

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9358

PUBLIC DOCUMENT

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO FILE A RESPONSE
TO ECM’S THIRD SUPPLEMENT TO ITS SECOND AND THIRD MOTIONS TO
EXCLUDE THE OHIO STATE STUDY**

Complaint Counsel respectfully requests leave to file a short response (fewer than 650 words) to the third supplemental filing Respondent ECM Biofilms, Inc. (“ECM”) submitted on March 1. The proposed response is attached hereto. Because ECM raises a slightly different issue concerning a different communication than its four prior pending sanctions filings address, Complaint Counsel asks the Court for an opportunity to respond briefly.

Dated: March 3, 2014

Respectfully Submitted,



Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
Phone: 202-326-2185; -2551; -3001
Fax: 202-326-2551

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ECM BioFilms, Inc.,)
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Docket No. 9358
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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO FILE A RESPONSE TO ECM’S THIRD SUPPLEMENT TO ITS SECOND AND
THIRD MOTIONS TO EXCLUDE THE OHIO STATE STUDY**

This matter having come before the Administrative Law Judge on March 3, 2014, upon a Motion to Compel (“Motion”) filed by Complaint Counsel seeking leave to file a 650-word response to ECM’s March 1, 2014 submission;

And having considered Complaint Counsel’s Motion and all supporting and opposing submissions, and for good cause appearing, Complaint Counsel’s Motion is hereby GRANTED.

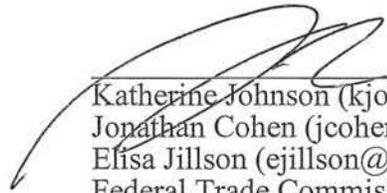
SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel (Jonathan Cohen) conferred with Respondent's counsel (Lou Caputo) by telephone and email. We were unable to reach an agreement. Mr. Caputo explained that Respondent takes no position concerning this motion, but Respondent reserves the right to seek leave to file a surreply if new matter is raised.

Dated: March 3, 2014



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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I caused a true and correct copy of the foregoing to be filed via the FTC E-File system and served as follows:

One emailed courtesy copy to the **Office of the Secretary:**

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One emailed courtesy copy and one hard 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 emailed courtesy copy to **Counsel for the Respondent:**

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

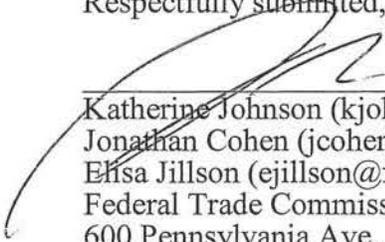
Peter Arhangelsky
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3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Lou Caputo
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: lcaputo@emord.com

I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Dated: March 3, 2014

Respectfully submitted,


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**UNITED STATES OF AMERICA
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In the Matter of)

ECM BioFilms, Inc.,)
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Docket No. 9358

PUBLIC DOCUMENT
ORAL ARGUMENT REQUESTED

**COMPLAINT COUNSEL’S RESPONSE
TO ECM’S THIRD SUPPLEMENT TO ITS SECOND AND THIRD MOTIONS TO
EXCLUDE THE OHIO STATE STUDY**

Implicitly conceding that C.F.R. § 4.10(g) required the communications with Ohio State Study author Frederick Michel, Respondent ECM Biofilms, Inc. (“ECM”) shifts theories, now accusing Complaint Counsel of allegedly interfering with a subpoena to Dr. Ramani Narayan, a Michigan State professor specializing in biodegradable polymers.¹ This time, ECM points to a brief email to Dr. Narayan’s prior counsel, and contends that this email “is not unlike the ‘advice letters’” found impermissible in *Price v. Trans Union, LLC*, 847 F. Supp.2d 788 (E.D. Pa. 2012). However, the *Price* court based its decision on three factors, none of which are present here.

First, in *Price*, the objecting party “requested that the third parties not comply with the subpoenas.” *Id.* at 795. Unlike *Price*, Complaint Counsel’s email does not instruct Dr. Narayan’s prior attorney (George Brookover) not to comply.² In fact, the email provides that our decision not retain Dr. Narayan as an expert “should make responding to the subpoenas much

¹ As with every scientist to have concluded that ECM’s additive does not work—and there are many—ECM alleges that Dr. Narayan has “conflicts” that allegedly render his scientific assessments unreliable. *See* Third Supp. at 1.

² The email states that the subpoena is objectionable, but advising that a subpoena is objectionable is not the same as advising someone not to comply. In any event, although Complaint Counsel suggests (correctly) that Dr. Narayan could assert objections, the email does not advise Dr. Narayan’s prior attorney to assert those objections. In fact, Dr. Narayan obtained new counsel, and those new attorneys will decide for themselves how to represent their client’s interests most effectively. Although Dr. Narayan’s new attorneys filed objections with the Court yesterday, Complaint Counsel has no objection if Dr. Narayan elects to respond to the subpoena fully including, for instance, ECM’s demands for personal financial information. *See* Response & Objections (Apr. 1, 2014) at 9.

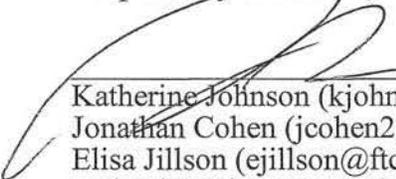
easier”—language that clearly contemplates a response.³ In fact, there is no evidence that our communications with Mr. Brookover caused him to withhold anything, or that he objected to aspects of ECM’s discovery for any reason other than his own views regarding how to best represent Dr. Narayan.

Second, in *Price*, the movant established prejudice because “the Court was required to grant . . . leave to re-subpoena the non-responding third parties before all of the requested information was produced.” *Id.* Unlike *Price*, the Court has not been forced to grant such leave, nor has ECM otherwise suffered any prejudice. Significantly, Dr. Narayan **did produce documents** to ECM on March 14—a fact that ECM’s *Third Supplement* omits.⁴

Third, in *Price*, “the objecting party stated that it would move to quash the allegedly defective subpoenas, but did not.” *Id.* Unlike *Price*, Complaint Counsel’s email does not inform (or misinform) a third party that we will move to quash. Accordingly, *Price* is inapplicable, and ECM’s *Third Supplement* adds little to the various motions and supplements it filed already.

Dated: April 3, 2014

Respectfully submitted,



Katherine Johnson (kjohnson3@ftc.gov)
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³ See Third Supp. Ex. A. ECM’s nefarious implications are misguided. Complaint Counsel evaluated Dr. Narayan as a potential expert, as Mr. Brookover understood. Had we engaged Dr. Narayan, we would have been obligated to respond to the subpoena rather than Mr. Brookover—including the obligation to lodge objections on Dr. Narayan’s behalf. The observations about the subpoena’s scope occurred in the context of communications regarding Dr. Narayan’s role, and Complaint Counsel’s role as affected by Dr. Narayan’s role. After Complaint Counsel chose not to engage Dr. Narayan, he hired other attorneys (the Miller Canfield firm) to lodge objections on his behalf.

⁴ CX-A:1.

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy through the FTC's e-filing system, and one electronic courtesy copy to the **Office of the Secretary:**

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy and one paper courtesy copy to the **Office of the Administrative Law Judge:**

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

One electronic copy to **Counsel for the Respondent:**

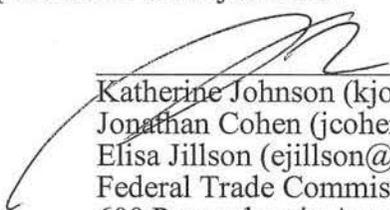
Jonathan W. Emord
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Lou Caputo
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Chandler, AZ 85286
Email: lcaputo@emord.com

I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: April 3, 2014



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Complaint Counsel Exhibit A

CX-A

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In the Matter of

**ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International**

**Docket No. 9358
PUBLIC DOCUMENT**

**DECLARATION OF JONATHAN COHEN IN SUPPORT COMPLAINT COUNSEL'S
RESPONSE TO ECM'S THIRD SUPPLEMENT TO ITS SECOND AND THIRD
MOTIONS TO EXCLUDE THE OHIO STATE STUDY**

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as an attorney in the Division of Enforcement in the Bureau of Consumer Protection. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. Attachment 1 hereto is a true and correct copy of a declaration of Dr. Ramani Narayan, dated March 14, 2014, but without the attachments thereto.

Executed this 3rd day of March, 2014 in Washington, D.C.


Jonathan Cohen
Complaint Counsel

**Complaint Counsel
Exhibit A
Attachment 1**

CX-A:1

Response to Subpoena dated February 13, 2014

AFFIDAVIT OF TRANSMITTAL

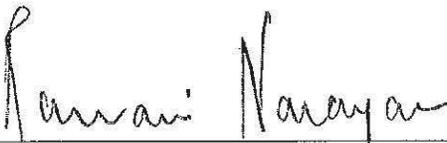
STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

I, Ramani Narayan, Ph.D., being first duly sworn, state:

1. I make this affidavit based on personal knowledge and can testify competently to the facts set forth herein.
2. I was the only person who searched for the requested materials.
3. The search is complete and all responsive documents are being produced as attached hereto.
4. These documents were in my possession and are authentic.
5. To the best of my knowledge, no documents requested have been lost, destroyed, or misplaced.
6. I declare under penalty of perjury that the foregoing is true and correct.

Further, affiant saith not.

Dated: March 14, 2014



 Ramani Narayan, Ph.D.

Subscribed and sworn before me this 14th day of March, 2014.



 Lindsay Decker, Notary Public
 Ingham County, Michigan
 Acting in Ingham County, Michigan
 My Commission Expires: 5/1/14

1. Request No. 1 – See attached Appendix 1 documents.
2. Request No. 2 – See attached Appendix 2 documents – all documents are Confidential and clearly identified as per the instructions and governed by the Protective Order governing confidential material
3. Request No. 3 – See attached Appendix 3 documents
4. Request No. 4 – See attached documents in Appendix 2 -- all documents are Confidential and clearly identified as per the instructions and governed by the Protective Order governing confidential material
5. Request No. 5 – See attached Appendix 5 documents
6. Request No. 6 – See attached Appendix 6 documents – Confidential and clearly identified as per the instructions and governed by the Protective Order governing confidential material
7. Request No. 7 – Documents in the possession of the American Society of Testing and Materials (ASTM) and can be obtained from ASTM
8. Request No. 8 – Documents in the possession of the American Society of Testing and Materials (ASTM) and can be obtained from ASTM
9. Request No. 9 – Documents in the possession of the American Society of Testing and Materials (ASTM) and can be obtained from ASTM
10. Request No. 10 – Documents in the possession of the American Society of Testing and Materials (ASTM) and can be obtained from ASTM
11. Request No. 11 – Documents in the possession of the American Society of Testing and Materials (ASTM) and can be obtained from ASTM.
12. Request No. 12 – No participation, document can be obtained from the parties conducting the study
13. Request No. 13 – On data extrapolations or intrapolations there are documents in the possession of ASTM and also available in the general scientific and engineering literature