

PUBLIC

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



In the Matter of

Docket No. 9378

Otto Bock HealthCare North
America, Inc.,
a corporation,

Respondent.

**COMPLAINT COUNSEL'S RESPONSE TO FOURROUX PROSTHETICS, INC.'S
AMENDED MOTION TO QUASH SUBPOENAS DUCES TECUM AND MOTION TO
QUASH SUBPOENAS AD TESTIFICANDUM**

Both Complaint Counsel and Respondent have served subpoenas *duces tecum* (“document subpoenas”) on Fourroux Prosthetics, Inc., which Fourroux Prosthetics has moved the Court to quash. As set forth below, Complaint Counsel does not oppose this motion, so long as Respondent does not oppose the motion either. If Respondent pursues document production from Fourroux, however, Complaint Counsel at least must have the opportunity to participate in any meet and confer between Respondent and Fourroux, as if our subpoena were still outstanding, to ensure that any production is not one-sided in favor of Respondent.

Complaint Counsel and Respondent also both served subpoenas *ad testificandum* (“deposition subpoenas”) on Keith Watson, the owner of Fourroux. Complaint Counsel opposes the motion of Fourroux to quash these subpoenas because Mr. Watson’s deposition is necessary for the litigation. However, Complaint Counsel sees no need for a separate deposition of Fourroux, as noticed by Respondent, and therefore does not oppose Fourroux’s motion to quash the Rule 3.31(c)(1) notice that Respondent served on the company.

ARGUMENT

1. Complaint Counsel Does Not Oppose Fourroux's Motion to Quash the Document Subpoenas, So Long as that Motion is Granted as to Both Subpoenas

Complaint Counsel's document subpoena seeks no additional documents, or categories of documents, beyond those sought by Respondent in its document subpoena issued to Fourroux. Thus, compliance with Complaint Counsel's document subpoena imposes no additional burden on Fourroux. Complaint Counsel issued its document subpoena to Fourroux to ensure it could participate in negotiations of the scope of any document production Fourroux might submit and to ensure Complaint Counsel receives timely access to any documents produced by Fourroux.

To the extent this Court deems it proper to quash or limit Respondent's document subpoena, we do not object to similar limitations being placed on Complaint Counsel's document subpoena. Similarly, should Respondent voluntarily withdraw its document subpoena issued to Fourroux, Complaint Counsel would do the same. Complaint Counsel seeks only to avoid a situation in which Respondent and Fourroux negotiate the scope of production pursuant to Respondent's document subpoena, without a seat at the table for Complaint Counsel, and Fourroux produces documents to Respondent without simultaneously producing them to Complaint Counsel.

2. Complaint Counsel Opposes Fourroux's Motion to Quash the Deposition Subpoenas Issued to Keith Watson in his Personal Capacity

Complaint Counsel opposes Fourroux's assertion that none of Fourroux's employees should be deposed. Mr. Watson, as a CPO and owner of Fourroux, has personal knowledge about many topics that are relevant to the case at issue, including, among other topics, the benefits of microprocessor-controlled knees and other prosthetic products for the patients Fourroux serves, the degree to which microprocessor-controlled knees and other prosthetic products are substitutes for one another, and the benefits Fourroux experienced as a result of

competition between Otto Bock and Freedom prior to their merger in September 2017. None of the testimony sought by Complaint Counsel in its deposition of Mr. Watson seeks expert testimony.

Fourroux, in its amended motion, makes no argument, and provides no evidence, as to why the deposition subpoenas issued by Complaint Counsel and Respondent to Mr. Watson seeking testimony in his personal capacity should be quashed. All of the arguments and objections pertain to the specific topics that Respondent identified in its subpoena to Fourroux for a corporate deposition. Those arguments, however, are inapplicable to a deposition subpoena for personal testimony, or are simply incorrect.

Fourroux operates a chain of prosthetic clinics. The company purchases microprocessor knees and works closely 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. In particular, he is certified in the newest microprocessor-controlled prosthetic knee systems. Unlike Respondent, Complaint Counsel has no independent ability to present testimony about the operation of the industry that is the subject of the Complaint—Complaint Counsel can only do so via market participants, including third parties. Fourroux is a significant participant in the market at issue and Mr. Watson has personal knowledge of facts that bear on the key issues in this matter, including market definition and the competitive interaction between market participants. His testimony, therefore, is relevant to Complaint Counsel's case. That Fourroux may not want to participate in this litigation is not the issue. *See generally Kirschner v. Klemons*, 2005 WL 1214330 (S.D.N.Y. May 19, 2005) (stating that "inconvenience alone will not justify an order to quash a subpoena that seeks potentially relevant testimony.") (internal

citation omitted); *Plant Genetic Systems, N.V. v. Northrup King Co., Inc.*, 6 F.Supp.2d 859, 862 (E.D. Mo. 1998) (stating that a motion to quash should be denied where third party “has done little more than make the bare assertion that it is burdensome for it to comply”); *Ispat Inland, Inc. v. Kemper Environmental, Ltd.*, 2007 WL 737786 at *2 (D. Minn. March 8, 2007) (same).

Fourroux incorrectly contends that the deposition subpoenas are improper, and should be quashed, because “Otto Bock and the FTC would be better-served by obtaining their desired information from a different third-party,” and that certain categories of information are already in the possession of Respondent. Motion to Quash at 4, 5. There is no basis in the law for the contention that, because information may potentially be available from one third party, it is not proper for a litigant to seek that information from a different third party, or that information may not be sought from Fourroux if similar information may be in the possession of Respondent. The Commission’s decision in *In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 5, 2017), cited by Fourroux, explains the importance of obtaining information from a variety of third-party sources. The Commission in that decision explained that, “an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with that obtained from third parties.” *Id.* at 6. In a subsequent ruling, the Commission held that “even if such information were available from other sources, it is still appropriate to adduce testimony from Humana to, *inter alia*, verify that information. Indeed, by its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery.” *In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 15, 2017) at 5 (internal punctuation and quotations omitted).

Fourroux also contends that information is better sought from one of “several trade organizations that can provide exactly the information that these parties desire.” Motion to Quash at 4. To the extent that argument is intended to apply to Mr. Watson’s subpoena, there is no evidence on the record that any of these trade associations does, in fact, possess all relevant information sought by the deposition subpoenas directed to Mr. Watson, or that any organization thus represents the “single source likely to have all of the necessary information,” referenced by the Commission in its *Humana Order. In the matter of subpoena Duces Tecum issued to Humana, Inc.*, F.T.C. File No. 161-0026 (Jun. 5, 2017) at 5. Indeed, the source most likely to have all of the necessary information about Fourroux’s purchasing practices and views of the market and its participants is Mr. Watson.

3. Complaint Counsel Does not Oppose Fourroux’s Motion to Quash the Rule 3.31(c)(1) Deposition Subpoena Issued by Respondent to Fourroux

Complaint Counsel does not oppose Fourroux’s motion to quash the Rule 3.31(c)(1) deposition subpoena that Respondent has served on Fourroux requiring testimony from a corporate representative. It is Complaint Counsel’s position that testimony from Mr. Watson, Fourroux’s owner, will provide both Complaint Counsel and Respondent counsel adequate access to information about how Fourroux’s business operates and participates in the marketplace for prosthetic products, including the microprocessor-controlled knee market.

CONCLUSION

For the foregoing reasons, this Court should reject Fourroux’s motion to quash the deposition subpoenas issued to Keith Watson in his personal capacity. Complaint Counsel does not oppose Fourroux’s motion to quash the document subpoenas issued to Fourroux by Respondent and by Complaint Counsel, or Fourroux’s motion to quash the deposition subpoena issued to Fourroux seeking testimony from a corporate representative.

Dated: March 16, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: March 16, 2018

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 16, 2018

By: /s/ Daniel Zach