

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 ON NON-PARTY O.W.S. INC.'S MOTION
TO QUASH OR LIMIT SUBPOENA *DUCES TECUM***

On March 12, 2014, non-party O.W.S. Inc. ("O.W.S.") filed a Motion to Quash or Limit a subpoena *duces tecum* ("Motion") served on it by Respondent ECM BioFilms, Inc. ("ECM"). O.W.S. also seeks an award of its expenses in connection with compliance with the subpoena. Federal Trade Commission ("FTC") Complaint Counsel filed a limited opposition to O.W.S.'s Motion on March 20, 2014 ("Limited Opposition"). Respondent filed its opposition to the Motion on March 24, 2014 ("Opposition").

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

I. Applicable Legal Standards

Pursuant to FTC Rule 3.31(c)(1), "[u]nless otherwise limited by order of the Administrative Law Judge, . . . [p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). However, even if proposed discovery meets the foregoing relevance test:

[t]he frequency or extent of use of the discovery methods . . . shall be limited by the Administrative Law Judge if he or she determines that:

- (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

16 C.F.R. § 3.31(c)(2).

A party seeking to quash a subpoena requesting relevant information has the burden of demonstrating that the request is unduly burdensome. *FTC v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, at *12 (D.D.C. 1977); *In re Intel*, 2010 WL 2143904 (May 19, 2010); *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *9 (Jan. 15, 2009). “Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” *Polypore Int'l*, 2009 FTC LEXIS 41, at *10; *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976).

II. Background

The Complaint charges that ECM manufactures, advertises, and sells additives for plastics (“ECM Additives”) and that Respondent 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 ECM Additives (“ECM Plastics”). Complaint ¶¶ 2, 9-13. Respondent defends itself, in part, by asserting that it possesses a reasonable basis that substantiates its advertising representations. Answer ¶¶ 12-13.

Non-party O.W.S. is an independent testing company that tests various types of plastics for biodegradability. Motion at 1 (citing Affidavit of Richard Tillinger (“Tillinger Aff.”) ¶ 3). From 2007 to present, O.W.S. has tested the biodegradability of hundreds of products and materials for over one hundred customers. Tillinger Aff. ¶ 4. Respondent states that O.W.S. has performed tests on products containing ECM Additives. Opposition at 3-4. Respondent asserts that O.W.S. is an industry player that issues certifications for the Biodegradable Products Institute (“BPI”), a direct competitor of ECM that markets compostable products, which Respondent describes as a technology that competes with ECM. *Id.* Respondent further asserts that O.W.S. and BPI are both members of ASTM Subcommittee D20.96, which according to Respondent, is the same committee that sets standards used in evaluations of ECM’s products. *Id.*

In its Limited Opposition, Complaint Counsel states that O.W.S. prepared three potentially relevant reports containing statements regarding the biodegradability of ECM Plastics and, thus, O.W.S. is likely to have probative information.¹

¹ Complaint Counsel expressly states that it takes “no position with respect to whether limited relief is appropriate given the alleged undue burden associated with ECM’s subpoena.” Limited Opposition at 1.

III. Analysis

O.W.S. asserts three reasons for quashing or limiting the subpoena: (1) confidentiality; (2) relevance; and (3) burden. In addition, O.W.S. seeks to recover costs it has incurred as a result of the subpoena. O.W.S.'s arguments pertaining to the confidentiality of the requested information are generally applicable to most of the document requests and thus are addressed first. O.W.S.'s arguments pertaining to relevance and burden are specific to each of the document requests and are addressed together, specific to each document request. Lastly, O.W.S.'s request for costs is addressed.

A. Confidentiality

O.W.S. asserts that the subpoena seeks confidential and proprietary information regarding O.W.S. customers, many of whom are competitors of ECM, and that O.W.S. owes strict contractual duties of non-disclosure and confidentiality to each such customer. Motion at 2-3. Respondent counters that the Protective Order Governing Discovery Material ("Protective Order"), attached to the ECM subpoena, affords adequate protection for non-disclosure of confidential information. Opposition at 1.

The Protective Order entered in this case pursuant to Commission Rule 3.31(d) adequately protects the information that O.W.S. seeks to protect. The Protective Order provides that any document submitted by a third party during the course of this proceeding that is entitled to confidentiality shall be designated as confidential and may be disclosed only in limited circumstances, including to Respondent's outside counsel. Protective Order ¶¶ 1, 2, 7. Outside counsel may only use confidential material "for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever." *Id.* ¶ 8. Courts routinely issue protective orders which allow disclosure of confidential information, restricted to outside counsel only. *E.g., Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 546 F. Supp. 2d 951, 954 (S.D. Cal. 2008); *Biovail Labs., Inc. v. Anchen Pharms., Inc.*, 463 F. Supp. 2d 1073, 1076 (C.D. Cal. 2006); *see also ODS Techs., L.P. v. Magna Entm't Corp.*, 583 F. Supp. 2d 1141, 1142 (C.D. Cal. 2008).

"The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *Le Baron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971); *In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 20, at *4 (Feb. 5, 2004). *See also FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement."). Because adequate safeguards are in place to ensure that sensitive information will not be misused, O.W.S. may not withhold relevant materials on the asserted basis that the information is confidential.

B. Relevance and burden

O.W.S. makes the general argument that the subpoena requests irrelevant information, including test results concerning O.W.S. customers other than ECM, and argues that information that is unrelated to ECM cannot be reasonably expected to yield information relevant to the allegations of the Complaint, the defenses of Respondent, or the proposed relief. O.W.S. asserts

that to the extent that the subpoena seeks information regarding O.W.S. customers other than ECM, that information is obtainable from sources that are more convenient and less burdensome, namely, those customers. O.W.S. then presents each contested request number and its explanation as to why each request seeks information that is either irrelevant, unduly burdensome, or both.

Respondent does not address the relevance of each of its specific requests. Instead, Respondent argues generally that the information it seeks from O.W.S. is relevant to: (1) O.W.S.'s evaluation of plastic products containing the ECM Additive; (2) the scientific data underlying O.W.S. information that challenges the biodegradability of plastics infused with ECM Additives; (3) the financial ties and interests of O.W.S. with ECM's competitors; and (4) the collaboration of O.W.S. with others, including ECM competitors, to shape testing standards directly at issue in this proceeding. Opposition at 5. Respondent further asserts that facts already in ECM's possession reveal communications between O.W.S. and BPI, O.W.S.'s reports discussing the ECM Additive, and Complaint Counsel's heavy reliance on O.W.S. and documents concerning O.W.S. *Id.* With respect to burden, Respondent asserts that it has narrowed its requests and O.W.S. has not met its burden of showing that production will in fact impose an undue burden. *Id.* at 6-7.

Request No. 1: All documents and correspondence concerning ECM BioFilms, Inc., [ECM's Chief Executive Officer] Robert Sinclair, and/or ECM BioFilms Master Batch Pellets.

O.W.S. states that it is searching for and producing documents that are not customer specific and that generically reference ECM, Mr. Sinclair, and/or the ECM Master Batch Pellets. O.W.S. asks that this Request be limited to exclude documents concerning O.W.S. customers other than ECM and to include documents concerning ECM that are non-customer specific to the extent readily located.

This Request seeks relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce documents that reference ECM, Mr. Sinclair, and/or the ECM Master Batch Pellets, regardless of whether such documents concern O.W.S. customers other than ECM.

Request No. 3: All correspondence between O.W.S. and any member, employee, representative, or officer of the United States Federal Trade Commission.

O.W.S. states that it is searching for and producing documents readily identifiable as correspondence with the FTC that may regard ECM. O.W.S. states that it does not know the name, identity, or even words to search for to know whether correspondence has been with a "member, employee, representative, or officer" of the FTC. O.W.S. thus asks that this Request be limited to those documents where O.W.S. knowingly corresponded with the FTC with regard to ECM.

This Request, as modified herein, seeks relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce documents that are readily identifiable as correspondence with the FTC regarding ECM or any

ECM testing or ECM Additive.

Request No. 4: All correspondence between O.W.S. and any member, employee, and/or representative of the Biodegradable Products Institute.

O.W.S. states that it is searching for and producing correspondence that is not customer specific and that relates generally to the BPI. O.W.S. argues that this Request encompasses documents that are not relevant to this proceeding, including communications with customers regarding requests for certification of customers' own products. O.W.S. further argues that some of O.W.S.'s customers are members of the BPI and that its correspondence with those customers is responsive to this Request, but not relevant to this matter.

O.W.S. asks that this Request be limited to only correspondence between O.W.S. and known employees of the BPI in regard to the work of BPI to the extent the correspondence directly pertains to ECM itself, and to exclude O.W.S.'s customers' correspondence and such customers' BPI certification efforts.

This Request, as modified herein, seeks relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce correspondence between O.W.S. and any known member, employee, and/or representative of the BPI that pertains to or relates to or makes any reference to ECM or ECM Additives or ECM Plastics. O.W.S. need not produce its customers' correspondence and such customers' BPI certification efforts if such documents do not pertain to ECM.

Request No. 5 (rephrased by agreement): Since January 1, 2010, all documents concerning any test or report (including any notes and raw data) performed or written to the biodegradability of plastic products under ASTM standards D5511 and D5526 for ECM and/or a plastic product containing the ECM Additive.

O.W.S. states that testing under these ASTM standards constitutes a significant amount of O.W.S.'s business. O.W.S. asserts that compliance with this Request would require O.W.S. to search for and produce other customers' documents and that the burden and expense involved in identifying and producing all responsive documents far outweighs the likely benefit of those documents. O.W.S. asks that the Request be limited to include only responsive tests performed for ECM.

This Request seeks relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce documents concerning any test or report (including any notes and raw data) performed or written to the biodegradability of plastic products under ASTM standards D5511 and D5526 for ECM and/or a plastic product containing the ECM Additive.

Request Nos. 6 and 8: All documents concerning the education, training, experience, and employee evaluations of Mr. Bruno de Wilde (No. 6) and of Mr. Richard Tillinger (No. 8).

O.W.S. states that these Requests seek entirely irrelevant documents and seeking this

information is improper. O.W.S. asks that these Requests be quashed. Respondent asserts that Complaint Counsel has relied repeatedly on O.W.S. reports in depositions and pleadings. (Opposition at 3).

Requests Nos. 6 and 8, as modified herein, seek relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce all documents concerning the education, training, experience, and employee evaluations of Mr. Bruno de Wilde (No. 6) and of Mr. Richard Tillinger (No. 8) if these employees have performed tests on or have been involved in any way in testing or evaluating ECM Additives or ECM Plastics.

Request No. 10 (rephrased by agreement): Since January 1, 2010, all documents and correspondence concerning any amendments, vote(s); and/or “negatives” related to ASTM standard D5511 and D5526.

O.W.S. asserts a relevance objection and states that the burden of producing responsive documents far outweighs their expected benefit. O.W.S. further states that Mr. Sinclair is on the same ASTM subcommittee as O.W.S. and thus Respondent can obtain these documents from a less burdensome source – Mr. Sinclair. O.W.S. asks that this Request be quashed.

Request No. 10, as modified herein, seeks relevant information and the burden and expense to O.W.S. do not outweigh the likely benefit. O.W.S. is hereby ORDERED to produce all documents and correspondence since January 1, 2010, concerning any amendments, vote(s) and/or “negatives” related to ASTM standard D5511 and D5526 that refer to or concern ECM or ECM Additives or ECM Plastics.

Instruction C: O.W.S. asserts that this instruction requires a complete copy of each document be produced, regardless of relevance. O.W.S. requests that this instruction be stricken and that O.W.S. be allowed to produce only those portions of documents that relate to ECM’s testing of ECM’s own products.

It is hereby ORDERED that ECM may redact portions of documents consistent with this Order.

Instruction L: O.W.S. asserts that this instruction improperly requires answers to interrogatories with regard to documents withheld for privilege. O.W.S. states that it will comply with 16 C.F.R. 3.38A and requests that this instruction be stricken.

It is hereby ORDERED that if O.W.S. complies with FTC Rule 3.38A, it need not comply with Instruction L.

C. Request for costs

O.W.S. asserts that it has already incurred significant costs as a direct result of the subpoena and will continue to do so. O.W.S. asserts that the expenses it has been forced to incur thus far are unreasonable and thus O.W.S. requests that ECM be ordered to pay for all additional

expenses O.W.S. will incur if its Motion is denied. Motion at 4-5.

Respondent counters that O.W.S. has not demonstrated that ECM's subpoena is unreasonable and that ECM is required to bear the reasonable costs of compliance with the subpoena. Opposition at 8.

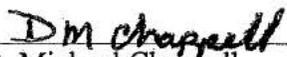
The Commission, in *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 1981 FTC LEXIS 75 (March 13, 1981), has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." 1981 FTC LEXIS 75, at *3. See *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena"). To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *Int'l Tel. & Tel.*, 1981 FTC LEXIS 75, at *3.

In support of its request for costs, O.W.S. avers that: its business operations consist of only two people; its annual revenue over the last three years was approximately \$698,000, and its average annual profit, approximately \$11,000; and O.W.S. has incurred legal fees of approximately \$19,000 and already spent approximately 60 hours, at a cost of approximately \$5,500, responding to the subpoena, already eliminating O.W.S.'s 2014 profit. (Tiffinger Aff. at ¶¶10, 11, 14). In light of the fact that, as Complaint Counsel asserts, O.W.S. has conducted three studies assessing the biodegradability of EMC Plastics, O.W.S. possesses information relevant to whether the ECM Additive works as advertised, a central issue in this case. Thus, O.W.S. has not met its burden of demonstrating that the burden or expense of the discovery outweigh its likely benefit. Given the likely probative value of the requested documents, although O.W.S. has provided specific information regarding the burden and expense involved in producing the requested documents, as narrowed by this Order, ECM's subpoena is not unreasonable. Accordingly, O.W.S.'s request for an award of its expenses is DENIED.

IV. Conclusion

For all the foregoing reasons, O.W.S.'s Motion is GRANTED IN PART and DENIED IN PART. O.W.S. is hereby ORDERED to comply with the subpoena, as narrowed by this order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 27, 2014