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 DENYING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL REBUTTAL FACT WITNESSES AND RESPONDENT'S REQUEST TO BAR REBUTTAL EXPERT WITNESS

I.

On August 25, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to Call Rebuttal Fact Witnesses ("Motion"). Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed its Opposition on August 26, 2014, and included therein a request to bar rebuttal testimony from Complaint Counsel's designated rebuttal expert ("Opposition"). Rulings on Complaint Counsel's Motion and Respondent's request were made on the record at trial on August 27, 2014. These rulings: (1) denied Complaint Counsel's Motion; and (2) denied Respondent's request to bar Complaint Counsel's rebuttal expert. The parties were further advised that a written order with analysis, reasoning, and applicable legal standards would issue subsequently.

Along with Complaint Counsel's Motion, Complaint Counsel filed a Motion for Leave to File a Motion in Excess of the Word Count. Along with Respondent's Opposition, Respondent filed a Motion to Extend the Page Count. Those two motions are GRANTED.

For the reasons stated on the record at trial, and as further explained below, Complaint Counsel's Motion is DENIED. Respondent's request to bar testimony from Complaint Counsel's designated rebuttal expert is also DENIED.

II.

Trial in this matter commenced on August 5, 2014. Complaint Counsel rested its case-in-chief on August 12, 2014. During preliminary proceedings at trial on Monday, August 25, 2014, Complaint Counsel advised of its desire to call two rebuttal fact witnesses after the conclusion of

Respondent's case. Complaint Counsel was directed to file a motion requesting leave to call rebuttal witnesses, and to include in its motion an offer of proof for each such witness along with a designation of the specific testimony that any such proof would rebut. Complaint Counsel was not required to provide such information with respect to testimony from Respondent's proffered experts, Dr. Ryan Burnette and Dr. David Stewart, because these witnesses had not yet testified. (Transcript of Proceedings ("Tr.") 2359, 2362). Complaint Counsel was specifically asked whether it objected to providing an offer of proof in its motion, and Complaint Counsel replied that it had no such objection. (Tr. 2362).

Complaint Counsel indicated that it intended to file its motion for leave to call rebuttal witnesses by the close of business on August 25, 2014. However, in order to provide Complaint Counsel with sufficient time to include its offer of proof in its motion, Complaint Counsel was permitted to file its motion the following day, August 26, 2014, no later than 1:00 p.m. *Id.* Notwithstanding the foregoing, Complaint Counsel filed its motion at approximately 1:00 p.m. on August 25, 2014.[1]

III.

FTC Rule 3.43(d) sets forth that a party is entitled to submit rebuttal evidence, in the discretion of Administrative Law Judge, as may be required for a full and true disclosure of the facts. 16 C.F.R. § 3.43(d). Rebuttal evidence is defined as "[e]vidence offered to disprove or contradict the evidence presented by an opposing party." *Black's Law Dictionary Abridged Ninth Edition* (Publisher: West; 9th edition (June 11, 2010)). "The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the *evidence offered by an adverse party*." *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008) (emphasis added) (internal citations omitted); *United States v. Hall*, 653 F.2d 1002, 1006 (5th Cir. 1981).

"Testimony offered only as additional support to an argument made in a case-in-chief, if not offered 'to contradict, impeach or defuse the impact of the evidence offered by an adverse party,' is improper on rebuttal." *Peals*, 535 F.3d at 630 (internal citations omitted). "A rebuttal witness may not be used to bolster testimony offered by a plaintiff in its case-in-chief. Rather, rebuttal testimony may only respond to evidence offered by the defendant." *Hein v. Deere & Co.*, 2013 U.S. Dist. LEXIS 102769, at *32-33 (N.D. Iowa 2013) (citing *Benedict v. United States,* 822 F.2d 1426, 1429 (6th Cir. 1987) (distinguishing between evidence offered "to reinforce [the plaintiff's] initial premise" and testimony which was "real rebuttal evidence")). *Accord Estate of James Frederick Brutsche v. City of Fed. Way*, 300 Fed. Appx. 552, 553 (9th

[1] Complaint Counsel's Motion included a footnote stating: "We note that Complaint Counsel's ability to prepare a full and complete offer of proof is limited somewhat by the fact that the Court added the requirement of including a written offer of proof less than three hours ago, and we have not yet heard Dr. Stewart's testimony." Motion at 12 n.30. At trial on August 27, 2014, it was pointed out to Complaint Counsel that Complaint Counsel had been given until 1:00 p.m. on August 26 to prepare its offer of proof, not "three hours," as stated in the footnote. Complaint Counsel was asked whether, given this inaccuracy, it wished to withdraw or strike footnote 30 from its Motion, but Complaint Counsel declined to do so. (Tr. 2484-2485). In addition, Complaint Counsel was instructed that if its request for a rebuttal witness was denied, Complaint Counsel would be permitted to add to its offer of proof at that time. (Tr. 2485-2486). Complaint Counsel did not attempt to supplement any offer of proof when the rebuttal witness requests were denied on August 27, 2014, or at any time before the record was closed on September 4, 2014.

Cir. 2008) ("[R]ebuttal evidence may not be offered merely to bolster the plaintiff's case-in-chief.").

"The potential for unfairness to the opponent and confusion of the issues militates against admitting new or repetitive evidence at the rebuttal stage." *Tramonte v. Fibreboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991) (citations omitted). Thus, a "plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case (as distinct from an affirmative defense) must put in his evidence on the issue as part of his case in chief." *Braun v. Lorillard Inc.*, 84 F.3d 230, 237 (7th Cir. 1996) (citation omitted).[2]

III.

Mr. Tarang Shah

Complaint Counsel requests to call Mr. Tarang Shah, whom Complaint Counsel identifies as a corporate materials and applications manager for Myers Industries. According to Complaint Counsel's offer of proof, Mr. Shah would testify that he properly manufactured, in accordance with ECM's instructions, the ECM plastic material provided to Dr. Frederick Michel, Complaint Counsel's designated rebuttal expert, for Dr. Michel's Ohio State study of the ECM additive (*see* CCX 905). Complaint Counsel contends that Respondent's proffered expert, Dr. Ranajit Sahu, "opined for the first time at trial that Myers Industries may not have manufactured the samples in accordance with ECM's instructions, rendering Dr. Michel's conclusions allegedly unreliable," Motion at 2, and that Mr. Shah's testimony will rebut this opinion.

In opposition, Respondent argues that Complaint Counsel has known about Mr. Shah and his role with respect to the testing materials used by Dr. Michel, but failed to note any intent to call Mr. Shah until after Complaint Counsel rested its case, and that the testimony proffered is, therefore, not proper rebuttal. Rather, Respondent argues, Mr. Shah's testimony is designed to bolster Complaint Counsel's case-in-chief, and will prejudice Respondent by denying Respondent the opportunity for full discovery related to Mr. Shah and to prepare a case in defense predicated on that discovery.

According to the excerpts of Dr. Sahu's testimony cited by Complaint Counsel, Dr. Sahu stated that he "did not know" various facts concerning the preparation and transmission of the test samples to Dr. Michel because Dr. Michel's testing report did not discuss these particular matters. (Motion at 6-7; Tr. 1959-1960). Contrary to Complaint Counsel's argument, such testimony does not express or imply that the test samples provided to Dr. Michel for his study were not properly manufactured in accordance with ECM's instructions, or otherwise impugn the integrity of the test samples. Moreover, no such inferences will be drawn from that testimony.

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[2] Complaint Counsel's Motion relies on a four-part legal test that applies when a party seeks to call a witness at trial that was not included on a final witness list. This test focuses principally on whether calling such a witness would unfairly "prejudice or surprise" the opposing party. However, when evaluating proffered rebuttal evidence, the authorities cited herein, above, make clear that the central, and foundational, issue is whether the proffered testimony, in fact, constitutes rebuttal evidence or whether the testimony serves principally to bolster a party's case-in-chief. In this regard, the four-part test upon which Complaint Counsel relies is inapposite.

Accordingly, the proposed rebuttal does not serve to "contradict, impeach or defuse" any testimony of Dr. Sahu, as asserted by Complaint Counsel. *See Black's Law Dictionary*, *supra*; *Peals*, 535 F.3d at 630.

For the foregoing reasons, Complaint Counsel's request to call Mr. Shah as a rebuttal witness is DENIED.

Mr. Paul McDonald

Complaint Counsel, through its proffered expert, Dr. Frederick Shane, procured a survey from Google Consumer Surveys ("GCS") to support Complaint Counsel's allegations as to the meaning of Respondent's advertising claims alleged in this case (the "Google survey"). Complaint Counsel seeks to call Mr. Paul McDonald, whom Complaint Counsel identifies as a product manager for GCS, to testify regarding eight subjects related to GCS, including, among other things: how GCS gathers and assesses survey responses; how GCS operates to provide a "reasonably reliable" sample of American consumers; how GCS's technology allows it to target survey respondents based on "inferred demographic criteria"; additional methods by which GCS validates the reliability of its surveys and the inferred demographic information; how GCS deals with attempts by survey respondents to "mask" their demographic characteristics; and the availability of GCS on certain tablet and mobile devices. Motion at 12-13.

Complaint Counsel argues that such testimony is to rebut Respondent's arguments that the Google survey results are unreliable and to rebut the expected critiques of GCS and the Google survey by Respondent's proffered survey expert, Dr. Stewart. Specifically, Complaint Counsel argues that Dr. Stewart is expected to testify that the Google survey sample upon which Complaint Counsel relies is unrepresentative (and presumably, therefore, unreliable) because the surveys are not made available to mobile users and because users can use private browsing or hidden cookies to "mask" their Internet Protocol ("IP") addresses. Respondent replies that Mr. McDonald is not a true rebuttal witness, but a fact witness that will bolster the testimony of Complaint Counsel's proffered survey expert, Dr. Frederick, and correct errors or omissions in Complaint Counsel's case-in-chief.[3] Respondent further argues that Complaint Counsel was well aware, months prior to trial, that the validity and reliability of the Google survey would be a contested issue in the case and that Complaint Counsel failed to demonstrate that it could not reasonably foresee the need for a GCS witness.

In court on August 27, 2014, a ruling on Complaint Counsel's request to call Mr. McDonald for rebuttal was reserved, pending receipt of testimony from Dr. Stewart. (Tr. 2488). Dr. Stewart's report does not opine that Google Consumer Surveys are unavailable to mobile users or that users can use private browsing or hidden cookies to "mask" their IP addresses, and Dr. Stewart did not address any of these points in his direct testimony. Thus, there is no basis for calling Mr. McDonald to "rebut" points that Respondent has not elicited. *See Peals*, 535 F.3d at 630 ("The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of

[3] On cross-examination, Complaint Counsel's proffered survey expert, Dr. Frederick, testified that he had no knowledge about the methodologies of GCS on these matters. *See* Motion at 4 n.13 (citing transcript excerpts).

the evidence offered by an adverse party.").

In addition, Complaint Counsel's proffered expert, Dr. Frederick, based his opinions upon the results of a Google Consumer Survey. It is beyond genuine dispute that the reliability of GCS, as well as the background and inner workings of GCS, would play major roles in assessing Dr. Frederick's proffered expert opinions. Thus, Complaint Counsel knew, or clearly should have known, that all aspects of the reliability of the Google survey sample, as well as Dr. Frederick's knowledge of the techniques and methodologies of GCS, would be significant, disputed issues. Accordingly, Complaint Counsel could have, and arguably should have, presented its evidence on these matters in its case-in-chief. Complaint Counsel's failure to do so does not create a need for "rebuttal." Rather, it appears that Complaint Counsel seeks to call Mr. McDonald to bolster Complaint Counsel's assertions as to the reliability of GCS and/or the Google survey which, as the foregoing legal authorities make clear, does not constitute true rebuttal. *See Hein*, 2013 U.S. Dist. LEXIS 102769, at *32-33.

Furthermore, given that Complaint Counsel failed to present evidence on known, disputed factual issues regarding GCS in its case-in-chief, it would be unfair and prejudicial to Respondent to allow Complaint Counsel to present Mr. McDonald's testimony under the guise of rebuttal. Complaint Counsel could have identified Mr. McDonald as a potential witness for its case-in-chief, and had it done so, Respondent would have had the opportunity to take related discovery and name its own fact witness to address GCS.[4] Under the circumstances presented, this opportunity, as a practical matter, is lost.

For all the foregoing reasons, Complaint Counsel's Motion to call Mr. McDonald as a rebuttal witness is DENIED.

IV.

Dr. Frederick Michel

Respondent included in its Opposition a request for an order prohibiting Complaint Counsel from calling Dr. Frederick Michel to testify as a rebuttal expert witness. Respondent argues that Complaint Counsel failed to file a motion for leave to call this rebuttal witness or to demonstrate that Dr. Michel's testimony is, in fact, rebuttal, rather than an attempt to bolster Complaint Counsel's case-in-chief. The requirement that a party seek leave to call a rebuttal witness does not apply to a properly identified rebuttal expert witness that filed a rebuttal report, pursuant to FTC Rule 3.31A(a). *See* 16 C.F.R. § 3.31A(a) (specifically authorizing rebuttal expert witnesses and reports). As to whether Dr. Michel's testimony constitutes fair rebuttal to the opinions of Respondent's proffered experts, it has already been held in this case that Dr. Michel's report constitutes fair rebuttal. *See* Order on Respondent's Combined Motion for

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[4] Complaint Counsel notes that Dr. Frederick's rebuttal report, submitted June 30, 2014, mentioned having "telephonic meetings" with Mr. McDonald prior to Dr. Frederick's deposition, which "confirmed the mechanics and methodology behind GCS." CCX 865 at 3; Motion at 4. The late date of such disclosure, two days before the close of expert discovery and more than a month after the close of fact discovery, cannot reasonably be interpreted as adequate notice. *See* Third Revised Scheduling Order at 1-2.

Sanctions, to Exclude Expert Witness, and for Leave (July 23, 2014) (denying Respondent's pre-trial request to bar Dr. Michel from testifying or allow Respondent to designate a surrebuttal expert witness). For these reasons, Respondent's request was denied on the record on August 27, 2014. (Tr. 2489-2491). Moreover, to prevent any unfair prejudice, in accordance with FTC Rule 3.31A(c) and (d), Dr. Michel's testimony was limited to matters within the scope of his report and to rebutting testimony offered by Respondent's experts. (Tr. 2489-2491)

Accordingly, Respondent's request to bar Dr. Michel from testifying as a rebuttal expert witness is DENIED.

V.

For the reasons stated in court on the record on August 27, 2014, and for all the foregoing reasons, Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses is DENIED. Respondent's request to bar Dr. Michel from testifying as a rebuttal expert witness is also DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 5, 2014