

ORIGINAL

PUBLIC

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



_____)	
In the Matter of)	
ECM BioFilms, Inc.,)	DOCKET NO. 9358
a corporation, also d/b/a)	
Envioplastics International,)	
Respondent.)	
_____)	

ORDER ON COMPLAINT COUNSELS' MOTION TO CERTIFY SCHEDULING ISSUES TO THE COMMISSION AND REQUEST FOR INTERIM RELIEF

On March 18, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Certify Scheduling Issues to the Commission and Request for Interim Relief ("Motion"). Complaint Counsel requests an order: (1) certifying to the Commission the question whether to extend the date for the evidentiary hearing in this case by three months, from the current date of June 18, 2014, to September 18, 2014, "to allow sufficient time to complete discovery"; (2) issuing findings and recommendations supporting the requested extension; and (3) providing "interim relief" by extending all dates in the Scheduling Order between February 28, 2014 through April 30, 2014 by 45 days. On March 28, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed an opposition to the Motion, opposing each of Complaint Counsel's requests for relief and requesting that the existing discovery schedule be enforced. ("Opposition").

Having fully reviewed and considered the Motion and the Opposition, and all assertions and arguments therein, the Motion is GRANTED IN PART and DENIED IN PART, as explained below.

Complaint Counsel also filed, on March 18, 2014, a Motion to Extend the Word Count Limit applicable to the instant Motion. Complaint Counsel represents that Respondent does not oppose a mutual extension, and Respondent did not file an opposition. For the reasons set forth below, the Motion to Extend the Word Count Limit is GRANTED, as to both the Motion and the Opposition.

I. Extension of Word Count Limit

In its Motion to Extend the Word Count Limit, seeking to extend the 2500 word limit

imposed by FTC Rule 3.22(c), Complaint Counsel asserts: (1) its Motion could reasonably be divided into two separate motions (one addressing certification and another addressing interim scheduling relief); (2) “because the Commission lacks the Court’s experience with this litigation’s procedural history, the filing requires additional detail”; and (3) the substantial importance of the issues raised warrants additional space.

Had Complaint Counsel sought to succinctly certify to the Commission only the certifiable issue – the hearing date – rather than to entangle other issues and accusations more properly addressed to the Administrative Law Judge (“ALJ”) assigned to hear the instant case, then an exhaustive account of the discovery disputes to date would not be necessary, nor would relief from the word count limit be necessary.¹ Nevertheless, because Respondent did not object to the relief sought and because both parties have already filed papers in excess of the 2500 word limit, the Motion to Extend the Word Count Limit is GRANTED.

II. Certification to the Commission

Pursuant to FTC Rule 3.11, the Commission sets the date of the evidentiary hearing when it issues its administrative complaint. 16 C.F.R. § 3.11(b)(4). Under FTC Rule 3.21(c), “[t]he Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint.” 16 C.F.R. § 3.21(c)(1). *See also* 16 C.F.R. § 3.21(c)(2) (“The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing.”).

Pursuant to FTC Rule 3.22(a), “[t]he Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule.” 16 C.F.R. § 3.22(a). In accordance with the foregoing Rules, and as more fully addressed herein, the request for a later starting date for the evidentiary hearing is hereby CERTIFIED to the Commission. The remaining requests contained in the Motion are addressed and resolved below.

III. Issuance of Findings and Recommendations

Complaint Counsel devotes the majority of its Motion to airing a long list of grievances against Respondent concerning the timing and sufficiency of Respondent’s discovery responses. Complaint Counsel urges a factual finding that Respondent engaged in intentional, dilatory tactics in providing discovery, thereby impeding the development of Complaint Counsel’s case, and seeks a recommendation to the Commission that the Commission extend the hearing date for this reason. Respondent’s Opposition returns fire with its own list of grievances, attempting to exonerate itself and to demonstrate that any

¹ Moreover, if the ALJ, who is familiar with this litigation’s procedural history and manages all other aspects of the case, was empowered by the Rules to reschedule the hearing date (see Section II *infra*), neither certification to the Commission, nor the “additional detail” would be necessary.

delay in the progress of discovery was due to Complaint Counsel's excessive and unreasonable discovery demands, which properly required negotiation, and ultimately, resolution by the ALJ. It is unfortunate that the certification process, addressed to the full Commission, has become a vehicle for the parties to air their grievances against one another. As Complaint Counsel acknowledges (Motion at 7-8), it is not necessary to demonstrate that a party engaged in intentionally dilatory tactics in order to justify resetting the trial date.

Discovery disputes, for better or worse, are a common occurrence in litigation. The Rules clearly permit a party to object to discovery in whole or in part and to seek orders to protect itself from what it believes is beyond the permissible scope of discovery. At this stage of the proceedings, after a Complaint has been issued and before an Initial Decision is issued, discovery disputes are more properly dealt with by the ALJ, who is the presiding officer with "the duty . . . to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order," and with "all powers necessary to that end." 16 C.F.R. § 3.42(c). The ALJ is thoroughly familiar with the discovery disputes to date, and with the good faith, or lack thereof, of each party, and is in the best position to determine whether scheduling relief is warranted, and, if so, how much time is needed.

Complaint Counsel's request for "findings" is not supported by any legal authority, is not appropriate, and is therefore DENIED. However, because the ALJ is uniquely familiar with the discovery disputes to date, this certification is made with the recommendation that the hearing date be extended.

An eight month time period between issuance of a complaint and the date of trial, as provided under Rule 3.11(b)(4), is insufficient where multiple discovery disputes arise, such as has occurred in this case. Negotiation, which is encouraged by the Rules, takes time, as does motion practice when negotiation fails. The parties are entitled to full and fair discovery. However, Complaint Counsel's request for 90 days is not sufficiently justified. Although Respondent opposes Complaint Counsel's request and "requests that the existing discovery schedule be enforced" (Opposition at 17), in a separate motion to compel and for sanctions, filed March 21, 2014, Respondent seeks an order extending Respondent's fact discovery deadline for conducting additional discovery on a limited matter. Therefore, in order to allow sufficient time for discovery and other trial preparation requirements, this certification is made with the recommendation that the Commission reset the date of the evidentiary hearing for the Tuesday following 45 days from the current hearing date of June 18, 2014, to August 5, 2014. In this respect, Complaint Counsel's Motion is GRANTED IN PART and DENIED IN PART.

IV. Extension of Scheduling Order deadlines

FTC Rule 3.21(c) states, in pertinent part:

The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other

than the date of the evidentiary hearing. . . . In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner.

16 C.F.R. § 3.21(c).

Complaint Counsel contends that it is impossible to complete fact discovery before the present discovery deadline of April 3, 2014. Complaint Counsel asserts that production of documents from ECM customers pursuant to outstanding subpoenas will not occur until early April, and that additional time is necessary to schedule depositions that can make use of the expected documents. Further, Complaint Counsel asserts, expert reports are due on April 16, 2014, and absent an extension of the deadlines, the experts will not have sufficient time to complete their analyses. Similarly, Complaint Counsel asserts, there is insufficient time under the Scheduling Order to make use of the anticipated discovery for purposes of witness lists, exhibit lists, and deposition designations, all of which are due between April 16 and April 24, 2014. Complaint Counsel requests an extension of 45 days for all deadlines between February 28 through April 30, 2014.

Respondent opposes extending the scheduling order deadlines as requested by Complaint Counsel.² Respondent argues that Complaint Counsel's asserted need is a result of Complaint Counsel's own delays and decisions with respect to taking discovery. Respondent contends that an extension of discovery by 45 days, and a three-month extension of the entire matter, will increase ECM's total litigation costs by hundreds of thousands of dollars, and that ECM cannot afford the additional expenses. *See* Opposition, Ex. RX-B ¶ 8 (Declaration of Kenneth Sullivan).

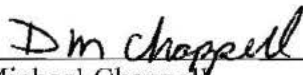
The factual issues in this case are scientific, technical, and complex, and the fact-finding process in this matter will be better served by enabling the parties to develop a complete record. Moreover, there have been no previous extensions of the Scheduling Order deadlines and an extension of certain Scheduling Order deadlines will not affect the ability to conclude the hearing, or render an initial decision, in a timely manner.

Complaint Counsel has demonstrated that good cause exists to extend deadlines in the Scheduling Order to enable completion of discovery in sufficient time before the start of trial. However, its request for an extension of 45 days for only certain deadlines is not feasible with the current hearing date. Issued concurrently with this Order is a Revised Scheduling Order. In the Revised Scheduling Order, pretrial deadlines have been extended as far as possible, given the current starting date for the hearing of June 18, 2014. In the event the Commission

² However, as noted above, Respondent seeks a 30 day extension of its fact discovery deadline to permit it to conduct limited additional discovery. *See* Respondent's Motion to Compel and for Sanctions, filed March 21, 2014.

extends the date of the evidentiary hearing, the Administrative Law Judge will issue another revised scheduling order to reflect any new hearing date. In this respect, Complaint Counsel's request for interim relief is GRANTED IN PART and DENIED IN PART.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 1, 2014