

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

**ORIGINAL**

**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S OPPOSITION TO  
COMPLAINT COUNSEL’S MOTION FOR LEAVE  
TO TAKE THE DEPOSITION OF ALAN JOHNSON**

Pursuant to Rule 3.22(d), Complaint Counsel respectfully files this reply to Respondent’s opposition to our Motion for Leave to Take the Deposition of Alan Johnson. ECM’s opposition contains two key factual inaccuracies. First, it mischaracterizes the testimony of the corporate designee of Northeast Laboratories, Inc. (“Northeast”). Second, it misstates Complaint Counsel’s response to her testimony.

Contrary to ECM’s disparaging description of her as a “lab technician,”<sup>1</sup> Northeast’s corporate designee, Alyssa Ullman, is the Project Manager for Biodegradation Studies.<sup>2</sup> And contrary to ECM’s characterization of her as an “uninformed witness,” Ms. Ullman testified that she was the “best person” to testify about each topic in Complaint Counsel’s Rule 3.33(c)(1) deposition notice<sup>3</sup> (whose topics included Northeast’s biodegradation testing and testing procedures and protocols<sup>4</sup>). Ms. Ullman prepared for her deposition by consulting Alan Johnson and Garrett Johnson,<sup>5</sup> the Northeast employees whom ECM itself had identified as potential

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<sup>1</sup> Opp. at 7.  
<sup>2</sup> RX-A at 5 (Tr. 13:24 – 14:1).  
<sup>3</sup> RX-A at 8 (Tr. 129:23 – 130:2-5).  
<sup>4</sup> RX-B at 6.  
<sup>5</sup> RX-A at 4 (Tr. 8:6-13).

witnesses. Ms. Ullman, Alan Johnson, and Garrett Johnson made the joint decision to put Ms. Ullman forward as the corporate designee for three specific reasons: (1) Ms. Ullman deals with all of Northeast's biodegradation testing clients; (2) she completes every client's biodegradation testing report; and (3) she has been involved in Northeast's biodegradation testing longer than any other Northeast employee.<sup>6</sup>

Based on this testimony, Complaint Counsel reasonably believed that Ms. Ullman spoke on behalf of Northeast.<sup>7</sup> Complaint Counsel's request to depose Mr. Johnson is simply an effort to develop a complete record that makes clear where an individual Northeast employee disagrees with the testimony of the laboratory itself.<sup>8</sup> Bringing any discrepancies to light during a deposition before trial will greatly facilitate efficient exploration of disputed issues at trial.

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<sup>6</sup> RX-A at 8 (129:23 – 130:2-5).

<sup>7</sup> It is not reasonable (or desirable from any party's perspective) to expect Complaint Counsel to have deposed every person or entity that ECM named on its preliminary witness list—which listed 106 persons, entities, or categories of persons or entities.

<sup>8</sup> ECM argues that Complaint Counsel should have taken Mr. Johnson's deposition earlier or sought to exclude his testimony by stipulation. Opp. at 7-8. Given that we had deposed Northeast's corporate designee already and are not obligated to depose the 100+ persons or entities on ECM's preliminary witness list, we had no obligation to depose Mr. Johnson earlier (or seek to exclude his testimony) before it became apparent that ECM would call him live at trial.

CONCLUSION

For these reasons, we respectfully ask the Court to grant Complaint Counsel's motion.

Dated: July 10, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 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**, and one copy through the FTC's e-filing system:

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

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

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