

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



In the Matter of)

Otto Bock HealthCare North America, Inc.,)

a corporation,)

Respondent.)

DOCKET NO. 9378

ORDER ON COMPLAINT COUNSEL’S MOTION TO COMPEL

I.

On March 8, 2018, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Compel Respondent to Produce Documents (“Motion”). Respondent Otto Bock HealthCare North America, Inc. (“Ottobock”) filed its opposition on March 15, 2018 (“Opposition”). 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. Ottobock is a Minnesota corporation. Ottobock’s parent company, Otto Bock HealthCare GmbH (“GmbH”), is headquartered in Germany. Answer ¶ 14. At issue in this Motion are Respondent’s objections to document requests served on four executives at GmbH: (1) Professor Hans Georg Nader (“Professor Nader”); (2) Harry Wertz; (3) Christin Gunkel; and (4) Thorsten Schmitt (collectively, the “Four GmbH Executives”).

¹ Although the parties designated much of the information in their pleadings as “confidential material,” only the information indicated in bold font and surrounded by braces constitutes “confidential material” as defined by the Protective Order issued in this case on December 20, 2017 and FTC Rule 3.31A.

III.

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 3.37(a) of the Commission's Rules of Practice, a party may serve on another party a request to produce documents which are within the scope of § 3.31(c)(1) and in the possession, custody, or control of the party upon whom the request is served. 16 C.F.R. § 3.37(a).

On a motion to compel, "[u]nless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a). 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).

In summary, the issues raised by the Motion are (A) whether the requested documents are in the custody or control of Respondent; and (B) whether the burden and expense of the proposed discovery outweigh its likely benefit.

A.

Complaint Counsel contends that it does not matter that GmbH is located outside the United States and states that documents need not be in the possession of a party to be discoverable; they need only be in its custody or control. Respondent asserts that it is a subsidiary of GmbH, a German organization, and that it does not have the legal authority to compel GmbH to produce documents.

"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) (citing *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, *9 (S.D.N.Y. Jan. 11, 1999)). "The test, therefore, looks to the 'nature of the relationship' between the subsidiary and its parent." *Id.* at *12-13 (citing *Gerling Int'l Ins. Co. v. Commissioner of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988); *Camden Iron & Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 441-42 (D.N.J. 1991)).

"To determine whether a subsidiary has 'control' over a foreign parent's documents, the courts have looked to factors, including '(a) commonality of ownership, (b) exchange or

intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation.” *Id.* at *13 (citing *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998); *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984)). Based on the arguments of the parties and the evidence presented in support of and in opposition of the Motion, the documents from GmbH are in the custody or control of Respondent.

First, Respondent admits that GmbH is the parent company of Respondent. Answer ¶ 14. Complaint Counsel states that Scott Schneider, the Chief Future Development Officer and President of Medical Care of Respondent, testified in his deposition that GmbH, as the umbrella organization, has overarching managerial responsibility for Respondent.

Second, Respondent states that Respondent and GmbH do not share any directors, officers, or employees. Complaint Counsel argues that there is significant intermingling of each firm’s directors, officer, and employees. Schneider testified that Respondent’s executives report up to GmbH and there is a collaboration in business units.

Third, Complaint Counsel states and points to evidence that generally there is a constant exchange of documents between Respondent and GmbH. Respondent states that none of the Four GmbH Executives customarily exchanges documents with Respondent or participates in meetings with Respondent.

Fourth, Complaint Counsel states and points to evidence that GmbH was actively involved in the acquisition of Freedom, from the initial negotiations to post-acquisition integration planning. Among the examples Complaint Counsel relies upon are actions taken by or involving Professor Nader. Respondent acknowledges that Professor Nader played a material role in the transaction at issue and that his role was to approve the transaction, but states that the other three of the Four GmbH Executives did not.

Fifth, Complaint Counsel contends that Respondent has involved GmbH in every aspect of this litigation, such as designating an employee to testify on behalf of Respondent in response to a Rule 3.33(c)(1) deposition notice and listing several executives on its preliminary witness list. Notably, the 3.33(c)(1) witness and the executives listed on Respondent’s preliminary witness list are not the Four GmbH Executives at issue in this Motion.

Based on the foregoing, Respondent’s objection to producing documents on the basis that Respondent does not have custody and control is rejected.

B.

Respondent asserts that it has produced, and is continuing to produce, documents from over 38 custodians, including from seven other employees of GmbH: Dr. Helmut Pfuhl, Dr. Sonke Rossing, Alexander Guck, Dr. Sven Ehrich, Dr. Johnnis Willem Van Vliet, Ralf Stuch, and Dr. Andreas Eichler. Respondent further states that these are the individuals primarily responsible for research, development, manufacturing and global sales related to MPKs; integration planning; due diligence and negotiations; and { [REDACTED] }

[REDACTED].

Respondent does not appear to be arguing that the requested discovery is not relevant. Instead, Respondent contends that Complaint Counsel has not established that the Four GmbH Executives possess “uniquely relevant documents in this case.”

Complaint Counsel argues, and Respondent acknowledges, that Professor Nader may have relevant information including information gained from negotiating directly with Freedom officials and ultimately approving the acquisition, directing Dr. Rossing and Mr. Guck’s

[REDACTED].

However, Respondent asserts, documents from the aforementioned Freedom officials, Dr. Rossing, and Mr. Guck, [REDACTED] have all been or will be produced in this case.

Complaint Counsel’s Motion does not argue that Wertz, Gunkel, or Schmitt specifically have relevant information. Instead, it argues generally that executives from GmbH negotiated the acquisition of Freedom and that GmbH is actively involved in the sale of MPKs in the United States. Respondent contends that the proposed discovery from the Four GmbH Executives is largely irrelevant, and, to the extent any of it is relevant, it would be unreasonably cumulative and duplicative of other discovery being produced in this case.

Respondent also asserts that, in addition to the traditional burdens associated with discovery, Respondent must also comply with European and German data privacy laws and therefore is utilizing the services of two law firms and two e-discovery vendors. Thus, Respondent asserts, the burdens and costs to Respondent associated with collecting, reviewing, processing, and producing documents and data from dozens of custodial files on various document management systems, across two continents have been substantial.

Lastly, Respondent argues that the Motion fails to demonstrate how Complaint Counsel would be prejudiced if it did not receive discovery from the Four GmbH Executives. Complaint Counsel argues that it will be prejudiced if Respondent does not produce documents from the Four GmbH Executives because three GmbH custodians (Guck, Rossing, and Pfuhl) are identified on Respondent’s preliminary witness list. However, Guck, Rossing, and Pfuhl are not among the Four GmbH Executives at issue in this Motion and Respondent states it has or is producing documents from seven other employees of GmbH, including Guck, Rossing, and Pfuhl. Complaint Counsel also asserts that Respondent is asserting defenses relating to subject matters in which Nader and other GmbH employees played a significant role.

Respondent states that it is producing documents from the individuals primarily [REDACTED] and thus it appears highly unlikely that Complaint Counsel would be materially prejudiced if it does not also receive documents from the Four GmbH Executives.

Upon review of the arguments and evidence presented in support and opposition of the Motion, with respect to three of the Four GmbH Executives (Wertz, Gunkel, and Schmitt), Respondent’s argument that the burden and expense of the proposed discovery outweigh its

likely benefit is persuasive. However, Respondent has failed to make a persuasive showing with respect to Professor Nader, who played a material role in the transaction at issue.

Accordingly, Complaint Counsel's Motion is GRANTED in part and DENIED in part. Respondent shall produce responsive documents from the custodial files of Professor Nader as expeditiously as possible.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 23, 2018