

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 ON COMPLAINT COUNSEL'S RENEWED
MOTION TO COMPEL AND MOTION FOR SANCTIONS**

On February 28, 2014, Complaint Counsel filed a combined Renewed Motion to Compel ("Renewed Motion to Compel") and Motion for Sanctions ("Motion for Sanctions") (collectively, "Motion"). Respondent ECM BioFilms, Inc. ("ECM" or "Respondent") filed a combined opposition to the Motion on March 6, 2014 ("Opposition").

Having fully reviewed and considered the Motion and Opposition, Complaint Counsel's Renewed Motion to Compel is GRANTED IN PART AND DENIED IN PART, as explained below. Complaint Counsel's Motion for Sanctions is DENIED WITHOUT PREJUDICE.

I. Background

On January 23, 2014, Complaint Counsel, pursuant to Rule 3.38(a), filed a Motion to Compel Respondent to Produce Documents in response to Complaint Counsel's November 27, 2013 Request for Production of Documents ("Motion to Compel"). Respondent opposed that motion on the grounds, *inter alia*, that the document requests at issue were overbroad, not reasonably calculated to lead to relevant information, and unduly burdensome and expensive.

Prior to the filing of the Motion to Compel, the parties had been negotiating certain limitations to Complaint Counsel's Document Requests. *See* Motion to Compel CCX:A; CCX:A-1-A-4. After the filing of the Motion to Compel, the parties continued their negotiations, including a deadline for Respondent's completing production. *See* Renewed Motion to Compel CCX:A-1; CCX:A-2. On February 7, 2014, Complaint Counsel filed a Withdrawal of the Motion to Compel ("Withdrawal"). This filing recited an agreement between the parties pursuant to which Respondent would, *inter alia*: (1) produce its entire "email archive" for the period January 1, 2009 through January 1, 2014, including internal

communications to the extent they exist, subject to certain limitations; (2) produce files from the email archive on a rolling basis, and complete production of such files by February 21, 2014; and (3) complete its production of Respondent's "summary database" encompassing Respondent's database of summaries of all emails, faxes, and phone calls from January 1, 2009 to the present, on or before February 12, 2014. Complaint Counsel further stated in the Withdrawal that, based on the foregoing agreement of Respondent, the Motion to Compel was moot and was thereby withdrawn, without prejudice to its right to refile the Motion, in the event Respondent did not abide by its agreement.

II. Renewed Motion to Compel

In its Renewed Motion to Compel, Complaint Counsel argues that Respondent failed to abide by its agreement by failing to complete production of all files from the email archive by the agreed upon date of February 21, 2014. Complaint Counsel seeks an order compelling Respondent to produce the remaining files from the email archive "immediately." Respondent does not dispute that it failed to complete this production by the agreed upon date. Respondent further states that at the time it agreed to produce all the files from the email archive by February 21, 2014, it believed that the deadline was reachable, but that when ECM began the project of extracting PDF files from the email archive, Respondent discovered that there were more responsive documents than anticipated, and that the process of extracting the files was more cumbersome than expected, thereby requiring additional time to complete production. Respondent further states that it began producing the subject documents on February 18, 2014; has continued to produce such documents on a rolling basis; and will complete production by March 14, 2014.

Rule 3.38(a) of the Commission's Rules of Practice states in part: "A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including . . . production of documents or things or access for inspection or other purposes under § 3.37." 16 C.F.R. § 3.38(a).

Based on the representations of the parties and the exhibits attached to the Renewed Motion to Compel and the Opposition, Respondent failed to complete production of all the files from the email archive by February 21, 2014, as the parties had agreed. Renewed Motion to Compel CCX A:3. The record further shows that Respondent produced approximately 20,000 pages of the subject email archive files on February 18, 2014, and has continued to produce responsive documents on a rolling basis, most recently on March 6, 2014. Opposition RX-1 attachment A. Thus, Complaint Counsel has demonstrated that Respondent failed to complete its production of files from the email archive by the agreed upon date of February 21, 2014, and that, as of March 6, 2014, Respondent's production remains incomplete. In this regard, therefore, Complaint Counsel's Renewed Motion to Compel is GRANTED. However, the Motion to Compel is DENIED, to the extent that Respondent will not be ordered to complete production of the files from the email archive "immediately," as requested by Complaint Counsel. Respondent is ordered to complete production of the files from the email archive by March 14, 2014, the date upon which Respondent represents that it will do so.

III. Motion for Sanctions

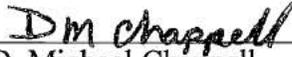
Complaint Counsel seeks a variety of sanctions against Respondent for its failure to meet its discovery obligations as recited in the Withdrawal.¹ Sanctions may be imposed for failing to comply with a discovery obligation where the failure to comply was “unjustified and the sanction imposed ‘is reasonable in light of the material withheld and the purposes of Rule 3.38(b).’” *In re IT&T*, 104 F.T.C. 280, 1984 WL 565367 at **127 (July 25, 1984) (quoting *In re Grand Union Co.*, 102 F.T.C. 812, 1983 FTC LEXIS 61 at *595 (July 18, 1983)).

The purpose of a motion for sanctions is “to induce parties to supply [requested discovery].” *IT&T*, 104 F.T.C. 280, 1984 WL 565367 at **128. Given that most of the requested discovery has already been provided, that Respondent has represented that it will complete production by March 14, 2014, and that Respondent is being ordered to complete production by March 14, 2014, which is less than three weeks after the Withdrawal deadline of February 21, 2014, and more than three weeks before the close of fact discovery on April 5, 2014, sanctions are not appropriate at this time. However, should Respondent fail to meet the deadline imposed under this Order, Complaint Counsel may seek appropriate relief at that time. Thus, Complaint Counsel’s Motion for Sanctions is DENIED WITHOUT PREJUDICE.

IV. Conclusion

For all the foregoing reasons, Complaint Counsel’s Renewed Motion to Compel is GRANTED IN PART AND DENIED IN PART, and Respondent is hereby ORDERED to complete its production of responsive documents from its email archive, in accordance with the agreement recited in the Withdrawal, no later than March 14, 2014. Complaint Counsel’s Motion for Sanctions is DENIED WITHOUT PREJUDICE.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 11, 2014

¹ The requested sanctions are: overruling and deeming waived all of Respondent’s objections to the outstanding document requests and claims as to privilege; amending the Scheduling Order issued in this case to allow Complaint Counsel additional time to conduct fact discovery with respect to the late-produced documents; granting Complaint Counsel the right to conduct additional depositions in Washington, D.C., with respect to the late-produced documents; and prohibiting Respondent from affirmatively introducing any of the late-produced documents in support of its case, its affirmative defenses, or in rebuttal.