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 RESPONDENT'S MOTION FOR PROTECTIVE ORDER

On February 18, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion for Protective Order ("Motion"), seeking an order prohibiting Federal Trade Commission ("FTC") Complaint Counsel from serving nonparty discovery upon 10 customers that Respondent identifies as its "top ten" revenue generating customer accounts, and limiting the total number of nonparty subpoenas that may be served on ECM customers by Complaint Counsel to 35, including 11 that have previously been issued to certain prospective or former customers of ECM. Complaint Counsel filed an opposition to the Motion on February 28, 2014 ("Opposition").

Having fully considered the Motion, Opposition, and all arguments and assertions therein, the Motion is DENIED, as further explained below.

I. Applicable Legal Standards

Pursuant to FTC Rule 3.31(c)(1), "[u]nless otherwise limited by order of the Administrative Law Judge, . . . [p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). However, even if proposed discovery meets the foregoing relevance test:

> [t]he frequency or extent of use of the discovery methods . . . shall be limited by the Administrative Law Judge if he or she determines that:
>
> (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity by discovery in the

action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

16 C.F.R. § 3.31(c)(2).

Even if requested discovery is otherwise permissible under the rules, FTC Rule 3.31(d) permits the Administrative Law Judge to "deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. § 3.31(d). The burden of demonstrating that the challenged discovery should not proceed is on Respondent, as the proponent of the requested protective order. *In re Polypore Int'l*, 2008 FTC LEXIS 155, at *14-16 (Nov. 14, 2008); *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *5 (July 6, 2001); *In re Phoebe Putney Health Sys.*, 2013 FTC LEXIS 84, at *13 (May 28, 2013). Furthermore, parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *In re Polypore*, 2008 FTC LEXIS 155, at *16.

II. Background

The Complaint in this case charges that ECM engaged in deceptive trade practices in violation of Section 5 of the Federal Trade Commission 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.

This is Respondent's second motion for a protective order directed at limiting Complaint Counsel's contact with ECM's customers. Among the issues presented by the previous motion, filed December 16, 2013, was whether Complaint Counsel was entitled to discover the identities of all Respondent's customers, the amount of ECM revenues that each such customer generated for ECM, and ECM's communications with its customers and potential customers. Respondent's requested protective order sought to limit Complaint Counsel to ECM's identification of 50 customers that did not have orders pending and exclusive of ECM's top 10 revenue generating customers, and to preclude Complaint Counsel from contacting, by formal or informal process, in excess of 10 of ECM's customers from the list of 50. Respondent's arguments in support of the proposed limitations included that (1) the benefit to Complaint Counsel of its requested discovery is outweighed by resulting economic harm from lost customer business, which,

Respondent argued, would surely occur if Complaint Counsel were to contact and/or issue subpoenas to ECM's customers; and (2) the customer communications requested by Complaint Counsel are available from ECM, which ECM asserts is less burdensome and less expensive than seeking such information from Respondent's customers.

Respondent's previous motion for protective order was denied by Order issued January 10, 2014. ("January 10 Order"). The January 10 Order held, among other things, that "[t]he nature of Respondent's representations to its customers and distributors is a key issue in the case," and thus within the scope of discovery under Rule 3.31(c)(1). January 10 Order at 6. Further, Respondent had acknowledged that ECM's communications with its customers regarding ECM Additives are discoverable. *See id.* at 8. In addition, the January 10 Order held that "Respondent's assertion that disclosure of ECM's customer list will inevitably result in a devastating loss of business" was not sufficiently supported by the facts that Respondent presented. January 10 Order at 6. Furthermore, the January 10 Order held that it was "premature to determine whether obtaining discovery of communications directly from ECM's customers is more burdensome or more expensive than obtaining such communications from ECM" because no discovery had yet been issued to any ECM customer, and there was no pending motion by any customer resisting discovery of ECM communications on the ground of burden or expense. *Id.*

III. Analysis

Based upon the representations of the parties and the exhibits attached to the Motion and Opposition, on or about January 29, 2014, Complaint Counsel issued subpoenas *duces tecum* to 11 ECM prospective or former customers, drawn from a list of customers provided by Respondent. In addition, on February 3, 2014, Complaint Counsel notified Respondent's counsel that it intended to issue subpoenas to 35 ECM customers identified by Respondent as current customers. On February 4, 2014, Complaint Counsel indicated it would issue subpoenas to 15 additional current ECM customers.[1] A copy of one document subpoena issued by Complaint Counsel, attached to the Motion, seeks all documents pertaining to ECM and the ECM Additive, including any communications with ECM; marketing materials; testing or scientific information; internal communications; and third-party communications. Motion RX-D. Respondent represents, and Complaint Counsel does not dispute, that other customer subpoenas are, or will be, substantially identical.

According to Complaint Counsel, in connection with previous discovery, Respondent provided a list of {[redacted]} prospective customers and another list of {[redacted]} current customers. Opposition at 2. Robert Sinclair, Respondent's President and Chief Executive Officer, states in a declaration attached to the Motion that ECM sold its product to {[redacted]} customers in 2013. Motion RX-A (hereafter, "Sinclair Decl.") ¶ 5.

Respondent does not dispute the relevance of the requested documents under Rule

[1] Respondent states that Complaint Counsel has represented that it will not serve subpoenas on additional ECM customers pending resolution of the instant Motion.

3.31(c)(1), but argues that customer subpoenas should nevertheless be limited under Rule 3.31(c)(2). Specifically, Respondent contends that (1) the discovery sought from ECM customers is redundant and cumulative because the same information is obtainable from ECM directly; (2) the probative value of discovery from ECM's top 10 customers is substantially outweighed by the burden the discovery will place on ECM, because, as a result of being subpoenaed, {[redacted]}; and (3) it is reasonable to impose an overall limit of 35 customer subpoenas and to exclude the top ECM accounts, given the financial harm that Respondent asserts will occur. Memorandum in Support of Motion ("Memorandum") at 6-8.

Complaint Counsel contends that there is insufficient evidence that any ECM customer has stopped, or will stop, purchasing from Respondent solely as a result of being contacted by Complaint Counsel; that it cannot properly litigate this case without taking discovery from ECM's customers; and that there are no other means to obtain the requested discovery. Opposition at 5-8.

As of the date of this Order, no ECM customer has filed a motion seeking to quash any subpoena issued by Complaint Counsel.

A. Asserted Duplication of Information Available from ECM Directly

Respondent argues that Complaint Counsel has received database summaries of ECM's communications with customers, and also has received, or will receive, thousands of pages of customer correspondence with ECM, such as e-mails and faxes. Included in these materials, Respondent asserts, are not only customer communications with ECM, but also marketing materials, and testing and scientific data that ECM conveyed to its customers in support of ECM's product claims. Because this is the same information Complaint Counsel seeks in its customer subpoenas, Respondent argues, the subpoenas seek cumulative and redundant documents, and should, therefore, be limited pursuant to Rule 3.31(c)(2)(i).

Complaint Counsel responds that ECM's document production is not duplicative of all information it seeks from ECM customers. Complaint Counsel states that Respondent's records provide little or no information about verbal communications, and further, that even if Respondent's records may indicate what Respondent said to its customers, it cannot be determined how customers understood Respondent's claims without hearing from the customers themselves. In addition, Complaint Counsel asserts, Respondent's records will not reflect customers' internal communications regarding Respondent's product claims, or customers' third-party communications in this regard that were not shared with ECM.

In *In re LabMD Inc.*, No. 9357, 2013 WL 6327986 (Nov. 22, 2013), an Order was issued holding that the respondent could not object to subpoenas issued to nonparties on the ground that the subpoenas sought information that was duplicative of information already provided by the respondent, because such argument improperly relied upon the rights of or burdens imposed on

nonparties, rather than those of the respondent. 2013 WL 6327986 at *4. *See also In re Horizon Corp.*, 88 F.T.C. 208, 1976 FTC LEXIS 209, at *4 n.5 (July 28, 1976) (holding that a party may not ask for an order to protect the rights of another). Other than citing the general language of 3.31(c)(2)(i) placing limits on cumulative discovery, Respondent fails to articulate how its interests are hurt by nonparties' producing allegedly duplicative documents.

Moreover, Respondent fails to demonstrate, and it will not be presumed, that customer records of communications, or marketing or testing materials, regarding ECM or the ECM Additive, are entirely duplicative of Respondent's records. There is no basis for concluding that Respondent's records include customers' internal communications, or all customers' third-party communications regarding ECM or the ECM Additive, or all non-written communications between ECM and its customers. In addition, while Respondent's database summaries of customer communications may purport to recite what ECM or a customer said in a given conversation, this is not a basis for preventing Complaint Counsel from exploring customer recollections of those conversations, and limiting discovery to Respondent's recitations.

Furthermore, as noted in the January 10 Order denying Respondent's previous motion for protective order, a "key issue" in this case is the nature of Respondent's representations to its customers. How customers interpreted Respondent's statements and written materials, which is uniquely within the knowledge of those customers, is relevant to this issue. *See In re Telebrands Corp.*, 140 F.T.C. 278, 291, 2005 FTC LEXIS 178 (Sept. 19, 2005) ("An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim."). Indeed, Respondent specifically claims, in defense, that it sells to "sophisticated customers" who would not interpret Respondent's representations in the manner alleged in the Complaint, further placing in issue the manner in which ECM customers interpreted Respondent's representations.

Accordingly, ECM customer subpoenas will not be limited on the basis that the requested discovery is cumulative and redundant of discovery provided, or to be provided, by Respondent.

B. Asserted Undue Burden

Respondent asserts, as it did in its previous motion for a protective order, that Complaint Counsel's issuance of subpoenas will result in ECM losing customers. Respondent further asserts, relying upon the declarations of Mr. Sinclair and ECM's Chief Financial Officer, and certain ECM financial documents attached thereto, that if ECM {[redacted]}. Sinclair Decl. ¶¶ 6, 15-16; Motion RX-C (Declaration of Kenneth C. Sullivan) ¶¶ 10-13. Thus, Respondent argues, the burden that will be placed on Respondent by the issuance of customer subpoenas outweighs the relevance of the information sought from the customers.

Fundamental to Respondent's claim of undue burden is the factual assertion that customers will cease doing business with ECM if subpoenaed by Complaint Counsel. In support

of this claim, Respondent points to four customers: {[redacted]}; American Plastic Manufacturing, Inc.; MacNeill Engineering Company; and Sigma Plastics Group.

1. {[redacted]}

Regarding {[redacted]}, which Respondent identifies as an end-user of an ECM customer and a "key account," the record shows that {[redacted]}

Motion RX-A:4. Respondent asserts that the foregoing supports its claim that issuance of subpoenas will cause its customers to cease doing business with ECM.

In response, Complaint Counsel submits the Declaration of {[redacted]}

[redacted]. While it is possible that the FTC subpoena was the "last straw" for {[redacted]} with respect to ECM-treated bags, it cannot be concluded on the record presented that, but for Complaint Counsel's subpoena, {[redacted]} would have continued doing business with ECM, or that {[redacted]} decided not to purchase ECM additive treated bags "because of" Complaint Counsel's subpoena, as opposed to {[redacted]} concerns about Respondent's claims. Thus, the loss of {[redacted]} business does not prove that Respondent will lose customers solely because they receive subpoenas from Complaint Counsel.

2. American Plastic Manufacturing, Inc. and MacNeill Engineering Company

In further support of Respondent's claim that Complaint Counsel's subpoenas will cause customers to cease doing business with ECM, Respondent states that in the investigative stage of this case, American Plastic Manufacturing, Inc. ("American Plastic") and MacNeill Engineering Company ("MacNeill") also ceased doing business with ECM after being "contacted" by Complaint Counsel during the investigative phase of this case, and before these companies entered into consent agreements with the FTC. Memorandum at 1; Sinclair Decl. ¶ 9. Even assuming that American Plastic and MacNeill have ceased doing business with ECM, Respondent submits no evidence to support a finding that such entities ceased doing business with ECM because of being subpoenaed by Complaint Counsel in the instant case. Further, in an affidavit, Complaint Counsel Katherine Johnson states that American Plastic and MacNeill knew that they were being investigated as targets, and that Complaint Counsel informed these companies that they would face litigation if they did not agree to stop conveying ECM's biodegradability claims. Opposition CCX-A (hereafter, "Johnson Decl.") ¶ 17. These unique circumstances do not warrant the inference that other ECM customers will discontinue business with ECM merely because they are subpoenaed to give information in this case.

3. Sigma Plastics Group

Respondent asserts that Sigma Plastic Group ("Sigma") has {[redacted]}. Sinclair Decl. ¶ 9. However, this statement does not explain the relationship of Sigma to ECM, state that Sigma has been subpoenaed by Complaint Counsel, or assert any reason for Sigma's {[redacted]}. It cannot be concluded based on this statement that Sigma is a "customer," or that Sigma's conduct is related to being subpoenaed by Complaint Counsel. Moreover, Complaint Counsel states that "Sigma has not received a subpoena, nor has Complaint Counsel proposed to subpoena Sigma." Opposition at 5 (citing Johnson Decl. ¶ 15). Thus, there is no basis for concluding that Sigma's {[redacted]} was caused by Complaint Counsel's serving a subpoena, or that other ECM customers would cease doing business with ECM if they are served with a subpoena by Complaint Counsel.

4. Conclusion

Respondent has failed to demonstrate as a factual matter that {[redacted]}, American Plastics, MacNeill, or Sigma ceased doing business with ECM solely because they were subpoenaed by Complaint Counsel. Thus, Respondent has failed to support its factual assertion that it will lose customers that are subpoenaed by Complaint Counsel. Because this assertion is the basis for Respondent's argument that Complaint Counsel's subpoenaing customers will unduly burden Respondent with irreparable financial harm, Respondent has similarly failed to demonstrate that Complaint Counsel should therefore be limited in its discovery, as proposed by Respondent.[2]

C. Reasonableness of the proposed limitation

Respondent asserts that "given the fact of business loss" that it claims has been demonstrated as a result of Complaint Counsel's issuing its first 11 subpoenas, "it is reasonable to impose an overall limit." Memorandum at 7-8. This assertion is logically indistinguishable from Respondent's claim that the issuance of subpoenas should be limited because it will result in irreparable financial harm to ECM, and thereby present an undue burden. As noted above, Respondent has failed to prove its assertion of business loss solely as a result of customers' being subpoenaed by Complaint Counsel. Absent such proof, the "reasonableness" of the proposed limitation is not material.

IV. Conclusion

For all the foregoing reasons, Respondent's Motion for Protective Order is DENIED.

ORDERED:

D M Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: March 18, 2014

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[2] Given that Respondent has not proven its basic factual premise that it will lose customers that are subpoenaed by Complaint Counsel, it is not necessary to further determine whether or not Respondent's financial documents prove Respondent's assertion that it will be "irreparably harmed" if it loses even one top ten customer.