

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 OPPOSITION TO COMPLAINT COUNSEL’S MOTION FOR LEAVE  
TO RESPOND TO ECM’S THIRD SUPPLEMENT TO ITS MOTION TO SANCTION  
COMPLAINT COUNSEL FOR UNAUTHORIZED DISSUASION OF RESPONSE TO  
SUBPOENA DUCES TECUM**

Respondent ECM BioFilms, Inc. (“ECM”) hereby supplies its limited opposition to Complaint Counsel’s motion for leave (filed Apr. 3, 2014).<sup>1</sup>

In its proposed response, Complaint Counsel represents to the Court that ECM has in its third supplement “impliedly” made concessions, which implications are in fact nowhere present in ECM pleadings. In particular, ECM objects to Complaint Counsel’s false representation that ECM “implicitly conced[ed]” that Complaint Counsel’s directives to Dr. Frederick Michel were “required” or somehow condoned by the rules. Because that legal argument neither responds to nor addresses new facts or argument in ECM’s pleadings, that content is inappropriate, and ECM objects on that narrow ground.

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<sup>1</sup> ECM objects to Complaint Counsel’s request for oral argument on grounds that it is late filed, coming not at the time of the original opposition, and because oral argument is unnecessary. The matters in issue are straightforward, the fact of the contacts is not in dispute, and the law is clear under the rules, the Court’s Scheduling Order, and relevant precedent.

To the extent the Court receives the pleading as a whole, Complaint Counsel's implication is erroneous; the rules do not transfer authority over subpoenas from the Court to Complaint Counsel and precedent gives no support for any unilateral assumption of judicial authority by a litigating party. *See Fox Industries, Inc. v. Gurovich*, No. CV 03-5166, 2006 WL 2882580, at \*4 (E.D. N.Y. 2006) ("It is the court's duty to rule on the validity of subpoenas and to direct the recipients to comply or not comply, not the attorney's..."); *Price v. Trans Union, LLC*, 847 F.Supp. 2d 788, 794 (E.D. Pa. 2012).

Neither Rule 4.10(g) nor this Court's Scheduling Order transfers to Complaint Counsel authority to interfere with a response to an opposing party's subpoenas. *See* Rule 4.10(g) (contemplating only that an opportunity be given to submitters of confidential information to seek protection for the information *from the Court*). The Scheduling Order directs the *subpoena recipient* (in this case Michel) to "promptly" notify the submitter of confidential information and obliges the parties to respect the confidential designations when asserted in compliance with that Order. *See* Dkt. No. 9358, ALJ Scheduling Order at ¶ 11. Even if Complaint Counsel does not offend the law by reminding a third party of non-disclosure obligations, it does not follow from that weak reed that Complaint Counsel somehow possesses an added authority to direct a third-party without leave of Court to ignore, change the terms of, object to, or delay response to an opposing party's subpoena.

Contrary to Complaint Counsel's misconstruction of the record, ECM cited Rule 4.10(g) in its initial pleading for the proposition that Complaint Counsel's reliance on Rule 4.10 is unfounded and improper (*See* ECM Mot. for Sanctions, at 7 (filed Mar. 19, 2014)), certainly not somehow to convey the false impression that Rule 4.10 gives Complaint Counsel an implied authority to usurp the powers of the ALJ and dissuade response to or otherwise interfere with a

party's subpoena to a non-party. Noting in ECM's supplemental pleadings suggests that rule 4.10(d) or (g) "requires" Complaint Counsel to interfere with ECM's subpoenas.

Accordingly, ECM thusly opposes Complaint Counsel's motion for leave because it seeks to raise new issues not present in ECM's original motions or supplements thereto.<sup>2</sup>

Respectfully submitted,

/s/ Jonathan W. Emord  
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DATED this 3rd day of April 2014.

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<sup>2</sup> ECM takes no position on whether the Court should grant leave to receive arguments in the remainder of Complaint Counsel's pleading.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 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**:

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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.

DATED: April 3, 2014

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