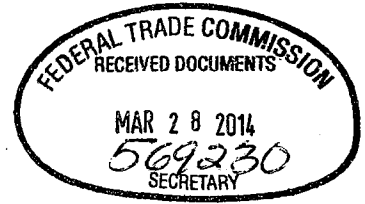


ORIGINAL

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 ON RESPONDENT'S MOTION TO COMPEL

I.

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, and accompanying Memorandum in Support thereof (collectively, "Motion").

The Motion arises in connection with Federal Trade Commission ("FTC") Complaint Counsel's supplemental document production on February 19, 2014 of a published 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"), and Complaint Counsel's subsequent supplemental document production, on March 18, 2014, of a 2012 draft of the Article, and related correspondence from late 2012 and early 2013 between FTC attorneys in the Bureau of Consumer Protection, Division of Enforcement and Mr. Michel, co-author of the Article. Respondent argues that Complaint Counsel's failure to produce the foregoing materials in response to Respondent's December 3, 2013 Request for Production of Documents was due to Complaint Counsel's failure to perform a diligent search for responsive documents and that, therefore, Complaint Counsel should be compelled to perform such a search at this time and thereafter confirm to the Administrative Law Judge that it has completed production of all responsive documents.

On March 27, 2014, Complaint Counsel filed an "Opposition to Respondent's Second and Third Motions to Exclude the Ohio State Study." ("Opposition"). Complaint Counsel has not filed an opposition to the Motion to Compel, and its consolidated Opposition does not directly address the relief requested by Respondent's Motion to Compel, although Complaint

Counsel asserts that its late disclosures were inadvertent. Rather, Complaint Counsel's Opposition focuses on Respondent's motions for sanctions against Complaint Counsel, particularly Respondent's request to preclude Complaint Counsel from introducing into evidence or otherwise relying on the Article for the hearing in this matter.

As set forth below, Respondent's Motion to Compel is GRANTED IN PART and DENIED IN PART.¹

II.

FTC Rule 3.38(a) states in pertinent part:

A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to . . . a production of documents . . . under § 3.37.

16 C.F.R. § 3.38(a).

Based on the language of Rule 3.38(a), Respondent's requested relief is, arguably, outside the scope of a motion to compel. Respondent's motion does not seek to compel additional document production by Complaint Counsel, or request a determination that Complaint Counsel's document productions to date are, in fact, insufficient; rather, Respondent seeks to require Complaint Counsel to again search for responsive documents, and thereafter confirm that its production is complete.

In any event, based on the record presented in the Motion and Opposition, including the exhibits attached thereto, it cannot be concluded, as a fact, that Complaint Counsel's production of documents under Respondent's First Request for Production of Documents is presently complete or incomplete. However, to the extent that Complaint Counsel has not yet conducted a diligent search for additional responsive documents, it shall do so and produce any additional responsive documents.

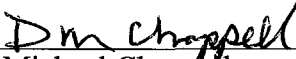
III.

For all the foregoing reasons, Respondent's Motion to Compel is GRANTED IN PART and DENIED IN PART, and it is hereby ORDERED that: to the extent that Complaint Counsel has not yet conducted a diligent search for documents responsive to Respondent's December 3, 2013 First Request for Production of Documents, it shall do so and produce any additional responsive documents no later than April 3, 2014; absent production of additional responsive

¹ FTC Rule 3.38(a), which authorizes motions to compel, requires issuance of an order "within 3 business days" of the response to the motion, as opposed to "within 14 days," as provided for all other motions under Rule 3.22(e). 16 C.F.R. §§ 3.22(e), 3.38(a). Accordingly, it is necessary to decide Respondent's Motion to Compel on an expedited basis and then decide Respondent's accompanying Motion for Sanctions pursuant to the time limits in Rule 3.22(e). Thus, this Order regarding the Motion to Compel is issued today, with the Order regarding the Motion for Sanctions to follow.

documents by April 3, 2014, Complaint Counsel's document production under Respondent's First Request for Production of Documents will be deemed complete. In addition, if no additional responsive documents are produced by April 3, 2014, Complaint Counsel shall inform Respondent in writing, no later than April 3, 2014, that it has completed its search and that no further responsive documents exist. Complaint Counsel may not introduce into evidence or otherwise rely upon, for any purpose, any document that has not been produced to Respondent in compliance with this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 28, 2014