

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 WITHOUT PREJUDICE RESPONDENT'S
MOTION FOR LEAVE TO SERVE SUBPOENAS *DUCES TECUM***

I.

On June 4, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion for Leave to Serve Subpoenas *Duces Tecum* bearing the Commission Seal to Federal Trade Commission ("FTC") Complaint Counsel's testifying experts, along with an accompanying memorandum (collectively, "Motion"). By Order dated June 4, 2014, Complaint Counsel was ordered to file an expedited response. Complaint Counsel filed its opposition on June 5, 2014 ("Opposition").

Having considered the Motion and the Opposition, and all arguments and assertions therein, the Motion is DENIED WITHOUT PREJUDICE, as explained below.

II.

In a previous motion to compel filed by Respondent on May 20, 2014, Respondent stated that on April 7, 2014, it had 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 had been produced in response to those subpoenas, the Curriculum Vitae of Dr. Tolaymet. By Order dated June 2, 2014, Respondent's motion to compel was denied, because those subpoenas lacked a Commission seal and were found to be invalid under FTC Rule 3.34(b). That Rule states in part: "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). *See* Order Denying Motion to Compel, June 2, 2014 at 2.

Respondent states that the discovery deadline in this case has passed, and moves this Court to allow ECM to reissue the subpoenas, modified to include the application of the Commission seal by the Secretary, with a response date beyond the discovery deadline. Motion at 10, 17. Under the Third Revised Scheduling Order issued in this case (hereafter, "Scheduling Order"), the close of discovery was May 21, 2014; the deadline for Complaint Counsel to provide expert witness reports was June 4, 2014; and the deadline for Complaint Counsel to serve any rebuttal reports is June 30, 2014. Complaint Counsel represents that depositions of Complaint Counsel's experts will take place between June 16 and June 27, 2014. Under the Scheduling Order, expert depositions must be completed by July 2, 2014, along with the exchange of expert-related exhibits.

III.

Notwithstanding the title of Respondent's Motion, Respondent's request is, in essence, a motion to extend the discovery deadline under the Scheduling Order in order to obtain documents from Complaint Counsel's experts pursuant to the proposed subpoenas. FTC Rule 3.21(c)(2) provides that "[t]he Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing." 16 C.F.R. § 3.21(c).

Respondent argues that good cause exists because Respondent timely served and sought enforcement of its original subpoenas. Respondent states that its original subpoenas were served on April 7, 2014, "well within the fact discovery cut-off," and that the proposed subpoenas are substantively the same as the original subpoenas. Motion at 13. Respondent also contends that Complaint Counsel and its witnesses would suffer no surprise from the reissued subpoenas. Respondent further argues that it is entitled to seek discovery from Complaint Counsel's experts, through subpoenas, because the requested materials are relevant for impeachment purposes. Specifically, Respondent contends, the requested materials are designed to discover evidence of each expert's bias, conflict of interest, and lack of independence in this matter.

Complaint Counsel responds that there is no good cause for Respondent's requested relief. According to Complaint Counsel, Respondent unduly delayed seeking a ruling on the original subpoenas because Complaint Counsel submitted its objections to the Respondent's subpoenas on April 25, 2014, but Respondent did not file its motion to compel until May 20, 2014. Complaint Counsel further argues that Respondent's attempt to obtain document discovery from Complaint Counsel's experts, by way of subpoenas, is procedurally improper. In addition, Complaint Counsel argues that subpoenas cannot be used to obtain document discovery from experts, and that the subpoenas, as drafted, are unduly burdensome.

IV.

Respondent has failed to demonstrate good cause to modify the Scheduling Order so that Respondent can issue the proposed subpoenas to Complaint Counsel's experts. Rule 3.31A specifically addresses the scope and procedures for expert discovery, and states in pertinent part as follows:

§ 3.31A Expert discovery

- (a) . . . Complaint counsel shall serve the other parties with a report prepared by each of its expert witnesses not later than 14 days after the close of fact discovery. Each respondent shall serve each other party with a report prepared by each of its expert witnesses not later than 14 days after the deadline for service of complaint counsel's expert reports. Complaint counsel shall serve respondents with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 10 days after the deadline for service of respondent's expert reports.
- ...
- (c) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years. . . .
- (d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the Administrative Law Judge, a deposition of any expert witness shall be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section. Depositions of expert witnesses shall be completed not later than 65 days after the close of fact discovery. *Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.*

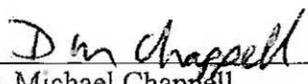
16 C.F.R. § 3.31A (emphasis added).

As shown above, Rule 3.31A(d) expressly allows a litigant to seek "further discovery," beyond the expert reports and the deposition testimony provided by Rule 3.31A, and does not exclude any particular method for such further discovery. Thus, Complaint Counsel's position that subpoenas may not, as a matter of law, be issued for the purpose of expert discovery is not supported by the language of Rule 3.31A. However, Rule 3.31A(d) is also clear that any expert discovery, beyond that provided by the expert reports and the expert's deposition, shall occur: (1) only if allowed by the ALJ after proper motion under Rule 3.31A(d) and; (2) only after service of the expert's report and completion of the expert's deposition. To be sure, the issuance of subpoenas by a litigant, *sua sponte*, is not intended to be the "opening salvo" in the process of expert discovery, as attempted by Respondent. Accordingly, at this stage of expert discovery, there is insufficient cause to modify the Scheduling Order to enable Respondent to pursue further discovery by way of subpoenas.

V.

For all the foregoing reasons, Respondent's Motion is DENIED; however, this ruling is WITHOUT PREJUDICE to Respondent's right to move for further discovery from Complaint Counsel's designated expert witnesses pursuant to Rule 3.31A(d), after completion of other expert discovery as described above, and for a modification of the Scheduling Order under Rule 3.21(c) in connection therewith.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 10, 2014