

ORIGINAL



**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 RESPONDENT'S MOTION FOR
SANCTIONS REGARDING EXPERT WITNESS**

I.

On April 17, 2009, Respondent Polypore International, Inc. ("Polypore") submitted its Motion for Sanctions Due to Exide Technologies' Interference with Respondent's Expert Witness ("Motion"). Complaint Counsel submitted its Response to Respondent's Motion for Sanctions ("Response") on April 22, 2009. Non-party Exide Technologies' Opposition to Respondent's Motion for Sanctions ("Opposition") was submitted on April 27, 2009.

For the reasons set forth below, Respondent's Motion for Sanctions is DENIED.

II.

Respondent asserts that "there is ample evidence" that non-party Exide Technologies, ("Exide"), a customer of Polypore, has "interfered" with Respondent's expert witness, Dr. James Mark Stevenson ("Dr. Stevenson"), a former employee of Exide. Motion at 1. Respondent points to a letter from Exide's counsel to Dr. Stevenson on March 19, 2009 – the day before his expert report was due – reminding him of his contractual obligation to keep secret all confidential information that he had acquired during his employment with Exide, warning that "Exide Technologies will take action, if necessary, to protect the confidentiality of its proprietary information." Ex. A, at 2, to Motion.

Respondent states that Dr. Stevenson repeatedly sought guidance from Exide regarding the scope of his 25-year old confidentiality agreement with that former employer, and sought assurances that Exide would take no legal action against him based on any alleged violation of this agreement through his work as an expert witness for Respondent. While there is no affidavit or declaration from Dr. Stevenson, Respondent alleges that it is "[o]ut of fear of reprisal from Exide," Motion at 3, that Dr. Stevenson did not file his expert report on or after March 20, 2009,

and has advised Respondent that he cannot proceed as an expert witness absent assurances from Exide.

Respondent, claiming interference with justice and extreme prejudice to itself, requests an order: (a) providing that Exide's relief is *in camera* treatment for any testimony by Dr. Stevenson, (b) ruling that Dr. Stevenson's testimony in this matter will not breach any obligation of confidentiality he owes to Exide, (c) precluding Exide from testifying, by deposition or otherwise, at the hearing in this matter, (d) requiring that an inquiry be conducted on Exide's conduct, and (e) awarding Respondent its attorneys' fees and costs for this Motion.

Complaint Counsel states in its Response that one of the requested sanctions – the preclusion of testimony, to be offered by Complaint Counsel into evidence, by any Exide witness – would in effect sanction Complaint Counsel. According to Complaint Counsel, “the evidence is clear that (i) Exide has a confidentiality agreement with Dr. Stevenson; (ii) Exide has not disobeyed any order or rule in this proceeding; (iii) Exide is not a party in this case, and no rule would support a sanction against Complaint Counsel for a non-party's conduct; and (iv) Complaint Counsel has acceded to every request by Respondent's counsel on this issue.” Response at 7.

Exide states in a sworn statement by its outside counsel that Dr. Stevenson was its Vice President for Manufacturing, Industrial Energy Europe, until December 31, 2006. Declaration of Donald Russell, appended to Opposition, ¶ 3. Exide supplies a copy of Dr. Stevenson's employment contract, which includes the referenced confidentiality agreement and which provides that it shall be governed by, and construed in accordance with, the law of England. Opposition Ex. 1, at ¶¶ 9, 19.

Exide indicates that Dr. Stevenson expects to address two subjects: the testing and qualification of battery separator products, and the assertedly worldwide nature of the market for battery separators. These subjects raise, in Exide's view, a significant risk that Dr. Stevenson's opinions would be based on, and might reveal, confidential information that he had obtained during his employment with Exide. Declaration of Mr. Russell, ¶¶ 6, 7. Exide states that its counsel told Dr. Stevenson that, in light of Dr. Stevenson's assurances that he did not expect to use or reveal Exide's confidential information, Exide had no objection to his work as an expert witness for Polypore. *Id.*, ¶ 10. Exide further states that Dr. Stevenson was repeatedly informed by Exide that if he were to ask Exide whether it considered specific information confidential – which, according to Exide, he did not do – he would receive a prompt response. Opposition at 9; *see* Opposition Exs. 13, 15, 17, 19.

III.

Respondent's Motion for Sanctions purports to be pursuant to Federal Trade Commission (“FTC” or “Commission”) Rules of Practice 3.38 and 3.42, 16 C.F.R. §§ 3.38, 3.42.

A.

Under Commission Rule 3.38(b), “If a party or an officer or agent of a party fails to comply with a subpoena or with an order” for discovery, “the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to” the range of sanctions specified in Rule 3.38(b)(1)-(5). 16 C.F.R. § 3.38(b) (emphasis added). Exide, a customer of Respondent, is not a party to this proceeding, and its conduct with respect to Dr. Stevenson violates no subpoena or discovery order.

Sanctions under Rule 3.38 are warranted only in limited circumstances, which do not apply in this matter. As the Commission has stated:

[S]anctions under Rule 3.38 should be imposed only if (1) production of the requested material has been mandated by a subpoena or specific discovery order issued by an ALJ or the Commission and directed at *the party (or its officer or agent)* from whom the material is sought; (2) *the party’s* failure to comply is unjustified; and (3) the sanction imposed “is reasonable in light of the material withheld and the purposes of Rule 3.38(b).”

In re Int’l Tel. & Tel. Corp. [ITT], 104 F.T.C. 280, 449 (1984) (emphasis added), quoting *In re Grand Union Co.*, 102 F.T.C. 812, 1089 (1983).

In *Grand Union*, the Commission considered, and upheld the denial of, sanctions based on the conduct of one of the complaint counsel’s expert witnesses. *Grand Union*, 102 F.T.C. at 1087-90. “The language of Rule 3.38 makes clear that sanctions may be imposed only upon a party, or an officer or agent of a party. In most cases a witness is not an agent or officer of a party.” *Id.* at 1089.

In the instant matter, the sanctions that Respondent seeks include an order precluding Exide from testifying, whether by deposition or otherwise, at the hearing. This requested sanction is not in keeping with the purpose of Commission Rule 3.38(b), which is to promote discovery. “[T]he purpose of Rule 3.38(b) is after all to induce parties to supply subpoenaed material.” *ITT*, 104 F.T.C. at 450. See also *In re R. J. Reynolds Tobacco Co.*, No. 9206, 1988 F.T.C. LEXIS 88, at *5 (1988) (purpose of sanctions under Rule 37 of the Federal Rules of Civil Procedure “to encourage discovery and to promote the production of relevant evidence”).

B.

Commission Rule 3.42, 16 C.F.R. § 3.42, relates to presiding officials. It is the duty of the Administrative Law Judge “to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order.” 16 C.F.R. § 3.42(c). There is no mention at all of non-parties in Rule 3.42, and the specified powers of the ALJ include the

power “[t]o regulate the course of the hearings and the conduct of *the parties* and their counsel therein.” 16 C.F.R. § 3.42(c)(6) (emphasis added). “*Any party* who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission.” 16 C.F.R. § 3.42(h) (emphasis added).

Respondent cites to no particular subsection of Commission Rule 3.42 that might apply in this instance. Commission Rule 3.42 provides no support for Respondent’s requested relief.

C.

Respondent, which offers no affidavit or declaration in support of its Motion, fails to identify any conduct in this matter by Exide, with respect to Dr. Stevenson in his capacity as expert witness for Polypore, that would warrant any sanction – let alone the requested sanctions, which include the preclusion of any testimony by Exide. While Exide’s conduct may have had the effect of delaying or deterring Dr. Stevenson’s work as an expert witness for Respondent, there is no indication that Exide acted with this specific intent, or did anything in this regard beyond noting to Dr. Stevenson and to Respondent’s counsel a legitimate concern with the protection of Exide’s confidential information.

Complaint Counsel appears to have agreed to each of Respondent’s requests to extend discovery deadlines relating to Dr. Stevenson, and there is no indication that Complaint Counsel “interfered” in any way with Dr. Stevenson’s work as Respondent’s expert witness. Respondent’s counsel, on the other hand, has not demonstrated that it complied with Commission Rule 3.22(g), 16 C.F.R. § 3.22(g). That Rule requires counsel for a party moving for sanctions pursuant to Commission Rule 3.38(b) to “confer[] with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion.” According to Complaint Counsel, Respondent’s counsel did not confer with it about the issues raised by this Motion, including in particular Respondent’s request to preclude testimony, to be offered by Complaint Counsel into evidence, by any Exide witness.

Another sanction that Respondent requests is an order “determining that Dr. Stevenson’s testimony in this matter will not constitute a breach of any obligation of confidentiality owed by Dr. Stevenson to Exide.” Motion at 8. This request for an advisory opinion or declaratory judgment on the scope of the employment agreement between Dr. Stevenson and Exide, which, according to its own terms, is “governed by and construed in accordance with the Law of England,” is inappropriate. Opposition Ex. 1, at ¶ 19.

Respondent relatedly requests an order “limiting Exide’s rights to *in camera* treatment for any testimony offered by Dr. Stevenson in this matter, whether at deposition or at the hearing.” Yet there is no authority for so broadly limiting in advance the right of non-party Exide to take appropriate action, if warranted, to protect the confidentiality of its proprietary information. If Exide or Complaint Counsel were to submit and properly support a motion, pursuant to Commission Rule 3.45, for *in camera* treatment of any testimony or other material by Dr. Stevenson, that motion would be considered.

IV.

Upon consideration of all of the arguments raised in the Motion, Response, and Opposition, and for the reasons set forth above, Respondent's Motion is DENIED.

ORDERED:

Dm Chappell

D. Michael Chappell
Administrative Law Judge

Date: May 1, 2009