

ORIGINAL

PUBLIC

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



_____ )	
In the Matter of )	
ECM BioFilms, Inc., )	DOCKET NO. 9358
a corporation, also d/b/a )	
Envioplastics International, )	
Respondent. )	
_____ )	

**ORDER ON RESPONDENT’S COMBINED MOTION FOR SANCTIONS,  
TO EXCLUDE EXPERT WITNESS, AND FOR LEAVE**

**I.**

On July 9, 2014, Respondent ECM Biofilms, Inc. (“Respondent” or “ECM”) filed a Combined Motion for Sanctions, along with a memorandum in support, seeking to exclude Dr. Frederick Michel as a rebuttal expert witness for Federal Trade Commission (“FTC”) Complaint Counsel, or in the alternative, to allow Respondent to introduce a surrebuttal expert report and testimony (collectively, “Motion”). Respondent also filed a Motion to Extend the Word Count Limit, pursuant to Rule 3.22(f), as to which Complaint Counsel has not filed any opposition. Complaint Counsel filed an opposition to the Motion on July 21, 2014. On July 22, 2014, Respondent submitted a “supplement” to its Motion, purporting to respond to an argument in the Opposition. The “supplement,” which is, in effect, a reply submitted without advance leave of court, will not be considered. See 16 C.F.R. § 3.22(d) (stating there is no right of reply, and limiting circumstances in which leave to reply may be granted). Respondent’s Motion to Extend the Word Count Limit for the Motion is GRANTED.

Having considered the Motion, the Opposition, the exhibits submitted by the parties, and all arguments and assertions therein, the Motion is DENIED, except that Respondent will be permitted to take Dr. Michel’s deposition in advance of Dr. Michel’s testimony, as explained below.

**II.**

Respondent contends that Dr. Michel should be excluded as a rebuttal expert witness because he was not properly disclosed by Complaint Counsel in accordance with FTC Rule 3.31A and the Third Revised Scheduling Order, and because Dr. Michel’s report does not present rebuttal opinions, but rather is used to buttress the reports and expected testimony of

Complaint Counsel's other designated experts. Complaint Counsel responds that Dr. Michel was properly disclosed within the applicable deadlines. Further, Complaint Counsel argues, Respondent's request to allow a surrebuttal report should be denied because Dr. Michel's rebuttal report does not present material outside the scope of fair rebuttal and because Respondent's request for such surrebuttal was untimely under Rule 3.31A(a).

### III.

#### A. Request to Exclude Dr. Michel

Rule 3.38(b), upon which Respondent relies, authorizes sanctions for violation of a discovery obligation, including an order barring a party from introducing, or otherwise relying on, any evidence that has been "improperly withheld or undisclosed . . ." 16 C.F.R. § 3.38(b). Thus, the preliminary issue is whether Complaint Counsel disclosed Dr. Michel as required by the Rules and the Scheduling Order issued in this case.

Rule 3.31A governs expert discovery. That rule states in pertinent part:

- (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. . . . [A] rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports.

16 C.F.R. § 3.31A(a).

Consistent with the timing requirements set forth in Rule 3.31A(a), the Third Revised Scheduling Order ("Scheduling Order") set May 21, 2014 for the close of fact discovery; June 4, 2014 as the deadline for Complaint Counsel to provide its witness expert reports; June 18, 2014 as the deadline for Respondent to provide its expert witness reports to Complaint Counsel; and June 30, 2014 as the deadline for Complaint Counsel to "identify rebuttal expert(s) and provide rebuttal expert report(s)." Scheduling Order at 1-2.

It is undisputed that Complaint Counsel provided Dr. Michel's rebuttal expert report to Respondents on June 30, 2014, shortly before midnight. Respondent contends this was a violation of Complaint Counsel's discovery obligations because, according to Respondent, Complaint Counsel could have named Dr. Michel as an expert earlier and improperly concealed Dr. Michel as a potential expert and/or induced Respondent to believe that Dr. Michel, at best, would be a fact witness. These arguments are rejected as grounds for excluding Dr. Michel. The Rules and the Scheduling Order did not obligate Complaint Counsel to disclose to Respondent that Dr. Michel would be a rebuttal expert any earlier than June 30, 2014. Events occurring in

the case prior to this June 30 deadline, described in detail in Respondent's Motion, do not change this essential fact. Furthermore, although it is also undisputed that Complaint Counsel failed to provide, along with the rebuttal report, a separate document "identifying" or "listing" Dr. Michel as a rebuttal expert, this does not warrant the extreme sanction of excluding Dr. Michel, as requested by Respondent. Finally, Respondent's interpretation of the Rules as requiring rebuttal experts to be named at the same time as case-in-chief experts are named, while creative, is incorrect. The express language of Rule 3.31A(a), implemented by the Scheduling Order, clearly treats rebuttal experts separately from other experts, and does not obligate disclosure of rebuttal expert opinions until "10 days after the deadline for service of respondent's expert reports," in this case, June 30, 2014. 16 C.F.R. § 3.31A(a). For all these reasons, Respondent has failed to demonstrate a sanctionable discovery violation by Complaint Counsel, and Dr. Michel will not be excluded on that basis.

Respondent's contention that Dr. Michel's report is not fair rebuttal, but serves only to bolster Complaint Counsel's other experts, is also without merit. Rule 3.31A(a) states that "a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports" 16 C.F.R. § 3.31A(a). An examination of the rebuttal report shows a point by point response to assertions in the reports of Respondent's designated experts. That Dr. Michel, in drawing his conclusions, may rely on certain methodologies that are also used by Complaint Counsel's designated expert witnesses, as argued by Respondent, does not take Dr. Michel's opinions out of the realm of fair rebuttal. This does not mean that Dr. Michel's opinions will be accepted or relied upon to support any disputed issue in this case, but only that that, at this time, his report appears to contain fair rebuttal.

Accordingly, Respondent's request to exclude Dr. Michel as a rebuttal witness is DENIED.

### **B. Surrebuttal expert**

Respondent asks that, in the event Dr. Michel is not excluded as a rebuttal expert witness, Respondent be permitted to introduce into evidence a surrebuttal expert witness and surrebuttal report. Rule 3.31A(a) does not allow a surrebuttal expert as of right, but permits the Administrative Law Judge to grant leave to allow a surrebuttal expert and report under limited circumstances, stating:

[A] rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports. If material outside the scope of fair rebuttal is presented, a respondent may file a motion not later than 5 days after the deadline for service of complaint counsel's rebuttal reports, seeking appropriate relief with the Administrative Law Judge, including striking all or part of the report, leave to submit a surrebuttal report by respondent's experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

16 C.F.R. § 3.31A(a).

As noted above, Respondent fails to point to any material in Dr. Michel's rebuttal expert report that is "outside the scope of fair rebuttal." Moreover, Respondent did not file its request for surrebuttal within "5 days after the deadline for service" of Complaint Counsel's rebuttal report. Because Complaint Counsel served Dr. Michel's report on June 30, 2014, Respondent was required to seek leave no later than July 7, 2014. Respondent's request was filed July 9, 2014, and is therefore untimely. For all these reasons, Respondent's request for surrebuttal is DENIED.

### C. Deposition

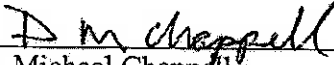
Respondent notes that the deadline to complete expert depositions under the Scheduling Order was July 2, 2014, only a few days after Respondent was served with Dr. Michel's rebuttal report. Respondent further asserts that, although Complaint Counsel offered a number of alternative deposition dates, such dates conflict with other pre-hearing deadlines, as well as overall preparation for the hearing, which commences August 5, 2014. However, given the fact that Dr. Michel is a rebuttal witness that would testify toward the end of the hearing, a deposition after the start of the hearing is feasible.

Respondent has demonstrated good cause for an extension of the expert deposition deadline in the Scheduling Order so that Respondent may have an opportunity to depose Dr. Michel, in advance of the date of his hearing testimony, as detailed below. 16 C.F.R. § 3.21(c)(2) (Administrative Law Judge may, upon a showing of good cause, extend any deadline specified in the scheduling order except the date of the evidentiary hearing).

### IV.

Having fully considered the Motion, Opposition, exhibits, and all assertions and arguments of the parties, Respondent's requests to exclude Dr. Michel as a rebuttal witness, or in the alternative to allow a surrebuttal witness are DENIED. Respondent is GRANTED leave to depose Dr. Michel at a mutually agreeable day at least three (3) business days in advance of the expected date of Dr. Michel's testimony. The parties shall cooperate to schedule a mutually agreeable date and time.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: July 23, 2014