ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
POLYPORE INTERNATIONAL, INC., Respondent.	)	Docket No. 9327

ORDER ON RESPONDENT'S MOTION FOR PROTECTIVE ORDER AND COMPLAINT COUNSEL'S CROSS-MOTION TO COMPEL

I.

On November 3, 2008, Respondent Polypore International, Inc. ("Polypore," "Daramic" or "Respondent"), filed a Motion for a Protective Order Regarding Discovery ("Motion"). On November 6, 2008, Complaint Counsel filed its Response to Respondent's Motion and Cross-Motion to Compel Respondent to Comply with Federal Trade Commission Rules of Practice Section 3.33 Seeking Discovery Through Deposition. On November 13, 2008, Respondent filed its Response to Complaint Counsel's Cross-Motion.

Respondent's motion seeks to: limit the scope of Complaint Counsel's First Set of Interrogatories and First Set of Document Requests; quash or limit the depositions sought of individuals previously questioned by Complaint Counsel as part of its pre-complaint investigation; and postpone depositions sought by Complaint Counsel until Complaint Counsel produces third party documents.

Complaint Counsel's cross-motion seeks to compel Respondent to make available seven previously identified and noticed employees and one former employee for deposition.

Respondent's response to the cross-motion states that Respondent has been working with Complaint Counsel to resolve their objections and to agree upon a mutually acceptable deposition schedule.

For the reasons set forth below, Respondent's motion is GRANTED in part and DENIED in part. Complaint Counsel's cross-motion is GRANTED.

II.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). An

Administrative Law Judge may limit discovery if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d).

A. Interrogatories

Under the Commission's Rules of Practice, parties may serve upon each other written interrogatories, not exceeding 25 in number, including all discrete subparts. 16 C.F.R. § 3.35(a). The Scheduling Order entered in this case increased the number of interrogatories to 50. Respondent states that the number of interrogatories served on it by Complaint Counsel is well in excess of the 50 interrogatory limitation, if the subparts are counted as separate requests. For instance, Interrogatory No. 5 asks that Polypore, Daramic and Microporous identify all sales by relevant product, in each relevant area, with 16 subparts requiring specific information. Complaint Counsel's definition of relevant product includes four product markets. Complaint Counsel's definition of the four relevant areas as North America, Asia, Europe and the World, further broadens the scope of discovery sought, urges Respondent.

Complaint Counsel responds that its First Set of Interrogatories consists of 37 separate requests and that the related subparts should not be counted as separate requests. Complaint Counsel further asserts that each of its interrogatories relates to a unified theme and topic from which the subparts naturally flow.

Both the Commission and the Federal Rules count subparts individually only if they are "discrete" subparts. Commission Rule 3.35(a); Fed. R. Civ. P. 33(a). Courts have found that a subpart is discreet when it is logically or factually independent of the question posed by the basic interrogatory. *Power & Tel. Supply Co. v. Suntrust Banks, Inc.*, 2004 U.S. Dist. LEXIS 6326, at *4 (W.D. Tenn. 2004); *Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 2003 U.S. Dist. LEXIS 18196, at *2 (D. Conn. 2003). "Genuine subparts should not be counted as separate interrogatories." *Kendall v. GES Exposition Serv., Inc.,* 174 F.R.D. 684, 685 (D. Nev. 1997); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (subparts related to a single topic are considered part of the same interrogatory). Simply asking for data elements for the same topic, as Complaint Counsel has done here, does not multiply each data element into a separate interrogatory. The interrogatories seeking various data elements for each relevant market and in each relevant area are logically or factually subsumed within and necessarily related to the primary question. Accordingly, Complaint Counsel has not exceeded the allowed number of interrogatories and, on this issue, Respondent's motion for a protective order is denied.

Respondent also charges that Complaint Counsel failed to ensure that it did not seek duplicative information previously obtained during the investigatory phase. Respondent asserts that Interrogatory No. 5, which asks that Polypore, Daramic and Microporous identify all sales by relevant product, is substantially duplicative of the CID request No. 2, but admits that Interrogatory No. 5 is different in that it seeks Respondent to identify the line from which the

sales came, the product code and the customer's parent. Complaint Counsel states that the interrogatories ask for nothing more than data elements and that it appears that most are data elements from databases uniquely under Respondent's control.

Pursuant to Rule 3.35(c) of the Commission's Rules of Practice:

> Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

16 C.F.R. § 3.35(c).

Respondent has not demonstrated that the burden of deriving or ascertaining the answers from the documents produced is substantially the same for Complaint Counsel as it is for Respondent, with respect to Interrogatory No. 5. Absent that showing, Respondent's motion for a protective order with regard to that objection to Interrogatory No. 5 is denied.

B. Entities to Whom Complaint Counsel's Written Discovery Has Been Propounded

Respondent charges that, in its written discovery, Complaint Counsel's definitions of Polypore and Microporous – which extend to foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures – are extremely broad. Respondent further charges that to require Respondent to respond to discovery using Complaint Counsel's definitions would be extremely onerous and would require production of information in no way related to this proceeding.

With respect to Polypore's objection that it must search all over the world for discovery from its owners or affiliates, Complaint Counsel represents that Polypore's counsel has never discussed this issue with Complaint Counsel. Nothing in Respondent's motion or response contradicts Complaint Counsel's representation.

The Scheduling Order in this case requires that each discovery dispute be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the

motion and has been unable to reach such an agreement. Scheduling Order at ¶ 5. The Scheduling Order further directs the parties that motions that fail to include such statement may be denied on that ground.

Complaint Counsel has represented that it would be willing to discuss this issue with Respondent. The parties are ordered to confer on this issue before raising it before the Administrative Law Judge. In this regard, Respondent's request that the written discovery requests be limited to Polypore International, Inc., Daramic LLC and Microporous, L.P., is denied without prejudice.

C. Depositions of Individuals Who Have Provided Testimony in Investigational Hearings

Complaint Counsel states that it gave Respondent eight deposition notices on October 22, 2008. Of the eight individuals noticed, five had previously given testimony at investigational hearings involving this matter. Respondent argues that Complaint Counsel should not be allowed to engage in duplicative discovery. Respondent urges that, to the extent such depositions are permitted, they should be limited to topics not previously covered and to new information or new questions related to topics that have previously been covered.

Complaint Counsel responds that Respondent's position is wrong and fails to acknowledge this Administrative Law Judge's ruling in *Hoechst Marion Rousell* and the precedent cited therein. Complaint Counsel states that simply because it has interviewed individuals in the investigatory phase of this matter does not preclude Complaint Counsel from taking depositions in the adjudicative phase of this proceeding. Complaint Counsel further argues that Respondent's request to limit the scope of the questioning of these individuals is unfounded.

Whether Complaint Counsel may properly seek to take the depositions of witnesses with relevant information during the discovery phase of a Part III adjudication where Complaint Counsel has previously conducted investigational hearings of those witnesses prior to the filing of a complaint was previously decided in *Hoechst Marion Roussel, Inc.*, 2000 WL 33596436 (F.T.C. Oct. 12, 2000).

> Simply because the agents of Respondents were examined during the pre-complaint investigation does not preclude Complaint Counsel from taking the depositions of these individuals in accordance with Part III of the Commission's Rules of Practice. Although the Administrative Law Judge retains the discretion to limit discovery if it is unreasonably cumulative or duplicative, and may enter a protective order to deny discovery to protect a party from annoyance, oppression or undue burden, or to prevent undue delay in the proceeding, 16 C.F.R. § § 3.31(c), 3.31(d), those circumstances are not present here. *Id.*

This holding is based on Supreme Court and Commission precedent. In *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), the Supreme Court distinguished the Commission's

investigatory power to get information and the judicial power to summon evidence in the course of litigation. *See also Hannah et al. v. Larche et al.*, 363 U.S. 420, 446 (1960) (there is a clear distinction between Part II, where the Commission seeks to gain information through investigation, and Part III, where the Commission seeks to gain evidence through discovery); *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.").

The Commission, in explaining differences between the scope of discovery under Part III of the Commission's Rules of Practice and an investigation under Part II, has stated:

> . . . [I]t should be manifest that the Commission's rules of practice are intended to and do provide for comprehensive *pre*-complaint *investigation.* The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post* complaint *discovery* procedures. . . .
>
> A subpoena, deposition, or order requiring access aimed at obtaining information not ordinarily obtainable before issuance of the complaint, additional details, or an extension of information as to disclosed transactions or events for which evidence is to be adduced in support of the complaint is manifestly within the bounds of proper pretrial discovery. . . . There is no provision in the Commission's rules, nor is there any precedent which would, in effect, require complaint counsel to have *all* evidence that he will need prior to the issuance of the complaint. . . .
>
> The general rule still remains that an onerous burden would be placed not only on the investigator but upon the party or parties investigated if the preliminary investigation must encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint. Many Federal Trade Commission proceedings present factual and conceptual complexities. In such cases, complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.

All-State Indus., et al., 72 F.T.C. 1020, 1023-24, 1967 FTC LEXIS 159, *6-10 (Nov. 13, 1967) (emphasis in original).

Respondent's request, that Complaint Counsel be precluded from deposing these five individuals, is denied. Complaint Counsel is entitled to depose these witnesses, notwithstanding their previous investigational testimony.

Respondent's request to limit these depositions to topics not previously covered and to new information or new questions related to topics that have previously not been covered is also denied. Under the Part III Rules of Practice, discovery may be limited if it is unreasonably cumulative or duplicative, and the Administrative Law Judge may enter a protective order to deny discovery to protect a party from annoyance, oppression or undue burden, or to prevent undue delay in the proceeding, 16 C.F.R. §§ 3.31(c), 3.31(d). *See also In re Chain Pharmacy Ass'n, Inc., et al.*, 1990 FTC LEXIS 193, *2, 4 (June 20,1990) (ordering respondent to submit to depositions and answer questions he claimed had been asked of him during an investigational hearing). Respondent has not demonstrated that those circumstances are present here.

D. Depositions Before Disclosure of Third Party Documents

Respondent asserts that Complaint Counsel has received numerous documents from third parties during the pre-complaint investigation that it has not yet provided to Respondent. Under the Protective Order Governing Discovery Material, entered in this case, Complaint Counsel is required to provide notice to the third parties of their rights under the Protective Order and that their documents will be produced to Respondent. Respondent states that Complaint Counsel has scheduled several depositions for dates prior to the date by which Respondent will receive these third party documents. Respondent asserts that Respondent's counsel should be entitled to see these documents before Complaint Counsel is permitted to engage in these depositions. Respondent seeks a protective order postponing the depositions until at least seven business days after the third party documents have been produced, or in the alternative, an order preventing Complaint Counsel from using such documents in any deposition until at least seven business days after the documents to be used have been produced.

Complaint Counsel states that the only third party material that Complaint Counsel has not produced are limited documents from Respondent's owner and from third parties who have moved for a protective order. Complaint Counsel further states that none of these documents can be used in any of these depositions pursuant to the Protective Order Governing Discovery Material entered in this case. Thus, Complaint Counsel argues, Respondent's argument that it needs access to these documents in order to defend the depositions of their own employees, who cannot see the documents, makes no sense.

There is no provision in the Commission's rules that requires parties to produce all documents prior to depositions. Instead, Rule 3.31 sets forth, "[t]he parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery." 16 C.F.R. § 3.31(a).

Respondent's motion on this point is granted in part and denied in part. Respondent shall produce its employees for deposition regardless of whether these documents have been produced. However, to the extent Complaint Counsel wishes to use documents in Complaint Counsel's possession to question a deponent, those documents must be produced to Respondent at least five business days prior to the deposition.

III.

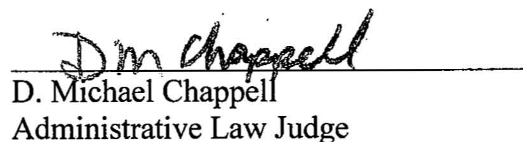
Complaint Counsel's cross-motion seeks to compel Respondent to make available seven, previously identified and noticed employees and one former employee for deposition. Complaint Counsel asserts that Respondent only recently agreed to produce two of the eight witnesses for deposition and has refused to schedule the remainder, including the deposition of the corporation or its CEO, Robert Toth, who Complaint Counsel characterizes as a central witness in this case.

Complaint Counsel asserts that it hand-delivered deposition notices and a subpoena *ad testificandum* to Respondent pursuant to Rule 3.33(a) on October 22, 2008. According to Complaint Counsel, Respondent's counsel indicated to Complaint Counsel that Mr. Toth went on a business trip to China after Respondent received notice of his deposition, and that Respondent's counsel could not communicate with Mr. Toth until he returned.

In its response to the cross-motion, Respondent states that it set out its objections to Complaint Counsel's notices and has engaged in conversations with Complaint Counsel regarding the scheduling of the noticed depositions. Respondent asserts that it has not refused to produce Mr. Toth for a deposition and has since proposed a specific date for his deposition.

Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. "When the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action." *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987) (allowing depositions of four corporate officials who implemented and/or administered plan challenged by plaintiff as anticompetitive on grounds that plaintiff was exploring defendant's motive). Respondent has not met this burden, therefore, Complaint Counsel's motion is granted. Accordingly, Respondent shall make Mr. Toth and the remaining disputed witnesses available for deposition as soon as practicable.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: November 14, 2008