IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

WAGGIN' TRAIN LLC,,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	
	)	
	)	Case No. 1:09-cv-01093-JDB-egb
NORMERICA INC., *et al.*,	)	
	)	
Defendants.	)	

ORDER ON PROTECTIVE ORDER MOTIONS

Before the Court are Defendants' three motions for protective order pursuant to Fed. R. Civ. P. 26 and 45 ("Motions") (D.E. 84, 90, 116), which were referred to the Magistrate Judge for a hearing and determination. On December 17, 2009, the Magistrate Judge held a hearing, wherein the parties presented their oral arguments. Based on these arguments, as well as the extensive briefing of these issues, Defendants' Motions (84, 116) are GRANTED IN PART, and Defendants' Motion for Protective Order filed on October 20, 2009 (D.E. 90), is DENIED, as Plaintiff voluntarily withdrew the subpoena to which this Motion referred.

Under Rule 26(c), "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending" Fed. R. Civ. P. 26(c). The court may then, for good cause, issue a protective order that limits the scope of the discovery sought against third parties. *Royal Surplus Lines Ins. Co. v. Sofamor Danek Group,* 190 F.RD. 463, 467 (W.D. Tenn. 1999) ("[C]ourts have been inclined to

limit the scope of discovery directed to non-parties in order to protect the non-party from harassment, inconvenience, or disclosure of confidential documents."); *see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S. Dist. Iowa*, 482 U.S. 522, 566 (1987) (explaining that under Rule 26, "[a] court may 'make any order which justice requires' to limit discovery, including an order permitting discovery only on specified terms and conditions, by a particular discovery method, or with limitation in scope to certain matters"); *Info-Hold. Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) (emphasizing that district courts have discretion to limit the scope of discovery under Rule 26); *Surles ex reI. Johnson V. Greyhound Lines. Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) ("district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce"); *U.S. v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995) ("[Rule 26] do[es] not give a party the right to unlimited discovery."); *Perry v. City of Pontiac*, 254 F.R.D. 309, 312 (E.D. Mich. 2008) ("A court may fashion a protective order to limit discovery in a number of ways, including ... 'forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.'" (quoting Fed. R. Civ. P. 26(c)(1)(D)).

Here, Defendant has demonstrated good cause for the Protective Orders it seeks that pertain to the subpoenas issued to Barrow-Agee Laboratories and Eurofins Scientific Inc. Plaintiff seeks an unlimited array of information from these non-parties on dog treat testing whether or not the testing is related to Plaintiff's and Defendants' products, and whether or not it is related to the products at issue in this case. Defendants have produced documents and information relating to the products at issue in Plaintiff's

amended complaint (Waggin' Train Chicken Jerky Tenders and Waggin' Train Duck Jerky Tenders) and the products identified in Defendants' counterclaim (Vitalife Chicken Tenders and Vitalife Duck Tenders). To the extent that Defendants have not produced documents fitting these criteria, Barrow-Agee Laboratories and Eurofins Scientific Inc. are ordered to produce them. The Court also finds that testing performed on Plaintiff's other dog treat products by the subpoenaed entities at Defendants' request is either relevant and/or may lead to the discovery of admissible evidence and should be produced.

The other information subpoenaed, such as testing performed by these companies on a non-parties' products, and testing performed by the non-parties on other products made by Defendant that are not at issue, is not relevant, and the subpoenas as written are overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence. Indeed, the subpoenas would require the production of a huge array of irrelevant information at great effort and expense, and the Court will not allow such a fishing expedition.

Accordingly, Plaintiff's subpoenas issued to Barrow-Agee Laboratories and Eurofins Scientific Inc. are limited to the production of documents pertaining to: (a) pre-litigation, non-work product testing of (1) any of Plaintiff's dog treat products performed at Defendants' request and (2) Defendants' Vitalife Chicken Tenders and Vitalife Duck Tenders; and (b) post-litigation routine testing (i.e., non-work product) of Defendants' Vitalife Chicken Tenders and Vitalife Duck Tenders.

On the other hand, Defendants' Motion for Protective Order with regard to Plaintiff's request for the voluntary production of documents to non-party Mortec

Scientific Inc. of Cambridge, Ontario, Canada is DENIED. Other than post-litigation testing which is protected by the work product doctrine, Mortec is free to decide whether or not to respond to Plaintiff's informal request, which the Court does not construe as a request pursuant to Rule 34.

IT IS SO ORDERED.

s/ Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

January 8, 2010
Date

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.