

ORIGINAL

PUBLIC

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



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

DOCKET NO. 9358

**ORDER DENYING COMPLAINT COUNSEL'S MOTION
FOR LEAVE TO TAKE THE DEPOSITION OF ALAN JOHNSON**

I.

On July 3, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to Take the Deposition of Alan Johnson ("Motion"). Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed its opposition on July 10, 2014 ("Opposition"). Also on July 10, 2014, Complaint Counsel filed a motion for leave to file a Reply in support of its Motion and its proposed Reply. Complaint Counsel's motion for leave to file a Reply is GRANTED. Having considered the Motion, the Opposition, and the Reply, and all arguments and assertions therein, the Motion is DENIED, as explained below.

II.

Pursuant to FTC Rule 3.21(c)(2), Complaint Counsel requests leave to take the deposition of Mr. Alan Johnson, Laboratory Director for Northeast Laboratories ("Northeast Labs"). Northeast Labs is a testing laboratory that offers a variety of testing services, including biodegradation testing under ASTM standards. Complaint Counsel listed Northeast Labs on its preliminary witness list. Complaint Counsel states that Respondent listed Mr. Johnson on both its preliminary witness list and its final proposed witness list. Complaint Counsel further states that, while Respondent identified Mr. Johnson and another employee of Northeast Labs on its preliminary witness list, Respondent listed only Mr. Johnson on its final proposed witness list.

Complaint Counsel took the deposition of Northeast Labs' corporate designee, Ms.

Alyssa Ullmann, pursuant to FTC Rule 3.33(c)(1)¹, on May 9, 2014. Ms. Ullmann is Northeast Labs' Project Manager for Biodegradation Studies and, according to Complaint Counsel, testified that she was the best person to testify about each topic in Complaint Counsel's Rule 3.33(c)(1) deposition notice.²

Complaint Counsel states that because Respondent has listed Mr. Johnson, as opposed to Northeast Labs' corporate designee, on its final witness list, Complaint Counsel now seeks to take the deposition of Mr. Johnson. Complaint Counsel argues that good cause exists to allow this request after the discovery deadline because: (1) taking Mr. Johnson's deposition will not impact any of the deadlines in this matter; (2) Mr. Johnson's deposition is important to develop a complete record, as Complaint Counsel believes that Mr. Johnson may offer testimony significantly different from the testimony of Northeast Labs' corporate designee; and (3) Complaint Counsel could not have reasonably foreseen that Mr. Johnson might offer testimony different from his employer's. Complaint Counsel does not offer an explanation for not seeking to take the deposition of Mr. Johnson during the discovery period, after Mr. Johnson was identified on Respondent's preliminary witness list or, at a minimum, after concluding the May 9, 2014 deposition of Northeast Labs' designee.

Respondent states that in the May 9, 2014 deposition, Ms. Ullmann explained that she has no scientific background; has a high school education; and attends school for accounting.³ Ms. Ullmann further testified that she began working at Northeast Labs for her grandfather who, until last year, co-owned Northeast Labs with Mr. Johnson, and that she would help her grandfather with biodegradation studies by typing up reports. (Resp. Exh. A, Dep. Tr. at 13, 127). Respondent states that Ms. Ullmann also testified that Mr. Johnson is the most knowledgeable person at Northeast Labs to answer questions concerning scientific issues and the tests and protocols. (Resp. Exh. A, Dep. Tr. at 130). Thus, Respondent included Mr. Johnson on its Final Proposed Witness list and did not include Ms. Ullmann.

Respondent argues that Complaint Counsel offers no sound justification for its late request to extend the discovery deadline to allow an additional deposition of Northeast Labs and that this request imposes a considerable hardship on Respondent as it prepares for the hearing that begins in less than 30 days. In addition, Respondent points to the nineteen fact depositions of testing laboratories and ECM customers throughout the country that Complaint Counsel has

¹ Rule 3.33(c)(1) Notice to corporation or other organization, sets forth: "[a] party may name as the deponent a public or private corporation The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify." 16 C.F.R. § 3.33(c)(1).

² Ms. Ullmann testified that Alan Johnson and Mr. Garrett Johnson, counsel for Northeast Labs, determined that Ms. Ullmann was the best person to provide deposition testimony in response to Complaint Counsel's subpoena because she handles all the clients, puts clients' reports together, and has "been doing biodegradation stuff the longest" (Deposition transcript of Northeast Labs, May 9, 2014, Exhibit A to Respondent's Opposition (hereinafter Resp. Exh. A, Dep. Tr.) at 130.

³ Ms. Ullmann testified that she is currently taking classes online toward her Bachelor's degree and previously took one biology class in 2008. (Resp. Exh. A, Dep. Tr. at 128-30).

already conducted and argues that an additional deposition, after the close of discovery, is unwarranted.

III.

Pursuant to Commission Rule 3.21(c)(2), “[t]he Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in [the] scheduling order other than the date of the evidentiary hearing.” 16 C.F.R. § 3.21(c)(2). Under the Second and Third Revised Scheduling Orders, the deadline for the close of fact discovery was May 21, 2014. Thus, to allow Complaint Counsel to take the deposition of Mr. Johnson requires Complaint Counsel to demonstrate good cause. “Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension.” *In re Chicago Bridge & Iron*, 2002 FTC LEXIS 64, at *4 (Oct. 16, 2002) (citing *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment)). Complaint Counsel offers no valid justification for failing to depose Mr. Johnson, as opposed to relying solely on a corporate designee deposition of Mr. Johnson’s employer, Northeast Labs, prior to the discovery deadline, given that Mr. Johnson was listed as a potential witness on Respondent’s preliminary witness list. Moreover, Complaint Counsel has not provided any justification for seeking to extend the May 21, 2014 discovery deadline, despite learning at the May 9, 2014 deposition of Northeast Labs that Alan Johnson would be the most knowledgeable person at Northeast Labs to answer questions concerning scientific issues. (Resp. Exh. A, Dep. Tr. at 130). Accordingly, Complaint Counsel has not shown that it could not have conducted the requested deposition before the current discovery deadline despite Complaint Counsel’s diligence, and thus has not shown good cause. In addition, “[i]n determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner” 16 C.F.R. § 3.21(c)(2). These factors militate against reopening discovery as requested by Complaint Counsel. The discovery deadline has already been extended by seven weeks from the deadline in the initial Scheduling Order, with Complaint Counsel having that additional time to conduct extensive discovery.

IV.

For the above stated reasons, Complaint Counsel’s Motion is DENIED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: July 11, 2014