

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  
Enviroplastics International,  
Respondent.

DOCKET NO. 9358

**ORDER GRANTING MOTION TO SERVE SUBPOENA  
*DUCES TECUM* ON DR. STEPHEN MCCARTHY**

**I.**

On July 8, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Renewed Motion for Leave to Serve Subpoena *Duces Tecum* on Dr. Stephen McCarthy, a designated expert witness for Federal Trade Commission ("FTC") Complaint Counsel, along with a memorandum in support (collectively, "Motion"). Complaint Counsel filed an opposition to the Motion on July 17, 2014 ("Opposition").

Having fully considered the Motion, the Opposition, the exhibits thereto, and all the arguments and assertions therein, Respondent's Motion is GRANTED, as explained below.

**II.**

By way of brief background, 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"). Respondent denies making false or misleading representations as alleged.

According to the parties' filings for the instant Motion, Respondent has been provided Dr. McCarthy's expert report, has taken Dr. McCarthy's deposition, and has received some documentary discovery related to Dr. McCarthy, in accordance with the Third Revised Scheduling Order and FTC Rule 3.31A(c) and (d). FTC Rule 3.31A(d) allows the Administrative Law Judge, upon motion, to "order further [expert] 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(d).

Respondent argues that further discovery by way of subpoena is appropriate at this time because discovery obtained thus far regarding Dr. McCarthy shows that he has a direct financial interest in the outcome of this litigation. Specifically, Respondent asserts that Dr. McCarthy receives royalties for patented technologies used by ECM's competitors in the biodegradable plastics market and that he receives research grant funding, through his university employer, from ECM's competitors. Respondent further contends that Respondent's competitors have "lobbied the FTC to act against ECM," Memorandum to Motion at 7, and that if Complaint Counsel succeeds in the instant action, ECM's competitors will gain market share and Dr. McCarthy stands to gain financially as a result. Respondent asserts that it is entitled, through the document subpoena, to probe the full extent of Dr. McCarthy's potential bias, conflict of interest, and/or lack of independence, because such matters are relevant to an expert's qualifications and the weight to be given the expert's opinions. Without the requested document discovery, Respondent argues, Respondent cannot explore the full extent of Dr. McCarthy's bias.

Complaint Counsel contends that Respondent has failed to show sufficient cause to justify an order under Rule 3.31A(d) permitting the requested document discovery from Dr. McCarthy because, according to Complaint Counsel: (1) Complaint Counsel already voluntarily produced responsive documents as to "many of" the specifications in the subpoena; (2) Dr. McCarthy testified at his deposition that he does not have "several categories" of documents sought by Respondent; and (3) ECM "already has all of" the information it seeks. Accordingly, Complaint Counsel argues, Respondent has failed to justify an order for additional discovery.

### III.

Respondent points to the following matters raised in the deposition excerpts and related exhibits submitted with the Motion: (1) Dr. McCarthy invented a patent for a technology that competes with the ECM Additive. University of Massachusetts, Lowell ("UMass"), Dr. McCarthy's employer, is the patent assignee. The exclusive licensee of the patent is Metabolix, whose products, based on Dr. McCarthy's patent, compete with ECM in the market for biodegradable, compostable, and recyclable products. Dr. McCarthy gets royalties on sales by Metabolix; (2) Metabolix has supplied grant money and equipment to UMass, totaling \$2.5 million in grant money and \$500,000 in equipment donations, over a period of years; (3) If Dr. McCarthy secures research money for UMass, and is the principal investigator on the research project, he benefits from a share of the grant allocated to the research; (4) In 2008, Metabolix wrote to the FTC asking it to "check out" ECM's claims, asserting ECM's claims were deceptive, and concluding that ECM was in "clear violation" of FTC guidelines; and (5) Metabolix is a member of the Biodegradable Products Institute ("BPI"). From approximately 2001 until 2011, Dr. McCarthy provided consulting services to BPI for its certification program. BPI has written to the FTC in the past regarding what it and its members believed were misleading biodegradability claims for plastic bags, including bags using the ECM Additive.

The foregoing is sufficient to justify further inquiry as to Dr. McCarthy's possible bias and/or financial conflicts of interest. Information that goes to the bias of an expert is discoverable. *Behler v. Hanlon*, 199 F.R.D. 553, 556-57 (D. Md. April 23, 2001). Good cause

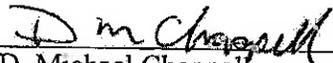
exists to allow Respondent to complete its discovery into this issue through the proposed document subpoena. Accordingly, Respondent's Motion is GRANTED. 16 C.F.R. § 3.31A(d).

This is not an order to produce any documents, including documents that may have already been provided. Moreover, no witness can be ordered to provide documents that do not exist. This Order holds only that Respondent has demonstrated sufficient cause to allow Respondent to issue the requested subpoena. Although Respondent's proposed subpoena includes specifications that appear to go to matters beyond bias, *e.g.*, Specifications 2 and 15 (requesting all documents used or referenced to form any and all opinions for the case); Specifications 10 and 21 (requesting documents pertaining to prior proceedings in which Dr. McCarthy served as an expert), such matters appear to be within the scope of proper expert discovery. *See* July 18, 2014 Order Denying Complaint Counsel's Motion to Compel Discovery Withheld by Dr. David Stewart; *In re Dura Lube Corp.*, 1999 FTC LEXIS 254 (Dec. 15, 1999). Accordingly, Respondent's Motion for Leave to issue the proposed subpoena should not be denied on that basis.

#### IV.

For all the foregoing reasons, Respondent's Motion is GRANTED, and it is hereby ORDERED, that the deadline for expert discovery pursuant to the Third Revised Scheduling is extended, for the limited purpose of the issuance of a subpoena for documents to Dr. McCarthy, consistent with this Order, for such time period as is necessary to enable production of the subpoenaed documents at least 48 hours prior to the expected date of Dr. McCarthy's testimony.

ORDERED:

  
D. Michael Chappell  
Chief Administrative Law Judge

Date: July 23, 2014