

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 SUPPLEMENT TO MOTION TO SANCTION COMPLAINT
COUNSEL FOR UNAUTHORIZED DISSUASION OF RESPONSE TO SUBPOENA
DUCES TECUM**

ECM BioFilms, Inc. (ECM), by counsel, hereby supplements its pending Motion to Sanction Complaint Counsel for Unauthorized Dissuasion of Response to Subpoena Duces Tecum ("Motion") with the attached new information. On March 24, with full notice of ECM's pending Motion, Matthew J. Wilshire, one of Complaint Counsel, yet again directed the subpoena response of ECM subpoena recipient Frederick Michel. *See* Exh. RX-J. The first letter of March 14 proceeded without leave of Court and is the subject of the pending Motion. The second letter of March 24 also proceeds without leave of Court; Complaint Counsel has again exercised the power reserved to this Court by directing the manner, content, and timing of Michel's subpoena response. Such interference with a subpoena response by an adverse party has long been held sanctionable misconduct for the reasons stated in the pending Motion. *See, e.g., Price v. Trans Union, LLC*, 847 F.Supp. 2d 788, 794 (E.D. Pa. 2012).

This second, additional usurpation of the Administrative Law Judge's subpoena power, when taken with the first, is proof of an intentional assumption of the exclusive province of this

Court over administrative subpoenas.¹ In particular, the first and second letters establish a fundamental violation of the separation of functions doctrine. Here Complaint Counsel represents itself as an agent of the Commission to Michel and, unlawfully, combines prosecutorial and judicial powers. As a matter of constitutional and administrative law, those functions may not be collocated in single hands.² When Congress enacted the Administrative Procedure Act, foremost among the members' concerns was a fear that a collocation of executive and judicial power would deprive the accused of due process and a fair trial on the merits (enabling the party bringing the charges, the accuser, to sit in judgment of the charges brought, thus destroying the impartiality for decision required to attain justice). See *Withrow v. Larkin*, 421 U.S. 35, 51-52 (1975); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950), *modified*, 339 U.S. 908 (1950). The Administrative Procedure Act thus codifies the separation of functions doctrine at 5 U.S.C. § 554(d).

Consequently, to ensure that the independence and authority of the Administrative Law Judge over the subpoena power is not compromised, his Honor should render the March 14 and 24 letters void and henceforth prohibit Complaint Counsel from emailing or contacting the subpoena recipient Frederick Michel, which emails presume to dictate the manner, content, and timing for response to an administrative subpoena issued by Respondent in this proceeding, and this Court should compel immediate production of the requested documents in addition to the

¹ The defense of ignorance, while rarely attractive in the law, is clearly now unavailable to Complaint Counsel because its second letter of March 24 (again issued without leave of Court) reveals an intentional assertion of the judicial power reserved to this Court for which the remedies called for in the Motion remain essential to deter future such abuses.

² From the very beginning, separation of powers was deemed a necessary defense against tyranny arising from consolidated government: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison).

other forms of relief requested in the Motion. The precedent arising from a decision that directly or tacitly condones Complaint Counsel's subpoena interference will dangerously invite more of that practice, institutionalizing the separation of functions doctrine violation and depriving the Respondent of the ability to secure evidence in its own defense as a matter of right, rather than at the discretion of the prosecutor.

Respectfully submitted,



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 25th day of March 2014.

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 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** using the FTC'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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Dr. Frederick Michel (michel.36@osu.edu)
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207 Hayden Hall
1680 Madison Ave.
Wooster, OH 44691

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: March 25, 2014


Jonathan W. Emord

PUBLIC

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EXHIBIT RX-J

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Bureau of Consumer Protection
Division of Enforcement
Matthew Wilshire
202-326-2976
mwilshire@ftc.gov

March 24, 2014

By Email

Frederick C. Michel
The Ohio State University-OARDC
1680 Madison Ave.
Wooster, OH 44691

Re: In the Matter of ECM BioFilms, Inc., Docket No. 9358

Dear Dr. Michel:

I am writing again regarding the subpoena you received in the above-captioned matter. In an earlier, March 14 letter regarding the subpoena, I advised that any responsive documents that were sent to you by the FTC were subject to a nondisclosure agreement. That agreement forbids you from disclosing those documents unless the FTC General Counsel consents or FTC Staff directs you to do so in connection with an adjudicative proceeding.

In the March 14 letter, I instructed that you should produce all FTC communications sought by the subpoena, with the exception of materials submitted by third parties to the FTC. I further directed you to delay production of those documents until March 28, 2014 to ensure that those parties have an opportunity to exercise any rights they have under the Commission's rules. *See* 16 C.F.R. § 4.10(g).

Since that date, one of the third parties, Down to Earth Designs, Inc., has indicated that it does not object to production of materials it submitted, provided that those materials are marked as confidential pursuant to the protective order entered in this matter. Accordingly, I am now instructing you to produce, as soon as reasonably practicable, responsive documents submitted by Down to Earth Designs. As with the FTC communications you produced on March 17, you should mark these additional documents as confidential.

Thank you for your continuing cooperation in this matter. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew J. Wilshire', with a long horizontal flourish extending to the right.

Matthew J. Wilshire

Cc: Jonathan W. Emord, Esq.
Katherine Johnson, Esq.
Jan Alan Neiger, Esq.