

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 GRANTING IN PART AND DENYING IN PART
COMPLAINT COUNSEL'S MOTION FOR SANCTIONS**

On January 22, 2014, Complaint Counsel filed a Motion for Sanctions Based on Respondent's Refusal to Comply with the Court's January 10, 2014 Order ("Motion"). Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed an opposition to the Motion on January 28, 2014. As explained below, the Motion is GRANTED IN PART AND DENIED IN PART.

I.

The Complaint in this case charges that ECM engaged in deceptive trade practices in violation of Section 5 of the FTC Act by making false or unsubstantiated representations regarding the biodegradability of plastics treated with an additive manufactured by ECM ("ECM Additive"). The Complaint alleges, among other things, that Respondent distributes ECM Additives to its customers -- independent distributors and plastic products manufacturers (collectively, "customers") -- located throughout the United States who, in turn, treat plastics with ECM Additives and thereafter advertise and sell the treated plastic products to end-users as biodegradable. Complaint ¶ 2. The Complaint further alleges that ECM's representations to its customers were passed on to plastics end-users, and therefore, ECM provided its customers with the "means and instrumentalities" to deceive the end-users. Complaint ¶¶ 4, 14, 15. Respondent defends against the charge, in part, by asserting that it sells to sophisticated customers who would not interpret Respondent's representations in the manner alleged in the Complaint. Answer ¶ 4.

On January 10, 2014 an Order issued ("January 10 Order") granting Complaint Counsel's Motion to Compel Respondent to provide a complete customer list in response to Interrogatory 1 of Complaint Counsel's First Set of Interrogatories to Respondent. That Interrogatory requested:

Identify, by business name, individual contact, address, and telephone number, all customers who have purchased any ECM Additive, including customers who purchased any ECM Additive from distributors, in which case, also provide the

name, address, and telephone number of the distributor from whom the customer purchased the ECM Additive.

The January 10 Order also denied Respondent's Motion for a Protective Order, through which Respondent sought to avoid providing customer information requested by, among other discovery requests, Interrogatory 2 of Complaint Counsel's First Set of Interrogatories to Respondent. That Interrogatory requested:

For each customer or distributor identified in Interrogatory 1, list ECM's revenue per customer or distributor per year.

Based on the representations and supporting exhibits provided by the parties for the instant Motion, the record shows that on January 16, 2014, Respondent provided a list of its customers to Complaint Counsel, including the name of each customer, the customer's address and telephone number, and the names of the relevant contact persons for each customer. Motion CCX-A:1 (hereafter, "Customer List"). Further, on January 20, 2014, Respondent provided Complaint Counsel with an itemized listing of yearly revenues generated by individual customer numbers. Motion CCX-A:2 (hereafter, "Revenues List"). The Revenues List, however, does not identify revenue by customer name, and the Customer List does not contain customer numbers. Thus, there is no way to tie the revenues figures disclosed to particular identified customers.

II.

Complaint Counsel contends that Respondent violated the January 10 Order by failing to provide a list of revenues by customer name. Complaint Counsel argues that Respondent's Revenues List is useless because the revenues are tied only to a customer number, and Respondent has not provided any way of determining which customer number belongs to which customer identified on the Customer List. Complaint Counsel accuses Respondent of "gamesmanship" in providing a "useless" list, and requests an order sanctioning Respondent for what Complaint Counsel argues is a violation of the January 10 Order. Complaint Counsel's requested sanctions include: barring ECM from arguing that any sample of information taken from ECM's customers is "unrepresentative"; barring ECM from making "any revenue-related argument" concerning potential remedies; and adjusting Complaint Counsel's deadline under the Scheduling Order for completing fact discovery, to compensate for the asserted delay in Respondent's compliance with the January 10 Order. Motion at 5.

Respondent denies violating the January 10 Order. Respondent states that, although the Order denied Respondent's Motion for a Protective Order, including with respect to Interrogatory 2, Complaint Counsel did not request an order compelling Respondent to respond to that Interrogatory. Rather, Respondent notes, Complaint Counsel only requested an order compelling production of the Customer List, which Respondent has provided. Therefore, Respondent argues, because the January 10 Order did not compel production of a list of revenues by customer name, there is no valid basis for imposing sanctions under Rule 3.38 for Respondent's failure to produce such a list. Respondent does not deny that the Revenues List fails to identify revenues by customer name, but contends that it is not obligated to create such a document for Complaint Counsel. Moreover, Respondent contends, under the January 10 Order, revenues are only relevant to damages and to "help identify customer-specific claims or the frequency of communication with customers." Opposition at 6. As to the latter purpose,

Respondent asserts, it has offered to produce a database of employee summaries of customer communications.

Finally, Respondent argues that the sanctions requested by Complaint Counsel are inappropriate because Complaint Counsel has reneged on a promise to “identify any subset of customers . . . that would lessen ECM’s burden” and because the requested sanctions are disproportionate to the discovery dispute presented. Opposition at 6.

III.

A.

Rule 3.38(b), upon which Complaint Counsel relies, provides: “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 but not limited to” an order striking a pleading; directing that a matter be admitted or subjected to an adverse inference; or prohibiting certain objections to evidence; among other sanctions. 16 C.F.R. § 3.38(b). Contrary to the arguments of both parties, nothing in the language of Rule 3.38(b) requires, as a prerequisite to ordering relief, that a party violate a court order. Rather, as set forth above, it must be shown only that the party failed to comply “with any discovery obligation imposed by [the] rules.” *Id.*

Prior to 2009, Rule 3.38(b) read in pertinent part: “If a party or an officer or agent of a party fails to comply with . . . an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge . . ., the Administrative Law Judge . . . may take such action in regard thereto as is just” including the sanctions described above. However, as part of the 2009 Rule revisions, the Commission revised Rule 3.38(b) to remove the requirement of showing violation of a judicial order. Proposed Rule Amendments; Request for Public Comment, 73 Fed. Reg. 58832, 58839 (Oct. 7, 2008). Cases cited by the parties for the proposition that 3.38(b) sanctions cannot be imposed absent violation of a court order were decided under the former Rule 3.38(b) and do not govern the instant Motion. *See, e.g., In re Polypore Int’l, Inc.*, No. 9327 (filed September 10, 2008), 2009 FTC LEXIS 92, at *5-6 (May 1, 2009).¹ Accordingly, based on applicable law, whether or not the January 10 Order affirmatively directed Respondent to answer Complaint Counsel’s Interrogatory 2 by disclosing revenues for each customer identified on the Customer List is not determinative. Rather, the issue is whether Respondent has failed to comply with a “discovery obligation” to answer Interrogatory 2.

Rule 3.35(a)(2), regarding interrogatories to parties, states in pertinent part: “Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to . . . in which event the reasons for objection shall be stated in lieu of an answer. . . . The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories.” 16 C.F.R. § 3.35(a)(2).

¹ Respondent cites *In re OSF Healthcare Systems*, 2012 WL 665030 (Feb. 22, 2012); however, the cited document is the brief of a party, not an order of an Administrative Law Judge or of the Commission, and therefore does not constitute legal authority.

Respondent objected to Interrogatory 2, and, by filing its Motion for Protective Order, Respondent sought to avoid providing information in response Interrogatory 2. Although Respondent argued that revenue information for each customer was confidential and not relevant, the January 10 Order rejected those arguments as without merit. The Order stated: “Respondent has failed to meet its burden of demonstrating that the requested discovery should be barred as not relevant [and] . . . confidentiality . . . is no bar to disclosing” the requested revenue information. January 10 Order at 7. The Order concluded that “Respondent has failed to demonstrate that ECM’s revenues by customer should not be disclosed in discovery.” January 10 Order at 8. Thus, while the January 10 Order did not specifically order Respondent to answer Interrogatory 2, the Order clearly determined that Respondent is obligated to answer Interrogatory 2, by holding that the information sought by the Interrogatory was properly within the scope of discovery and by denying the requested protective order. Respondent’s attempt in its Opposition to the instant Motion to “relitigate” the discoverability of customer-related revenue information is rejected.

B.

Having concluded that Respondent had an obligation under the discovery rules to answer Interrogatory 2, the issue becomes whether Respondent has failed to comply with that obligation. It appears from the record presented on the Motion that, rather than answering Interrogatory 2 in a narrative format, Respondent opted instead to produce a document that reports ECM’s revenues by customer number only. *See* Motion CCX-A:2. Rule 3.35(c) permits substitution of documents as response to an interrogatory, as follows:

(c) Option to produce records. Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records *from which the answer may be derived or ascertained* and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents *from which the answer may be ascertained*.

16 C.F.R. § 3.35(c) (emphasis added).

The document provided by Respondent does not sufficiently answer Interrogatory 2. Interrogatory 2 clearly directs Respondent to set forth, for each customer identified on its Customer List, the yearly revenues generated per customer per year. Respondent does not deny that the Revenues List provided to Complaint Counsel identifies customers only by number, but contends that “a document that supplies information tying each revenue generated to a named customer” does not exist and that it is not “obliged to create such a document.” Opposition at 5.

Pursuant to Rule 3.35(a)(2), Respondent is required to answer Interrogatory 2 fully. If a party chooses to provide documents in lieu of a narrative answer, as Respondent chose here, such

response is sufficient only where the answer “may be derived or ascertained from” the documents provided. 16 C.F.R. § 3.35(c). In the instant case, it is not possible to derive the customer name from the Revenues List, and the Customer List provided does not identify customers by number. Thus, neither the Revenues List alone, nor the Revenues List in combination with the Customer List, is sufficient to derive the “revenue per customer . . . per year” “[f]or each customer . . . identified” on the Customer List, as requested in Interrogatory 2. Respondent’s assertion that it need not create a responsive document for Complaint Counsel is a “red herring” that fails to address the issue. Respondent is not required to produce any documents to respond to an Interrogatory; however, if Respondent chooses to do so, the documents must be sufficient to answer the Interrogatory. Because here the Revenues List fails to meet this requirement, Respondent remains obligated to answer Interrogatory 2.

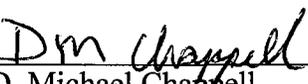
C.

Complaint Counsel has demonstrated that Respondent failed to fulfill its obligation to answer fully Complaint Counsel’s Interrogatory 2. To this extent, Complaint Counsel’s Motion is GRANTED. It does not follow, however, that Complaint Counsel’s requested sanctions must be entered. Rather, Rule 3.38(b) grants the Administrative Law Judge the discretion to take whatever action in regard Respondent’s failure “as is just . . .” 16 C.F.R. § 3.38(b). The Motion fails to demonstrate that Complaint Counsel’s requested sanctions, at this stage of the proceedings, would be just. To this extent, Complaint Counsel’s Motion is DENIED. Based on the present record, a just order requires Respondent to promptly remedy its failure to fully answer Interrogatory 2, as detailed below.

IV.

For all the foregoing reasons, Complaint Counsel’s Motion is GRANTED IN PART and it is hereby ORDERED that Respondent shall provide a complete answer to Complaint Counsel’s Interrogatory 2 no later than February 10, 2014, including without limitation, yearly revenues tied to customer names. If Respondent opts to produce records, the production must comply fully with Rule 3.35(c) so as to answer Interrogatory 2 fully, including without limitation, providing yearly revenues tied to customer names. Complaint Counsel’s Motion is otherwise DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 4, 2014