

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LATINO FOOD MARKETERS, LLC.,
a Wisconsin Company,

Plaintiff,

v.

OLE MEXICAN FOODS, INC.,
a Georgia Corporation,

Defendant.

ORDER

03-C-190-C

On February 17, 2004, defendant filed its second “emergency motion” in this case, this time to quash a subpoena issued on third party Wisconsin Cheese Group. *See* Dkt. 101. Plaintiff opposes the motion. I am not convinced that a motion to quash filed 28 days after issuance of the challenged subpoena and 23 days before the anticipated deposition qualifies as an “emergency,”¹ nor do I see the need for a telephonic hearing on this particular motion. This is a garden variety discovery dispute and both sides have had an adequate opportunity to present their positions.²

Having considered both sides’ arguments, I am denying the motion to quash.

¹ Random House Webster’s College Dictionary defines “emergency” as “a sudden, urgent, usually unexpected occurrence usually requiring immediate action; a situation requiring help or relief, usually created by an unexpected event.”

² Defendant filed an unrequested reply which triggered plaintiff’s unrequested surreply. Both are nullities. *See* June 4, 2003 Preliminary Pretrial Conference Order, Dkt. 15, at 5.

From November 2001 through March 31, 2003, plaintiff provided cheese products to defendant pursuant to a contract. At the end of March 2003, defendant terminated the relationship and chose Wisconsin Cheese Group (WCG) as its new supplier. The instant lawsuit resulted, with plaintiff demanding that defendant pay allegedly outstanding and overdue bills for product, and defendant countersuing for alleged overcharges and improper actions that resulted in lost customers and lost sales opportunities.

In the instant skirmish, defendant has leapt to the defense of WCG, claiming that plaintiff's subpoena to WCG demands production of highly-sensitive competitive information that is irrelevant to this lawsuit. The challenged subpoena demands production of WCG's documents relating to communications between WCG and defendant regarding potential sales or sales transactions during the time period April 1, 2004 through April 15, 2003. The subpoena also demands production of all documents relating to potential production, manufacture, sale, private labeling or packaging of cheese or other potential for actual transactions between WCG and defendant during the time period April 1, 2002 through April 15, 2003, including documents relating to pricing, production schedules, production capability, invoices, bills of lading, among other things. *See* Deft's Brief in Support, Dkt. 102, Exh. 1. Defendant claims that none of this is necessary in light of WCG's previous averment that it did not sell any cheese from "Exhibit A" to defendant from November 2001 through March 2003, and that the documents requested contain extraordinarily sensitive, highly-confidential business information that cannot be protected

adequately by any protection order, even “attorneys eyes only.” According to defendant, “the information would provide a road map to a competitive marketing attack.” *Id.* at 2. Predicting that plaintiff might choose to defend against the counterclaim by asserting that defendant was motivated to switch suppliers because of lower prices rather than poor performance by plaintiff, defendant offers to provide generic information about pricing in the form of “over” / “same” / “under” price comparison characterizations.

In response, plaintiff inveighs against the vexatious and overreaching discovery requests it has suffered at the hands of defendant. *See* Pltf’s Brief in Opposition, Dkt. 107. Plaintiff catalogs the extensive discovery to which defendant has subjected it, providing copies of subpoenas from defendant to plaintiff’s suppliers and customers, in which defendant demands production of documents such as price lists, invoices, purchase orders, etc., for the period September 2001 through March 2003. Some of the subpoenas also asked for “all documents relating to your distribution or sale of La Chona during the time period from January 2003 through August 2003.” *See, e.g.*, Deft’s Subpoenas to La Tortilleria, Inc., Southeast Mexican Foods, Edgar Cheese Corporation, Premiere Marketing International, La Campana Distributor, and First Choice Foods, all attached to Dkt. 107. Additionally, plaintiff argues that the disputed pricing information either will or will not show defendant’s motivation to switch from plaintiff to WCG, and the information will be relevant to defendant’s damages claim.

From all this it appears that the parties' attempts to obtain confidential financial information about the other's business dealings roughly mirror each other, with the exception that plaintiff seeks from WCG two extra weeks of information, from April 1 - April 15, 2003.³

I appreciate that all businesses abhor divulging business information of any sort their rivals, but in commercial litigation information must be exchanged that each side would rather keep to itself. This court's starting point in applying Rule 26 is that the fairest, most accurate decisions are reached in lawsuits when both sides have access to all of the arguably relevant information. Only a strong showing of an acute need for complete secrecy will trump a discovery demand backed by a protective order.

Defendant has not come close to making that showing in its motion. I do not discern enough difference here between the timing and types of information sought by the two parties to conclude that plaintiff is not entitled to the information it seeks from WCG in the challenged subpoena. Plaintiff is seeking two extra weeks of information beyond that sought by defendant, and the information is almost a year old. Perhaps last spring's financial information still has currency, but it is not so fresh and vital as to defy disclosure in this lawsuit, particularly where disclosure can be limited to "attorneys' eyes only."

³ Defendant is seeking information through August 2003 regarding one particular product, but this seems different enough to be excluded from the instant analysis.

Therefore, it is ordered that defendant's emergency motion to quash subpoena is denied.

Entered this 1st day of March, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge