PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

ORIGINAL

In the Matter of **ECM BioFilms, Inc.,** **a corporation, also d/b/a** **Enviroplastics International,** **Respondent.**	**Docket No. 9358** **PUBLIC**

RESPONDENT ECM BIOFILM'S MOTION FOR LEAVE TO FILE REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO RECESS THE TRIAL OR BEGIN THE TRIAL WITH ITS EXPERT

Pursuant to Commission Rules 3.22(d) Respondent, ECM BioFilms, Inc. ("ECM") hereby requests leave to file the attached Reply (Exh. A). A Reply is warranted in light of the following:

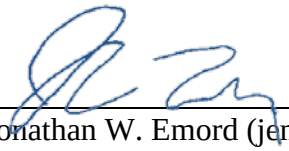
1. Since ECM filed its motion for a recess, the parties had material discussions concerning the resolution of this dispute. Complaint Counsel referenced ECM's position in their Opposition brief, but omitted material information, and even chose not to include ECM's email correspondence on the issue, which was necessary for a full and complete exhibit.

2. Complaint Counsel raises new points concerning Dr. Stewart's "availability" to testify, and Complaint Counsel's unworkable alternative proposal, which are based on unsupported (and incorrect) assumptions, and to which ECM should have an opportunity to respond.

Rule 3.22(d) permits Reply pleadings with leave of Court, where that pleading would draw the Court's attention to recent important developments. For the foregoing reasons, explained more fully in ECM's Reply brief attached, good cause exists for grant of this motion in

that it ensures a full record of argument on a substantial dispute that, if resolved against ECM, threatens to exclude major components of ECM's defense. ECM respectfully requests that the Court receive and file the attached Reply.

Respectfully submitted,



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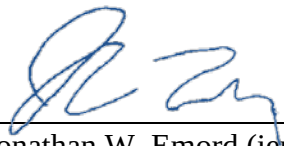
DATED: July 21, 2014

STATEMENT CONCERNING MEET AND CONFER

Pursuant to Rule 3.22(g), 21 C.F.R. § 3.22(g), the undersigned counsel certifies that, on July 21, 2014, Respondent's counsel attempted to confer with Complaint Counsel via e-mail and via telephone in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. Complaint Counsel failed to respond to Respondent's counsel.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy to the Office of the Secretary through the e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to Counsel for Complainant:

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I certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.

Respectfully submitted,

/s/ Jonathan W. Emord

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

In the Matter of	
ECM BioFilms, Inc., a corporation, also d/b/a Enviroplastics International,	**Docket No. 9358**
Respondent.	**PUBLIC**

RESPONDENT ECM BIOFILM'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO RECESS THE TRIAL OR BEGIN THE TRIAL WITH ITS EXPERT

Respondent ECM BioFilms, Inc. ("ECM") hereby submits this Reply to Complaint Counsel's Opposition to ECM's Motion to Recess the Trial or Begin the Trial with Its Expert. In its Opposition, Complaint Counsel omits key information concerning ECM's correspondence on this matter. Complaint Counsel has been entirely inflexible, refusing to offer any reasonable option that would permit Dr. Stewart's testimony. Instead, without demonstrating any real prejudice to its case, Complaint Counsel has attempted to profit from this unfortunate scheduling issue, and essentially preclude ECM's key expert from offering testimony. ECM hereby addresses two key points in Complaint Counsel's Opposition.

First, Complaint Counsel suggests that ECM's failure to bring this issue before the court months ago is "dispositive." Not so. Complaint Counsel offers no argument or reasoning explaining how or why ECM's requested relief before this Court would be any different had it brought this motion weeks ago. The parties have noticed the appearance of already eight expert witnesses, and two more hang in the balance following motions pending before this court. The schedule for the hearing is uncertain. Witnesses may receive only 48 hours' notice before their

appearance is required before the court. RX-A, at ¶ 21. ECM explained in its opening brief that, by Commission Rule 3.41(b), the hearing may consume thirty 7-hour trial days for a total of 210 hours. That means, excluding weekends and holidays, the parties should have anticipated that the hearing could span until Wednesday, September 17, 2014. Dr. Stewart has said he would be available the week of August 27, 2014, well within the period under which the hearing might still be in session. ECM could not have determined whether a possible conflict might arise and, indeed, it is unsure if one will occur. ECM filed its motion out of an abundance of caution to alert the Court, and provide advanced relief should that become necessary. ECM did not receive Complaint Counsel's proposed witness list until June 11, 2014, and it produced ECM's proposed witness list to Complaint Counsel on June 25, 2014 per the Scheduling Order. Over the next week, ECM confirmed expert availability based on the parties' proposed witness lists and the anticipated timeline for the hearing. Based on projections (which are guesses at this point), ECM learned at Dr. Stewart's July 1, 2014 deposition that he would be unable to move his travel plans. He has since confirmed that he has no possible way to change his plans and appear in Washington before August 27, 2014. ECM counsel conferred with Complaint Counsel on July 2, 2014 about Dr. Stewart's availability. ECM attempted to work with Dr. Stewart on his scheduling issues, and filed its motion soon thereafter.

ECM has not delayed this motion, even assuming that was a so-called "dispositive" element here. In fact, last week ECM contacted Complaint Counsel asking if they would provide advanced information concerning the fact witnesses, if anyone, they intend to actually subpoena for live testimony at the hearing. RX-B. That information would better inform ECM of the potential scheduling issues, and allow for proper arrangement of witness travel plans. ECM received no response to that email.

Complaint Counsel's refusal to entertain any form of scheduling flexibility shows that they are motivated by a desire to deny ECM a reasonable opportunity to present expert testimony, rather than out of a clear need to protect against prejudice to their case (which prejudice is not apparent in their opposition pleading). Complaint Counsel also misrepresents their so-called proposal in CX-A ¶ 2, wherein they state that their offer was to "submit [Dr. Stewart's] deposition *in lieu* of cross-examination." That deviates substantially from their actual offer, presented on Friday, July 18, 2014, wherein they provided the following:

> [W]e would agree that you can submit Dr. Stewart's report along with a paper direct (confined to his report in accordance with the Court's rules). Dr. Stewart would not give a live direct, but we would cross Dr. Stewart for the full day on August 6.

See CC Opp. Exh. CX-A:1. In a response email sent that *same day* (and conspicuously not included in Complaint Counsel's exhibits to this Court), ECM explained how Complaint Counsel's offer is extremely prejudicial. *See* RX-C. In short, a proposal that would have ECM's essential expert witness testify only through his report, but undergo a full cross-examination, is prejudicial to the point where it almost nullifies completely the witness's testimony.[1] Dr. Stewart has not detailed his complete testimony in the Rule 3.31A report as he would during a full day of direct examination. Moreover, Dr. Stewart has not had an opportunity to testify in response to Complaint Counsel's expert rebuttal reports, which Dr. Stewart would have received just hours before his July 1, 2014 deposition. Complaint Counsel's proposal to have Dr. Stewart testify through his report only would give them four opportunities to contest Dr. Stewart's

[1] Another area of prejudice involves the near complete loss of investment ECM has placed in Dr. Stewart's work, which includes a costly consumer perception study that ultimately supported ECM's defense.

written opinion, without affording ECM *any* opportunity to develop the testimony through direct examination.[2]

Dr. Stewart's opinion is, in fact, critical to the issues before this Court. Dr. Stewart will testify persuasively that, *inter alia*, Complaint Counsel's survey expert used wholly unreliable methods and achieved biased results.[3] He will testify that consumers' lack any uniform or cogent understanding of "biodegradable" claims, such that rendering enforcement or policy decisions based on erroneous consumer impression is a flawed approach. Dr. Stewart bases his opinions on a telephone survey of high methodological quality, using methods found to be reliable in prior cases. Dr. Stewart's opinions and methodologies have been accepted by this Court, and the Commission, in prior cases.

Although in light of Complaint Counsel's protestations it would appear that the August 6, 2014 date mentioned in ECM's opening brief is unworkable, ECM has presented good cause for a limited recess (if even necessary) to accommodate Dr. Stewart's testimony after August 27th. Complaint Counsel, by contrast, has shown no prejudice resulting from that limited recess.[4]

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[2] Complaint Counsel has already had an opportunity to present rebuttal reports, take the deposition of Dr. Stewart (an entirely one-sided event, of course), will have an opportunity to cross-examine Dr. Stewart at the hearing, and will then have the ability to present Dr. Frederick's rebuttal testimony.

[3] To save money after receiving a flat fee arrangement, Complaint Counsel's witness used "Google Surveys," a survey methodology that has *never* been accepted as a reliable method in a court of law, and for good reason.

[4] Complaint Counsel only suggests that Dr. Frederick *might* be inconvenienced by having to return at a later time for *rebuttal testimony.* That position lacks merit, because given the 210 hour window for the hearing by Rule, Dr. Frederick must already be prepared for that possibility. Furthermore, Dr. Frederick presently cannot determine when he would need to appear because of the uncertainties in the hearing process. The Yale fall semester begins August 27, which is just *sixteen* business days after the hearing beings (including the first day). Complaint Counsel has already indicated that they will require a full day of cross-examination for expert witnesses, which would likely follow a day of direct examination. That would mark potentially *fourteen* trial days for each of the other seven experts in this case (not including Dr. Stewart), and that does not account for fact witnesses. For that reason, a recess may not even be necessary and, if it

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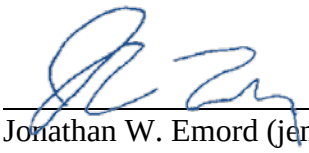

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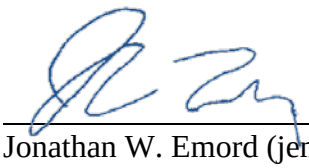
DATED: July 21, 2014

is, the duration would be quite short. The argument that Dr. Frederick is somehow prejudiced is without merit, as is Complaint Counsel's contumacious opposition on those grounds.

STATEMENT CONCERNING MEET AND CONFER

Pursuant to Rule 3.22(g), 21 C.F.R. § 3.22(g), the undersigned counsel certifies that, on July 21, 2014, Respondent's counsel conferred with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Respectfully submitted,



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DATED: July 21, 2014

RX-A

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

SCHEDULING ORDER

January 17, 2014	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
January 31, 2014	-	Respondent's Counsel provides preliminary witness lists (not including experts) with a brief summary of the proposed testimony.
February 28, 2014	-	Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
March 5, 2014	-	Complaint Counsel provides expert witness list.
March 12, 2014	-	Respondent's Counsel provides expert witness list.
March 20, 2014	-	Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
April 3, 2014	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
April 16, 2014	-	Deadline for Complaint Counsel to provide expert witness reports.
April 24, 2014	-	Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions or

		designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 30, 2014	-	Deadline for Respondent's Counsel to provide expert witness reports. Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
May 7, 2014	-	Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
May 8, 2014	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). *See* Additional Provision 7.
May 12, 2014	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
May 12, 2014	-	Exchange deposition transcript counter-designations.
May 16, 2014	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.

May 20, 2014	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
May 20, 2014	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
May 23, 2014	-	Deadline for filing motions for *in camera* treatment of proposed expert related exhibits.
May 27, 2014	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
May 27, 2014	-	Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
May 28, 2014	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
May 28, 2014	-	Exchange objections to the designated testimony to be presented by deposition and counter-designations.
May 30, 2014	-	Deadline for filing responses to motions for *in camera* treatment of proposed expert related exhibits.
May 30, 2014	-	Complaint Counsel files pretrial brief supported by legal authority.
June 2, 2014	-	Exchange proposed stipulations of law, facts, and authenticity.
June 6, 2014	-	Respondent's Counsel files pretrial brief supported by legal authority.
June 11, 2014	-	File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
June 12, 2014	-	Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits and any designated deposition testimony. To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations. Counsel may present any objections to the final proposed witness lists and exhibits, including to any designated deposition

testimony. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)

June 18, 2014 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the Docket Number and the title of the submission.** The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges. The parties are reminded that all filings with the Office of the Secretary, including electronic filings, are governed by the provisions of Commission Rule 4.3(d), which states: "Documents must be received in the Office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day."

2. The parties shall serve each other by electronic mail and shall include "Docket 9358" in the re line and all attached documents in .pdf format. Complaint Counsel and Respondent's Counsel agree to waive their rights to Service under 16 C.F.R. § 4.4(a)-(b).

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In

addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006), and summarized herein. Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009)

(citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions including all discrete subparts except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information.

12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum,* the party seeking the deposition shall consult with the other parties before the deposition date is scheduled. The parties need not separately notice the deposition of a third party noticed by an opposing party. At the request of any party, the time and allocation for a third party deposition shall be divided evenly between them, but the noticing party may use any additional time not used by the opposing party. If no party makes such a request, cross-examination of the witness will be limited to one hour.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those

documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert.

(b) 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.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert

witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel (i) a list of all commercially-available computer programs used by the expert in the preparation of the report; (ii) a copy of all data sets used by the expert, in native file format and processed data file format; and (iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

20. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

21. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

22. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

23. Complaint Counsel's exhibits shall bear the designation CX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation CXD and Respondent's demonstrative exhibits shall bear the designation RXD or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

24. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if RX 100 and CX 200 are different copies of the same document, only one of those documents shall be offered into evidence. In addition, the parties shall confer in advance of the

final prehearing conference to prepare a Joint Stipulation that lists the proposed exhibits to which neither party has an objection to admissibility. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November 21, 2013

RX-B

From:	Peter Arhangelsky
To:	Johnson, Katherine
Cc:	Cohen, Jonathan; Jonathan Emord; Eric Awerbuch
Subject:	Service Copy; Dkt. 9358, Respondent ECM Biofilm"s Objections to Complaint Counsel"s Final Proposed Exhibit List & Witness List (July 18, 2014)
Date:	Friday, July 18, 2014 1:57:01 PM
Attachments:	Dkt. No. 9358 - Respondent"s Objections to Complaint Counsel"s Final Proposed Exhibit List (July 18, 2014).pdf Dkt. No. 9358 - Respondent"s Objections to Complaint Counsel"s Final Proposed Witness List (July 18, 2014).pdf

Counsel,

Please see the attached objections per the Court's Third Revised Scheduling Order. We reserve the right to amend or supplement our objections to accommodate expert exhibits not yet designated.

Concerning the witness lists, we note that ECM's list overlapped with your list for certain fact witnesses. To ensure witness availability at the hearing, we would like to determine which of those fact witnesses Complaint Counsel intends to subpoena for live testimony. We recognize that you may attempt to designate transcripts in lieu of in-person testimony, and that you may not have made final decisions concerning your witnesses. However, because these are third party witnesses who likely need adequate notice, perhaps we can cooperate to produce a list of individuals we intend (at least presently) to subpoena. ECM can then provide its witnesses sufficient notice so they can reserve their schedules and perhaps arrange travel in advance of the subpoena *ad testificandum*. Our position is that a non-party fact witness called in your case-in-chief should need to make just one appearance, wherein both parties would have sufficient opportunity for an examination (without need for ECM to recall that witness weeks later).

Please let us know your thoughts on this. We are available to discuss on Monday.

Thanks,

Peter A. Arhangelsky, Esq. | **Emord & Associates, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

RX-C

From:	Peter Arhangelsky
To:	Cohen, Jonathan
Cc:	Johnson, Katherine; Jonathan Emord; Eric Awerbuch
Subject:	RE: Service & Dr. Stewart
Date:	Friday, July 18, 2014 12:21:13 PM
Attachments:	Service Copy Respondent"s Opposition to Complaint Counsel"s Motion to Compel Discovery Wrongly Withheld by Dr. David Stewart.msg Dkt. No. 9358 Respondent"s Opposition to Complaint Counsel"s Motion to Compel Discovery Wrongly Withheld by Dr. David Stewart.msg

Jonathan,

We served you twice on July 11, 2014: once when we copied you on our email courtesy copy to the OALJ, and again minutes later through a service email (both attached here).

Concerning Dr. Stewart's appearance, we think his live testimony is essential, and it does not appear that an out-of-turn appearance will fit the schedule. The offer to have him enter a "paper direct" through his report, while appreciated, would substantially prejudice ECM. We think it would be reversible error. Much like your experts, Dr. Stewart did not articulate his opinions in his report to the level of detail that he would offer at the hearing. Moreover, he has not had an opportunity to testify in response to Dr. Frederick's rebuttal report (which Dr. Stewart received on the eve of his deposition). Dr. Frederick also introduced additional argument based on new data, and Dr. Stewart did not have an opportunity to address that information in his original report. By having him subject to cross-examination only, Complaint Counsel essentially gets three opportunities to contest Dr. Stewart's direct testimony (the deposition, cross at hearing, and rebuttal testimony of Dr. Frederick), without affording ECM a single opportunity to develop Dr. Stewart's direct testimony in any meaningful way.

So we must reject your offer because it would obviously marginalize Dr. Stewart's testimony, which is tantamount to excluding his testimony altogether. A short recess of the sort we proposed is not out of the norm in litigation, and it imposes almost no burden on Complaint Counsel. As we noted in our motion, Dr. Frederick appears slated to teach about 2 hours per week this upcoming semester. Even if he carried a heavier schedule, it strains credulity to think that he cannot clear one day for rebuttal testimony during late August, at a time still within the allotted 210 hours for the hearing set by the rules.

We filed our motion because time was of the essence, and it did not appear that an agreement between the parties was likely. But let us know if you think we can reach an agreement now.

Best,

Peter A. Arhangelsky, Esq. | **Emord & Associates, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
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From: Cohen, Jonathan [mailto:jcohen2@ftc.gov]
Sent: Friday, July 18, 2014 11:46 AM
To: Eric Awerbuch; Jonathan Emord; Peter Arhangelsky
Cc: Decastro, Arturo; Johnson, Katherine
Subject: ECM: Service & Dr. Stewart

Counsel,

We have no record of receiving your opposition to our motion concerning the manufacturer's pilot study, although the Court relied on your opposition to deny our motion. If we simply missed your service, I apologize. If not, please serve us now, and we'll evaluate what to do next (having not seen your opposition, we reserve our rights).

More broadly, please confirm that there's nothing else ECM has filed but not served on Complaint Counsel. Again, if we simply missed your service copy, then I apologize.

Finally, with respect to your motion to recess the trial, we suggest another option that would still prejudice us somewhat, but less than the alternatives you propose. Specifically, we would agree that you can submit Dr. Stewart's report along with a paper direct (confined to his report in accordance with the Court's rules). Dr. Stewart would not give a live direct, but we would cross Dr. Stewart for the full day on August 6. This would prejudice us because the trial would begin with your case, not ours, and but the prejudice would be limited because it would only be the cross of an adverse witness, rather than the direct of an adverse witness.

Please let us know if you agree to this alternative, so that we can avoid both further filings and further uncertainty with respect to Dr. Stewart's testimony.

Best,

Jonathan Cohen
Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., CC-9528 Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov