

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

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In the Matter of )  
)  
CERTAIN ADJUSTABLE KEYBOARD ) Investigation No. 337-TA-670  
SUPPORT SYSTEMS AND )  
COMPONENTS THEREOF )

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Order No. 18: Relating To Alston & Bird's Motion No. 670-7 To Quash

On September 8, 2009, pursuant to Commission rule 210.15, third party Alston & Bird LLP (Alston & Bird) filed a motion to quash the July 15, 2009 subpoena served on it by respondents CompX International, Inc. (CompX) and Waterloo Furniture Corporation Ltd. (Waterloo) (collectively CompX) and subsequently modified by CompX in this investigation. (Motion Docket No. 670-7.)

Respondents CompX, in a response dated September 10, 2009, argued that Motion No. 670-7 should be denied.<sup>2</sup>

No other party responded to Motion No. 670-7.

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<sup>1</sup> Complainant on July 27, 2009 in its Motion No. 670-2 had moved to quash the July 15, 2009 third party subpoenas which issued upon application by respondents to the law firm of Alston & Bird, as well as the law firm of Bryan Cave LLP. Order No. 11, which issued on August 26, 2009, found, *inter alia*, that complainant had no standing as it affects Alston & Bird and set September 9, 2009 as the date Alston & Bird was to comply with the subpoena or file a motion to quash.

<sup>2</sup> In said response, respondents represented that, on September 8, 2009, after Alston & Bird filed the motion to quash, Alston & Bird and respondents met and conferred regarding the scope of the subpoena; that during this meet and confer, respondents agreed to further limit the subpoena to (1) documents evidencing complainant Humanscale's attorney's possession of prior art documents produced during Softview Computer Products Corp. v. Waterloo Furniture Components Ltd., 1:98-cv-6412 and 1:98-cv-6996 (Waterloo Litigations) during the reexamination, and (2) prior art produced during Softview Computer Products Corp. v. Haworth, Inc., 1:97 Civ. 8815 (Haworth Litigation). (Response at 1-2.)

Alston & Bird, in support of the pending motion, argued that, when Alston & Bird ceased to represent complainant Humanscale in 2007, Alston & Bird returned to complainant all of the documents that were not work product or subject to protective order (Motion No. 670-7 at 4-5); that said subpoena requests either duplicate copies of documents which respondents have already obtained from complainant, or documents subject to privilege or protective order (Motion No. 670-7 at 5); that the requested documents are irrelevant to this investigation (Motion No. 670-7 at 6); that compliance with the subpoena would require Alston & Bird to review and log some 350 boxes of documents, which would pose an undue burden on Alston & Bird (Motion No. 670-7 at 6); and that the burden of reviewing and logging documents outweighs any alleged need for the requested documents in this investigation (Motion No. 670-7 at 2).

Respondents CompX argued that the documents sought in the subpoena pertain to prior art of which Humanscale's attorneys may have been aware (Response at 3); that said attorneys have changed firms several times during the last ten years, complicating the question of whether they knew of said prior art at any given time (Response at 3); that the attorneys' knowledge of said prior art is relevant to the validity of U.S. Patent No. 5,292,097 (the '097 patent) in issue because the '097 patent cites U.S. Patent No. 4,616,798 (the '798 patent), which is the patent involved in the Haworth Litigation (Response at 3); that the requested documents are otherwise unavailable to CompX (Response at 3-4); that Philippe Bennett (Bennett), now one of Alston & Bird's attorneys, represented Humanscale in said litigations before moving to Alston & Bird (Response at 3); and that, during the Waterloo Litigations, Humanscale's attorney Philippe Bennett knew at least of the German Patent No. DE3323780 (the Kompauer reference), allegedly a prior art reference, and yet failed to disclose said Kompauer reference to the United States

Patent and Trademark Office (USPTO) during the reexamination of the '097 patent (Response at 2-3).

In determining whether a court should take the step of quashing a subpoena, the following three factors have been weighed: (1) the relevance of the discovery sought; (2) the need of the requesting party; and (3) the potential hardship to the party responding to the subpoena. Certain Display Controllers and Products Containing Same, Inv. No. 337-TA-491, Order No. 17, 2003 WL 22273570 at \*2 (Sept. 26, 2003).

Regarding relevance of the documents sought, respondents have stated that the documents from the Haworth Litigation are or may be relevant to the prosecution history of the '097 patent because said patent, on its face, cites the '798 patent, which was involved in the Haworth Litigation; and discovery with respect to the '798 patent may therefore lead to admissible evidence concerning the prosecution history of the '097 patent. (Response at 3-4.) Respondents further argued that the Kompauer reference, which Alston & Bird's attorney Bennett may or may not currently possess, is also relevant as alleged anticipation of the '097 patent. (Response at 2-3.) Alston & Bird argued, however, that it did not represent Humanscale in the Haworth Litigation or in the Waterloo Litigations and would thus have no relevant documents. (Motion No. 670-7 at 3.) Moreover, Alston & Bird argued that respondents should already have all responsive, non-privileged documents, as any such documents relevant to the Haworth Litigation were returned to Humanscale in 2007 and 2008 and should therefore have been produced by Humanscale and any such documents relevant to the Waterloo Litigations should have been produced by Humanscale's counsel in this litigation or by respondents' trial counsel in the Waterloo litigations, Banner & Witcoff. (Motion No. 670-7 at 4-5.) Based on the foregoing,

the administrative law judge finds that no responsive non-privileged documents remain to be discovered.

With respect to the need for the requested documents, it is not denied that Banner & Witcoff, which currently represents respondents, was involved in the Waterloo Litigations, and thus should have most, if not all, of any documents that Alston & Bird would have from said litigation.<sup>3</sup> (Motion No. 670-7 at 4-5.) Also, it is not denied that documents from both the Waterloo Litigations and the Haworth Litigation were already produced by complainant and/or complainant's counsel in this investigation. (Motion No. 670-7 at 4-5.) Further, respondents claimed that all non-privileged documents with respect to the Haworth litigation were returned to Humanscale after Humanscale ceased to be a client. (Motion No. 670-7 at 5.) Moreover, respondents have not shown what documents, if any, they expect would not be privileged, given the nature of the attorney-client relationship between Alston & Bird and complainant. Further, respondents have not shown that Alston & Bird is the only party from which any possible non-privileged documents may be obtained. Thus, the administrative law judge finds that respondents have not shown a need for the requested documents with respect to Alston & Bird.

With respect to the potential hardship to Alston & Bird if forced to respond to the subpoena, respondents have represented:

As set forth in its CompX's Opposition, it does not seek . . . privileged documents, it has further agreed to work with [Alston & Bird] as needed to ensure that . . . privileged documents are not compromised. Furthermore, [the subpoena] expressly describe[s] the procedure for creating a privilege log, and [includes] a copy of

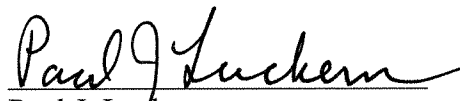
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<sup>3</sup> It is also not denied that Alston & Bird was not counsel of record for Humanscale for the Waterloo litigations. Moreover, a subpoena to Bryan Cave, Humanscale's counsel of record in the Waterloo litigations, has been quashed. (Motion No. 670-7 at 4.)

the Protective Order describing the procedure for marking any confidential business information. The very purpose of these provisions is to protect privileged documents and prevent disclosure of any confidential business information. [Alston & Bird is] capable of complying with the subpoenas and the Protective Order, and CompX's lawyers are also bound by these provisions to ensure protection of . . . privileged and confidential information.<sup>[4]</sup>

They also agreed, in their September 10, 2009 response to Motion No. 670-7, to limit the subpoena further to (1) documents evidencing complainant Humanscale's attorney's possession of prior art documents produced during the Waterloo Litigations during the reexamination, and (2) prior art produced during the Haworth Litigation.<sup>5</sup> The administrative law judge has, however, found supra, that no non-privileged documents remain to be discovered. Moreover, it is not denied that Alston & Bird would have to review and log over 350 boxes of documents to comply with the subpoena. Thus, the administrative law judge finds such a review is a potential hardship to Alston & Bird.

Based on the foregoing, the administrative law judge finds that discovery sought is not relevant, that the potential hardship to Alston & Bird is significant, and that respondents have failed to show sufficient need for the discovery request to Alston & Bird. Thus, Motion No. 670-7 is granted, and the July 15, 2009 subpoena issued by respondents to Alston & Bird is quashed.

  
Paul J. Luckern  
Chief Administrative Law Judge

Issued: September 29, 2009

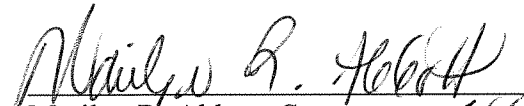
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<sup>4</sup> See respondents' reply to complainant's response to Order No. 8, which requested complainant to clarify its standing.

<sup>5</sup> See fn. 2, supra.

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Order** has been served by hand upon the Commission Investigative Attorney, Heidi E. Strain, Esq., and the following parties as indicated, on September 30, 2009.

  
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