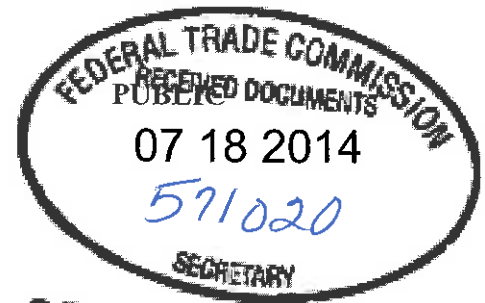


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of)

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

DOCKET NO. 9358

**ORDER DENYING COMPLAINT COUNSEL'S MOTION
TO COMPEL DISCOVERY WITHHELD BY DR. DAVID STEWART**

I.

On July 9, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Compel Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") to supplement its responses to document requests issued by Complaint Counsel in November 2013 regarding ECM's "sophisticated customer" defense. Respondent filed its opposition on July 11, 2014 ("Opposition"). Having considered the Motion, the Opposition, and all arguments and assertions therein, the Motion is DENIED, as explained below.

II.

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"). The Complaint alleges, among other things, that Respondent distributes ECM Additives to its customers – independent distributors and plastic products manufacturers (collectively, "customers") – located throughout the United States who, in turn, treat plastics with ECM Additives and thereafter advertise and sell the treated plastic products to end-users as biodegradable. Complaint ¶ 2. The Complaint further alleges that ECM's representations to its customers were passed on to plastics end-users, and therefore, ECM provided its customers with the "means and instrumentalities" to deceive the end-users. Complaint ¶¶ 4, 14, 15. Respondent defends against the charge, in part, by asserting that it sells to sophisticated customers who would not interpret Respondent's representations in the manner alleged in the Complaint. Answer ¶ 4.

Complaint Counsel states that Respondent engaged Dr. David Stewart to opine regarding how ECM's customers understand biodegradation. Complaint Counsel further states that, at his deposition, Dr. Stewart testified that he conducted a "manufacturers' pilot study" for ECM and that, to facilitate this study, ECM provided Dr. Stewart with a list of customers for interviewers working for Dr. Stewart to contact. Complaint Counsel states that ECM and Dr. Stewart did not provide the list of customers who were interviewed to Complaint Counsel and that although ECM and Dr. Stewart provided a report of the pilot study results, because the results identify survey respondents by number and Complaint Counsel has no way to correlate the numbers on the results with ECM's list of potential survey respondents, Complaint Counsel cannot determine which companies or persons on the list were interviewed or provided which responses. Complaint Counsel seeks to compel ECM to produce information "sufficient to establish which ECM customers provided which interview responses to Dr. Stewart's researchers." Motion at 6.¹

Respondent states that: it retained Dr. Stewart to provide expert testimony concerning, *inter alia*, public perception of "biodegradable" claims in the marketplace; Dr. Stewart designed a pilot study that involved a telephone survey of plastics companies; ECM provided Dr. Stewart with a list of 150 former and current customers; Dr. Stewart hired a third party, California Survey Research Services, Inc. ("CSRS") to perform the survey; CSRS selected a random group of businesses from the list of 150 companies that Dr. Stewart had provided to CSRS; and CSRS recorded responses for ten survey respondents. Respondent further states: "neither Dr. Stewart nor ECM [was] given the names of the study participants that CSRS contacted. Responses were blinded by CSRS, and given to Dr. Stewart with codes instead of names." Opposition at 4 (citations omitted). Thus, Respondent argues, ECM never possessed the specific names of the survey participants and there is no evidence that Dr. Stewart relied on the customer names in any capacity when forming his opinions in this case, or that the names were relevant to Dr. Stewart's analysis.

III.

Dr. Stewart is a testifying expert. Therefore, the dispositive issue is whether or not Respondent, in complying with expert discovery requirements, is required to identify each survey participant contacted by CSRS and which identified participant gave which response. The Commission's rule governing expert discovery requires the parties to provide expert reports to the opposing party, signed by the expert, and containing 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; and any exhibits to be used as a summary of

¹ In addition, Complaint Counsel asserts that two of its document requests, issued in November 2013, seeking documents relating to consumer perception of biodegradability and to Respondent's contention that its customers or purchasers are sophisticated purchasers, cover the information at issue and that Respondent has a duty to supplement its responses in a timely manner. Complaint Counsel argues that Respondent has no basis for refusing to disclose the requested information. Specifically, Complaint Counsel asserts that Rule 3.37(a) applies to all materials in ECM's "possession, custody, or control," and that ECM can request the responsive information from Dr. Stewart. Complaint Counsel further asserts that there is no privilege protecting the names of the survey respondents from disclosure. However, as explained herein, these arguments are not dispositive to the dispute at issue and thus need not and will not be addressed.

or support for the opinions. 16 C.F.R. § 3.31A(c). In addition, pursuant to the Scheduling Order agreed to by the parties and entered in this case:

The parties are required to comply with Rule 3.31A and with the following: . . .
At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. *Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.*

Scheduling Order ¶19(b) (emphasis added).

Addressing the scope of expert discovery in *In re Dura Lube Corp.*, 1999 FTC LEXIS 254 (Dec. 15, 1999), it was held that “all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document” must be produced. *Id.* at *7. “The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but extends to documents considered but rejected by the testifying expert in reaching those opinions.” *Id.* (citation omitted). “Any document considered by an expert in forming an opinion, whether or not such document constitutes work product or is privileged, is discoverable.” *Id.* **7-8 (citations omitted).

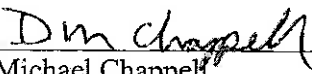
Respondent has provided to Complaint Counsel the list of 150 companies that ECM provided to Dr. Stewart. Respondent has also provided to Complaint Counsel the survey responses generated by the manufacturers' pilot study. Motion at 3. The dispute at issue is whether Respondent is further required to provide Complaint Counsel with the names of the ten individual companies that provided each of the responses obtained by CSRS at Dr. Stewart's direction. Applying the foregoing authorities, the dispositive question in resolving this dispute is whether Dr. Stewart considered or relied upon the identities of the individuals who provided responses to the CSRS survey in formulating any opinion in this case.

In his deposition, in response to a question from Complaint Counsel asking for additional information to enable Complaint Counsel to figure out who CSRS contacted, Dr. Stewart testified that he did not know the identity of the specific survey respondents. RX-A:1 Deposition of Dr. Stewart, at 272-274. If Dr. Stewart did not have the names of the specific survey respondents, he could not have considered or relied upon them in formulating any opinion in this case. Moreover, even if Dr. Stewart did know the identity of the individuals, Dr. Stewart would not be required to disclose those identities unless he relied upon the identity of those individuals in formulating his expert report in this case or any opinions therein. *In re Dura Lube Corp.*, 1999 FTC LEXIS 254, at *7. Because Complaint Counsel has failed to demonstrate that Dr. Stewart considered the identities of the pilot study survey respondents (as opposed to the responses themselves), there is no basis for concluding that such identities are discoverable.

IV.

Because Respondent has not wrongfully withheld discovery and for the above stated reasons, Complaint Counsel's Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 18, 2014