

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of)

ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Enviroplastics International,)
Respondent.)

DOCKET NO. 9358

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL
EXPERT WITNESSES' RESPONSES TO SUBPOENAS *DUCES TECUM***

I.

On May 20, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion to Compel designated expert witnesses for Federal Trade Commission ("FTC") Complaint Counsel to respond to Respondent's subpoenas *duces tecum* ("Motion"). Complaint Counsel filed its opposition on May 28, 2014 ("Opposition"). On May 30, 2014, Respondent filed a Motion for Leave to File a Reply and a Reply in Support of its Motion ("Reply").¹

Respondent's Motion for Leave to File a Reply is GRANTED. Having considered the Motion, the Opposition, and the Reply, the Motion is DENIED, as explained below.

II.

Respondent states that on April 7, 2014, it served subpoenas *duces tecum* on Complaint Counsel's designated expert witnesses, Drs. Stephen McCarthy, Thabet Tolaymet, and Shane Frederick (collectively, "Complaint Counsel's experts") and that only one document has been produced in response to these subpoenas, the Curriculum Vitae of Dr. Tolaymet. Respondent asserts that the Commission Rules do not exempt testifying experts from discovery; that

¹ Respondent sent an email to the Office of Administrative Law Judges ("OALJ") indicating its intent to file a motion for leave to file a reply. Complaint Counsel then sent an email to the OALJ presenting arguments against Respondent's email notification of its intent to file a reply and stating that it reserves the right to move to strike Respondent's reply, to seek leave to file a supplemental submission, or both. Complaint Counsel subsequently sent an additional email indicating its intent to file its opposition to Respondent's motion for leave to file a reply. Because, as explained below, Respondent's Motion to Compel is DENIED, Complaint Counsel's email requests are not addressed.

subpoenas are a proper mechanism for obtaining discovery from experts; and that evidence of an expert's bias, conflicts, and lack of independence, which the subpoenas seek, is directly relevant and discoverable. Respondent seeks to compel Complaint Counsel's experts to produce documents responsive to its subpoenas.

Complaint Counsel argues that Respondent's subpoenas are defective for three reasons. First, the subpoenas are procedurally flawed because they were "issued" without the seal of the Secretary of the Federal Trade Commission. Second, according to Complaint Counsel, the demands exceed the scope of permissible expert discovery. And third, Complaint Counsel argues, the subpoenas request duplicative and irrelevant information and impose a substantial burden on Complaint Counsel's experts that outweighs the benefit to Respondent.

III.

The FTC Rule governing the issuance of discovery subpoenas states: "Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce . . . documents . . ." 16 C.F.R. § 3.34(b). Complaint Counsel, who accepted service on behalf of its experts, and thus physically received the original subpoenas in dispute, has represented that the subpoenas do not have the required raised official seal of the Office of the Secretary. Respondent, in its Reply, does not dispute that the subpoenas do not have the required official seal of the Office of the Secretary. Instead, Respondent asserts that as "[a]n out-of-state respondent, ECM has complied with Rule 3.34(b) to the letter when issuing its subpoenas *duces tecum*." Reply at 7.

Although this may appear to be merely a formality, because the FTC Rules no longer require the Secretary to sign subpoenas,² the raised seal of the Office of the Secretary on subpoenas is the only remaining indication of authority that allows the subpoena recipient to distinguish an enforceable subpoena from an unofficial form simply copied from the FTC's website. By letter dated October 29, 2013, counsel for Respondent was advised by the Office of the Secretary of the requirement of obtaining the appropriate, official subpoena form from the Office of the Secretary ("the October 29, 2013 letter"). Specifically, the October 29, 2013 letter states: "In the event a party wishes to effect the issuance of a subpoena to a third party, pursuant to Rule 3.34(a) and (b), that party should complete the appropriate subpoena form and deliver such form to [an FTC employee with the Office of the Secretary] . . . Upon receipt, the Document Processing Section will affix the Commission seal to the subpoenas so that they can be signed and issued, and the Section will notify you when they are ready to be picked up."

Nothing in Rule 3.34 or the October 29, 2013 letter exempts an out-of-state respondent from obtaining official subpoena forms from the Office of the Secretary.³ A subpoena that is not

² Prior to the 2009 amendments to the Rules of Practice, FTC Rule 3.34(b) stated: "The Secretary of the Commission, upon request of a party, shall issue a subpoena, signed but otherwise in blank, commanding a person to produce . . . documents . . ."

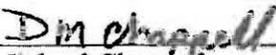
³ Although it is not dispositive, it should be noted that Respondent has counsel located in Clifton, Virginia, a suburb of Washington, D.C.

valid, for any reason, will not be considered and can not be enforced. Respondent did not obtain the required official subpoenas. Therefore, Respondent did not comply with Rule 3.34(b) and the subpoenas underlying Respondent's motion are invalid. Because the underlying subpoenas are invalid, there is no basis for evaluating a motion for compliance. Accordingly, other arguments raised by the parties need not, and will not, be addressed.

IV.

For the reasons set forth above, Respondent's Motion is DENIED. This Order does not preclude Respondent from inquiring into information germane to expert qualifications, knowledge, training, and experience, as well as information germane to expert bias, conflicts of interest, or lack of independence, at the designated expert witnesses' depositions.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 2, 2014