

ORIGINAL

PUBLIC

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



In the Matter of _____)
)
ECM BioFilms, Inc., _____)
a corporation, also d/b/a _____)
Enviroplastics International, _____)
Respondent. _____)
_____)

DOCKET NO. 9358

**ORDER DENYING RESPONDENT'S MOTION TO SANCTION COMPLAINT
COUNSEL FOR VIOLATION OF DISCOVERY RULES**

On March 21, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion to Compel and to Sanction Complaint Counsel for Violation of Discovery Rules ("Motion"). Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion on March 27, 2014 ("Opposition").¹ By Order issued March 28, 2014, Respondent's Motion to Compel was granted in part and denied in part, but that Order reserved ruling on the Motion for Sanctions, pursuant to FTC Rules 3.22(e) and 3.38(a), 16 C.F.R §§ 3.22(e), 3.38(a).²

On March 27, 2014, Complaint Counsel filed a Motion to Extend the Word Count Limit under Rule 3.22(f) with respect to its Opposition by 1,000 words, stating that Respondent consented to the proposed relief. Complaint Counsel's Motion to Extend the Word Count Limit is GRANTED.

Complaint Counsel's Opposition contained a request for oral argument on the Motion for Sanctions. Because oral argument is not necessary to resolve the Motion, Complaint Counsel's request is DENIED.

Having fully reviewed and considered the Motion for Sanctions and the Opposition, the exhibits thereto, and all assertions and arguments therein, the Motion is DENIED, as explained below.

¹ Complaint Counsel consolidated its Opposition to the instant Motion with its opposition to a separate, unrelated Motion for Sanctions, filed by Respondent on March 21, 2014.

² Pursuant to Rule 3.38(a), an order on a motion to compel must be issued within 3 business days, as opposed to within 14 days for other motions under Rule 3.22.

I.

Respondent's Motion seeks sanctions in connection with Complaint Counsel's production of: (1) an article titled, "Biodegradability of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation," by Eddie F. Gomez and Frederick C. Michel, Jr., who are associated with Ohio State Agricultural Research and Development Center (the "Ohio State Article" or "Article"), published on October 1, 2013, in a journal entitled *Polymer Degradation and Stability*, 98 (2013) 2583-2591; and (2) a draft of the Article (the "Draft") and various emails reflecting communications between FTC Bureau attorneys and a co-author of the Article ("Communications").

The Article was provided to Respondent for the first time on February 19, 2014, during Complaint Counsel's questioning of ECM's designee, Mr. Sinclair, on the second day of ECM's deposition. On March 13, 2014, Complaint Counsel disclosed that on March 12, 2014, Complaint Counsel learned that "two FTC attorneys (not representing Complaint Counsel)," one of whom worked on the investigative phase of the case but who has since left the FTC, had, in fact, received a draft of the Ohio State Article. See Clarification Regarding Respondent's Sanctions Motion, March 13, 2014; see generally Order Granting in Part and Denying in Part Respondent's Motion for Sanctions, March 21, 2014. On March 17, 2014, Complaint Counsel served Supplemental Initial Disclosures, identifying the Article authors and the above referenced FTC Bureau attorneys, among other FTC personnel, as persons with knowledge of discoverable information. According to the Motion, the Draft and the Communications were provided to Respondent between March 14 and March 18, 2014.

Respondent argues that Complaint Counsel wrongfully withheld the Article, the Draft, and the Communications from Respondent, and requests sanctions under FTC Rule 3.38(b), as follows: (1) censure of Complaint Counsel and referral to D.C. Bar Counsel, Board of Professional Responsibility; (2) compel Complaint Counsel to perform a diligent search of all FTC files and produce all documents responsive to Respondent's Requests for Production, and certify that production is complete; (3) exclude the Article from evidence, and preclude Complaint Counsel from relying on the Article at the trial of this matter; (4) "summarily deny" Complaint Counsel's March 28, 2014 Motion for Certification and to revise discovery deadlines and hearing date; and (5) extend ECM's fact discovery deadline by at least 30 days for the limited purpose of pursuing additional discovery from Mr. Michel, Ohio State University and others involved in the Article, including, but not limited to FTC personnel and Complaint Counsel. Motion at 2-3.

Complaint Counsel denies that it intentionally withheld any information from Respondent. Complaint Counsel asserts that it had no knowledge of the Draft or the Bureau's relationship with Mr. Michel prior to March 12, 2014, and further argues that it was justified in failing to have such knowledge because, Complaint Counsel asserts: (1) the Bureau attorneys communicating with Mr. Michel, and who received the Draft, did so in connection with retaining Mr. Michel as a consultant for two "entirely unrelated investigations"; and (2) the Draft was not used in the investigation or prosecution of the ECM matter. Accordingly, Complaint Counsel argues, it fulfilled its duty to search for responsive documents, as limited by FTC Rule

3.31(c)(2). Complaint Counsel further asserts that it acted diligently to provide, via production in discovery, the materials at issue upon learning of the previous contact with Mr. Michel by other Bureau attorneys. At most, Complaint Counsel argues, the late production was inadvertent and does not warrant Respondent's requested sanctions. Opposition at 5-6.

II.

The records submitted in connection with the Motion and Opposition show that on November 2, 2012, Mr. Michel forwarded the Draft to FTC attorney Wilshire, an attorney in the Bureau of Consumer Protection, then with the Division of Enforcement. CX-C-1; RX C-2; Declaration of Matthew Wilshire, CX-A ("Wilshire Decl.") ¶ 2. From September 2012 until January 6, 2014, when he moved into the Bureau's Division of Financial Practices, Mr. Wilshire was the lead attorney on two environmental marketing matters (Down to Earth Designs, Inc., ("gDiapers")) and another, non-public, investigation (the "Other Matters"). Wilshire Decl. ¶¶ 3, 4. The Draft was received in connection with the attorneys' evaluation of Mr. Michel's credentials to be a consulting expert on the Other Matters. RX C-1. Mr. Wilshire worked on the Other Matters with FTC attorney Pessolano, also in the Bureau of Consumer Protection, Division of Enforcement, but who left the FTC in February 2013. RX C-1; RX-K; Declaration of Kathleen Pessolano, CX-C ("Pessolano Decl.") ¶ 4. Mr. Wilshire forwarded the Draft to Ms. Pessolano on November 16, 2012. Pessolano Decl. ¶ 2.

On December 3, 2012, at the recommendation of attorneys Wilshire and Pessolano (RX I-2), the FTC retained Mr. Michel as a consulting expert in connection with the Other Matters. Wilshire Decl. ¶ 4; RX-J. Mr. Michel proceeded to consult on the Other Matters through at least September 2013. RX-K.

Mr. Wilshire states that he was not involved in the investigation of ECM. Wilshire Decl. ¶ 5. Mr. Wilshire further states that his only participation in this litigation with ECM is through certain recent communications between Mr. Wilshire and Mr. Michel regarding ECM's subpoena to Mr. Michel, which are the subject of ECM's March 25, 2014 Motion for Sanctions for alleged unauthorized interference with third party discovery. *See id.* ¶¶ 5-6, 8. Ms. Pessolano was involved in the pre-Complaint investigation of Respondent, working with Complaint Counsel Johnson, but Ms. Pessolano left the FTC in February 2013, approximately eight months before the Complaint in this case was issued. *See Clarification Regarding Respondent's Sanctions Motion*, March 13, 2014; *see also* RX-I-1; Pessolano Decl. ¶ 1; CX-B, Declaration of Katherine Johnson ("Johnson Decl.") ¶ 2.

Complaint Counsel states that none of the attorneys who have entered an appearance in this litigation were aware of the Article or any version thereof prior to February 14, 2014, and that, prior to February 14, 2014, neither the Article or any version thereof was collected or reviewed by anyone who has entered an appearance as Complaint Counsel. Johnson Decl. ¶¶ 3, 4. Further, Complaint Counsel states that it first learned of prior FTC contact with Mr. Michel on March 12, 2014. *Id.* ¶ 5.

When she resigned from the FTC in February 2013, Ms. Pessolano made a copy of emails that she sent and received regarding the ECM investigation and advised Complaint

Counsel Johnson where to find them. Pessolano Decl. ¶ 4. She also provided Complaint Counsel Johnson with paper files from the ECM investigation. *Id.* Complaint Counsel Johnson acknowledges that Ms. Pessolano's emails and paper files regarding the ECM investigation were provided to her, and that she searched these materials for responsive information, in connection with Complaint Counsel's mandatory Initial Disclosures and Respondent's First Request for Production of Documents. Johnson Decl. ¶ 7. Complaint Counsel acknowledges that it did not search Mr. Wilshire's files, but states that it was because Mr. Wilshire had no involvement with the ECM matter. *Id.* ¶ 8.

III.

FTC Rule 3.38(b) states:

(b) If a party or an officer or agent of a party fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to the following:

- (1) Order that any answer be amended to comply with the request, subpoena, or order;
- (2) Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (3) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- (4) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
- (5) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (6) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

16 C.F.R. § 3.38(b). Sanctions may be imposed for failing to comply with a discovery obligation where the failure to comply was "unjustified and the sanction imposed 'is reasonable in light of the material withheld and the purposes of Rule 3.38(b).'" *In re International Telephone &*

Telegraph Corp., 1984 WL 565367 at **127 (July 25, 1984 (quoting *Grand Union*, 1983 FTC LEXIS 61 at *595)).

Respondent has failed to demonstrate that, contrary to the sworn declarations submitted, Complaint Counsel was aware of the Article prior to February 14, 2014, or of the Draft or the Communications with Mr. Michel prior to March 12, 2014. Further, nothing in the Communications supports a finding that Complaint Counsel had such knowledge. Thus, it cannot be concluded that Complaint Counsel knowingly withheld these materials when responding to Respondent's discovery requests in this case, as argued by Respondent.

Moreover, FTC Rule 3.31(c)(2) provides limits on Complaint Counsel's obligations with respect to searching for responsive documents, as follows: "(2) Limitations. Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics." 16 C.F.R. § 3.31(c)(2). Although Complaint Counsel's discovery obligations clearly are not limited to the attorneys who have entered an appearance in this litigation, as implied by Complaint Counsel, it does not appear that a search, within the parameters of FTC Rule 3.31(c)(2), would have uncovered the Article, the Draft, or the Communications, because these materials were not collected or reviewed for the instant matter, but for the Other Matters.

Even if it is arguable that a more diligent search on Complaint Counsel's part would have uncovered the Draft and the Communications at an earlier time in this litigation, given the limited search for documents authorized by Rule 3.31(c)(2), Complaint Counsel's failure to conduct a more diligent search would not warrant sanctions under Rule 3.38(b), including the extreme sanction of censure and referral to D.C. Bar Counsel, as requested by Respondent. Accordingly, this requested sanction is DENIED.

Respondent's request to compel Complaint Counsel to perform a diligent search of all FTC files and produce all documents responsive to Respondent's Requests for Production, and certify that production is complete, was resolved by the Order of March 28, 2014, granting, in part, Respondent's Motion to Compel. The relief granted therein is sufficient, and therefore, the requested sanction is DENIED AS MOOT.

Respondent's request to "summarily deny" Complaint Counsel's Motion for Certification and to revise discovery deadlines and hearing date, is also DENIED AS MOOT because such Motion was granted, in part, by Order issued April 1, 2014. *See* Order Granting in Part and Denying in Part Motion to Certify Scheduling Issues to Commission and Request for Interim Relief. Similarly, the Revised Scheduling Order issued on April 1, 2014 extended the April 3, 2014 discovery deadline in this case to May 8, 2014, thereby rendering moot Respondent's request for a 30-day extension in order to obtain additional discovery regarding the Article. Because additional time has been added to the discovery calendar in this case, this requested sanction is also DENIED AS MOOT.³

³ This holding is not to be construed as a ruling on the propriety of any particular discovery request that Respondent has issued or may issue with respect to Mr. Michel or the Article.

Respondent's request to exclude the Article from evidence, as a sanction for Complaint Counsel's failure to produce the Article to Respondent until February 19, 2014 was previously denied by the Order of March 21, 2014. Respondent's instant Motion fails to demonstrate sufficient facts to justify reversing the Order of March 21, 2014, and ordering exclusion of the Article from evidence as a sanction. A more reasonable and just remedy is to provide Respondent with additional time to conduct discovery on the Article, which relief has been provided pursuant to the Revised Scheduling Order issued April 1, 2014. *See* 16 C.F.R. § 3.38(c) (sanctions should be "sufficient to compensate for withheld . . . evidence"). Accordingly, Respondent's request to exclude the Article, as a sanction for Complaint Counsel's timing in providing the Article, is DENIED. This holding is not to be construed as a ruling on the admissibility of the Article as evidence in this matter.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 7, 2014