

PUBLIC¹

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

In the Matter of)

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.

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Respondent does not appear to be arguing that the requested discovery is not relevant. Instead, Respondent contends that Complaint Counsel has not est-2 (ha)4 (ibha)4 ()-1 (no)-10hdiat the rFnso G

likely benefit is persuasive. However, Respondent has failed to make a persuasive showing with respect to Professor Nader, who is not a member of the faculty.