

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 GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SANCTIONS**

On February 28, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion for Sanctions for the asserted failure of Federal Trade Commission ("FTC") Complaint Counsel to supplement its document production "in a timely manner," pursuant to FTC Rule 3.31(e)(2) ("Motion"). 16 C.F.R. § 3.31(e)(2). Complaint Counsel filed an opposition to the Motion on March 10, 2014 ("Opposition"), and a Clarification Regarding Respondent's Motion for Sanctions on March 13, 2014.

On March 12, 2014, Respondent filed a Motion for Leave to Supplement its Motion for Sanctions by submitting a complete transcript of the ECM deposition, in lieu of deposition excerpts as originally filed as RX-A to the Motion. As of the date of this Order, no opposition to that motion has been filed. Respondent's Motion for Leave is GRANTED, and citations to the deposition transcript shall refer to RX-A as supplemented by Respondent.

Having fully reviewed and considered the Motion, Opposition, and Clarification, and the exhibits thereto, the Motion is GRANTED IN PART AND DENIED IN PART, as more fully explained below.

I. Background

The Motion is based upon Complaint Counsel's use of a document at the deposition of ECM, via its designee, ECM's Chief Executive Officer Robert Sinclair, which took place on February 18 and 19, 2014. Motion RX-A (Transcript of Deposition (hereafter "Tr.")). The document, marked as Deposition Exhibit 23, is 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"). Tr. 366. The Ohio State Article was published on October 1, 2013, in a journal entitled *Polymer Degradation and Stability*, 98 (2013) 2583-2591.

Id.; Opposition CCX-A ¶ 5, Attachment 1.

Based on the parties' representations and the exhibits offered in support thereof, on Friday, February 14, 2014, at approximately 8:00 p.m., Complaint Counsel received a copy of the Ohio State Article. Declaration of Jonathan Cohen, Opposition CCX-A (hereafter, "Cohen Decl.") ¶ 6. Although Mr. Cohen states that the article was received "unsolicited," *Id.* ¶ 6, he does not disclose how, or from whom, the Ohio State Article was received. The Declaration further states that Complaint Counsel had not "communicated in any way" with any of the authors of the Ohio State Article, or anyone at Ohio State. Cohen Decl. ¶ 7.

Complaint Counsel's March 13, 2014 "Clarification" regarding the Motion states that on the previous day, 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. The Clarification does not state when the draft was received.¹ According to the Clarification, the two attorneys had been working with Mr. Michel "as a consulting expert on unrelated matters involving biodegradability claims other companies asserted" and received the Article in connection with that work. Clarification at 1 and n.1.

On the afternoon of February 15, 2014, the day after Complaint Counsel received the Ohio State Article, Complaint Counsel Johnson packed for her travel to ECM's offices, where the deposition was scheduled to take place, taking the Ohio State Article with her. Tr. 374-375. February 17, 2014 was President's Day, a federal holiday. The deposition commenced on Tuesday morning, February 18, 2014. Tr. 1. After recessing for the night, the deposition reconvened the following morning, on Wednesday, February 19, 2014. Tr. 223. At approximately 1:24 p.m., after the lunch break, Complaint Counsel produced the Ohio State Article, marked it as an exhibit to the deposition, and proceeded to question Mr. Sinclair concerning the Article, including regarding the findings and conclusions of the study. Tr. 366-378. It is undisputed that this was the first time Complaint Counsel had disclosed the document to Respondent.

In response to the objections of Respondent's counsel, Complaint Counsel stated that it received the Ohio State Article the previous Friday; that Complaint Counsel "might have" had the opportunity to send a copy of it to Respondent's counsel at that time; and that someone on Complaint Counsel's staff also "possibly" could have provided a copy to Respondent's counsel. Tr. 371-372. The dialogue continued:

MR. EMORD: So we could have been given a copy of the document so we could confirm –

¹ The Clarification also does not state, among other details, by whom the draft was received, where it was located, or whether or not the draft was relied upon in the investigation or prosecution of this case. See 16 C.F.R. § 3.31(c)(2) (Complaint Counsel must search for responsive documents "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. . . ."). Respondent has submitted a Motion to Compel and for Sanctions with respect to the draft article and related correspondence.

MS. JOHNSON: Well, you have a copy now. So if you want to take some time and take a look at it, that's totally fine.

Id.

...

MR. EMORD: . . . You gave us no advanced notice of this document. None. You had it on Friday, you knew you were going to use it in a deposition –

MS. JOHNSON: I did not know I was going to use it.

MR. EMORD: When did you decide you were going to use it?

MS. JOHNSON: We packed up our stuff on Saturday afternoon.

MR. EMORD: This is highlighted. Who did the highlighting on the document?

MS. JOHNSON: I'm not going to reveal that.

MR. EMORD: . . . [I]n any event, you did not turn this document over to us when you had the opportunity to do it and –

MS. JOHNSON: This is your opportunity . . .

Tr. 374-375.

...

MS. JOHNSON: I apologize for that. . . . Would you like to take a few moments to read it, we can take a break?

Tr. 375-376.

II. Analysis

A. Overview

Respondent asserts, and Complaint Counsel does not deny, that the Ohio State Article is within the scope of Respondent's First Request for Production of Documents, specifically, Requests 1 and 3, which state:

Document Request 1: Provide all documents that concern whether plastics in general and ECM Plastics in particular will break down and decompose into elements found in nature after customary disposal or in a landfill.

Document Request 3: Provide all documents that support or call into question your conclusion that ECM's biodegradable claims for degradation are false.

Motion RX-B at 7.

Respondent argues that Complaint Counsel intentionally withheld the Ohio State Article from Respondent until the afternoon of the second day of ECM's deposition in order to gain an advantage of surprise, and that such conduct violated Complaint Counsel's duty to supplement in a timely manner under Rule 3.31(e)(2). FTC Rule 3.31(e) provides in pertinent part:

A party who has . . . responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

...

(2) A party is under a duty to amend in a timely manner a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

16 C.F.R. § 3.31(e)(2).

Respondent further argues that Complaint Counsel's conduct in withholding the document was willful and unjustified, and that Complaint Counsel's questioning of ECM on the previously undisclosed document was prejudicial to Respondent. Thus, Respondent argues, Complaint Counsel should be barred from introducing into evidence at trial, or "otherwise relying on" the Ohio State Article, pursuant to Rule 3.38(b)(4). That Rule provides that if a party "fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party," the Administrative Law Judge "may take such action in regard thereto as is just," including a ruling "that the party may not introduce into evidence or otherwise rely" upon "improperly withheld or undisclosed materials, information, witnesses, or other discovery." 16 C.F.R. § 3.38(b)(4).

B. Timely Supplementation

Complaint Counsel does not dispute that it was under an obligation to supplement its previous document production by providing the Ohio State Article to Respondent. The disputed issue is whether, under the circumstances presented, Complaint Counsel's conduct in delaying production of the Ohio State Article until five days after its receipt, during the middle of the second day of a previously scheduled deposition, violated Complaint Counsel's obligation to supplement "in a timely manner." As explained below, and based on the record presented, by delaying production of the Ohio State Article and presenting the Article to Respondent for the first time in the midst of the second day of the deposition, when Complaint Counsel had clearly determined the relevance and possible use of the Article before the start of the deposition, Complaint Counsel did not supplement in a timely manner.

Complaint Counsel clearly recognized the relevance of the Ohio State Article, if not immediately upon receipt, then certainly no later than Saturday afternoon, February 15, 2014,

when Complaint Counsel packed the document in order to use it at ECM's deposition. *See* Tr. 374-375. Yet Complaint Counsel declined numerous opportunities to provide the Article to Respondent and thereby fulfill its duty to supplement Complaint Counsel's prior document production. Putting aside whether, in the current age of instant communications, including via government issued Blackberry, Complaint Counsel had an obligation to transmit the Article to Respondent over the long holiday weekend, Complaint Counsel fails to explain or justify why it did not supplement its document production by providing the Ohio State Article to Respondent before the start of the ECM deposition, during the first day of the deposition, or at any other time prior to marking the Article as a deposition exhibit on the afternoon of the second day of the ECM deposition.

Rule 3.31(e) does not define what constitutes a "timely manner" for purposes of the duty to supplement. Furthermore, the parties do not point to a case defining the phrase in the context of the type of delayed supplementation present in this case. However the phrase "timely manner" might be defined, it manifestly does not include a conscious withholding of a responsive document that was planned to be used as a deposition exhibit, as occurred in this case.

Having determined that Complaint Counsel violated its obligation to supplement discovery in a timely manner, the analysis now turns to whether a sanction is appropriate, as requested by Respondent.

C. Sanction

Respondent argues that the appropriate sanction for Complaint Counsel's violation is to bar any use of the Ohio State Article for purposes of trial. Respondent contends that Complaint Counsel's conduct was willful and unjustified. In addition, Respondent asserts that Complaint Counsel's delay in producing the Article until the second day of the deposition prejudiced Respondent, because the delay put Mr. Sinclair in the position of answering questions about the Article without adequate preparation. According to Respondent, where a discoverable document is improperly withheld, the customary remedy is to exclude the document from any use at trial.

Complaint Counsel responds that there has been no prejudice to Respondent because Mr. Sinclair "admitted essentially nothing" about the Ohio State Article; Mr. Sinclair is free to testify at trial that he believes the study was faulty;² ECM's experts have until April 30, 2014 to analyze the study; and providing the document earlier "would not have affected [ECM's experts'] ability to respond" Opposition at 6.

"Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process." *In re Grand Union Co.*, 102 F.T.C. 812,

² Indeed, Complaint Counsel contends that ECM has, in fact, gained an advantage vis a vis Mr. Sinclair's potential trial testimony concerning the study. Complaint Counsel states: "[I]f Complaint Counsel had forwarded ECM the Ohio State Study early (in the middle of the night on Friday the 14th, or at the end of the day on Tuesday February 18 (after one business day had elapsed)), Sinclair could not have testified that he had never seen the study before, which might have made it difficult for him to supplement any hastily-prepared deposition testimony at trial." Opposition at 6. Instead, according to Complaint Counsel, the fact that Sinclair had not seen the study before "gives ECM several months to figure out some sort of response." *Id.*

1983 FTC LEXIS 61 at *594 (July 18, 1983). 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).’” See *Matter of International Telephone & Telegraph Corp.*, 1984 WL 565367 at **127 (July 25, 1984 (quoting *Grand Union*, 1983 FTC LEXIS 61 at *595)).

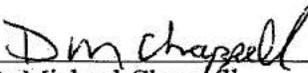
Regardless of whether exclusion of the Ohio State Article would be an appropriate remedy had Complaint Counsel delayed production of the document until after the discovery deadline or the start of trial – conduct present in the cases cited by Respondent – in the instant case the extent of Complaint Counsel’s delay does not warrant this sanction. The fact discovery deadline in this case is presently April 3, 2014, and the close of expert discovery is presently May 16, 2014. Trial is currently scheduled to begin on June 18, 2014. Under these circumstances, exclusion of the Ohio State Article is not necessary or appropriate to remedy the asserted prejudice. Accordingly, Respondent’s request to exclude the Article, as a sanction for Complaint Counsel’s delayed production of the Article, is DENIED.

However, Respondent has demonstrated that Complaint Counsel violated its discovery obligation to supplement in a timely manner with respect to the Ohio State Article, and based on the facts presented, a sanction is appropriate. Accordingly, the Motion is GRANTED IN PART. Complaint Counsel has failed to show that its conduct was justified, and a sanction under these circumstances will affirm the integrity of the administrative process. Moreover, Complaint Counsel should not be permitted to benefit from its conduct. In the instant case, a reasonable and just sanction under Rule 3.38(b) is an order prohibiting Complaint Counsel from using or in any way relying upon any of Mr. Sinclair’s deposition testimony regarding the Article. Rule 3.38(b) (stating that ALJ may enter any sanction order that is “just”); see also Rule 3.38(c) (stating that ALJ shall order relief “as may be sufficient to compensate for withheld testimony, documents, or other evidence”).

III. Conclusion and Order

For all the foregoing reasons, Respondent’s Motion for Sanctions is GRANTED IN PART, and it is hereby ORDERED, that Complaint Counsel may not introduce into evidence, or otherwise rely, for any purpose, including without limitation impeachment, upon testimony given at the deposition of ECM on February 18 and 19, 2014, regarding the Ohio State Article. The Motion is in all other respects DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 21, 2014