these corporate officers are listed as custodians.

Please provide documents in the custody of these officers and/or an explanation as to why they are not listed as custodians.

iii. Schedules for relevant documents that were, but no longer are, in the possession of the Respondents are missing

For each Respondent, please provide a formal sworn response to the issue of relevant documents that were, but no longer are, in that Respondent's possession, power or control.

iv. 46 documents "Withheld with Privilege": Absence of specifics

There are a series of documents with a note "Withheld for Privilege" which do not specify the type of the privilege that is asserted, nor is the document listed in any of the Respondents' Schedules of privileged documents. Based on the metadata available, we are unclear about the nature of privilege of these documents. For example, PROD054381 is a document from Randall Hofley, then at Stikeman Elliott, to Larry Bryenton of the Competition Bureau. Given that the recipient is the Bureau, it is unclear why the content of the document would not be shared.

These documents lack a title and in some cases it appears that a document has a date associated with it and in other cases there appears to be no date.

Please elaborate on the particulars of the privilege that is claimed for these 46 documents.

v. Litigation Privilege is claimed on documents that pre-date 2017, as far back as 2009, with insufficient particulars

As you know, on May 12, 2017, the Competition Bureau delivered a letter to Mr. Jared Smith, President and CEO of Ticketmaster Canada Holdings ULC. (As noted above, this is one of the entities for which no documents have been produced, which raises a separate issue of why documents such as this have not been listed in the schedules in relation to that entity, particularly given the Respondents' admission in the Response that Ticketmaster Canada Holdings ULC controls the content on the Ticketing Platforms (paragraph 12).) We have attached this letter for your review. It is listed in our affidavit of documents at PEJG00479_00000289.

In that May 12, 2017 letter, Josephine Palumbo, (Deputy Commissioner of Competition, Deceptive Marketing Practices Directorate) referred to concerns under the misleading advertising provisions in relation to Ticketmaster Canada Holdings ULC, its subsidiaries and related entities (referred to therein as "Ticketmaster"). Ms. Palumbo referred to "drip-pricing" and indicated that Ticketmaster's practices raised significant concerns that needed to be addressed. This letter referred to the potential for enforcement action.

As a result of the May 2017 letter, we can understand why documents created after this date might be considered litigation privileged. With respect to documents that pre-date May of 2017, we are unclear as to why some documents are claimed to have litigation privilege. The claim for litigation privilege dates back for some documents to 2009. For example, the document listed in the Affidavit of Documents of Ticketmaster Canada LP as #3417, PRIV06708, Outlook Email 5/13/2009 is claimed as "Litigation Privileged". The claim for litigation privilege lacks sufficient particulars to explain why litigation was contemplated prior to May of 2017 and lacks sufficient particulars to explain any relation to the present litigation as defined in the pleadings.

Please elaborate on the particulars to explain why litigation privilege is claimed on documents that pre-date May of 2017.

vi. Solicitor-Client Privilege is claimed on documents for which no counsel is listed in the index

There are a number of entries in the Affidavits of Documents where solicitor-client privilege is claimed, but there is no reference to any specific counsel in relation to the entry.

Please elaborate on the particulars of the privilege that is claimed.

vii. Settlement Privilege is claimed on documents with insufficient particulars

We do not have enough context to assess the claims for settlement privilege. Please explain the context within which settlement privilege is claimed.

viii. Claims for Privilege and relation to the pleading of an estoppel defence

In their Response, the Respondents plead that the Commissioner should be estopped from bringing this Application in respect of Ticketmaster's past conduct.

The claim that "Over the past eight years, Ticketmaster has had knowledge of and relied upon the fact that the Commissioner chose not to take action against Ticketmaster's buyflows in 2010" puts in issue any legal advice and/or discussions that Ticketmaster would have had in relation to past discussions with the Commissioner and their legal impact. While we cannot demand that the Respondents waive solicitor-client privilege, we are putting you on notice that we will take the position at the hearing that an estoppel defence in these circumstances cannot be raised in the absence of a waiver of solicitor-client privilege with respect to the narrow issue of estoppel and legal discussions in that regard.

ix. Source code and HTML code of the Ticketing Platforms are missing

The pleadings relate to the Respondents' websites and mobile applications. However the Respondents have failed to produce the source code (such as front-end HTML, CSS, or JavaScript, or back-end Ruby or Python) for these sites and applications. Please identify and produce such source code while maintaining the directory structure(s) for the period since 2009 (or another mutually agreed upon period of time).

x. Results from recent research and testing are missing

It is apparent from the productions that the Respondents have carried out research with respect to matters such as fee display in 2018. For example, such testing is referred to in documents PROD054303 and PROD054304. However, results of this testing have not been produced.

Please provide all documents, including memoranda, reports, studies, surveys, analyses, presentations, evaluations, recommendations, directives, policies and guidelines (including any drafts thereof), in relation to any research and testing done in 2018 up to the present date and, of course, this will be a continuing disclosure obligation.

xi. Testing videos are missing

It is apparent from the productions that the Respondents have carried out consumer research to determine how users perceive the websites as well as pricing and fee disclosures. More particularly, videos were generated as part of various research efforts, some of which going back to 2008. In some cases, it would appear that the Respondents have been working closely in collaboration with specialized firms such as UserTesting.

Please produce all of these videos.

xii. **Tests, research, studies conducted prior to 2010 are missing**

The document in PROD049788*,* dated in August of 2010, states as follows (emphasis added):

"And **all the data we have** says that the fan just wants to know how much it is going to cost to go see the game/concert/show/whatever. He HATES that **we kind of trick him with one price, then layer in additional fees on top of that later in the process**. He just wants us to tell him the truth about how much of his hard earned money we are all asking him to give up for a live experience. So...starting this week we are rolling out a new presentation of fees on Ticketmaster.com. I've attached a slide showing the different treatment. This is subtle, but a BIG STEP FORWARD for our industry. It shows we are taking responsibility for moving the industry in a direction that is fan friendly, even if it ruffles the feathers of a few people along the way who don't quite get it yet. They will, and most importantly our fans will appreciate it. **And the data says they will be more likely to buy**."

We do not appear to have the data referred to in this document or the data and documents in general in relation to the studies conducted prior to 2010 in this regard.

Please produce this data and any documents, including memoranda, reports, studies, surveys, analyses, presentations, evaluations, recommendations, directives, policies and guidelines (including any drafts thereof), in relation to the studies conducted prior to 2010.

xiii. **Clickstream data and transactional data are missing**

As already indicated, it is apparent from the productions that the Respondents have carried out analyses since at least 2014 to determine how users have been interacting with the relevant websites/mobile applications. In some cases, it would appear that the Respondents have been working closely in collaboration with specialized firms such as Monetate and Optimizely.

More particularly, the Respondents have conducted tests, such as "A/B testing", whereby they presented to different users various options for displaying tickets prices and measured the effect of such options on consumer behaviour and revenues.

These tests are relevant the allegations made in the pleadings. The production indicates that for the purpose of conducting the tests referred to above, the

Respondents have relied on and utilized “web analytics” (or clickstream) data as well as transactional data. The production is missing much of this data.

The relevant “web analytics” (or clickstream) data would include detailed information collected while consumers interact with and navigate through the Respondents’ websites/mobiles applications.

It would include, at a minimum, information identifying the particular user, the device and browser used, pages visited, user queries, links the user clicked on, user actions such as sorting, selecting tickets, buying tickets, etc.

For example, it would include the following:

1. visitor identification (e.g., ID, IP address, login, cookies, daily/weekly visits)
2. browser and device information
3. geo information (e.g. language, country, region)
4. page information (e.g. page URL and name, referrer, page events, queries)
5. click information (e.g., actions (e.g. sort), type, context, source, tag)
6. timestamp of all clicks and events

The relevant transactional data would include detailed information on each ticket purchase concluded on the Respondents’ websites/mobiles applications. It would include at, a minimum, information on the purchaser, the ticket price (including the fees), the event for which tickets were paid, the venue or facility in question, etc.

For example, it would include the following:

1. Site/platform ID and name (e.g., ticketmaster.ca,ticketweb.ca)
2. Channel (e.g., web, mobile)
3. Sale date and time (i.e., timestamp)
4. Invoice date, invoice number, and line item for each transaction
5. Price of ticket
6. Service fee
7. Facility charge
8. Order processing fee
9. Delivery fee
10. Other fees
11. Taxes
12. Event name
13. Venue/facility name

This data is relevant, is within the Respondents’ control and possession, and can be retrieved without creating an undue burden.

Please identify and produce the data repositories, databases or data files which have contained the relevant clickstream and transactional data since 2009 (or another mutually agreed upon period of time). As you are aware, FC Rule 230b confirms that a party is still required to list a document even if the party is of the opinion that its production for inspection could be onerous. We would therefore expect at a minimum the listing of documents in relation to the above entities.

For each repository, database or file, provide a data dictionary that includes a list of field names and a definition for each field contained.

CONCLUSION

We are asking for productions as requested above to be provided before August 31, 2018. This timeframe is necessitated by the timing set out in the scheduling order made by the Tribunal in this matter.

Best regards,

Kenneth Jull
General Counsel
Competition Bureau Legal Services

François Joyal
General Counsel
Department of Justice
For the: Competition Bureau Legal Services

Annex G

Annex H

Annex I

Federal Court | Cour fédérale

CANADA

05 349 023

Date: 20051130

Docket: T-1832-04

Citation: 2005 FC 1628

Ottawa, Ontario, November 30, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

BETWEEN:

RHODIA UK LIMITED and
RHODIA INC.

Plaintiffs
(Defendants by Counterclaim)

and

JARVIS IMPORTS (2000) LTD. and
116038 B.C. LTD.

Defendants
(Plaintiffs by Counterclaim)

REASONS FOR ORDER AND ORDER

[1] This matter involves three motions:

(1) Defendant Jarvis Imports (2000) Ltd.'s (the "Defendant Jarvis") motion for a better affidavit of documents from the Plaintiffs.

(2) Defendants' appeal from the Order of Prothonotary Morneau dated October 25, 2005.

(3) Plaintiffs' appeal from the Order of Prothonotary Morneau dated October 25, 2005.

[2] These motions arise from an action commenced by the Plaintiffs on October 12, 2004 against the Defendants alleging infringement of a registered trade-mark, passing off and depreciation of goodwill. The Plaintiffs are seeking declarations, injunctions, destruction of allegedly infringing items and damages.

(1) Defendant Jarvis's motion for a better affidavit of documents from the Plaintiffs

[3] The Defendant Jarvis requests an order compelling each of the Plaintiffs (Defendants by Counterclaim) to deliver a further and better affidavit of documents listing all documents relating to any unadmitted allegation in the pleadings.

[4] The Defendant Jarvis alleges that the Plaintiffs have failed to list all of the relevant documents in the possession, power or control of each Plaintiff in its affidavit of documents, and has therefore failed to provide a proper and complete affidavit of documents, pursuant to Rules 222 and 223 of the *Federal Court Rules, 1998*, SOR/98-106 (Text of Rules 222 and 223 at Annex "A").

[5] It is well established that the party seeking further production must offer persuasive evidence that documents are available, but have not been produced, and the burden of showing that another party's productions are inadequate lies with the party making the

allegation: *Montana Band v. Canada*, [2001] F.C.J. No. 991 (T.D.) at para. 5; *Havana House Cigar & Tobacco Merchants Ltd. v. Naeini* (1998), 80 C.P.R. (3d) 132 at para. 19, aff'd (1998), 80 C.P.R. (3d) 563 (F.C.T.D.); *Apotex Inc. v. Merck & Co.*, (2004) 33 C.P.R. (4th) 387 (F.C.) at para.13 -14.

[6] It is also well settled law that the primary consideration on the scope of discovery is relevance: *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 24 C.P.R. (3d) 66 at 70 (F.C.T.D.) at 70-72, cited with approval in *Merck & Co. v. Apotex Inc.*, [2003] F.C.J. No. 1725 (C.A.) at para. 10. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Compagnie Financiere Du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) at 63, cited with approval in *Fiddler Enterprises Ltd. v. Allied Shipbuilders Ltd.*, [2002] F.C.J. No. 78 (T.D.) at para. 8.

[7] The request for production consists of seven groups of documents as set out in the Notice of Motion.

[8] The first group of documents relates to sales in Canada and worldwide of textile fibres; yarns and woven, knitted, netted, felted, and bonded fabrics; lace and embroidery, ribbons and braid; mats and matting, fireproofing preparations for the treatment and

processing of textile fibres, yarns and woven, knitted, netted, felted and bonded fabrics of all kinds in association with the PROBAN trade-mark, including without limitation:

- purchase orders;
- invoices;
- price lists;
- documents exchanged with customers, distributors or licensees;
- any corporate, financial or other documents referring to the volume of sales of the PROBAN products; and
- storage media recording such information

[9] The Plaintiffs have made allegations that the PROBAN trade-mark is well-known in Canada and worldwide and that considerable time, effort and money has been invested in the development, promotion and advertisement of the trade-mark. The Defendant Jarvis maintains that the Plaintiffs have failed to list or produce any documents to establish that fact, such as through documents relating to the extent of sales or time, effort and money expended, in Canada and worldwide in association with the PROBAN trade-mark in issue.

[10] In an Order for bifurcation rendered on February 21, 2005, Prothonotary Hargrave stated that any question as to the extent of the infringement of any right, any question as to the damages flowing from the infringement of any right, and any question as to the profits arising from the infringement of any right (collectively, the "Deferred Issues") would be the subject of a separate determination to be conducted after the trial of the remaining

issues in the action. The Plaintiffs submit that this category of documents is directed to issues regarding the extent of infringement, damages flowing from the infringement, and profits arising from the infringement and therefore need not be produced.

[11] In *Montana Band v. Canada*, [2001] F.C.J. No. 528 (T.D.), Hugessen J. stated at paragraphs 4-5:

> That brings me to the motion I have today with respect to discoveries. It is in my view fundamental that when an order for severance is made the severed issues which are not then going to be tried in the first trial are irrelevant for the purposes of that first trial. To put it in a very familiar context where liability and damages are severed questions relating to damages are not relevant to the trial on the issue of liability.
>
> It flows from that, that discoveries whether they be written or oral which are conducted following an order for severance should be limited to the issues which are to be tried at the first trial. Questions relating to matters which will only become relevant if they ever do become relevant at the second trial should not be put. [...]

[12] Similarly, in *Intel Corp. v. 3395383 Canada Inc.* (2003), 28 C.P.R. (4th) 48 (Proth.) at para. 28, (aff'd (2004), 30 C.P.R. (4th) 469 (T.D.), aff'd (2004), 35 C.P.R. (4th) 97 (C.A.)):

> Accordingly, where, as in this case, issues regarding the extent of infringement and damages/profits have been separated from issues regarding liability, questions relating to the extent of damages and/or profits should not be ordered to be answered at the liability stage. To do so would undermine the very purpose of Rule 107.

[13] While both of these cases dealt with questions asked at oral discovery, I find the reasoning equally applicable to production of documents. In view of the Order of bifurcation, documents relating to matters which will only become relevant should a determination of the Deferred Issues arise need not be produced for the purposes of the first trial. In my view, the majority of the first group of documents will have no bearing on the issue of liability for the alleged infringement of the trade-mark as they are directed to

issues regarding damages flowing from infringement. Therefore, they should not be produced. However, I do find that corporate and financial documents referring to the volume of sales of the PROBAN products in Canada and worldwide, given that they relate to how well known the trade-mark is, are relevant to the alleged infringement of a registered trade-mark, passing off and depreciation of goodwill and should be produced.

[14] The second group of documents relates to advertisement or marketing of the trade-mark PROBAN in Canada and worldwide, including without limitation:

- advertising, flyers, catalogues, brochures and newsletters;
- documents establishing the value of volume of such advertising, including invoices and corporate, financial or other documents referring to volume or expenses relating to marketing; and
- storage media recording such information

[15] The third group of documents relates to the development, promotion and advertisement of the PROBAN trade-mark in Canada and worldwide, including without limitation:

- business plans, marketing plans and advertising plans;
- financial documents indicating expenses involved in such development, promotion and advertisement;
- documents reflecting the number of personnel and efforts involved in such activities; and

- storage media recording such information;

[16] The fourth group includes any publications in Canada or elsewhere containing references to PROBAN and any documents indicating the scope, extent or circulation of media in which such references occur.

[17] The Plaintiffs submit that they have provided the Defendants with relevant documents relating to the development, promotion and advertising of the PROBAN trade-mark that are in their power and control.

[18] The Plaintiffs further submit that the documents sought by the Defendant Jarvis relate to the quantum of damages, which will be the subject of a reference after trial, should one arise.

[19] I cannot accept that the second and fourth groups of documents relate only to the quantum of damages. In my opinion, these documents are indeed relevant to the issue in litigation as they relate to the use of the trade-mark PROBAN. The Plaintiffs have pleaded that the Plaintiff Rhodia UK Limited and its predecessors have used the PROBAN trade-mark for more than 45 years and that it is well-known in Canada and throughout the world. Documents relating to the extent to which PROBAN is well-known in Canada and throughout the world are relevant to the first trial as they may tend to prove or disprove the allegations of the Plaintiffs that the Defendants' actions have caused confusion, damaged

the Plaintiffs' goodwill and caused other harm to the businesses of the Plaintiffs. For these reasons, I order that the second and fourth groups of documents be produced.

[20] The second and fourth groups of documents relate to the advertisement and marketing of the trade-mark PROBAN. The six pieces of documentation already produced by the Plaintiffs, including the Powerpoint Presentation, excerpts from the Rhodia website and the press release, are examples of such documents as they are directed to the development, promotion and advertising of the trade-mark. In contrast, the third group of documents encompasses business, marketing and advertising plans as well as financial documents indicating expenses and efforts involved in the development, promotion and advertisement of the trade-mark PROBAN. In my view, the third group is not relevant to determining whether the Defendants' actions have caused confusion or damaged the Plaintiffs' goodwill. They relate more appropriately to the issue of quantum of damages. Therefore, these documents should not be produced.

[21] The fifth group includes documents available from the Plaintiffs' licensees which fall into the same categories as group one through four above.

[22] This group of documents is held by third parties. The Plaintiff first submits that the Defendants adduce no evidence that such documents are available and no evidence as to their relevance. Secondly, the Plaintiffs have produced the available license agreements between themselves and their licensees and have also produced a bundle of invoices pertaining to sales by one of its licensees, Westex Inc., of fabrics and fibers treated with

the PROBAN material. Lastly, production of the type of documents requested should take place only in the context of a reference after trial.

[23] While it can be presumed that some sort of business relationship exists between the Plaintiffs and their authorized licensees, the mere fact that the Plaintiffs have been able to produce the licensing agreements does not mean that they have the requisite possession, power or control to produce the licensees' marketing, advertising and promotion materials, as sought by the Defendant Jarvis. The Defendant Jarvis has not discharged its burden to show that the fifth group of documents should be produced.

[24] The sixth group of documents relates to the corporate status of Rhodia UK Limited and Rhodia Inc., including but not limited to:

- articles of incorporation;
- memoranda of incorporation.

[25] This has been resolved by the parties as the Plaintiffs have included as items 47 and 48 of their amended affidavits of documents, the certificate of incorporation of Rhodia Inc. and the certificate of incorporation of Rhodia UK Limited.

[26] The seventh group of documents relates to the ownership of and rights to the PROBAN trade-mark and registration, including without limitation assignments or other change of name documents from the original registrant Proban Limited to Albright & Wilson Ltd., the apparent next successor in title.

[27] In response to the Defendants' request, the Plaintiffs have listed the relevant documents as items 1 to 4, 28 to 30 and 32 of Schedule 1 of the amended affidavit of documents.

[28] The eighth is a copy of the schedule(s) to document number 17 of each of the Plaintiffs' affidavit of documents.

[29] I accept the affidavit evidence of Ginette Renaud, in response to the Defendants' request, that the document requested could not be located.

[30] The ninth is a copy of the technology transfer license referred to in document number 26 of each of the Plaintiffs' affidavits of documents.

[31] Said document was included as document 25 of the Plaintiffs' affidavit of documents. The Plaintiffs' have also included as items 39 to 46 of their amended affidavits of documents, copies of additional license agreements.

[32] In response to the Defendants' request for documentation relating to the "channels of trade", I accept the Plaintiffs' submission that this is a matter for testimony at trial and that the Plaintiffs do not have any specific documents relating to "channels of trade" other than the documents already produced.

[33] In conclusion, I will allow the motion in part. A better affidavit of documents, in accordance with these reasons, is to be produced within twenty-one (21) days from the date of this Order. Costs in the cause.

(2) Defendants' appeal from the Order of Prothonotary Morneau dated October 25, 2005.

[34] This motion by the Defendants is for an order setting aside in part the Order of Prothonotary Morneau dated October 25, 2005 by which the Court ordered in part that examinations for discovery of both Defendants be held within sixty (60) days of the date of the aforesaid Order.

[35] The Defendants submit that Prothonotary Morneau erred in failing to take into account and giving effect to the fact that documentary discovery of the Plaintiffs is incomplete having regard to the Defendant's pending motion for a complete affidavit of documents from the Plaintiffs and that fairness requires full documentary discovery by the Plaintiffs before examination of the Defendants. The Defendants also submit that fairness requires that the Defendants have full disclosure of documents so that they may properly prepare for the discoveries.

[36] It is well established that discretionary orders of prothonotaries ought not to be disturbed on appeal unless (a) the questions raised in the motion are vital to the final issue to the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion

by the prothonotary was based upon a wrong principle or upon a misapprehension of facts: *Merck & Co. Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (C.A.) at para. 19.

[37] In determining whether the questions are vital to the final issue of the case, the Court has held that "the emphasis is put on the subject of the orders, not on their effect" (*Merck & Co., ibid.,* at para. 18).

[38] Production of documents, before examination for discovery and trial, is one of our most important procedures (*Havana House, supra,* at para. 19). Thus, in my view, it raises a question that is vital to the final issue of the case.

[39] Additionally, fairness dictates that each side should have full documentary discovery as well as proper preparation time before examination (*British Columbia Ferry Corp. v. Royal Vancouver (The)*, [1995] F.C.J. No. 507 (Proth.) at para. 28.

[40] I agree with the Defendants that it was incorrect for Prothonotary Morneau to order that examinations for discovery of the Defendants take place despite the Defendants' outstanding motion for a further and better affidavit of documents from the Plaintiffs. I do not accept the Plaintiffs' argument that production of the Plaintiffs' amended affidavit of documents will not affect the examination of the Defendants. The Defendants should have full disclosure of all documents in preparing for examination for discovery. If the Defendants are successful in ferreting out further documents, on examination for discovery, or the existence of further documents, there would very likely be additional

examinations for discovery, adding delay and expense (*Havana House, supra,* at para. 23).

[41] For these reasons, I will allow the Defendants' appeal. The examinations for discovery of the Defendants shall be held within sixty (60) days from the date of filing of a better affidavit by the Plaintiffs. Costs in the cause.

(3) Plaintiffs' appeal from the Order of Prothonotary Morneau dated October 25, 2005

[42] This motion by the Plaintiffs is for an order setting aside in part the Order of Prothonotary Morneau dated October 25, 2005 and ordering the Defendant 116038 B.C. Ltd. to file a further and better affidavit of documents and ordering that the examinations for discovery of both Plaintiffs be held within 60 days of the day on which the examinations for discovery of the Defendants are completed.

[43] By decision dated October 25, 2005, Prothonotary Morneau:

(a) ordered that the examination for discovery of both Defendants be held within sixty (60) days of the date of this order and be held one after the other on the same day or on consecutive days;

(b) refused to order the Defendant, 116038 B.C. Ltd. to produce a better affidavit of documents;

(c) refused to order that the examinations for discovery of the Plaintiffs be held within sixty (60) days of the completion of the examination for discovery of the Defendants.

[44] Prothonotary Morneau was not satisfied that the Plaintiffs had advanced persuasive evidence establishing that the Defendant, 116038 B.C. Ltd. was precluding the production of relevant documents.

[45] The Plaintiffs submit that the exercise of discretion by Prothonotary Morneau was based upon a wrong principle and upon a misapprehension of the facts. The Plaintiffs further submit that the Prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

[46] The Plaintiffs allege that while the Defendant, 116038 B.C. Ltd. has not listed any documents in Schedules 1, 2, 3 and 4 to its affidavit of documents, it produced relevant documents in support of its motion for summary judgment (which was dismissed). These documents were before Prothonotary Morneau as they were included in the Responding Motion Record, which included the affidavit of Sarah Jarvis filed in support of the motion for summary judgment and its exhibits as well as the transcript of her cross-examination. As such, the documents before Prothonotary Morneau included an asset purchase agreement and the schedules thereto documenting the sale of some of the assets of the Defendant, 116038 B.C. Ltd., to the other Defendant, Jarvis Imports (2000) Ltd. in November 2000.

[47] In the affidavit of Sarah Jarvis at paragraph 7 and in her cross-examination, reference is made to the CA number which appears on the infringing articles. The CA number is affixed to the articles in accordance with the *Textile Labelling Act*, R.S.C. 1985, c. T-10. The CA number was registered in the name of the Defendant, 116038 B.C. Ltd., until May 2005, at which point it was transferred to the other Defendant, Jarvis Imports (2000) Ltd. The CA registration and the documents evidencing its transfer are not listed in the affidavit of documents of 116038 B.C. Ltd.

[48] As stated above, production of documents is recognized as an essential cornerstone of the discovery process. In the absence of production of documents, the Plaintiffs cannot conduct effective examinations for discovery and thus it is vital to a final issue in this case.

[49] Moreover, in my respectful opinion, Prothonotary Morneau's conclusion on this issue was based on a misapprehension of the facts, given that there were documents before him at the motion which were relevant, such as the asset purchase agreement, which were not listed in the affidavit of documents. Additionally, from the material before him, it was clear the infringing articles bear labels with a CA number, which CA number stood until May 2005 in the name of 116038 B.C. Ltd. Yet, no documents have been produced as to the registration of the CA number by the Defendant, 116038 B.C. Ltd. or its assignment to the other Defendant, Jarvis Imports (2000) Ltd., in May 2005. In my view,

documents evidencing transfer or assignment of the assets of a business are not merely historical records.

[50] In the result, I order the production of a better affidavit of documents by the Defendant, 116038 B.C. Ltd., within twenty-one (21) days of the date of this Order, to include the asset purchase agreement as well as documents as to the registration and assignment of the CA number.

[51] The decision of Prothonotary Morneau is silent as to the order requested for the discoveries by the Defendants of the Plaintiffs. In my opinion, having ordered that examinations for discovery of the Defendants take place within 60 days of the filing of a better affidavit of documents by the Plaintiffs, and in view of the delays encountered to date in this file, it is necessary for me to render such an Order to ensure that the matter moves forward. The examinations for discovery of both Plaintiffs will thus be held within sixty (60) days of the day on which the examinations for discovery of the Defendants are completed.

[52] Costs in the cause.

ORDER

THIS COURT ORDERS THAT:

[1] The Defendants' motion for a better affidavit of documents is granted in part. The Plaintiffs shall serve and file an amended affidavit of documents in accordance with these reasons within twenty-one (21) days from the date of this Order.

[2] The Defendants' appeal from the Order of Prothonotary Morneau dated October 25, 2005, is allowed.

[3] The Plaintiffs' appeal from the Order of Prothonotary Morneau dated October 25, 2005 is allowed. The Defendant 116038 B.C. Ltd. shall serve and file an amended affidavit of documents in accordance with these reasons within twenty-one (21) days from the date of this Order.

[4] A timetable for the examinations for discovery of the parties be set as follows:

(1) that the examinations for discovery of both Defendants be held within sixty (60) days of the date of filing of the Plaintiffs' amended affidavit of documents.

(2) that the examinations for discovery of both Plaintiffs be held within sixty (60) days of the day on which the examinations for discovery of the Defendants are completed.

[5] Costs in the cause.

"Danièle Tremblay-Lamer"
JUDGE

ANNEX "A"

Definition of "document"

222. (1) In rules 223 to 232 and 295, "document" includes an audio recording, video recording, film, photograph, chart, graph, map, plan, survey, book of account, computer diskette and any other device on which information is recorded or stored.

Interpretation

(2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

Définition de « document »

222. (1) Pour l'application des règles 223 à 232 et 295, est assimilée à un document toute information enregistrée ou mise en mémoire sur un support, y compris un enregistrement sonore, un enregistrement vidéo, un film, une photographie, un diagramme, un graphique, une carte, un plan, un relevé, un registre comptable et une disquette.

Pertinence

(2) Pour l'application des règles 223 à 232 et 295, un document d'une partie est pertinent si la partie entend l'invoquer ou si le document est susceptible d'être préjudiciable à sa cause ou d'appuyer la cause d'une autre partie.

***

Time for service of affidavit of documents

223. (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

Contents

(2) An affidavit of documents shall be in Form 223 and shall contain

Délai de signification de l'affidavit de documents

223. (1) Chaque partie signifie un affidavit de documents aux autres parties dans les 30 jours suivant la clôture des actes de procédure.

Contenu

(2) L'affidavit de documents est établi selon la formule 223 et contient :

(a) separate lists and descriptions of all relevant documents that

(i) are in the possession, power or control of the party and for which no privilege is claimed,

(ii) are or were in the possession, power or control of the party and for which privilege is claimed,

(iii) were but are no longer in the possession, power or control of the party and or which no privilege is claimed, and

(iv) the party believes are in the possession, power or control of a person who is not a party to the action;

(b) a statement of the grounds for each claim of privilege in respect of a document;

(c) a description of how the party lost possession, power or control of any document and its current location, as far as the party can determine;

(d) the identity of each person referred to in subparagraph (a)(iv), including the person's name and address, if known;

(e) a statement that the party is not aware of any relevant document, other than those that are listed in the affidavit or are or were in the possession, power or control of another party to the action; and

a) des listes séparées et des descriptions de tous les documents pertinents:

(i) qui sont en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels aucun privilège de non-divulgation n'est revendiqué,

(ii) qui sont ou étaient en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels un privilège de non-divulgation est revendiqué,

(iii) qui étaient mais ne sont plus en la possession, sous l'autorité ou sous la garde de la partie et à l'égard desquels aucun privilège de non-divulgation n'est revendiqué,

(iv) que la partie croit être en la possession, sous l'autorité ou sous la garde d'une personne qui n'est pas partie à l'action;

b) un exposé des motifs de chaque revendication de privilège de non-divulgation à l'égard d'un document;

c) un énoncé expliquant comment un document a cessé d'être en la possession, sous l'autorité ou sous la garde de la partie et indiquant où le document se trouve actuellement, dans la mesure où il lui est possible de le déterminer;

d) les renseignements permettant d'identifier toute personne visée au

(f) an indication of the time and place at which the documents referred to in subparagraph (a)(i) may be inspected.

Document within party's power or control

(3) For the purposes of subsection (2), a document shall be considered to be within a party's power or control if

(a) the party is entitled to obtain the original document or a copy of it; and

(b) no adverse party is so entitled.

Bundle of documents

(4) A party may treat a bundle of documents as a single document for the purposes of an affidavit of documents if

(a) the documents are all of the same nature; and

(b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

sous-alinéa a)(iv), y compris ses nom et adresse s'ils sont connus;

e) une déclaration attestant que la partie n'a pas connaissance de l'existence de documents pertinents autres que ceux qui sont énumérés dans l'affidavit ou ceux qui sont ou étaient en la possession, sous l'autorité ou sous la garde d'une autre partie à l'action;

f) une mention précisant les dates, heures et lieux où les documents visés au sous-alinéa a)(i) peuvent être examinés.

Document sous l'autorité ou la garde d'une partie

(3) Pour l'application du paragraphe (2), un document est considéré comme étant sous l'autorité ou sous la garde d'une partie si :

a) d'une part, celle-ci a le droit d'en obtenir l'original ou une copie;

b) d'autre part, aucune partie adverse ne jouit de ce droit.

Liasse de documents

(4) Aux fins de l'établissement de l'affidavit de documents, une partie peut répertorier une liasse de documents comme un seul document si :

a) d'une part, les documents sont tous de même nature;

b) d'autre part, la

description de la liasse est suffisamment détaillée pour qu'une autre partie puisse avoir une idée juste de son contenu.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1832-04
STYLE OF CAUSE:	RHODIA UK LIMITED and RHODIA INC. And JARVIS IMPORTS (2000) LTD. and 116038 B.C. LTD.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 25, 2005
REASONS FOR ORDER:	TREMBLAY-LAMER J.
DATED:	November 30, 2005

APPEARANCES:

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Mr. Paul Smith	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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