

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



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In the Matter of ) )  
 ) )  
Otto Bock HealthCare North America, Inc., ) )  
 ) )  
a corporation, ) )  
 ) )  
Respondent. ) )  
\_\_\_\_\_ ) )

Docket No. 9378

**ORDER ON MOTION TO QUASH  
FILED BY NON-PARTY FOURROUX**

**I.**

On March 12, 2018, non-party Fourroux Prosthetics, Inc. (“Fourroux”) filed a Motion to Quash Subpoenas *Duces Tecum* and Motion to Quash Subpoenas *Ad Testificandum* and on March 15, 2018, Fourroux filed an Amended Motion to Quash Subpoenas *Duces Tecum* and Motion to Quash Subpoenas *Ad Testificandum* (collectively, “Motion”). Federal Trade Commission (“FTC”) Complaint Counsel filed a response to the Motion on March 16, 2018 (“Response”). Respondent Otto Bock HealthCare North America, Inc. (“Respondent” or “OttoBock”) filed an opposition to the Motion on March 26, 2018 (“Opposition”).<sup>1</sup>

For the reasons set forth below, the Motion is GRANTED in part and DENIED in part.

**II.**

The Complaint in this matter charges that Respondent’s acquisition of FIH Group Holdings, LLC (“Freedom”) may substantially lessen competition in the market for microprocessor-controlled prosthetic knees (“MPKs”) sold to prosthetic clinics in the United States. Complaint ¶¶ 1, 67. Respondent is a manufacturer and supplier of MPKs in the United States. Complaint ¶ 1.

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<sup>1</sup> By Order dated March 20, 2018, Respondent was directed to meet and confer with Fourroux regarding the issues raised by the Motion before filing an opposition to the Motion. It is clear that Respondent has taken steps to meet and confer to narrow the issues raised by the Motion.

Fourroux operates a chain of prosthetic clinics. It purchases MPKs and works with patients, their families, and their healthcare professionals to design a customized approach for its patients. Mr. Watson, Fourroux's owner, is a certified practitioner in orthotics and prosthetics and has been with Fourroux for over twenty years.

Fourroux seeks to quash five subpoenas:

- (1) Subpoena *ad testificandum* to Keith Watson issued by Complaint Counsel;
- (2) Subpoena *ad testificandum* to Keith Watson issued by Respondent;
- (3) Subpoena *ad testificandum* pursuant to Rule 3.33(c)(1) issued by Respondent;
- (4) Subpoena *duces tecum* to Fourroux, issued by Respondent; and
- (5) Subpoena *duces tecum* to Fourroux, issued by Complaint Counsel.

Pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice, unless otherwise limited by order of the Administrative Law Judge, 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). Pursuant to Rule 3.33(c)(1), a party may name as the deponent an organization, which shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. The person(s) so designated shall testify as to matters known or reasonably available to the organization. 16 C.F.R. § 3.33(c)(1).

Discovery shall be limited if the Administrative Law Judge determines that: (i) The discovery sought from a party or third party 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 on a party or third party outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2). In addition, the Administrative Law Judge may deny discovery or make any other order that justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

A party seeking to quash a subpoena has the burden of demonstrating why discovery should be denied. *In re Polypore Int'l, Inc.*, 2008 WL 4947490, at \*6 (Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*); *FTC v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178 at \*12 (D.D.C. 1977). "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." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at \*10 (Jan. 15, 2009); *In re Kaiser Alum. & Chem. Co.*, 1976 FTC LEXIS 68 at \*\*19-20 (Nov. 12, 1976).

### III.

#### A. Subpoenas *ad testificandum*

On February 26, 2018, Complaint Counsel issued a subpoena *ad testificandum* to Keith Watson, the owner of Fourroux. On March 2, 2018, Respondent issued a deposition subpoena to

Keith Watson to testify in his individual capacity and issued a Rule 3.33(c)(1) deposition subpoena requiring testimony from a corporate representative of Fourroux (collectively, “deposition subpoenas”).

Fourroux seeks to quash the three deposition subpoenas, asserting that the dispute between the FTC and Respondent has nothing to do with Fourroux; Fourroux is not owned by OttoBock or Freedom; Fourroux has no ongoing contractual relationship with OttoBock or Freedom; and Fourroux had no input on the transaction between OttoBock and Freedom. Fourroux argues it has no desire to provide testimony in this action and should not be compelled to. Fourroux further contends that the subpoenas will impose a substantial burden on Fourroux. Fourroux also argues that much of the information requested would expose confidential business information.

Regarding Mr. Watson, Respondent states that, although Respondent possess knowledge of the industry from the perspective of a manufacturer, evidence regarding how clinics, such as Fourroux, make their purchasing decisions is critical to the claims and defenses in this case, and that such information is uniquely in the possession of clinics like Fourroux. Respondent further states that Fourroux is a significant participant in the markets at issue in this case and Mr. Watson has personal knowledge of facts that bear on key issues in this matter, including market definition and competitive interaction between market participants. Complaint Counsel also states that Mr. Watson has personal knowledge about many topics that are relevant to the case, including the benefits of MPKs and other prosthetic products for the patients Fourroux serves, the degree to which MPKs and other prosthetic products are substitutes for one another, and the benefits Fourroux experienced as a result of competition between OttoBock and Freedom prior to their merger in September 2017. Complaint Counsel further states that it is only able to present testimony about the operation of the industry via market participants, and that Fourroux is a significant participant in the market at issue.

Regarding the corporate designee, Complaint Counsel does not oppose Fourroux’s motion to quash the Rule 3.33(c)(1) deposition subpoena served by Respondent on Fourroux. Complaint Counsel takes the position that testimony from Mr. Watson, Fourroux’s owner, will provide both Complaint Counsel and Respondent adequate access to information about how Fourroux’s business operates and participates in the market. Respondent argues that the entity, Fourroux, possesses information that is directly relevant to Respondent’s defenses and states that it has agreed to limit the original twenty-two corporate designee topics to eight topics.

The deposition subpoenas clearly seek relevant information. However, subject to the ruling made in Part B in this Order below, a deposition from both Mr. Watson and from a corporate designee would be unreasonably cumulative or duplicative and the burden and expense of both depositions outweigh the likely benefit.

Accordingly, Fourroux’s Motion to quash the deposition subpoenas issued to Keith Watson in his personal capacity is DENIED. Fourroux’s Motion to quash the deposition subpoena issued to a corporate designee is addressed in connection with the subpoenas for document production.

**B. Subpoenas *duces tecum***

On March 2, 2018, Respondent issued a document subpoena to Fourroux. On March 5, 2018, Complaint Counsel also issued a document subpoena to Fourroux, which seeks no additional documents or categories of documents beyond those requested by Respondent. Complaint Counsel states that it issued its document subpoena to Fourroux to ensure that it could participate in negotiations of the scope of any document production Fourroux might make and to ensure that Complaint Counsel receives timely access to any documents produced by Fourroux.

Respondent's document subpoena contained twelve document requests. In negotiations with Fourroux, Respondent reduced the number of document requests from twelve to seven, and narrowed those seven requests by date range and content requested. In addition, Respondent states that the information requested in six of the seven document requests could be provided through the testimony of Fourroux's corporate designee, and that Respondent is willing to accept such deposition in lieu of documents. Fourroux's Motion does not address Respondent's efforts to limit the burden on Fourroux.

Upon review of the document requests, as narrowed by Respondent, the requested information is relevant and is not unduly burdensome.

Fourroux's Motion to quash the document subpoenas is GRANTED in part and DENIED in part. Fourroux shall produce documents responsive to the one remaining document request. In addition, Fourroux shall either: (1) produce documents responsive to the seven requests, as narrowed by Respondent; or (2) produce a corporate designee to provide testimony on the six remaining requests for which Respondent seeks information. In the event that Fourroux elects to provide a corporate designee in lieu of documents, the designee shall be required to also provide testimony on the eight deposition topics narrowed by Respondent.

**C. Confidentiality concerns**

To the extent that Fourroux objects to the subpoenas on the ground that they call for information that is "confidential" or "proprietary," the Protective Order entered in this case pursuant to Commission Rule 3.31(d) on December, 20, 2017 adequately protects discovery material. *In re Lab Corp.*, 2011 FTC LEXIS 5, at \*3-4 (Jan. 28, 2011).

**IV.**

As set forth above, the Motion is GRANTED in part and DENIED in part.

It is hereby ORDERED that:

- (1) Fourroux shall produce Mr. Watson in his personal capacity for a deposition;
- (2) Fourroux shall produce documents responsive to the revised document request, as listed as item one by Respondent in Exhibit J to the Opposition; and

(3) Fourroux shall either:

(A) produce documents responsive to the revised document requests, listed as items two through seven by Respondent in Exhibit J to the Opposition; or

(B) produce a corporate designee to testify about the information requested in the revised document requests, listed as items two through seven by Respondent in Exhibit J to the Opposition, and about the eight deposition topics narrowed by Respondent.

Fourroux shall produce documents to both parties within two weeks and provide the ordered deposition testimony within one week of its production of documents.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: March 28, 2018