

PUBLIC

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



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In the Matter of )  
 )  
ECM BioFilms, Inc., )  
a corporation, also d/b/a )  
Enviroplastics International, )  
Respondent. )  
\_\_\_\_\_ )

DOCKET NO. 9358

**ORDER ON RESPONDENT'S MOTION FOR LEAVE TO CALL AN EXPERT WITNESS OUT OF TURN OR FOR A BRIEF RECESS DURING THE HEARING**

**I.**

On July 17, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion for Leave to Call an Expert Witness Out of Turn, or, in the Alternative, for a Brief Recess During the Hearing in Order to Allow Respondent's Expert Witness Dr. David Stewart to Testify ("Motion"). By Order dated July 18, 2014, Federal Trade Commission ("FTC") Complaint Counsel was ordered to file its opposition no later than July 21, 2014. Complaint Counsel filed its Opposition on July 21, 2014 ("Opposition").

On July 21, 2014, Respondent filed a Motion for Leave to File Reply to Complaint Counsel's Opposition and its proposed Reply. Complaint Counsel filed an Opposition to Respondent's Motion for Leave to File Reply on July 22, 2014. Respondent's Motion for Leave to File a Reply is DENIED. Complaint Counsel's Opposition to the Motion for Leave to File a Reply will not be considered. As explained below, the alternative request for relief in Respondent's Motion is GRANTED IN PART.

**II.**

The hearing in this matter is scheduled to commence on August 5, 2014. The original hearing date, as set by the Commission when it issued the Complaint in this matter, was June 18, 2014. Respondent states that its designated expert, Dr. David Stewart, cleared his schedule in anticipation of the hearing beginning June 18, 2014, and that he has confirmed academic and business commitments requiring him to be in Australia and New Zealand during the period from August 7, 2014 through August 26, 2014. Respondent further states that the Commission's 45-day extension, which reset the hearing to begin August 5, 2014, has created a conflict for Dr. Stewart's travel schedule and that Dr. Stewart is unable to cancel or reschedule his other obligations without incurring substantial costs. Respondent requests that it be allowed either to call Dr. Stewart out of order to testify on August 6, 2014, or in the alternative, that it be granted a continuance during the hearing to allow

Dr. Stewart to testify on August 27, 2014.

Complaint Counsel opposes this request, arguing that Respondent knew or should have known that Dr. Stewart was unavailable when the Commission reset the trial date. Complaint Counsel argues that Respondent should have raised this issue months ago; Respondent has not established Dr. Stewart's unavailability because it did not provide information on Dr. Stewart's precise plans; the relief Respondent seeks is unfairly prejudicial to Complaint Counsel; and that there are better alternatives for accommodating Dr. Stewart's schedule than those proposed by Respondent.

### III.

Commission Rule 3.41(b) states that "[h]earings shall proceed with all reasonable expedition, and, insofar as practicable, . . . shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded." 16 C.F.R. § 3.41(b). A request made in advance of trial for a brief interval to accommodate a witness's schedule is "of the sort normally involved in judicial proceedings." It is unfortunate that the parties are unable to agree, without intervention, to witness scheduling. Many of the parties' arguments raised to support of their positions are immaterial, and will not be addressed. An exception is the point raised by Complaint Counsel that it would be unfairly prejudiced by Respondent's request.

To allow Respondent to call Dr. Stewart on August 6, 2014, over Complaint Counsel's objection, would be unfairly prejudicial, as it would place Complaint Counsel in a position of having to begin its case-in-chief with a defense against Respondent's expert's direct testimony. Furthermore, Respondent has stated that Dr. Stewart is not available on August 7, 2014. It seems highly improbable that the parties are capable of conducting and concluding the direct and cross-examination of Dr. Stewart in one day. Therefore, Respondent's request to call Dr. Stewart on August 6, 2014 is DENIED.

Complaint Counsel has not demonstrated that it would be prejudiced in any manner by allowing Dr. Stewart to testify on August 27, 2014. With trial beginning on August 5, 2014, it cannot be assumed that the hearing will be concluded before August 26, 2014, such that a continuance will even be necessary. Indeed, given the many scientific issues in the case, it seems more likely that trial will be ongoing as of August 26, 2014. Accordingly, Respondent's request to be allowed to call Dr. Stewart on August 27, 2014 is GRANTED. The request for a continuance is DENIED. If a continuance or recess becomes necessary to allow Dr. Stewart to testify on that date, that issue will be addressed at the proper time. The parties are instructed that cooperation is expected to accommodate their witnesses' schedules.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: July 22, 2014