

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)
)
Envioplastics International,)
)
Respondent.)

DOCKET NO. 9358

**ORDER DENYING RESPONDENT’S MOTION FOR
SANCTIONS FOR UNAUTHORIZED DISSUASION OF
RESPONSE TO SUBPOENA *DUCES TECUM***

On March 20, 2014, Respondent ECM BioFilms, Inc. (“Respondent” or “ECM”) filed a Motion to Sanction Complaint Counsel, together with a supporting memorandum and exhibits (collectively, “Motion”). Respondent submitted two additional exhibits, by way of supplementation to the Motion, on March 25, 2014, and March 31, 2014. Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition to the Motion on March 27, 2014, and an amended opposition, containing minor non-substantive corrections, on March 28, 2014. (“Opposition”).¹ Having fully reviewed and considered the Motion for Sanctions, the Opposition, the exhibits thereto, and all assertions and arguments therein, the Motion is DENIED, as explained below.

On April 1, 2014, Respondent filed an additional exhibit, through what Respondent titled a “third supplement” to the Motion; however, upon review, this exhibit pertains to different alleged conduct, and a different witness, and is outside the scope of the instant Motion. Accordingly, the exhibit was improperly filed and is not considered herein. On April 3, 2014, Complaint Counsel filed a Motion for Leave to File a Response to ECM’s Third Supplement. Because the third supplement is not being considered herein, Complaint Counsel’s Motion to respond to the supplement is unnecessary, and therefore, Complaint Counsel’s Motion is DENIED AS MOOT.

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. Complaint Counsel’s Motion to Extend the Word Count Limit with respect to the Opposition was granted by an Order issued April 7, 2014. By that same Order, Complaint Counsel’s request for oral argument on the Motion was denied.

I.

The material facts are not in dispute. On February 28, 2014, Respondent issued a Subpoena *Duces Tecum* to Frederick C. Michel, Jr. RX-E (“Subpoena”). By way of background, Mr. Michel is a researcher with Ohio State University, and the author of an article titled, “Biodegradability of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation” (“Article”). The Article was first provided to Respondent in the course of the ECM deposition on February 19, 2014. *See generally* Order Granting in Part and Denying in Part Respondent’s Motion for Sanctions, March 21, 2014. Thereafter, on March 14, 2014, Complaint Counsel disclosed that it had just learned that, in December 2012, Mr. Michel had been retained by the FTC as a consultant on two other environmental marketing enforcement matters (the “Other Matters”) and had worked with other attorneys in the FTC Bureau of Consumer Protection (“Bureau”) on those matters. Further, Complaint Counsel disclosed that those attorneys had received a draft of the Article in connection with Mr. Michel’s consultancy. *See* Clarification Regarding Respondent’s Sanctions Motion, March 13, 2014. Between March 14 and March 18, 2014, Complaint Counsel provided documents to Respondent pertaining to the FTC’s relationship with Mr. Michel. *See* Order of March 21, 2014, *supra*. In addition, on March 17, 2014, Complaint Counsel supplemented its initial disclosures to, *inter alia*, identify Mr. Michel as a “person with knowledge” of scientific testing relevant to this case.

The Subpoena to Mr. Michel directed that the requested documents be provided to Respondent by March 17, 2014. Included with the Subpoena was a copy of the Protective Order Governing Discovery Material issued in this case, as required by paragraph 4 of the Protective Order.

On March 12, 2014, almost two weeks after the date the Subpoena was issued, Mr. Michel telephoned Bureau attorney Wilshire, who was the lead attorney on the Other Matters, and advised that he had received a subpoena in the instant case. Declaration of Matthew Wilshire, CX-A (“Wilshire Decl.”) ¶ 6. Complaint Counsel states that this was the first time Complaint Counsel learned that anyone at the FTC had had contact with Mr. Michel. Opposition at 2; CX-B, Declaration of Katherine Johnson (“Johnson Decl.”) ¶ 5. According to Mr. Wilshire, Mr. Michel advised him that some responsive documents in his possession had been submitted to the FTC by third parties in connection with the investigation of the Other Matters (the “Third Party Submissions”). Wilshire Decl. ¶ 6. The Third Party Submissions had been provided to Mr. Michel in the course of his consulting work on those Other Matters. *See* RX-B; CX-A:1

On March 14, 2014, Mr. Wilshire sent a letter to Mr. Michel, with a copy to Complaint Counsel and Respondent’s counsel. The letter asserted that the Subpoena’s request for “[a]ll correspondence between” Mr. Michel and the FTC (Document Request 20), encompassed certain third party documents governed by the nondisclosure agreement that Mr. Michel executed prior to receiving such documents. Mr. Wilshire advised that the nondisclosure agreement “provides that you will not divulge any materials or information you receive from the FTC to outside parties, unless directed to do so by FTC Staff in connection with an adjudicative proceeding.” RX-B. The March 14, 2014 letter continued:

Because the third party materials in question may be entitled to confidential treatment under the FTC Rules of Practice, we request that you delay production of those materials until **March 28, 2014**. This is necessary to give the submitters “an opportunity to seek an appropriate protective or *in camera* order” regarding any confidential materials. See 16 C.F.R. § 4.10(g).

Id. (emphasis in original). The letter concluded that “[w]e have no objection” to Mr. Michel’s producing any other requested documents by the Subpoena return date of March 17, including communications between Mr. Michel and FTC staff, provided that [they] are stamped “confidential,” and that “[u]nless we direct you otherwise, we have no objection to you producing the remaining responsive documents on March 28.” RX-B. Mr. Wilshire’s letter did not inform Mr. Michel that he, Mr. Wilshire, did not represent Mr. Michel with regard to Mr. Michel’s obligations under the Subpoena, and instructed Mr. Michel to provide the subject materials after the Subpoena deadline.

On March 14, 2014, Mr. Wilshire sent notices to counsel for the Other Matters, informing them of “their rights under Commission Rule 4.10(g), 16 C.F.R. § 4.10(g), to protect confidential information.” Wilshire Decl. ¶ 7.

In response to Mr. Wilshire’s letter to Mr. Michel, on March 14, 2014, Respondent’s counsel emailed Mr. Michel and others stating that Mr. Wilshire’s March 14, 2014 letter directing Mr. Michel to delay production of certain documents until March 28, 2014, was without proper legal authority and invalid. RX-A:2. The email further noted that absent a motion to quash under FTC Rule 3.34, Mr. Michel was bound to comply with the Subpoena’s return date of March 17, 2014. *Id.* Respondent’s counsel further asserted that the Protective Order in this case, which was provided along with the Subpoena, specifies the means by which Mr. Michel can designate confidential documents and that the Protective Order, not FTC’s letter, governs the matter. *Id.*

On March 17, 2014, Mr. Michel provided Respondent’s counsel with a CD containing documents responsive to Document Request 20, requesting “all correspondence between” Mr. Michel and the FTC. RX-A:3. However, in the accompanying transmittal letter, Mr. Michel advised Respondent that he was not producing at that time “documents that contain information submitted by 3rd Parties to the FTC” *Id.* Mr. Michel continued: “It is my understanding that disclosing these protected documents would violate a non-disclosure agreement between me and the FTC. I understand that third parties who submitted these documents to the FTC have the right to object to their disclosures according to FTC rules.” *Id.* Mr. Michel further advised Respondent that the documents responsive to all remaining document requests in the Subpoena were being supplied separately by the Ohio State University. *Id.* The transmittal letter concluded: “Unless directed otherwise by FTC staff, I will produce all responsive documents in my possession in native format by March 28th, 2014.” *Id.*

On March 24, 2014, Mr. Wilshire again wrote to Mr. Michel regarding the Subpoena, advising him that one of the third parties concerned, Down to Earth Designs, Inc., had responded that it does not object to production of materials it submitted, “provided that those materials are marked as confidential pursuant to the protective order entered in this matter [‘Protective Order’]. Accordingly, I am now instructing you to produce, as soon as reasonably practicable,

responsive documents submitted by Down to Earth Designs” Respondent’s First Supplement to Motion for Sanctions, RX-J. Thereafter, on March 28, 2014, Mr. Wilshire sent an email to Mr. Michel confirming that the other third party whose documents were at issue “has not objected” to production of its documents, provided they are marked confidential under the Protective Order, and directing “you should now produce any remaining” responsive documents submitted by this third party. Respondent’s Second Supplement to Motion for Sanctions, Attachment A. There is nothing in the record to indicate that Mr. Michel failed to provide the Third Party Submissions on or before March 28, 2014.

II.

FTC Rule 3.38(b) governs the issuance of sanctions. That Rule 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 asserts that Complaint Counsel purposefully interfered with subpoena compliance by a third party by directing Mr. Michel to delay providing certain documents until

March 28, 2014, when the Subpoena return date was March 17, 2014. Respondent argues that such conduct is contrary to the law and unethical, and is routinely sanctioned by the courts. Even if Mr. Michel possessed confidential third party documents, Respondent argues, the Protective Order issued in this case governs production of such materials in discovery, and is sufficient to protect the confidentiality of the documents. Respondent requests the following sanctions: (1) censure Complaint Counsel and refer this matter to the D.C. Bar and the FTC's Inspector General; (2) exclude the Article from evidence at the hearing, and preclude Complaint Counsel from relying on the Article in any way; and (3) extend ECM's fact discovery deadline to permit ECM a limited opportunity to conduct additional discovery from Mr. Michel and others involved with the Article. Motion at 2.

The Protective Order Governing Discovery Material in this case, issued verbatim in accordance with FTC Rule 3.31, Appendix A, provides that: "Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order." Protective Order ¶ 2. Confidential material produced in discovery may not be disclosed, except for the purpose of hearing preparation and appeal, and except to limited individuals involved in the litigation such as "(a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question." *Id.* ¶ 7.

Complaint Counsel maintains that, notwithstanding the Protective Order, the FTC has statutory and regulatory obligations that affected the release of investigative documents submitted by third parties to the FTC ("submitters") and provided to Mr. Michel for his consulting work on the Other Matters, including: (1) the obligation to notify the third party submitters, and (2) the obligation to act to prevent Mr. Michel's disclosure of those investigative submissions, which Mr. Michel possessed as an agent of the FTC on the Other Matters, pending such notification and further action by the third party submitters.² These facts, Complaint Counsel argues, readily distinguish this case from Respondent's cited cases, which involve private litigants without such obligations. Opposition at 2-4.

Complaint Counsel relies on FTC Rule 4.10(g), which states in pertinent part:

(g) Material obtained by the Commission:

² Complaint Counsel does not contend that, in preparing his letters to Mr. Michel, Mr. Wilshire acted independently of Complaint Counsel or otherwise without Complaint Counsel's advance knowledge and approval.

(1) Through compulsory process and protected by section 21(b) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(b) or voluntarily in lieu thereof and designated by the submitter as confidential and protected by section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(f), and § 4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(c), and § 4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and § 4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§ 1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

16 C.F.R. § 4.10(g).

FTC Rule 3.45, referred to in Rule 4.10(g) above, designates procedures for obtaining *in camera* treatment for confidential information to be offered into evidence in an administrative hearing. Specifically, the Rule provides that “[a] party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days['] notice of the proposed use of such material.” 16 C.F.R. § 3.45(b).

According to Complaint Counsel, the nondisclosure agreement signed by Mr. Michel “requires FTC staff or the FTC General Counsel to consent to disclosure” of the third party materials provided to the FTC and forwarded to Mr. Michel as its consultant for the Other Matters. Opposition at 3. The nondisclosure agreement prohibits Mr. Michel from divulging materials and information received from the FTC except to “an authorized person.” CX-A:1. The agreement further states, however:

None of these provisions [barring disclosure] shall limit disclosures: (1) at and consistent with directions of FTC staff, during an adjudicative or judicial proceeding to which the FTC is a party; or (2) with the written consent of FTC General Counsel . . . which consent can only be given if consistent with the FTC Act, the FTC’s Rules of Practice, and any other applicable laws, regulations or orders.

Id.; see also 16 C.F.R. § 4.10(d) (authorizing FTC to disclose confidential submission to “a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information”).

III.

Complaint Counsel’s argument that, pursuant to Rule 4.10(g), the FTC was legally required to direct Mr. Michel to delay providing the Third Party Submissions until March 28, 2014, in order to enable the submitters time to file a motion under Rule 3.45, is based upon an incorrect interpretation of the Commission’s Rules of Practice. It is clear from the plain language of Rule 4.10(g) that the Rule is designed to protect third party investigative documents from being made *public* in a judicial or administrative proceeding. The Rule accomplishes this by requiring that a submitter of documents receive advance notice so the submitter can file for either a court protective order, in the case of a judicial proceeding, or in the case of an administrative proceeding, an order granting *in camera* treatment of such documents pursuant to Rule 3.45. An *in camera* order under Rule 3.45 is only applicable to confidential documents “offered into evidence” at the hearing. 16 C.F.R. § 3.45(b). Thus, Rule 4.10(g) does not govern maintaining confidentiality of materials provided in discovery. Rather, maintaining the confidentiality of such materials is accomplished through the Protective Order, which by rule must be entered at the beginning of an administrative proceeding, and which was entered in this case on October 22, 2013. See 16 C.F.R. § 3.31 Appendix A. The provisions in the Protective Order are adequate to protect the Third Party Submissions from public disclosure during the pretrial phase of this case. See Order Denying Respondent’s Motion for Protective Order and Granting Complaint Counsel Cross-Motion to Compel (January 10, 2014). In the event that either party seeks to introduce any of the Third Party Submissions into evidence at the hearing in this matter, the procedures of Rule 3.45 will apply.

Ideally, upon receipt of the Subpoena on February 28, 2014, Complaint Counsel would have immediately notified the third party submitters of the production of their confidential documents in discovery in this matter, and provided them with a copy of the Protective Order. This would have provided ample time for the submitters to investigate their rights and seek any desired relief before the Subpoena’s document production deadline of March 17, 2014. Similarly, after receiving the Subpoena on February 28, 2014, Complaint Counsel had 10 days to file a motion to limit the Subpoena under Rule 3.34(c), pursuant to which it could have sought to delay production, based upon the FTC’s asserted obligation to protect the Third Party Submitters, pending notification to the submitters. See Rule 3.34(c). Unfortunately, Complaint Counsel’s failure to ascertain until March 12, 2014 that Mr. Michel had a consulting relationship with Complaint Counsel’s attorney colleagues in the Bureau of Consumer Protection effectively precluded both alternatives. See April 7, 2014 Order Denying Respondent’s Motion to Sanction Complaint Counsel (explaining history of relationship between Bureau attorneys and Mr. Michel and timing of Complaint Counsel’s discovery of relationship).

Another option that could have protected both the third party submitters and the discovery process herein would have been for Mr. Michel to be directed to mark the Third Party Submissions “confidential,” prior to providing the documents to Respondent, just as Mr. Wilshire’s March 14 letter directed with respect to all other FTC correspondence with Mr. Michel encompassed by Subpoena Document Request 20. See RX-B. Proceeding in this fashion

would have enabled timely production, and protection, of the Third Party Submissions, pending formal notification to the submitters of the documents' release and any objections thereafter posed by the submitters.

Notwithstanding the foregoing, however, Respondent has failed to demonstrate that Complaint Counsel's conduct with regard to the Michel Subpoena constitutes "purposeful interference" justifying the requested sanctions. Among other things, Respondent has failed to show that the conduct herein was for the purpose of interfering with Respondent's rights, as opposed to enforcing what was believed, albeit erroneously, to be legal obligations to the third party submitters. There is no indication that Complaint Counsel acted wilfully or in bad faith, in asserting an obligation to keep the Third Party Submissions confidential, including in the hands of Mr. Michel, pending notification to the submitters. Moreover, Respondent has not shown that the conduct at issue had the effect of depriving Respondent of relevant discovery.

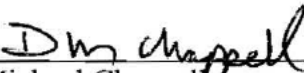
Finally, the FTC's obligations to third party submitters of investigative documents readily distinguish the facts of this case from those in the cases cited by Respondent, which involved private litigants, who do not have these obligations. Moreover, the bad faith, purposeful interference addressed in Respondent's cited cases is not analogous to Complaint Counsel's demonstrated conduct in the instant case. *See, e.g., Price v. Trans Union, L.L.C.*, 847 F. Supp.2d 788 (E.D. Pa. 2012) (sanctioning plaintiff for letters to subpoenaed non-parties directing non-parties not to respond to defendant's subpoenas, because, among other things, plaintiff's conduct was intended to hinder discovery and plaintiff had acted in willful bad faith); *Fox Indus., Inc. v. Gurovich*, 2006 WL 2882580 (E.D.N.Y. Oct. 6, 2006) (sanctioning defendant and holding that letters to subpoenaed non-parties directing the non-parties not to respond to plaintiff's subpoenas, stating that the subpoenas were "null and void as a matter of law and should not be complied with," constituted "clear evidence" of bad faith and evinced a deliberate effort to usurp the authority of the court).

Although Complaint Counsel may have erred in its interpretation of Rule 4.10(g), this is not a sufficient basis upon which to grant a motion for sanctions.

IV.

Having fully reviewed and considered Respondent's Motion for Sanctions, Complaint Counsel's Opposition thereto, the attached exhibits, and all arguments and assertions of the parties, and for all the foregoing reasons, Respondent's Motion for Sanctions is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 9, 2014