IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FEDERAL TRADE COMMISSION,	)	Case No. C:16-cv-228
	)	
Plaintiff,	)	Judge Patricia A. Gaughan
	)	
v.	)	Magistrate Judge Kenneth S. McHargh
	)	
CHEMENCE, INC.,	)	
	)	
Defendant.	)	

DEFENDANT CHEMENCE'S COMBINED MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTIONS FOR PROTECTIVE ORDER[1]

(ORAL HEARING REQUESTED)

I. INTRODUCTION

The Federal Trade Commission (FTC) is allowing all of Chemence's competitors to falsely claim that their super adhesives are "Made in the USA" when all parties agree that none of the Intervenors actually produce a super adhesive in the USA. Now Plaintiff FTC has joined forces with Chemence's competitors to hide the very documents that establish that Chemence is the only company manufacturing super adhesives in the USA. Chemence is a defendant in a federal civil prosecution. It is in need of these documents to defend itself against such prosecution. Chemence is also entitled to these documents to identify evidence which will support a Motion for Summary Judgment showing that the FTC has failed to meet its statutory requirements for suing Chemence. Certainly, it is relevant if these documents show that the FTC espouses one standard

[1] In the interest of judicial economy, this Combined Memorandum opposes the Motions for Protective Order filed by Intervenors Gorilla Glue Company ("Gorilla Glue"), Adhesive Systems, Inc. and Royal Adhesives and Sealants LLC (collectively, "ASI") and Toagosei America, Inc. ("Toagosei") (collectively, "Intervenors") and requests that the Court convene an oral hearing on the Motions. (See Docket Nos. 15, 21 and 28, individually a "Motion" and collectively, "Motions.")

on one day for Made in the USA claims with one company and a different standard on the next day with another. Such an inconsistency in the FTC's conduct would damage the credibility of its arguments.

The FTC has never promulgated rules or issued clear standards about the use of "Made in USA" claims on products. Chemence needs discovery from the FTC about the results of its 2014 investigation of the cyanoacrylate glue industry in order to prove its defense that the FTC has applied conflicting standards under the law on an industry-wide basis. In the absence of clear legal standards and proof that Chemence violated a rule made by the FTC, [2] the FTC cannot prevail. The requested discovery from the FTC will show that Chemence's use of "Made in the USA" labeling is not deceptive, does not violate any FTC rule and that the FTC cannot meet its burden of proof.

Chemence is the only chemical processor that makes its glue in the United States. Chemence pays higher costs to process glue in the United States and prides its resulting superior glue products. Chemence does not mislead anyone by making U.S. origin claims on its products. In contrast, the Intervenors lie when they label their products "Made in the USA." The Intervenors do not make glue or anything else in the United States. Everyone agrees that the Intervenors import glue in bulk from other countries and then repackage it in the United States.[3]

With apparent full knowledge about their business practices, the FTC gave the Intervenors a complete pass by approving their U.S. origin claims as long as they make certain disclaimers. Now with their free pass in hand, Intervenors oppose Chemence's discovery requests for the information gathered in the FTC's investigation of the cyanoacrylate glue industry. Intervenors

[2] See 15 U.S.C. §57b(a).
[3] Battisti Dec. ¶9.

oppose the discovery request because it will expose their own U.S. origin claims as false. The FTC does not oppose the Motions because the discovery will also show that this lawsuit is without a legal basis.

To further show the relevance of this requested discovery, the FTC has permitted the Intervenors' to use U.S. origin labels that contradict the Tariff Act of 1930. Section 19 U.S.C. §1304 requires every item of foreign origin imported into the United States be marked conspicuously with its country of origin before passing United States Customs. Commence needs to discover the basis for the FTC to allow such conduct. This argument cannot be fully developed without the discovery at issue here. Chemence has every reason to believe that U.S. Custom records will show that Intervenors import their glue in bulk and then repackage the glue with "Made in the USA" labels only after passing U.S. Customs.[4] These same type of records do not exist for Chemence because its glues are chemically transformed and processed in the United States. Discovery from the FTC about the results of its investigation of this industry are also probative of this potentially case dispositive issue. Again, it is the credibility of the FTC's conduct that is at issue, thus, necessitating Chemence's requested discovery.

The Intervenors also arrogantly claim confidentiality without even producing any type of log identifying the documents withheld or state any specific reasons. The Intervenors have not identified why any one specific document is proprietary and the steps taken to keep it confidential. The Motions lack merit and are a concerted effort to gang up on the only company producing super adhesive in the United States and who is willing to identify the fraud the FTC permits.

[4] Battisti Dec. ¶9.

II. FACTS RELEVANT TO CHEMENCE'S NEED FOR DISCOVERY

A. Chemence Processes Superior Glue Products in the United States.

Chemence chemically processes its cyanoacrylate glue products in its 100,000+ square-foot plant in Georgia.[5] (Battisti Dec. ¶3) Cyanoacrylate glue is a quick-bonding glue used to repair or combine almost anything including plastic and wood. Many people think of this type of glue as "super glue," "Krazy Glue" or "Gorilla Glue". Cyanoacrylate is imported into the USA and exported from the USA under the international harmonized tariff code HS3506. (Battisti Dec. ¶4)

Cyanoacrylate glue is a quick-bonding glue used to repair or combine almost anything including plastic and wood. (Battisti Dec. ¶4) Many people refer to this as "super glue." Chemence uses or has used the brand names of KwikFix, HammerTite and Flash Glue. Gorilla Glue Company uses the brand name "Gorilla Glue", Toagosei America uses the brand name "Krazy Glue" and Adhesive Systems Inc (ASI acquired by Royal Adhesives) uses the trade name "High Performance Instant Adhesive" and ASI also private label its super glues for others such as the Gorilla Glue Company. (Battisti Dec. ¶5) Chemence's glues are superior because they are processed in the United States utilizing unique manufacturing processes and best practices. Multiple raw materials including ethyl cyanoacetate with an international tariff code HS2926 undergo a substantial transformation within the USA and eventually a new chemical is created (super glue) with different characteristics, different use and is evidenced by a new tariff number HS3506. (Battisti Dec. ¶6) Therefore, Chemence's "Made in the USA" labeling is not deceptive.

[5] See Declaration of Peter Battisti ("Battisti Dec.") attached hereto.

B. The FTC Investigates the Cyanoacrylate Glue Industry.

In 2014, the FTC investigated several cyanoacrylate glue companies for making U.S. origin claims. (See e.g. Decl. of Peter D. Ragland attached to Gorilla Glue's Motion, Docket No. 15, pages 1-2; ASI's Motion, Docket No. 21, Fn. 3; Toagosei's Motion, Docket No. 28, page 3.) After comprehensive review of records from several glue companies, the FTC declined to make any specific rules for U.S. origin claims. Instead, the FTC closed its investigations even though it knew that Intervenors imported their glue in bulk from China and only repackage it in the United States. (Battisti Dec. ¶9)

The FTC then sued Chemence to hold it to the same labeling standard as Intervenors. The discovery requested of the FTC will prove the FTC's position in this lawsuit is unreasonable because Chemence processes its glue in the United States while Intervenors do not make anything in the United States.[6]

[6] The chemical processing performed by Chemence is completely different from that employed by either the Gorilla Glue Company, Toagosei America (aka Krazy Glue) and Adhesive Systems Inc. as all three companies repack or assemble imported finished components that do not change the use, or function of the adhesive nor change the harmonized tariff code of the imported article namely cyanoacrylate with harmonized code HS3506 as it remains the same code as the imported article. The 5th and 6th digit of the harmonized code (HS3506.XX) refer to the container or pack size but do not define the article or a code change. Adhesive Systems Inc import both superglue packaging and superglue, also known as Cyanoacrylate (with tariff code HS3506) into the USA from China, Peoples Republic of China, Korea and India and in turn supply the Gorilla Glue Company. Toagosei (Krazy Glue) import superglue with tariff code HS3506 and packaging from China and the Gorilla Glue Company import superglue packaging from China and Korea that they in turn provide to ASI for filling. In all three instances imported (Chinese) superglue and packaging is packed into consumer containers and marked "Made in USA" or "Made in USA with imported materials". In these three instances, the only made in USA item is the product label and blister card that states "Made in USA". (Battisti Dec. ¶¶7-8)

C. The FTC Has Never Articulated Clear Standards or Made Rules Regarding U.S. Origin Claims.

The FTC has never made rules about the use of "Made in USA" claims on products and offers only limited guidance about "Made in USA" claims. The FTC states that a business may make an unqualified "Made in USA" claim when "the product [is] 'all or virtually all' made in the U.S." "'[A]ll or virtually all' means that all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no – or negligible – foreign content."[7]

Chemical processing, however, is distinctly different from traditional manufacturing. Traditional manufacturing assembles various components to create a final product (such as screws, bolts, knobs and sheet metal to create a barbeque grill). (Battisti Dec. ¶11) In contrast, chemical processing actually converts components into new and different compounds. Thus, chemical processing results in an entirely new chemical, not just putting together parts. *Id*. Given this important difference, the limited FTC guidance about U.S. origin claims offers no help to chemical processors such as Chemence.

Without any formal rule by the FTC, the only documents explaining the factors for the FTC's standard for U.S. origin claims are those related to the FTC's investigations of other cyanoacrylate glue manufacturers. Therefore, the requested discovery directly relates to the FTC's claims. Discovery of this information is critical for Chemence to defend itself and understand why the FTC disagrees with its U.S. origin claims when Chemence is the only company in this industry actually processing its glue in the United States.[8] Defendant may be able to identify documents

[7] The FTC offers this guidance in its Enforcement Policy Statement on U.S. Origin Claims contained in a 1998 guidance brochure entitled *Complying with the Made in USA Standard* at page 4 (attached hereto for the Court's convenience) and found at 62 Fed. Reg. 63756 (December 2, 1997)

[8] The Intervenors seemingly argue that the discovery requested does not relate to an Affirmative Defense in its Answer. This is not the case. Chemence did assert as its first affirmative defense

that will assist it to attack the FTC's claim that Chemence violated the law and will also support its position that the FTC did not even meet its statutory requirements to file this lawsuit in the first place.

D. The FTC's Closing Letter to Gorilla Glue Offers Limited Guidance Based on Undisclosed Facts.

The FTC notified Gorilla Glue it was under investigation in October 2014. (Gorilla Glue Motion at page 3, Docket No. 15). Gorilla Glue's Motion represents that Gorilla Glue provided documentation to the FTC relating to its suppliers, contract manufacturers, ingredients, sources of ingredients, percentages of certain ingredients, manufacturing locations, and marketing and packaging materials. *Id*. at 6. The FTC concluded its investigation by issuing a Closing Letter, noting the FTC staff would not recommend further action (the "Closing Letter")(attached hereto for the Court's convenience).

The Closing Letter is the only publicly available document offering any industry specific guidance about U.S. origin claims.[9] In the Closing Letter, the FTC noted that Gorilla Glue's products "include imported raw materials that are significant, either in quantity or to the function of the relevant product." Closing Letter p. 2. The FTC did say what "significant" means.

In the absence of the discovery of the facts considered by the FTC in issuing the Closing Letter, Chemence is left to speculate on the FTC's standard that "[the] percentage of the cost of the product the raw materials *** and how far removed from the finished product the raw materials

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that the FTC has failed to state a claim upon which relief may be granted. (Doc. 4 at p. 3) The discovery requested directly relates to the inability of the FTC to prove its case as noted herein.

[9] The FTC also issued a Closing Letter to Toagosei on April 13, 2015 (attached hereto for the Court's convenience). Although Toagosei's Motion does not refer to this Closing Letter, it reads very similarly to the Gorilla Glue Closing Letter.

are." *Id*. at 1-2. The facts revealed in the FTC's investigation is the only way to explain the FTC's standard.

III. ARGUMENT OF LAW

A. The Applicable Legal Standard.

Federal Rule of Civil Procedure 26(b)(1) permits discovery regarding "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…" Fed. R. Civ. P. 26(b)(1). The federal courts recognize the discovery standard to be liberal in favor of disclosure. *Federal Trade Commission v. AMG Services, Inc., et al.*, 2015 U.S. Dist. LEXIS 114550, *6 (D. Nev. Aug. 28, 2015) (*citing* Fed. R. Civ. P. 26(b), Advisory Comm. Notes (1946)).

B. Courts Allow Discovery of Confidential Information Under Protective Orders.

The Intervenors raise objections about disclosing proprietary information in this case. However, the Intervenors also argue in the alternative that protective order may be appropriate in this case. Courts routinely address similar cases where parties seek to discover the underlying facts discovered by the FTC in industry-wide investigations. Courts often issue protective orders to balance the needs of the requesting party for the information with the competitive concerns of the disclosing party. See Fed. R. Civ. P. 26(c). Commonly FTC enforcement actions present this same issue. Case law strongly favors allowing the discovery under a protective order withholding the discovery altogether.

For example, in *Federal Trade Commission v. Advocate Health Care Network*, 2016 U.S. Dist. LEXIS 24788 (N.D. Ill, Feb. 29, 2016),[10] the court considered a case where the FTC challenged the merger of two healthcare entities. The two defendants requested the FTC produce the information it relied upon to form the basis of the allegations in the lawsuit and the court

[10] Copy attached for the Court's convenience.

permitted the discovery under an existing protective order, with heightened restrictions in place only as to those in competitive decision making roles. The court noted "[w]here in-house counsel are involved in competitive decision making *** the risk of inadvertent disclosure is obviously higher than for retained counsel." In this case, retained counsel is representing Defendant in only this matter and not involved in day to day competitive decision making. Therefore, the risk of inadvertent disclosure is much lower, requiring a less degree of protection as noted by the Court in *Advocate Health Care Network.*

Likewise in *FTC v. Foster,* 2007 U.S. Dist. LEXIS 55163, 2007 WL 2219410 (D.N.M. Apr. 26, 2007),[11] the court permitted discovery of competitors' cost data, customer lists, prices, and volumes sold. The court held that a protective order limiting access as to who could view the information and public disclosure provided adequate protection.

Also, in *FTC v. Whole Foods Mkt., Inc.*, 2007 U.S. Dist. LEXIS 53567, 2007 WL 2059741 (D.D.C. July 6, 2007),[12] the court allowed discovery of confidential business information of Whole Foods' competitors but restricted access from those with competitive decision making within the company, recognizing the relevance of the information to the litigation.

As one more example the court allowed discovery of confidential and proprietary information in *FTC v. Penn State Hershey Med. Ctr.*, 2016 U.S. Dist. LEXIS 24177, 2016-1 Trade Reg. Rep. (CCH) P79,559 (M.D. Pa. Feb. 29, 2016).[13] The court noted that "[i]n FTC litigation in-house counsel typically may have access to confidential information subject to certain reasonable constraints…[w]e conclude that the safeguards in place are sufficient to protect the interests of potential witnesses, while also promoting disclosure of information."

[11] Copy attached for the Court's convenience.
[12] Copy attached for the Court's convenience.
[13] Copy attached for the Court's convenience.

The same result should be reached here. Chemence must discover information about the FTC's investigation of the cyanoacrylate glue industry in order to defend itself and prove Chemence's use of "Made in the USA" labeling is not deceptive. Under these circumstances, the Court should favor disclosure of this critical information to Chemence while protecting disclosure in a reasonable manner.

1. The Cases Cited By Intervenors Present Different Facts From This Case.

The Intervenors cite two cases limiting discovery of trade secrets which do not apply to the facts in this case and are not analagous. In *Mannington Mills, Inc. v. Armstrong World Industries, Inc.*, 206 F.R.D. 525 (D. Del. 2002), the plaintiff requested discovery from a third-party competitor in a patent dispute. Several important differences must be noted about the *Mannington Mills* case.

Most significantly, the *Mannington Mills* lawsuit involved a civil lawsuit between private litigants. In contrast, the FTC is civilly prosecuting Chemence. To show the importance of the difference, one of the remedies the FTC seeks is to disgorge all monies earned from products labeled "Made in the USA," which could poterntially put Chemence out of business. This is not a dispute about only money damages. Given the very serious potential consequences to Chemence in this case, a balancing of the need for discovery with confidentiality concerns necessarily must weigh more in favor of Chemence.

Another important difference is that *Mannington Mills* found that Mannington Mills did not establish factual relevance and potential hardship in the production of the requested discovery due to over breadth. *Mannington Mills* at 532. Those are factual determinations on why the court limited discovery. Obviously, different facts exist in the within case and no Intervener has complained of a hardship simply because Chemence is not requesting the documents from them.

Chemence requested information from the FTC about its closed investigations of its competitors to prove its defense that the FTC has applied conflicting standards under the law on an industry-wide basis. In the absence of clear legal standards and proof that Chemence violated a rule made by the FTC, the FTC cannot prevail. Given the direct relevance of this information to Chemence's defense, factual relevance is not disputed like it was in *Mannington Mills*. Over breadth and burden to produce the information does not exists here either. This is information the FTC already has and could easily produce.

Lastly, the court in *Mannington Mills* expressed concern that even if the information was disclosed under an attorneys-eyes only protective order the information would not be handled properly at trial. *Id.* at 530. However, this is not a legitimate concern here because this case will not be tried to a jury. This Court will control the handling of evidence at all levels and may require trial exhibits be kept under seal. Chemence would not object to such a procedure.

The *Mannington Mills* court also stated concern about the law firms involved in the litigation also representing in the prosecution of patent applications and other proceedings before the Patent and Trademark Office. *Mannington Mills* at Fn 10. In other words, revealing the information to the attorneys would be similar to revealing the information to employees of the company because of their close relationship in the patent field. This issue does not exist here. Undersigned counsel only represent Chemence in this matter and are not involved in any other matters much less competitive decision making. Given these many differences, the *Mannington Mills* case is not instructive to the Court here.

Intervenors also argue that *CACI Field Services, Inc. v. U.S.*, 12 Cl. Ct. 440 (U.S. Cl. Ct. 1987) supports their position that competitive information should not be disclosed. The ruling in *CACI* is not instructive in this case either. In *CACI* the plaintiff sued the government after being

denied a bid. *Id.* at 441. CACI requested discovery about the technical proposals submitted by other companies. *Id.* The court denied only some of the discovery based on relevance and noted that CACI's claims related to GSA's relationship with CACI, not GSA's relationship with other companies. The court did permit some of the requested discovery to the extent it was relevant.

CACI does not apply to the facts of this case. The case involved a bid redress claim, not an FTC enforcement action. The impact of a bid redress matter is limited to the parties, but the impact of an enforcement action expands industry-wide. As noted above, Chemence requested information from the FTC about its closed investigations of its competitors to prove its defense that the FTC has applied conflicting standards under the law on an industry-wide basis. Factual relevance is not disputed in this case like it was in the *CACI* case.

IV. CONCLUSION

Chemence requested discovery from the FTC about the results of its 2014 investigation of the cyanoacrylate glue industry in order to prove its defense that the FTC has applied conflicting standards on an industry-wide basis. Unless the FTC can prove that Chemence violated a rule made by the FTC, the FTC cannot prevail. Discovery from the FTC will show that Chemence's use of "Made in the USA" labeling is not deceptive, does not violate any FTC rule and that the FTC cannot meet its burden of proof. The discovery is highly relevant and the Motions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed on this 23rd day of May, 2016 through the Court's ECF system which will send notification of all parties and counsel having appeared in this matter.

/s/ Helen M. Mac Murray
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