**PUBLIC DOCUMENT**



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



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

**RESPONDENT'S MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL EXPERT RESPONSE TO SUBPOENAS *DUCES TECUM***

ECM BioFilms, Inc. ("ECM"), by counsel, hereby requests leave to file the attached Reply. A Reply is warranted in light of the following:

- Complaint Counsel raises new argument concerning the facial validity of ECM's subpoenas;
- Complaint Counsel altered its original position conveyed to ECM in the parties' Rule 3.22(g) negotiations, and has now abandoned its primary legal argument; and
- Complaint Counsel seeks exemption from discovery burdens substantially less onerous than the discovery burdens imposed on ECM.

Rule 3.22(d) permits Reply pleadings with leave of Court, where that pleading would draw the Administrative Law Judge's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. For the foregoing reasons, explained more fully in ECM's accompanying Reply memorandum, good cause exists for grant of this motion. ECM respectfully requests that the Court receive and file the attached Reply.

Respectfully submitted,

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

DATED this 30th day of May 2014.

## CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2014, I caused a true and correct copy of the paper original of the foregoing document to be served as follows:

One electronic copy to the **Office of the Secretary** filed through the Federal Trade Commission's 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 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.

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# Respondent's Exhibit A

**UNITED STATES OF AMERICA**
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| **In the Matter of** | **Docket No. 9358** |
| **ECM BioFilms, Inc., a corporation, also d/b/a Enviroplastics International,** | **PUBLIC DOCUMENT** |
| **Respondent.** | |

**RESPONDENT ECM BIOFILM'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL[1] EXPERT RESPONSE TO SUBPOENAS *DUCES TECUM***

Respondent ECM BioFilms, Inc. ("ECM") submits this Reply memorandum in response to Complaint Counsel's Opposition, filed May 28, 2014. Under Rule 3.22(d), a Reply is appropriate where "parties wish to draw the Administrative Law Judge's or Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." *See* 16 C.F.R. § 3.22(d). Complaint Counsel has abandoned the primary legal argument advanced to ECM at the outset, and propounds instead a

[1] ECM's pleading was properly filed as a Motion to Compel under Rule 3.38, which governs motions seeking to compel discovery. *See* 16 C.F.R. 3.38(a). Rule 3.38(b) gives the ALJ authority to require compliance with subpoenas. Rule 3.38(c) permits certification to the Commission of a request to enforce a subpoena. Complaint Counsels' reliance on *In the Matter of Phoebe Putney Health Sys., Inc., et.al.*, 9348, 2013 WL 2444710 (F.T.C. May 30, 2013) is misplaced. There the respondent asked the Court to enforce a subpoena through a footnote in an unrelated pleading. *Id.* at 5, n.2. This Court rejected that maneuver because the request should have been made in a formal, independent motion. The decision said nothing about whether a Rule 3.38 motion to compel was appropriate. It is, and many other parties in Part 3 adjudications have filed similar motions, including complaint counsel. *See, e.g., In re MSC.Software Counsel*, FTC Dkt. No. 9299 (Dec. 17, 2001) (Complaint Counsel's "Motion to Compel Compliance with Subpoenas Ad Testificandum and Duces Tecum," filed under 16 C.F.R. § 3.38).

different position based on burden. Accordingly, ECM has not had an opportunity to brief that issue, which by leave it does so in this reply

### A. ECM's Subpoena Was Properly Issued In Accord With FTC Rules

An out-of-state respondent, ECM has complied with Rule 3.34(b) to the letter when issuing its subpoenas *duces tecum*.[2] ECM's subpoenas are materially indistinguishable from those issued by Complaint Counsel. ECM has dispatched approximately 20 third-party subpoenas in this matter. Complaint Counsel only now argues that ECM's subpoenas are somehow procedurally deficient, notwithstanding that Complaint Counsel has previously supported ECM's same non-party subpoenas when compliance with those documents were in Complaint Counsel's interest. *See* Dkt. No. 9358, CC Limited Opp. to OWS Mot. to Quash (Mar. 20, 2014).

### B. Complaint Counsel's New Argument of Burden Lacks Support Given This Court's Prior Orders Compelling ECM to Produce Vastly Greater Discovery

Complaint Counsel argued to ECM that ECM had no right to issue Rule 3.34 subpoenas to Complaint Counsel's experts. *See* Exh.'s RX-C; RX-D. At the outset, Complaint Counsel contended to ECM that *Marsh v. Jackson*, 141 F.R.D. 431, 432 (W.D. Va. 1992) (mag. op.) and its progeny forbade discovery of expert witnesses outside of Rule 3.31A. *See* Exh. RX- C. ECM disagreed and the parties exchanged legal positions on that point. *See* Exh.'s RX-D, RX-E Complaint Counsel maintained that, based on *Marsh*, et al., the Rule 3.31A mandatory disclosures were the only information available to ECM concerning Complaint Counsel's experts, and that non-party subpoenas were not authorized by the rules. *See* Exh. RX-D.

[2] The FTC's Rules of Practice were amended in 2009 to specifically permit "[c]ounsel for a party [to] sign and issue a subpoena, on a form provided by the Secretary…" *See* 16 C.F.R. § 3.34(a), (b).

In the Opposition, however, Complaint Counsel abandoned its underlying premise and instead relied on a Rule 3.31(c)(2) burden theory. *See* Dkt. No. 9358, CC Opp. to ECM Mot. to Compel at 6-8. Complaint Counsel therefore did not confront the issues in ECM's opening motion, which ECM advanced based on the information exchanged in the Rule 3.22(g) conference. *See generally* CC Opp. to ECM Mot. to Compel. Complaint Counsels' *volte face* on *Marsh* nullified the Rule 3.22(g) good-faith conference and prevented a "genuine effort to resolve the dispute." *See* Rule 3.22(g); *Care Envtl. Corp. v. M2 Technologies Inc.*, CV-05-1600 (CPS), 2006 WL 1517742 (E.D.N.Y. May 30, 2006).

Complaint Counsel now argues under Rule 3.31A, the Scheduling Order, and inapposite precedent, that Rule 3.31(c)(1) "contemplate[s] discovery of a circumscribed universe of information," which does not include the expert discovery ECM seeks. Rule 3.31(c)(1), however, explicitly contemplates that type of discovery. *See* 16 C.F.R. § 3.31(c)(1). Additionally, the Court's Scheduling Order does not limit Rule 3.31's scope. The opinion in *In the Matter of Basic Research*, No. 9318, 2004 FC LEXIS 237, *9 (F.T.C. Dec. 9, 2004) not only supports the use of subpoenas *duces tecum* to obtain discovery from experts but reaffirms Rule 3.31(c)(1)'s broad scope, which is not limited to certain categories of documents or information. *Id.* (noting that the discovery sought must be "reasonably expected to yield information relevant to the allegations to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent").

### C. Complaint Counsel Seeks to Impose Discovery Burdens on ECM while Claiming Immunity from Same for Itself

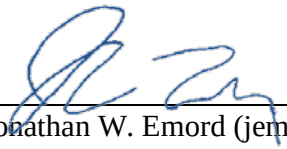
Complaint Counsel hypocritically argues that ECM's subpoenas would unduly burden its compensated witnesses, after having demanded broad discovery from ECM of over 115,000

responsive pages within just a few weeks; having conducted more than fifteen fact depositions across the continental United States and Hawaii; and having subpoenaed more than fifty (50) ECM customers. The extensive discovery burdens on ECM are well-documented. *See, e.g.*, Dkt. No. 9358, ALJ Order Denying Respondent's Motion for Protective Order at 8 (Jan. 10, 2014). The declarations of Complaint Counsel's experts offer far less in the way of burden when compared with ECM's affidavits, and those declarations do not prove consistent with FTC precedent the presence of any burden sufficient to justify quashing the subpoenas. The Court should employ the same standard of review and reach the same conclusion it reached with respect to ECM's requests for relief from a far greater burden in expense, time, and volume of production. Discovery in this case has been one-sided. Although Complaint Counsel has served dozens of subpoenas on ECM or its representatives, the only witnesses Complaint Counsel is responsible for are its experts; yet those experts it would shield from any discovery that aims at adducing proof of bias and lack of independence.

Complaint Counsel has failed to carry its high burden to prove the requests unduly burdensome or overbroad. *See Nat'l Acad. of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 680 (C.D. Cal. 2009). Complaint Counsel has failed to demonstrate that ECM's subpoenas are "of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Robertson v. Bair*, 242 F.R.D. 130, 136 (D.D.C. 2007). Complaint Counsel has not shown harm of any type will befall Drs. McCarthy, Tolaymet, and Frederick if they must complete a search of documents in response to the few discrete requests ECM presents, all tailored to receive information about those expert's credentials, conflicts, bias, and independence. Evidence of bias is essential, especially where Complaint Counsel's own experts have ties to industry members overtly hostile

to ECM and its technology. *See* Dkt. No. 9358, Resp. Mot. to Compel, at 1-2, n. 2 (May 19, 2014). ECM must be given the chance to fully investigate the breadth of witness bias and conflicts, as must this Court. Note well that Complaint Counsel's own subpoenas and deposition notices sought the very same information from non-party witnesses. *See, e.g.*, Exh.'s RX-O-1, RX-O-2.

Respectfully submitted,



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DATED this 30th day of May 2014.