



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

_____)
In the Matter of)
)
McWANE, INC.,)
a corporation, and)
)
STAR PIPE PRODUCTS, LTD.,)
a limited partnership,)
Respondents.)
_____)

DOCKET NO. 9351

ORDER ON SIP INDUSTRIES' MOTION TO QUASH SUBPOENA

I. Background

On March 9, 2012, non-party Serampore Industries Private (Ltd.), Inc., d/b/a SIP Industries (SIP), filed a Motion to Quash Subpoena *Duces Tecum* ("Motion") served on it by Respondent McWane, Inc. ("McWane" or "Respondent"). By agreement of the parties, Respondent requested and obtained two separate extensions of time to respond to the Motion so that the parties could continue negotiating SIP's objections to the Motion. See Orders dated March 20, 2012 and April 2, 2012. In accordance with the deadline set by the last extension Order, Respondent filed its opposition to the Motion on April 9, 2012 ("Opposition").

SIP objects to subpoena requests 2, 3, 5 and 6 in their entirety, and objects to part of request 4. According to the Opposition, negotiations between the parties conducted after the Motion was filed resulted in agreement as to request 6 and request 4. Respondent's representations in this regard are accepted, and the Motion with respect to those requests is DENIED WITHOUT PREJUDICE to re-filing in the event that an agreement has not, in fact, been reached. As to SIP's remaining objections, the Motion is GRANTED IN PART and DENIED IN PART, as further explained below.

II. Arguments of the parties

Subpoena requests 2, 3, and 5 ask SIP to produce documents as follows:

Request No. 2: Documents sufficient to identify your purchases of all DIWF [ductile iron waterworks fittings] products from any Person from January 1, 2003 to the present including, but not limited to the Person from whom you purchased

DIWF and the volume units, SKU number, diameter, size, configuration, coating, finishing, price, discount, or rebates attributable to your purchases.

Request No. 3: Documents sufficient to identify your sales of all DIWF products from January 1, 2003 to present including, but not limited to, the Person whom you sold DIWF, the volume, units, SKU number, diameter, size, configuration, coating, finish, price, discount, and rebates of your sales.

Request No. 5: All documents constituting or relating to communications between you and any person relating to proposed or actual sales prices for DIWF, including any discounts or rebates, from January 2, 2003 to the present.

SIP contends that the foregoing requests are overbroad and unduly burdensome because SIP does not organize its data by customer or product, and that SIP does not have the ability or available resources to locate and organize the documents requested. SIP further argues that the requests reach every communication during a nine-year period. In addition, SIP contends that the requested documents contain highly confidential and proprietary information that it should not be required to share with competitors, such as McWane, and that the Protective Order issued in this case is insufficient to protect SIP. In support of the Motion, SIP offers the affidavit of its Vice President of Business Development, Mr. Bharat Agarwal (hereafter, "Agarwal Aff.").

Respondent states that, as a result of negotiations between the parties, Respondent has offered to narrow requests 2 and 3 to only seek "summary level" sales and purchase data, from January 1, 2007 to the present, and to narrow request 5 to only seek emails from one individual, SIP's Vice President of Business Development, from January 2007 to the present. Opposition at 2. According to Respondent, SIP continues to object on the grounds that the requests are unreasonable, unduly burdensome, and request proprietary and confidential information which the Protective Order issued in this case is insufficient to protect. *Id.*

III. Analysis

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1). However, discovery shall be limited if the Administrative Law Judge determines 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. 16 C.F.R. § 3.31(c)(2)(i).

A. Relevance

Although SIP asserts that the requested information is not relevant, it fails to explain this assertion. SIP is a competitor to McWane, purchasing and selling ductile iron pipe fittings ("DIPF"), including the waterworks fittings (DIWF) that are the subject of requests 2, 3 and 5; Agarwal Aff. ¶¶ 2, 3. The Complaint alleges, among other things,

that McWane engaged in anticompetitive and exclusionary acts to enhance or maintain its monopoly power in the relevant domestic ductile iron pipe fittings (DIPF) market. Complaint ¶¶ 69-70. Competitor information is relevant to these monopolization allegations. See *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *5 (Jan. 30, 2004 (noting that competitor information can be crucial in antitrust cases)).

In support of its contention that the requested competitor information is irrelevant in this case, Respondent cites *Spiegel Inc. v. FTC*, 494 F.2d 59 (7th Cir. 1973) and *Independent Directory Corp. v. FTC*, 188 F.2d 468 (2d Cir. 1951). However, neither *Spiegel* nor *Independent Directory Corp.* involved anticompetitive practices in violation of antitrust laws. *Spiegel* was a false advertising case in which Spiegel sought competitor information to show that, compared to its competitors, Spiegel's advertising conduct was exemplary. The court held that the fact that "[t]hat Spiegel's competitors were worse" was not material to whether Spiegel's advertising was deceptive. *Id.* at 64. See also *Independent Directory Corp.*, in which the petitioner was found to have induced new customer listings by misrepresenting its order forms to be those of competitors with whom the customer was already doing business. In that case, it was not error to deny discovery of competitors' order forms to allow petitioner to show that competitors' forms were so different from petitioner's that customers could not actually have confused the forms, where the "test as to the likelihood of deception in these cases [was] not what would be apparent from comparison." *Independent Directory*, 188 F.2d at 471. Thus, both *Spiegel* and *Independent Directory* are readily distinguishable.

SIP has failed to demonstrate that the requests, as limited by this Order, are irrelevant. SIP's remaining objections are addressed below.

B. Overbreadth

SIP objects that the requests seek a "vast amount" of information, going back over nine years. Motion at 6. However, Respondent has agreed to modify the relevant time period to require documents from January 1, 2007, instead of from January 1, 2003, and to limit the request for "all [SIP's] communications" to only emails from one individual, SIP's Vice President of Business Development. The requests will be limited as proposed by Respondent. As so limited, the requests are not overbroad.

C. Burden

SIP contends that even if relevant, locating and organizing all the requested documents "would be an enormous undertaking" that would "unduly disrupt or seriously hinder" SIP's normal business operations. Motion at 6. 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." *In re Polypore*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *Federal Trade Commission v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *In re*

North Texas Specialty Physicians, 2004 FTC LEXIS 14, at *2 (quoting *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965)).

According to the Agarwal Affidavit, SIP is an importer and distributor of a wide range of cast iron products, fittings and other industrial products including fittings and accessories for water works and soil pipes. Agarwal Aff. ¶ 2. A SIP purchase order will often include DIPF products and other products. Agarwal Aff. ¶ 6. SIP has approximately thirty-five employees and contractors, including approximately twenty salesmen and office personnel handling DIPF purchases and sales. Agarwal Aff. ¶ 3.

Prior to 2007, SIP maintained its purchase and sales records in a combination of paper files and computer files, which are not easily accessed. Agarwal Aff. ¶ 4. In 2007, SIP overhauled and updated its computer system. *Id.* SIP's methods of communicating with suppliers and customers include mail, email, text messages, and telephone calls, which are not organized by product or customer. Agarwal Aff. ¶ 5. Therefore, according to the Agarwal Affidavit, "there is no index or other means to access materials related solely to DIPF purchases and sales or regarding individual customers." *Id.* Mr. Agarwal states: "I cannot imagine how we could identify business records, emails and other materials involving only DIPF" without individually reviewing "many tens of thousands" of documents and striking out information related to other products. Agarwal Aff. ¶ 7. SIP maintains that it does not have a team of employees that could be dedicated such a task. *Id.*

As noted above, Respondent has agreed to limit requests 2 and 3 to only summary level sales and purchase data, from January 1, 2007 to the present, and to limit request 5 to only emails from one individual, SIP's Vice President of Business Development, from January 2007 to the present, and the requests will be limited in this manner. Applying the foregoing legal principles and having fully considered the Agarwal Affidavit, requests 2, 3 and 5, as so limited, do not present such a heavy burden as would outweigh the relevance of the inquiry and the public interest. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *6. "The burden of showing that the request is unreasonable is on the subpoenaed party." *In re Polypore*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). SIP has not met this burden.

D. Confidential and Proprietary Information

SIP asserts that the Respondent's subpoena requests demand production of "highly confidential and proprietary" information, such as negotiations regarding SIP's capacity, outstanding orders, and pricing, which could be "highly damaging" to its business if disclosed to SIP's competitors. Agarwal Aff. ¶ 8. However, the fact that discovery "might result in the disclosure of sensitive competitive information is not a basis for denying" discovery. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *5, citing, *inter alia*, *FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (holding that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement"). "In addition,

information on competitors is frequently crucial in proceedings . . . See *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954) (“In an action under the antitrust laws, based upon an alleged abuse of competition, a competitors’ business records, where good cause has been shown are not only not immune from inquiry, but they are precisely the source of the most relevant evidence’).” *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *5.

Moreover, the Protective Order issued in this case protects against disclosure of SIP’s confidential information to McWane or other competitors by limiting those to whom such materials may be disclosed. Paragraph 7 provides:

Confidential material shall be disclosed only to: . . . (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; [and] (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

Protective Order ¶ 7.

SIP further contends that the Protective Order entered in this case is insufficient to protect SIP’s interests because the requests are overbroad and McWane has not explained how the documents might be used in this litigation. In particular, SIP expresses concern over whether and how the documents may be used by retained experts. As noted above, as modified, the requests are not overbroad. Regardless of how the documents might be used, the Protective Order is sufficient to prevent disclosure to SIP’s competitors. Protective Order, Para. 7. Moreover, if the documents are disclosed to consultants, such as experts, paragraph 12 of the Protective Order further provides in pertinent part:

At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters

Contrary to SIP’s assertions, the Protective Order is sufficient to protect the confidentiality of SIP’s documents. Accordingly, SIP cannot withhold documents in response to the requests 2, 3 and 5, as limited by this Order, on the grounds that they are confidential and proprietary.

IV. Conclusion and Order

For the forgoing reasons, SIP's Motion to Quash is GRANTED, to the extent that requests 2 and 3 are hereby limited to "summary level" sales and purchase data, from January 1, 2007 to the present, and request 5 is hereby limited to emails from one individual, SIP's Vice President of Business Development, from January 2007 to the present.

Based upon an apparent agreement by the parties to limit requests 4 and 6, the Motion is DENIED WITHOUT PREJUDICE as to those requests.

Except as set forth herein, the remainder of the Motion is DENIED.

It is hereby ORDERED that SIP shall respond to requests 2, 3 and 5 as limited by this Order on or before May 7, 2012.¹

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 23, 2012

¹ SIP contends that under Commission Rule of Practice 3.37(b) it has thirty days to respond to a request for documents. 16 C.F.R. § 3.37(b). Rule 3.37 governs requests for production directed to "a party" by any other "party." *Id.* at § 3.37(a). Accordingly, Rule 3.37 does not govern the time for responding to a subpoena directed to a non-party under Rule 3.34. Under the circumstances presented, fourteen days is a reasonable time to respond to the modified requests 2, 3 and 5.