

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,**

**Respondent.**

**Docket No. 9358**

**PUBLIC**

**RESPONDENT’S (THIRD) SUPPLEMENT TO MOTION TO SANCTION COMPLAINT  
COUNSEL FOR UNAUTHORIZED DISSUASION OF RESPONSE TO SUBPOENA  
DUCES TECUM**

ECM BioFilms, Inc. (ECM), by counsel, hereby provides this third supplement to its pending Motion to Sanction Complaint Counsel for Unauthorized Dissuasion of Response to Subpoena Duces Tecum (“Motion”) with the attached new information. On March 31, 2014, after ECM submitted its original motion on March 19, 2014, Complaint Counsel produced documents that included correspondence germane to ECM’s above-captioned motion to sanction. The information was not available to ECM when it filed its original motion.<sup>1</sup>

ECM hereby submits additional evidence of Complaint Counsel interference with a non-party response to an ECM subpoena. On February 13, 2014, ECM subpoenaed Dr. Ramani Narayan for information concerning industry conflicts and his scientific assessments of ECM’s product. ECM supplemented that subpoena with additional requests on February 28, 2014. Dr. Narayan was a scientific officer for the “Biodegradable Plastics Institute,” an interest group funded by companies with interests in composting technologies—companies that compete

---

<sup>1</sup> Rule 3.22(d) generally embraces filings that supplement the record with important developments that could not have been raised in earlier pleadings.

directly with ECM and who stand to gain financially from a reduction in competing landfillable plastics.<sup>2</sup>

In early March, Complaint Counsel discussed the terms of ECM's non-party subpoena with Dr. Narayan's counsel. On March 5, 2014, Complaint Counsel represented to Dr. Narayan's counsel that, because FTC did not intend to call Dr. Narayan as an expert or fact witness, the information required to be produced under ECM's subpoena would be significantly reduced. According to Complaint Counsel: "[t]his should make responding to [ECM's] supplemental subpoena much easier, since most of the requests are completely irrelevant, burdensome, and otherwise objectionable." *See* Attachment A (March 5, 2014 Email from Complaint Counsel to Narayan Counsel).

ECM submits Attachment A as further evidence of direct Complaint Counsel interference with non-party subpoenas. This evidence, involving a non-party other than Dr. Michel (the subject of the originally filed motion), reveals that the practice may be systemic. The conduct demonstrated in Attachment A hereto is not unlike the "advice letters" featured in the *Price* case. *See Price v. Trans Union, LLC*, 847 F.Supp. 2d 788, 791 n.2 (E.D. Pa. 2012) (that attorney had stated in his advice letter that, "we feel compelled to advise your organization of these concerns and expect your cooperation in refraining from providing documents and information..."). Complaint Counsel has no legal authority or right to supplant this Court's authority over subpoenas or interfere with ECM subpoena requests, as further evidenced by the attached email which seeks to dissuade production of requested documents.

---

<sup>2</sup> Since at least 2005, BPI has directly lobbied the Commission to investigate ECM plastics. BPI also had a substantial role in advocating changes to the FTC's "Green Guides," which ultimately favored the composting industry over all others who sell biodegradable products.

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord (jemord@emord.com)

EMORD & ASSOCIATES, P.C.

11808 Wolf Run Lane

Clifton, VA 20124

Telephone: 202-466-6937

Facsimile: 202-466-6938

DATED this 1st day of April 2014.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2014, I caused a true and correct copy of the foregoing filing to be served as follows:

One copy to the **Office of the Secretary** via 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**:

Katherine Johnson (kjohnson3@ftc.gov)  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580

Elisa Jillson (ejillson@ftc.gov)  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580

Jonathan Cohen (jcohen2@ftc.gov)  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580

I further 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.

DATED: April 1, 2014

/s/ Jonathan W. Emord  
Jonathan W. Emord  
EMORD & ASSOCIATES, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Telephone: 202-466-6937

# Attachment A

**From:** george brookover <g.brookover@gmail.com>  
**Sent:** Wednesday, March 5, 2014 7:21 PM  
**To:** Johnson, Katherine <kjohnson3@ftc.gov>  
**Subject:** Re: Dr. Narayan

---

thanks

On Wed, Mar 5, 2014 at 2:19 PM, Johnson, Katherine <kjohnson3@ftc.gov> wrote:

George,

After careful consideration, we will not list Dr. Narayan as a potential expert witness; and likely will have no reason to call him as a fact witness either. This should make responding to the supplemental subpoena much easier, since most of the requests are completely irrelevant, burdensome, and otherwise objectionable. I would hope that ECM withdraws the supplemental subpoena once it receives our expert witness list later on today.

If I can do anything further to assist you, please do not hesitate to let me know.

Regards,

Katherine

---

Katherine E. Johnson, Attorney  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, DC 20580  
Direct Dial: (202) 326-2185  
Fax: (202) 326-2558  
Email: [kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov)

--  
DISCLAIMER/CONFIDENTIALITY: This communication, along with any documents, files or attachments, is intended only for the use of the addressee and may contain legally privileged and confidential information. Any document attached is a legal document and should not be changed or altered without the knowledge and approval of legal counsel. The sender takes no responsibility for alterations, additions, revisions, or deletions to any such document. Due to software and printer variations, documents printed at the recipient's location may vary from the original printed document.