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 LEAVE TO TAKE THE DEPOSITION OF GRAEME FRASER-BELL IN THE UNITED KINGDOM PURSUANT TO 16 C.F.R. § 3.36**

**I.**

On January 14, 2009, Respondent submitted a motion and memorandum in support thereof for leave to take the deposition of Graeme Fraser-Bell in the United Kingdom, pursuant to 16 C.F.R. § 3.36 ("Motion"). ENTEK International LLC ("ENTEK"), whose wholly-owned subsidiary in the United Kingdom is the employer of Fraser-Bell, submitted an Opposition on January 23, 2009. In addition, Complaint Counsel submitted an Opposition to Respondent's Motion on January 23, 2009.

For the reasons set forth below, Respondent's Motion is DENIED WITHOUT PREJUDICE.

**II.**

Respondent seeks the issuance of a subpoena, to be served in the United Kingdom, to enable Respondent to take the deposition of Mr. Graeme Fraser-Bell, Vice President of International Sales for ENTEK International Ltd. ENTEK is a global battery separator manufacturer and a competitor of Respondent. Respondent asserts that it has met the requirements of Commission Rule 3.36.

ENTEK disputes that Respondent has met the requirements of Commission Rule 3.36 and claims that the "vast majority" of the information sought from Fraser-Bell is available through less burdensome and less expensive means. Complaint Counsel asserts that Respondent has failed to meet three of the four requirements of Commission Rule 3.36(b).

## III.

Rule 3.36(b) of the Commission's Rules of Practice requires the party seeking issuance of a subpoena to be served in a foreign country to make specific showings that:

> (1) the material sought is reasonable in scope;
>
> (2) the material sought falls within the limits of discovery under § 3.31(c)(1);
>
> (3) the information or material sought cannot reasonably be obtained by other means; and
>
> (4) the party seeking discovery has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

16 C.F.R. § 3.36(b).

In 2001, the Commission amended its Rules of Practice to require Administrative Law Judge supervision of proposed foreign compulsory process. In explaining the reasons for the amendment, the Commission stated:

> Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law. In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36.

Statement of the Federal Trade Commission re Amendments to Its Rules of Practice, 66 Fed. Reg. 17622, 17623 (April 3, 2001). The Commission further explained that the requirements of Rule 3.36 are designed "[i]n the interest of limiting or avoiding conflicts with foreign authorities occasioned by foreign discovery requests." *Id.*

> Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, such discovery should only occur if a judge determines that the request is reasonable and

that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.

*Id.*

Section 9 of the Federal Trade Commission Act authorizes the Commission to require the "attendance of witnesses and the production of . . . documentary evidence . . . from any place in the United States." 15 U.S.C. § 49. In *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the court, interpreting the similar statutory provision that authorized the Commodity Futures Trading Commission to compel the attendance of witnesses and the production of documents "from any place in the United States," held that the district court lacked jurisdiction to enforce an investigative subpoena served upon a foreign citizen in a foreign nation. *Id.* at 491, 496.

In *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1304 (D.C. Cir. 1980), the court held that the Federal Trade Commission did not have the authority to serve investigatory subpoenas directly upon the citizens of another country by registered mail, in the face of the foreign country's direct protest to that mode of service and in the absence of clear congressional intent to authorize that manner of exercise of American sovereign power. "The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct." *Id.* at 1315. Consistent with these limitations, Respondent's request for the issuance of a subpoena is evaluated under Commission Rule 3.36(b).

## IV.

As set forth below, Respondent has met the first requirement of Commission Rule 3.36(b). However, Respondent has not sufficiently demonstrated compliance with the remaining requirements.

### (1) Whether the material sought is reasonable in scope

ENTEK, a global battery separator manufacturer, is named in the Complaint as "the sole remaining competitor" of Respondent in North America. Complaint ¶ 19. Fraser-Bell is Vice President of International Sales for ENTEK International Ltd., a wholly-owned subsidiary in the United Kingdom of ENTEK International LLC. Declaration of Graeme Fraser-Bell in Support of ENTEK's Motion to Quash ¶ 1; Exhibit A, Respondent's Memorandum in Support of Motion for Leave to Take Deposition of Graeme Fraser-Bell, at 1. Respondent states that it believes Fraser-Bell has extensive knowledge of ENTEK's sales of battery separators in a market that Respondent asserts is global. Respondent argues that the material sought is reasonable in scope because it seeks only one deposition, limited to seven hours, in accordance with the Scheduling Order in this case. Neither ENTEK nor Complaint Counsel address whether the material sought is reasonable in scope.

Respondent has demonstrated that the material sought is reasonable in scope.

**(2) Whether the material sought falls within the limits of discovery under § 3.31(c)(1)**

Commission Rule 3.36(b) requires a specific showing that the material sought falls within the limits of discovery under Commission Rule 3.31(c)(1). Commission Rule 3.31(c)(1) allows discovery of materials that may be reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or the defense of any respondent. Commission Rule 3.31(c)(1) also provides that discovery shall be limited by the Administrative Law Judge if he or she determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery outweigh its likely benefit.

16 C.F.R. § 3.31(c)(1).

Respondent states that Fraser-Bell has "intimate knowledge of the battery separator industry," including knowledge about pricing, capacity and competition, and is believed to have knowledge of ENTEK's business dealings with customers located in the United States and abroad. Respondent argues that the information sought through Fraser-Bell's deposition cannot be obtained through other means because Fraser-Bell has relevant knowledge about customers and other suppliers in both Europe and Asia, as well as about any expansion effort by ENTEK in the United Kingdom to increase its productive capacity for the sale of battery separators in the United States and elsewhere in the world. Respondent asserts that there is no other person at ENTEK who could substitute for Fraser-Bell.

ENTEK does not dispute that Fraser-Bell has knowledge relevant to this adjudicatory proceeding. Instead, ENTEK asserts that taking Fraser-Bell's deposition would be unreasonably duplicative and unduly burdensome because the "vast majority" of the information sought from Fraser-Bell is available to Respondent through more convenient, less burdensome, and less expensive means. Those alternative means, ENTEK asserts, include ENTEK's document production and the deposition of Mr. Daniel Weerts, ENTEK International LLC's Vice President of Sales and Marketing.

ENTEK asserts that Weerts has relevant knowledge regarding topics identified by Respondent, as well as the additional subjects identified in a subpoena Respondent served on

ENTEK's corporate representative. ENTEK states that Weerts has worked at ENTEK or its predecessor since 1989 and has been involved in the battery separator industry for over 30 years. ENTEK further states that Weerts is intimately involved in ENTEK's strategic planning and has extensive experience not only in the sales and marketing of battery separators but also in their production and manufacturing. In addition, ENTEK avers, Weerts not only oversees all of ENTEK's sales efforts, in the United States and internationally, with respect to its most significant customer, Johnson Controls Inc. and its affiliates, but also is very familiar with the operations, cost structure, and expansion plans of ENTEK's U.K. facility.

Complaint Counsel points to representations by ENTEK in a related filing, ENTEK's Memorandum in Support of Motion to Quash Subpoenas *Ad Testificandum* Issued to Graeme Fraser-Bell and Robert Keith, to support Complaint Counsel's contention that the information Respondent seeks from Fraser-Bell can be obtained more easily, and with less burden and expense, from Weerts. Complaint Counsel also argues that a deposition of Fraser-Bell in the United Kingdom would be a costly endeavor for all concerned, and that the burden and expense of such discovery would likely outweigh the benefit of any non-duplicative evidence discovered during that deposition.

ENTEK has not yet fully complied with document production, and depositions of ENTEK's employees have not been completed. Thus, at this stage in the discovery process, Respondent has not demonstrated that it cannot obtain the requested information from other sources, such as ENTEK's documents and the deposition testimony of Weerts or other ENTEK employees.

**(3) Whether the information or material sought cannot reasonably be obtained by other means**

Commission Rule 3.36(b)(3) also requires respondents to make a specific showing that the "information or material sought cannot reasonably be obtained by other means." 16 C.F.R. § 3.36(b)(3). As discussed above, with other discovery ongoing, Respondent has not demonstrated that it cannot reasonably obtain the information sought from Fraser-Bell by other means.

**(4) Whether the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought, and whether any additional procedural requirements have been or will be met before the subpoena is served**

Respondent represents that it "has a good faith belief that the deposition of Fraser-Bell is permitted in the United Kingdom and that any additional procedural requirements have been or will be met before the subpoena is served." Memorandum in Support of Respondent's Motion for Leave to Take the Deposition of Graeme Fraser-Bell, at 6. In support of its belief, Respondent states only that both the United States and the United Kingdom are signatories to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, which

provides the opportunity to depose a witness overseas. *Id.* (citing 28 U.S.C. § 1781 (1979)). Respondent states, alternatively, that it could hire a British solicitor to take the deposition of Fraser-Bell in the United Kingdom. *Id.* (citing U.S. Department of State website at http://travel.state.gov/law/info/judicial/judicial_671.html).

Complaint Counsel contends that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters does not provide for the use of subpoenas to obtain information abroad. According to Complaint Counsel, the three established methods for such discovery are by letter of request, by consular or diplomatic official, or by appointed commissioner. Complaint Counsel's Opposition at 6 (citing 28 U.S.C. § 1781, Articles 1, 15, 17). Complaint Counsel claims that the first method can be compulsory, but that the second and third methods can only be used with willing witnesses. Because ENTEK has moved to quash Respondent's subpoena *ad testificandum* to Fraser-Bell, Complaint Counsel concludes that Fraser-Bell is not a willing witness, and, therefore, that the second and third methods are unavailable to Respondent.

Complaint Counsel further asserts that Respondent's Motion fails to mention other likely legal impediments to the use of compulsory process to obtain evidence in the United Kingdom. Complaint Counsel states that the United Kingdom has enacted a blocking statute that can limit or prohibit subpoenaed parties from producing evidence in connection with a foreign legal proceeding. Complaint Counsel suggests that impediments to obtaining personal jurisdiction and to effecting valid service can also render it "highly problematic" to obtain evidence in a manner that is consistent with U.K. law and practice.

Commission Rule 3.36(b)(4) requires the party seeking issuance of a subpoena to be served in a foreign country to make a specific showing that it "has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served." 16 C.F.R. § 3.36(b)(4). A specific showing of a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice requires more than a simple assertion that both the United States and the country in which the proposed deponent is located are signatories to the Hague Convention. Rather, Respondent is required to set forth the specific treaty, law, custom or practice in the United Kingdom that authorizes the discovery Respondent seeks, and to explain how that treaty, law, custom or practice will be complied with.

The express language of Commission Rule 3.36(b)(4) also requires a specific showing of "a good faith belief that . . . any additional procedural requirements have been or will be met before the subpoena is served." 16 C.F.R. § 3.36(b)(4). While Respondent states that any additional procedural requirements have been or will be met before the subpoena is served, Respondent does not describe any additional procedural requirements, or show whether or how they would be fulfilled. To meet its burden under Commission Rule 3.36(b)(4), Respondent must specify in detail all additional procedural requirements that must be met and indicate specifically how they have been or will be met.

## V.

For the above stated reasons, Respondent's Motion is DENIED WITHOUT PREJUDICE.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: February 10, 2009