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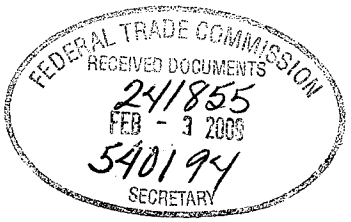

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER ON NON-PARTY THE MOORE COMPANY'S MOTION TO LIMIT RESPONDENT'S SUBPOENA AND RECOVER COSTS, AND ON RESPONDENT'S CROSS-MOTION TO COMPEL

I.

On December 30, 2008, non-party The Moore Company ("Moore") filed a motion for an order to limit the subpoena *duces tecum* that Respondent Polypore International, Inc. ("Polypore," "Daramic," or "Respondent") served on Moore on November 6, 2008, and to recover Moore's costs of complying with Respondent's subpoena ("motion"). On January 8, 2009, Respondent filed its Memorandum in Opposition to Moore's motion, together with a cross-motion to compel Moore to produce the documents Respondent's subpoena seeks. Moore submitted a motion for leave to file a reply brief on January 21, 2009, which was granted on the following day, and submitted its reply brief in further support of its motion to limit the subpoena and to recover costs on January 26, 2009.

For the reasons set forth below, Moore's motion is DENIED and Respondent's cross-motion is GRANTED.

II.

Moore is a U.S. corporation, located in Rhode Island, with a wholly-owned subsidiary Amer-Sil, S.A. ("Amer-Sil"), located in Luxembourg. Moore contends that it does not compete in the relevant product markets and the relevant geographic market alleged in the Federal Trade Commission's ("FTC" or "Commission") Complaint. Moore asserts that the documents sought by Respondent's subpoena are not relevant to this proceeding. Moore also claims that the

subpoenaed information may be obtained more efficiently and cost-effectively from the U.S. battery manufacturers identified in the subpoena than from Amer-Sil.

Moore states that it would take approximately 1000 hours and cost approximately $490,000 to collect and review responsive materials for privilege, were the subpoena not limited, and that "[t]his would effectively cripple Amer-Sil and force it to cease its normal business operations." Declaration of Guy Dauwe, Amer-Sil's Managing Director, in Support of Moore's Motion to Limit Subpoena ¶ 33. Moore asks for an order requiring Respondent to reimburse it for these costs, which it claims are unreasonable.

In addition, Moore objects to producing materials, such as information on Amer-Sil's relationships with its customers, that it deems highly confidential and commercially sensitive. Lastly, Moore contends that most, if not all, of the subpoenaed documents are in Amer-Sil's possession in Luxembourg. Moore charges that the subpoena, while served on it in the United States, circumvents the Commission's Rules of Practice regarding service of a subpoena in a foreign country and contravenes European Union privacy and data protection laws.

Respondent argues that the documents requested in its subpoena are clearly relevant to the issues raised by the Complaint and Answer, including Respondent's contentions that the Complaint has mischaracterized the relevant product and geographic markets. The limitation on Respondent's subpoena that Moore offers would, Respondent submits, unjustly hinder its defense to the Commission's Complaint.

In Respondent's view, Moore fails to show that compliance with the subpoena would be unduly burdensome, and even if Moore could make any such showing, reimbursement should be limited to copying costs. Respondent asserts that the Protective Order entered in this proceeding on October 23, 2008 adequately addresses Moore's concerns about the disclosure of confidential and commercially sensitive documents. Respondent further avers that Moore was properly served in the United States, that Moore has control over the subpoenaed documents that are located abroad, and that the production of these documents would not violate European Union law.

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; *reh'g denied*, 434 U.S. 883 (1977). "Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* 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 documents requested by Respondent's subpoena are relevant and the costs and other burdens of compliance with its subpoena are not unreasonable or undue. Furthermore, the documents, though located abroad, are in the custody or control of Moore. Accordingly, Moore has failed to meet its burden of establishing that the subpoena is unreasonable and oppressive, and the subpoenaed documents shall be produced.

A. Relevance of, and Alternative Sources for, the Documents

The Complaint in this case defines the relevant product markets as "separators for flooded lead-acid batteries" in the "(a) deep-cycle; (b) motive; (c) automotive; [and] (d) uninterruptible power supply stationary ('UPS')" markets or, alternatively, "an all PE [polyethylene] separator market." Complaint ¶¶ 5, 6. It defines the relevant geographic market as North America. *Id.* ¶ 14. The Commission charges that Polypore has, in these markets, "the market/monopoly power to exclude competition and/or increase prices and reduce innovation and has illegally and wrongfully maintained its market power," and that Polypore's acquisition of Microporous and other conduct by Polypore substantially lessen competition in numerous ways. *Id.* ¶¶ 45, 38. Respondent denies in its Answer each of the above allegations. Answer ¶¶ 5, 6, 14, 45, 38.

The Complaint identifies Amer-Sil, the subject of this subpoena dispute, as one of "only two other manufacturers of motive and UPS separators in the world [besides Respondent] of any significance." *Id.* ¶ 15. Moore disputes that Amer-Sil competes in either the relevant product markets or in the relevant geographic market that the Complaint sets forth, and argues on that basis that Respondent's subpoena seeks documents that are not relevant to this proceeding.

Among the documents that Respondent's subpoena seeks are documents that relate to the following: the scope of competition, both across products (including any products under development and any substitute products or technologies) and across national borders, for lead acid battery separators; actual and potential competitors to Amer-Sil for lead acid battery separators; Amer-Sil's market share for lead acid battery separators; the level or state of competition in, and Amer-Sil's pricing and pricing strategy for, lead acid battery separators both before and after Polypore's acquisition of Microporous; any actual or potential barriers to entry, including costs of entry or of achieving minimum viable scale, in (a) North America and (b) the world, for suppliers or manufacturers of lead acid battery separators; any effect on Amer-Sil's

business of an acquisition of Microporous by Polypore, and any plan or course of action considered or adopted by Amer-Sil in response to such actual or potential acquisition; and Amer-Sil's submissions to, and communications with, the FTC regarding Polypore or Microporous. Subpoena *Duces Tecum* Issued to Moore on Behalf of Polypore, Requests 1, 7-16, 28, 31, 33-35, and 37.

The challenged requests in Respondent's subpoena seek materials that go to central issues in this case, such as the definition of relevant product and geographic markets, market share in appropriately defined markets, pricing, barriers to entry, and the competitive effect of Polypore's acquisition of Microporous. Moore proposes to limit Respondent's subpoena, for the time period from 2007 to the date of the subpoena, to the following information relating to Moore's battery separator products: gross revenue, average sales price, annual production volume, annual production capacity, and customer lists. This proposal would yield information that is so aggregated and circumscribed that it would shed little light on central issues in this case. The documents that Respondent seeks from Moore may reasonably be expected to yield information relevant to the Complaint's allegations, to the proposed relief, or to the Respondent's defenses.

While Moore states that the information sought by the subpoena may be obtained more efficiently and cost-effectively from the U.S. battery manufacturers identified in the subpoena than from itself, it points in this regard to only two of the 38 requests (requests 5 and 6) in Respondent's subpoena. Even with respect to these two requests, it is not apparent that the information in Moore's files would coincide with the information in the U.S. battery manufacturers' files. Moore has not shown that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

B. Costs of Compliance with the Subpoena

In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Federal Trade Comm'n v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). "The burden of showing that the request is unreasonable is on the subpoenaed party." *Id.* "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* (enforcing subpoena served on non-party by the respondent). *See In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.").

Moore seeks reimbursement for all costs of compliance with Respondent's subpoena. The Commission, in *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 203, 1981 FTC LEXIS 75, at *3

(March 13, 1981), has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *See In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 203, 1981 FTC LEXIS 75, at *3 (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). Moore estimates that it would take around 1,000 hours and cost approximately $490,000 at a blended rate of 350 Euros (or, using the exchange rate Moore is applying, $490) per hour to gather and review materials responsive to the subpoena. Dawe Declaration in Support of Moore's Motion to Limit Subpoena ¶ 33. This cost would, Moore alleges, "effectively cripple Amer-Sil and force it to cease its normal business operations." *Id.* While Moore does not provide information as to its own total size and resources, it states that Amer-Sil's annual revenue is much smaller than Polypore's, and ascribes to Polypore, citing its 2007 Annual Report, net sales in excess of $537 million. *Id.* ¶ 17.

Moore has not demonstrated that its estimated compliance costs, even if these costs were to amount to $490,000, are unreasonable or unduly burdensome. Moreover, even if the subpoenaed party has shown that its costs of compliance are unreasonable, "where the non-party is in the industry in which the alleged acts occurred and the non-party has [an] interest in the litigation and would be affected by the judgment, only the cost of copying, and no other costs of the search, need be reimbursed." *In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96, at *16-17 (March 19, 1982). Accordingly, Moore's request for reimbursement of its costs, including its copying costs, is DENIED.

C. Confidential Documents

Moore also challenges the subpoena on the ground that the subpoena seeks highly confidential and commercially sensitive information. Moore attaches to its reply brief agreements with its customers and suppliers that would, Moore claims, be breached if it were to comply with Respondent's subpoena. Moore's argument does not, however, take into account the provisions protecting confidential information contained in the Protective Order that was entered in this proceeding on October 23, 2008.

Section 6(f) of the Federal Trade Commission Act and Section 21(d)(2) of the Federal Trade Commission Improvements Act (codified at 15 U.S.C. § 46(f) and 15 U.S.C. § 57b-2(b), respectively) limit the Commission's ability to disclose confidential information to the public. Moreover, the Commission's Rules of Practice do not specifically protect confidential

information from discovery. "The fact that information sought by a subpoena may be confidential does not excuse compliance." *In re Rambus Inc.*, 2002 LEXIS 90, at *11 (Nov. 18, 2002), *quoting In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS 68, at *10 (Nov. 12, 1976); *Federal Trade Comm'n v. Dresser Industries, Inc.*, 1977 U.S. Dist. LEXIS 16178, at *15 (D.D.C. 1977). Accordingly, Moore cannot withhold relevant documents based solely on its desire to shield confidential information.

The Protective Order entered in this case allows disclosure of confidential documents to an very limited group. "[A]bsent a showing to the contrary, one has to assume that the protective order will work, especially in light of the extensive use of the device in Commission litigation . . . ." *In re Coca-Cola Bottling*, 1976 FTC LEXIS 33, at *5 (Dec. 7, 1976). In addition to the safeguards of the Protective Order, the Commission's Rules governing *in camera* treatment of confidential information prohibit disclosure of highly confidential documents at trial. Pursuant to Commission Rule 3.45(b), if either party seeks to introduce Moore's confidential information into evidence at trial, Moore may file a motion for *in camera* treatment for documents it believes should be withheld from the public record.

Because the Protective Order and *in camera* provisions will protect Moore's confidential documents, Moore cannot use its claims that the documents are confidential to shield them from discovery.

D. Documents in Moore's Custody or Control

Moore also argues that the subpoena does not comply with Section 3.36 of the Commission's Rules of Practice, because Respondent has failed to make the four specific showings that the Rule requires, including 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." 16 C.F.R.§ 3.36. Section 3.36 applies, however, only to certain types of subpoenas, including "a subpoena to be served in a foreign country." *See* 16 C.F.R. § 3.36. The subpoena *duces tecum* that Respondent directed to Moore indicates that it was served not in a foreign country, but in Westerly, Rhode Island.

Moore goes on to argue that the subpoena should be limited not only as an "attempted end run around required FTC procedure," but as contravening European Union privacy and data protection laws and as "offending fundamental principles of international law and policy" regarding the production of documents located abroad. Moore has not demonstrated, however, that the European Commission directive to which Moore cites, regarding "personal data," applies, or applies without an exception for legal proceedings, to the documents at issue here. Generally, the cases cited by Moore require the movant to demonstrate that compliance with the subpoena would in fact violate applicable foreign law. *See In re Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962) (Lower court denied motion where movant failed to submit affidavits of Panamanian lawyer supporting interpretation of Panamanian law; upon reargument,

lower court heard testimony of Panamanian legal expert that sufficiently demonstrated that production of documents would violate Panamanian law.); *First Nat'l City Bank of N.Y. v. I.R.S.*, 271 F.2d 616, 620 (2d Cir. 1959) (affidavit of movant bank's "expert" held insufficient basis for nonenforcement of the subpoena). *Compare Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) (Affidavits of Canadian counsel, rebutted by opinion letter from different Canadian counsel, raised genuine concern that enforcement of subpoena would violate Canadian law.).

Moreover, "[c]ourts have frequently required persons within their jurisdiction to produce books and papers which were beyond the territorial limits of the court, even in cases where the documents were located in a foreign country." *Securities and Exchange Comm'n v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217 (9th Cir. 1945). *See also In re Automotive Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 494 (E.D. Pa. 2005) (rejecting the argument that a subpoena was invalid because the requested documents were located abroad and observing that "'the district in which the production . . . is to be made' under Federal Rule of Civil Procedure 45(a)(2) is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over").

Cases arising under statutory provisions similar to the FTC Act confirm that discovery requests served within the United States but seeking documents located abroad "are authorized by the FTC Act and are not likely to present the same extraterritoriality concerns as actual service of discovery requests abroad." Statement of the Federal Trade Comm'n re Amendments to Its Rules of Practice, 66 Fed. Reg. 17622, 17623 (Apr. 3, 2001) (citing *Federal Maritime Comm'n v. DeSmedt,* 366 F.2d 464, 468-469 (2d. Cir.), *cert. denied*, 385 U.S. 974 (1966); *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir.1979)). While Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, provides that "the production of . . . documentary evidence may be required from any place in the United States," this statutory provision has been interpreted to allow documents located abroad to be produced in response to a subpoena validly served in the United States. In *Securities and Exchange Comm'n v. Minas de Artemisia, S.A.*, the court held that the Securities Act of 1933, authorizing the SEC to require the production of documents "from any place in the United States," entitled the Commission to an order enforcing its subpoena for books and records located in Mexico, "provided only that service of the subpoena is made within the territorial limits of the United States." 150 F.2d at 216-218. In *Federal Maritime Comm'n v. DeSmedt,* the court ruled that the Shipping Act of 1933, authorizing the Federal Maritime Commission to compel documents "from any place in the United States," authorized the Commission to "require a resident by subpoena to produce documents under his control wherever they are located." 366 F.2d at 471. And, in *Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft*, the court determined that the pertinent statutory provision "was not intended as a limitation on agency subpoena authority, but rather was intended to free the agency of the geographic limitations imposed on subpoenas issued by the district courts." 591 F.2d at 953.

The Commission, similarly, has held: "Section 9 authorizes the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States." *In*

re General Foods Corp., 95 F.T.C. 383, 383-384 (1980) (remanding to the administrative law judge on the issue of personal jurisdiction). *See also In re Petition to Quash Subpoena [on] Nippon Sheet Glass Co.*, 113 F.T.C. 1202, 1204 (1990) (ruling it within the FTC's statutory grant of power to serve process on the U.S. agent or alter ego of a foreign entity).

One of the principal cases on which Moore relies, *Laker Airways Ltd. v. Pan American World Airways,* 607 F. Supp. 324 (S.D.N.Y. 1985), was an unusual case in which the vacated subpoenas had been served on British branch offices in New York that had not even been open at the time of the events complained of, and that contained no files or documents, or any person with any knowledge of, matters relating to the case. *Id.* at 326. Service of the subpoenas in New York was found to be "a transparent attempt to circumvent" the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and "also an end run" around the British Protection of Trading Interests Act of 1980. *Id.* at 326-327. By contrast, in this case, Moore, the U.S. parent of a wholly owned foreign subsidiary, has not demonstrated that it has not been operating at the time of the events complained of or that it, as the sole owner of Amer-Sil, does not have access to or the ability to obtain documents in the possession of Amer-Sil.

In determining whether a corporation within the United States may be compelled to produce documents held by a foreign affiliate, courts consider the nature of the relationship between the U.S. corporation and its foreign affiliate. *E.g., Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, at *8-9 (S.D.N.Y. 1999). Documents need not be in the possession of a party to be discoverable; they need only be in its custody or control. *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (requiring the production of documents within the custody of the party's British affiliate). "'The test to determine whether a corporation has custody and control over documents located with an overseas affiliate is not limited to whether the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents.'" *In re Rambus Inc.,* 2002 FTC LEXIS 90, at *12 (Nov. 18, 2002) (denying a non-party's motion to quash or limit a subpoena requesting documents in the possession of a foreign parent company) (*quoting Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, at *9 (S.D.N.Y. 1999)). *Accord, Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462, 467-469 (D. Mass. 1993) (ordering the production of documents in the possession of a foreign parent company). This standard of "control" applies to non-parties as well as to parties. *Id.* at 468; *In re Rambus Inc.*, 2002 FTC LEXIS 90, at *13 n.1.

Moore claims that most of the subpoenaed documents are in the possession of Amer-Sil, its wholly-owned subsidiary in Luxembourg. Moore makes no claim, however, that the documents in Amer-Sil's possession are outside of Moore's custody or control, and there is no indication in the papers submitted in support of this motion that Moore lacks control over Amer-Sil. Because the documents requested are in the custody or control of Moore, they are subject to the subpoena and shall be produced.

IV.

Moore, as the party resisting compliance with the subpoena, has not met the required burden to limit the subpoena. For the reasons stated above, Moore's motion to limit Respondent's subpoena and to recover its costs of compliance with that subpoena is DENIED; Respondent's cross-motion to compel Moore to produce the documents requested in its subpoena is GRANTED. Moore shall produce all responsive documents within twenty calendar days.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: February 3, 2009