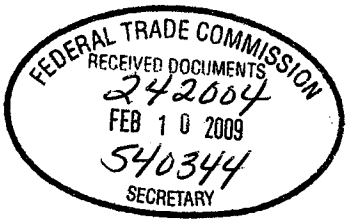
ORIGINAL



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

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

ORDER ON NON-PARTY ENTEK INTERNATIONAL LLC'S MOTION TO QUASH THE SUBPOENAS *AD TESTIFICANDUM* ISSUED TO GRAEME FRASER-BELL AND ROBERT KEITH

I.

On January 9, 2009, non-party ENTEK International LLC ("ENTEK") submitted a motion to quash the subpoenas *ad testificandum* issued to Messrs. Graeme Fraser-Bell and Robert Keith ("Motion"). On January 21, 2009, Respondent submitted its Opposition. For the reasons set forth below, ENTEK's Motion is GRANTED in part and DENIED in part.

II.

ENTEK is named in the Complaint as a competitor of Respondent. Complaint ¶¶ 19, 23, 25, and 43. Respondent served four subpoenas *ad testificandum* on ENTEK directed to the following individuals and entities: (1) ENTEK International LLC ("Corporate Subpoena"); (2) Mr. Daniel Weerts, ENTEK's Vice President of Sales and Marketing ("Weerts Subpoena"); (3) Mr. Graeme Fraser-Bell, ENTEK International Ltd.'s Vice President of International Sales, who works and resides in the United Kingdom ("Fraser-Bell Subpoena"); and (4) Mr. Robert Keith, ENTEK's President and Chief Executive Officer ("Keith Subpoena"). ENTEK does not challenge the Corporate Subpoena or the Weerts Subpoena.

ENTEK objects to and moves to quash the Keith and Fraser-Bell Subpoenas. ENTEK argues that their depositions would be burdensome and that the value of the information that Respondent may gain from their depositions would not outweigh the costs. In addition, ENTEK argues that because Fraser-Bell is a citizen and resident of the United Kingdom, Respondent's subpoena, issued pursuant to Commission Rule 3.34(a)(1), is not valid.

Respondent asserts that the Keith and Fraser-Bell Subpoenas are calculated to yield relevant information vital to Respondent's defense in this matter. Respondent argues that Keith's and Fraser-Bell's status as busy corporate executives should not prevent them from

being deposed and that the benefits of deposing them would outweigh the alleged burdens. Respondent further argues that the Fraser-Bell Subpoena was properly issued and served.

III.

"Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 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 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. *Id.* 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).

The burden is on the subpoenaed party to show that a subpoena request is unduly or unreasonably burdensome. *Federal Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977). *See also Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (permitting a deposition to proceed in the absence of a showing that the proposed deponent had no personal knowledge). That burden is no less when the subpoena is directed at a non-party. *In re Rambus Inc.*, 2002 FTC LEXIS 90, at *9 (Nov. 18, 2002); *In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96, at *15 (Mar. 19, 1982).

As set forth below, the deposition of Keith, sought by Respondent, may be reasonably expected to yield relevant information and the costs and other burdens of compliance with the Keith Subpoena are not unreasonable or undue. With respect to Fraser-Bell, however, Respondent's subpoena does not comply with Commission Rule 3.34.

A. Keith Subpoena

ENTEK argues that Keith has no unique factual knowledge that may be reasonably expected to yield information relevant to the allegations of the Complaint or the defenses of Respondent. ENTEK states that in matters including prices, supply, demand, volume, cost, production, competition, competitors, entry, and ENTEK's strategy in the lead acid battery separator industry, Weerts, as ENTEK's Vice President of Sales and Marketing, has more detailed and more direct knowledge than Keith. ENTEK argues that requiring Keith to prepare and sit for a deposition would force the company's CEO away from his responsibilities for at least two days during a time of crisis in the U.S. automotive industry, which ENTEK serves almost exclusively, and, thus, would impose a significant hardship on ENTEK.

Respondent asserts that documents produced by ENTEK and non-party Johnson Controls, Inc. ("JCI") reveal that Keith has knowledge of several issues relevant and necessary to Respondent's defense of the Commission's allegations. Respondent points, as examples, to

specific documents produced by ENTEK which indicate: {
REDACTED – CONFIDENTIAL, SUBJECT TO PROTECTIVE ORDER

}

Respondent has demonstrated that Keith has factual knowledge that may be reasonably expected to yield information relevant to the allegations of the Complaint or Respondent's defenses thereto. As set forth below, ENTEK has not demonstrated that the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive, or that the burden and expense of the proposed discovery outweigh its likely benefit.

Courts have barred depositions of high-ranking corporate officials where the proposed deponent has submitted an affidavit stating that he or she has no knowledge of matters at issue in the litigation. *E.g., Thomas v. International Business Machines*, 48 F.3d 478, 481 (10th Cir. 1995); *Elvis Presley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991); *Evans v. Allstate Insurance Co.,* 216 F.R.D. 515, 518 (N.D. Okla. 2003); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). *Cf. Nyfield v. Virgin Islands Tel. Corp.,* 202 F.R.D. 192, 194 (D.V.I. 2001), *aff'd,* 2002 U.S. Dist. LEXIS 1955 (D.V.I. 2002) (denying a motion to bar or delay the deposition of the chief executive officer, who had not averred lack of knowledge and who was a named defendant based upon his alleged individual conduct). The mere incantation that a proposed deponent is the corporate president and that president's claim of limited knowledge cannot insulate him from appropriate discovery. *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 97 (S.D. Ia. 1992). *See also Reif v. CNA*, 248 F.R.D. 448 (E.D. Pa. 2008) (party must demonstrate the insufficiency of other discovery, including the depositions of lower-level employees, before deposing the defendant's CEO, who assertedly lacked personal knowledge); *Baine v. General Motors Corp.,* 141 F.R.D. 332 (M.D. Ala. 1991) (vacating without prejudice the notice of deposition of the corporation's vice president where it had not been shown that the information could not be obtained through other discovery or that the vice president had superior or unique personal knowledge).

In this case, ENTEK has provided the declaration of one of its outside counsel stating that ENTEK objects to the Keith Subpoena on the grounds that Respondent had not made a showing that Keith has unique or special knowledge of the facts at issue and that Keith's testimony would likely be duplicative of Weerts' in all material respects. Declaration of Hanno F. Kaiser in Support of ENTEK's Motion to Quash ¶ 8. ENTEK has also provided the declaration of its Vice President and General Counsel who stated that if Keith were forced to prepare for and attend a deposition in this matter, his absence would be disruptive to ENTEK's operations. Declaration of Joel Kuntz in Support of ENTEK's Motion to Quash ¶ 2. Kuntz further declares that Weerts is ENTEK's most knowledgeable witness as to all of the specifications contained in the Corporate Subpoena. *Id.* ¶ 3. Kuntz indicated that he has no reason to believe that Keith's testimony would yield any relevant information that Weerts could not provide, in light of

Weerts' "vast knowledge" about the company and its business. *Id.* ¶ 5. Significantly, Respondent does not provide a declaration from Keith stating that he has no knowledge, or no knowledge beyond that of Weerts, of matters at issue in this proceeding.

"Although the [corporate president's] deposition testimony may prove to be duplicative in some respects from that provided by lower ranking executives, individuals with greater authority may have the final word on why a company undertakes certain actions, and the motives underlying those actions." *Rolscreen*, 145 F.R.D. at 97. *See also Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987) (allowing the depositions of four corporate officials who implemented or administered an allegedly anticompetitive program where the motives behind the program were at issue).

Even if, as ENTEK asserts, Weerts has more relevant information than Keith, this does not preclude a deposition to discover what relevant information Keith may have. Because ENTEK has not demonstrated that Keith's deposition would be unreasonably cumulative, or that the burden of taking his deposition would outweigh its likely benefit or be undue, ENTEK's motion to quash the subpoena *ad testificandum* served on Keith is DENIED.

B. Fraser-Bell Subpoena

ENTEK asserts that the testimony of Fraser-Bell would also duplicate information that is available through less burdensome and less expensive means. In addition, ENTEK asserts that Respondent failed to serve properly a valid subpoena *ad testificandum* on Fraser-Bell. Fraser-Bell states that he is a British citizen who works and resides in Liverpool in the United Kingdom. Declaration of Graeme Fraser-Bell in Support of ENTEK International LLC's Motion to Quash, ¶¶ 2-3. He declares that he is not employed by ENTEK International LLC, but is employed by ENTEK International Ltd., where, as Vice President of International Sales, he is "primarily responsible for managing ENTEK International Ltd.'s relationship with non-North American customers." *Id.* ¶¶ 1, 4-6.

Respondent contends that Fraser-Bell undoubtedly has information relevant and necessary to Respondent's defense to the Commission's allegations. Respondent notes that ENTEK International Ltd. is a wholly-owned subsidiary of ENTEK International LLC, a corporation with its principal place of business in Lebanon, Oregon. Respondent asserts that Fraser-Bell was properly served with the subpoena sent to him by certified mail to ENTEK International LLC in Oregon, since "Fraser-Bell is clearly within the possession, custody, and control of ENTEK [International LLC]" and "ENTEK [International LLC] has control over Fraser-Bell and his documents."

Under Rule 3.34(a)(1) of the Commission's Rules of Practice, "the Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service." 16 C.F.R. § 3.34(a)(1). The subpoena directed to Fraser-Bell was issued pursuant to Commission Rule 3.34(a)(1). Rule 3.34 does not, however, authorize "the

issuance of subpoenas . . . to be served in a foreign country, which may be authorized only in accordance with § 3.36." 16 C.F.R. § 3.34(c).

Respondent cites no legal authority for its assertion that the U.S. parent company, ENTEK International LLC, has "possession, custody, and control" over an employee, who is neither a citizen nor a resident of the United States, of its wholly-owned foreign subsidiary, ENTEK International Ltd. The phrase "possession, custody, or control," both in the Commission's Rules of Practice and in the Federal Rules of Civil Procedure, is not used with reference to individuals but only with reference to documents or other tangible things. *See, e.g.*, 16 C.F.R. § 3.37 (referring to "designated documents . . . or tangible things . . . in the possession, custody, or control of the party upon whom the request is served"); F. R. Civ. P. 45(a)(1)(A)(iii) (distinguishing between subpoenas commanding a person to "attend and testify" and those commanding a person to "produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control").

A court may, under certain circumstances, order an entity located and properly served in the United States to produce documents located abroad with its foreign affiliate, yet find at the same time that it lacks the power to order that same entity's or its foreign affiliate's employee, officer, or partner, who reside(s) abroad, to come to the United States to be deposed. *See Hunter Douglas, Inc. v. Comfortex Corp.,* 1999 U.S. Dist. LEXIS 101, at *8-*12 (S.D.N.Y. 1999); *In re Price Waterhouse LLP,* 182 F.R.D. 56, 59-64 (S.D.N.Y. 1998). *See also Stanford v. Kuwait Airlines Corp.*, 1987 U.S. Dist. LEXIS 10981 (S.D.N.Y. 1987) (denying a motion to compel witnesses residing abroad to appear for deposition in New York); *Securities and Exchange Comm'n v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978) (ruling that the SEC "has no power to subpoena an alien non-resident to appear before it from a foreign land" and distinguishing cases where the SEC requested property located abroad of a company residing or doing business within the United States). The court in *In re Price Waterhouse* commented: "It is not surprising that [the party seeking the depositions] has cited no authority that has held that a United States court has the power to compel a nonparty witness residing overseas to attend a deposition in the United States." 182 F.R.D. at 63. The court observed: "The instant decision to quash is not inconsistent with the prior decision to compel the production of documents from [abroad] . . . . It is one thing to require document production and another to force the presence of a nonparty witness in a foreign land." *Id.*

The Fraser-Bell Subpoena was, in addition, not properly served under Commission Rule 4.4. This Rule provides that "processes of the Commission under 15 U.S.C. § 45" that are served by certified mail "shall be addressed to the person . . . to be served at his . . . residence or principal office or place of business." 16 C.F.R. § 4.4(a)(1)(i). Fraser-Bell, as noted above, resides and has a principal office or place of business in the United Kingdom.

Because Fraser-Bell resides and works in a foreign country, the subpoena sent to him by certified mail to ENTEK International LLC in Lebanon, Oregon is not valid under Commission Rules 3.34 or 4.4.

IV.

For the above stated reasons, ENTEK's Motion is GRANTED in part and DENIED in part. Respondent may take the deposition of Robert Keith pursuant to the subpoena *ad testificandum* issued under the authority of Rule 3.34(a)(1). Respondent may not take the deposition of Fraser-Bell pursuant to a subpoena *ad testificandum* issued under the authority of Rule 3.34(a)(1).

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: February 10, 2009