

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  
Envioplastics International,

Respondent.

Docket No. 9358

PUBLIC

**RESPONDENT ECM BIOFILM'S MOTION FOR LEAVE TO CALL AN EXPERT WITNESS OUT OF TURN OR, IN THE ALTERNATIVE, FOR A BRIEF RECESS DURING THE HEARING IN ORDER TO ALLOW RESPONDENT'S EXPERT WITNESS DR. DAVID STEWART TO TESTIFY**

Pursuant to Commission Rules 3.41(b) and 4.3(b) Respondent, ECM BioFilms, Inc. ("ECM"), requests that this Court allow Dr. David Stewart to testify on August 6th, 2014, or grant ECM a continuance to allow Dr. David Stewart to testify on or after August 27th. Dr. Stewart originally cleared his schedule in anticipation of the Hearing beginning June 18, 2014, as stated in the original Scheduling Order. Dr. Stewart confirmed academic and business commitments to travel to Australia and New Zealand from August 7th through August 26th. The Commission's 45-day extension, which reset the Hearing to begin August 5th, 2014, conflicts with that travel schedule.<sup>1</sup> Dr. Stewart is unable to cancel or reschedule his other obligations without incurring substantial costs both financially and professionally.

Should Dr. Stewart, one of ECM's essential witnesses, not be permitted to testify, ECM would suffer significant prejudice in light of the fact that Complaint Counsel's witness on the

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<sup>1</sup> Because Complaint Counsel requested a 90 day extension, ECM had no opportunity to brief the issue of whether a 45 day extension would cause any scheduling conflicts with ECM's experts.

same subject matter, Dr. Shane Frederick, will testify live. Conversely, should this Court allow Dr. Stewart to testify out of turn, or grant a short recess to allow Dr. Stewart's live testimony, Complaint Counsel would suffer no prejudice and likely benefit with additional preparation time from a short break. Therefore, ECM requests that Dr. Stewart be permitted to testify either August 6th, or after August 27th, 2014, even if that request requires a short recess in the hearing schedule. The recess should not substantially alter the timeline of this case.

### **BACKGROUND**

The original scheduling order, filed on November 21, 2013, set the hearing to commence on June 18, 2014. RX-A. ECM subsequently retained Dr. David Stewart on or about December 13, 2013. RX-B, at ¶ 3. Dr. Stewart is an expert in marketing and public policy among other areas. *See* RX-B, at ¶ 2. Dr. Stewart has a history of testifying in FTC proceedings and the Commission has relied on Dr. Stewart's surveys repeatedly. *See* RX-C, at PP. 46, 49.

ECM retained Dr. Stewart as an expert witness in order to review and comment on prior consumer survey research that has examined consumer perceptions related to biodegradability and to conduct additional market research. RX-D, at P. 8. Dr. Stewart challenges reliance on Complaint Counsel's flawed Synovate and American Plastics Council surveys. He also challenges the methods and the reliability of Dr. Shane Frederick's (Complaint Counsel's survey expert's) Google Consumer surveys. In addition, Dr. Stewart designed and oversaw a large, well-designed telephone survey of consumer perception concerning biodegradable claims. *Id.* He also performed a pilot study of industry purchasers of the ECM additive. *See* RX-D, at PP. 30–31. In anticipation of the hearing previously to commence June 18, 2014, Dr. Stewart arranged his schedule to be available for testimony in late June or early July and lumped his business and academic trips together for the month of August. RX-B, at ¶ 3.

On March 18, 2014, nearly four months after the Court issued the original Scheduling Order, Complaint Counsel moved this Court and the Commission to extend the date of the hearing by 90 days. *See generally* RX-E. The Commission decided to extend the hearing by 45 days in lieu of the 90 days requested by Complaint Counsel, and the hearing is now scheduled for August 5, 2014. RX-G, at P. 4; *See* RX-E; RX-F.

On the morning of his deposition, July 1st, 2014, Dr. Stewart informed ECM counsel that he could not, without considerable expense and harm to professional relationships, change his schedule for trips to Australia and New Zealand for the span from August 7th through August 26th. RX-B, at ¶ 5. Further, it does not appear that FTC permits witnesses to testify via videoconference or other technological means. *See* RX-H. Therefore, Dr. Stewart is only available to testify either on August 6th, 2014, or after August 27th, 2014. RX-B, at ¶ 6.

### **ARGUMENT**

#### **A. The ALJ has authority to allow expert witnesses to testify out of order or to continue the hearing to accommodate live testimony**

Commission Rule 3.41(b) states that “[h]earings shall proceed with all reasonable expedition, and, insofar as practicable . . . shall continue, *except for brief intervals of the sort normally involved in judicial proceedings*, without suspension until concluded.” 16 C.F.R. § 3.41(b) (emphasis added). Further, Commission Rule 4.3(b) grants the ALJ authority to extend any time limit except those governing motions directed to the Commission, interlocutory appeals and initial decisions, and deadlines that the rules expressly place in the province of the Commission. 16 C.F.R. § 4.3(b). It is not uncommon for experts, ordinarily busy professionals, to have conflicts that require modifications to the order of presentation, or even short recesses to accommodate scheduling.

The rules give the ALJ authority to permit reasonable recesses during the hearing when practicable and for good cause. *See, e.g., In the Matter of POM Wonderful LLC*, 2012 WL 402215, at \*1–\*2 (F.T.C. Jan. 26, 2012). In *POM*, this Court held that “Respondents ha[d] demonstrated good cause to extend the date for closing arguments beyond the 5 day window provided in this Rule” because their lead counsel was unavailable to prepare for and attend the closing argument as previously scheduled. *Id.* at \*1–\*2. The *POM* decision suggested that, once good cause is shown by the movant, the nonmoving party must show undue prejudice as a result of the extension. *Id.* at \*2.

Similarly, federal appellate courts consider trial continuances appropriate, and even necessary, where an expert witness becomes temporary unavailable to testify at trial. *See, e.g., U.S. v. Ellis*, 263 Fed. App’x 286, 290 (4th Cir. 2008) (holding that the trial court abused its discretion in refusing to grant the defendant’s motion to continue the date of the trial where the defendant’s expert witness was unavailable to testify on the date of the trial); *Brown v. Bobby*, 656 F.3d 325, 344 (6th Cir. 2011) (noting that the trial court granted the defendant two separate continuances “because his expert witness was unavailable”); *see also Barker v. Wingo*, 407 U.S. 514, 531 (1972) (stating that “a valid reason, such as a missing witness, should serve to justify appropriate delay”).

Likewise, federal agencies routinely grant continuances where an expert witness is unavailable to testify at trial. *See, e.g., In the Matter of Checkosky*, SEC Release No. 296, 52 S.E.C. Dkt. 454, 1988 WL 357009 (S.E.C. Apr. 1, 1988) (holding that good cause was shown for postponing hearing where expert witnesses would be unavailable to testify at trial); *In Re: \*\*\*\* Applicant for Security Clearance*, DISCR OSD Case No. 04-00972, 2005 WL 4700831 (Dec. 31.

2005) (the court continued the hearing because the applicant's key witnesses were unavailable to testify at the hearing).

The ALJ ensures that hearings, "insofar as practicable," continue without suspension until concluded.<sup>2</sup> 16 C.F.R. § 3.41(b). To this end, federal agencies allow expert witnesses to testify out of order. For example, in one matter before the U.S. International Trade Commission, the agency accommodated the respondent's expert witness who would be absent for a business trip. *In the Matter of Certain Sucralose*, USITC Inv. No. 337-TA-604, 2008 WL 291496 (U.S. Int'l Trade Comm'n Jan. 30, 2008). The court noted that "it [could not] fathom any reason why the parties were not able to reach an agreement on this matter" and ordered the parties to come to an agreement as to the timing of the expert's testimony, or else the court would allow the direct testimony to come into evidence without any cross examination. *Id.*; *See also Wilson v. Kalelkar*, 1999 WL 1101211, at \*1 (N.D. Ill. Dec. 1, 1999) (noting that the "ALJ allowed Plaintiff's expert witness Dr. Waler to be called out of order to accommodate his schedule").

**B. ECM will suffer substantial prejudice should Dr. Stewart not be allowed to testify; Complaint Counsel will suffer no prejudice should either of ECM's requests be granted.**

Dr. Stewart is one of ECM's key witnesses, and ECM will suffer substantial prejudice should Dr. Stewart not be able to testify at the hearing. Dr. Stewart has a history of testifying at FTC proceedings on behalf of the Commission. *See* RX-C, at PP. 46, 49. In this case, Dr. Stewart will testify for the respondent concerning Complaint Counsel reliance on surveys

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<sup>2</sup> Complaint Counsel represented that they would oppose a short recess, however they would be amenable to "calling him out of order." RX-L. Although ECM would prefer to avoid a delay in these proceedings and have Dr. Stewart testify on August 6th, that date is likely impractical logistically. Dr. Stewart would not be available on August 7th. If his testimony lasts longer than a day, the parties may experience the same interruption. Regardless, ECM would be satisfied with any result that permits Dr. Stewart to testify.

deemed flawed by the Commission itself, on Google Consumer surveys conducted by FTC's expert, and on well designed in person telephone surveys he conducted related to consumer impression of biodegradable marketing claims. RX-I, at PP.8–9. He will testify that there is no appreciable consensus among consumers concerning biodegradability claims. He will testify that the actual consumer impression of biodegradability claims does not align with the Commission's prior policy statements that undergird this action against ECM. *Id.* Dr. Stewart will also rebut the opinions offered by Complaint Counsel's purported expert, Dr. Shane Frederick. *Id.* In particular, he will explain the Complaint Counsel's expert employed methodologies that are far beneath the standard for competent surveys required in litigation, and are unreliable and not credible.

Conversely, Complaint Counsel will suffer no prejudice if a short continuance is granted to accommodate Dr. Stewart, or if ECM presents Dr. Stewart's testimony out of order.<sup>3</sup>

Assuming a recess is even necessary, ECM does not request a lengthy break.<sup>4</sup> The Commission

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<sup>3</sup> During the meet and confer, Complaint Counsel argued that they would suffer prejudice because Dr. Frederick may not be available to testify in late August or early September because of his teaching schedule. However, it is quite possible that the hearing lasts until September even without this Court granting the recess requested in this motion—this is further supported by the fact that, during the meet and confer, Complaint Counsel claimed they would need at least a full day to cross-examine Dr. Stewart. That being the case, and with potentially 10 expert witnesses testifying, if each expert consumes one day of direct and one day of cross-examination, the hearing would last until September 3rd—even assuming that there were *no* fact witnesses or any other delays. In addition, Dr. Frederick appears to be teaching only two courses during the fall semester, with each being only two hours per week. *See* RX-M; RX-N. ECM finds it disingenuous that Complaint Counsel implied that Dr. Frederick, who is a tenured professor, cannot find one or two days in August or September to present his rebuttal testimony after Dr. Stewart testifies.

<sup>4</sup> Out of an abundance of caution, however, ECM submits this request for a possible recess several weeks before the hearing is set to commence, to provide this Court with advanced notice, and permit the parties to plan accordingly. It was impossible for ECM to determine whether it would be necessary to ask for a recess before the parties submitted their final proposed witness lists and before Complaint Counsel disclosed Dr. Michel as an expert witness for the first time on June 30, 2014 at 11:46 P.M. EST. RX-O. Complaint Counsel should be barred from

Rules allow the hearing to span 210 hours (the equivalent of 30 seven-hour trial days). 16 C.F.R. § 3.41(b); RX-H. Therefore, even assuming, *arguendo*, that the recess period herein requested counted against the 210 hour limit, the hearing might last until Wednesday, September 17th.<sup>5</sup>

Accordingly, a recess may not be necessary. With the many witnesses, exhibits,<sup>6</sup> and other legal issues likely to be presented, the hearing may last through August 27th. Complaint Counsel's Final Proposed Witness List includes four "Current and Former ECM employees," 16 "ECM Customers," four "Current and Former FTC Employees," and three "Expert Witnesses." RX-J<sup>7</sup>. ECM's Final Proposed Witness List includes one additional "Fact Witnesses" and five "Expert Witnesses."<sup>8</sup> RX-I. The parties listed over 1,250 exhibits on their fact exhibit lists, and ECM has, so far, listed over 400 exhibits on its expert exhibit list. Therefore, even if a recess is required to permit Dr. Stewart's testimony, that period is likely to be short in duration.

If this Court grants a recess, Complaint Counsel suffers no prejudice. First, the recess period gives Complaint Counsel additional time to prepare for Dr. Stewart's examination. Second, because his testimony would likely come at the end of the case, the recess would not affect any other witnesses. Finally, because Dr. Stewart is out of the country during Complaint Counsel's case-in-chief, he loses the opportunity to watch Complaint Counsel's witness testify, an opportunity Complaint Counsel's witness would have.

If the Court grants the motion and permits Dr. Stewart to testify out of turn, Complaint Counsel suffers no prejudice. Unlike the other scientific experts in this case, Dr. Stewart's

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arguing that ECM had any obligation whatsoever to raise the scheduling conflict at issue here prior to Complaint Counsel disclosing all of its witnesses.

<sup>5</sup> The hearing will commence on August 5, 2014 and, so, 30 days after August 5, 2014, excluding weekends and Labor Day, is September 17, 2014.

<sup>6</sup> Based on the parties proposed witness and exhibit lists, but excluding Complaint Counsel's expert witness list, which ECM has not yet received.

<sup>7</sup> This list does not include Dr. Michel.

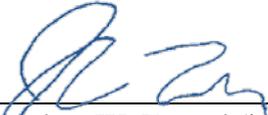
<sup>8</sup> This list does not include ECM's possible surrebuttal expert witness, Dr. Grossman.

testimony concerning consumer impression is compartmentalized. Complaint Counsel's expert witness, Dr. Shane Frederick, has already submitted a rebuttal report, and he intends to testify in rebuttal to Dr. Stewart's testimony. *See* RX-K. Therefore, because Complaint Counsel would still have an "ample opportunity to cross-examine [Stewart] and counteract any prejudice that might result from [Stewart's] testifying out of order," Complaint Counsel "cannot show that [it will suffer] any prejudice as a result of [Stewart's] testimony." *Pivnick v. White, Getgey & Meyer Co., LPA*, 552 F.3d 479, 489 (6th Cir. 2009).

**RELIEF REQUESTED**

Based on the foregoing, ECM respectfully requests that this Court grant leave to allow ECM to call Dr. David Stewart out of order to testify on August 6th, 2014, or in the alternative, to order a continuance during to allow Dr. David Stewart to testify on August 27th, 2014.

Respectfully submitted,

  
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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: July 17, 2014

**STATEMENT CONCERNING MEET AND CONFER**

Pursuant to Rule 3.22(g), 21 C.F.R. § 3.22(g), the undersigned counsel certifies that, on July 15, 2014, Respondent's counsel conferred via e-mail, and again on July 17th, 2014 via telephone, with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. The parties have been unable to reach an agreement on the issues raised in the attached motion, and Complaint Counsel failed to propose, or to agree to, any possible way for Dr. Stewart to testify in person given Dr. Stewart's unavailability.

Respectfully submitted,



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Jonathan W. Emord (jemord@emord.com)  
EMORD & ASSOCIATES, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Telephone: 202-466-6937  
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ECM BioFilms, Inc.,  
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Docket No. 9358

PUBLIC

**[PROPOSED] ORDER GRANTING RESPONDENT ECM BIOFILM’S MOTION FOR LEAVETO CALL AN EXPERT WITNESS OUT OF TURN OR, IN THE ALTERNATIVE, FOR A BRIEF CONTINUANCE DURING THE HEARING IN ORDER TO ALLOW RESPONDENT’S EXPERT WITNESS DR. DAVID STEWART TO TESTIFY**

This matter having come before the Administrative Law Judge on July \_\_\_\_, 2014, upon a Motion for leave to call an expert witness out of turn or, in the alternative, for a possible brief continuance during the hearing, in order to allow Respondent’s Expert Witness Dr. David Stewart to testify, filed by Respondent ECM BioFilms, Inc. (“ECM”) pursuant to Commission Rules 3.41(b) and 4.3(b).

Having considered ECM’s Motion and all supporting and opposing submissions, and for good cause appearing, it is hereby ORDERED that ECM’s Motion is GRANTED; This Court will allow Dr. David Stewart to testify on \_\_\_\_\_.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 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 through 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](mailto: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:

Katherine Johnson  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov)

Elisa Jillson  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [ejillson@ftc.gov](mailto:ejillson@ftc.gov)

Jonathan Cohen  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

Arturo Decastro  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [adecastro@ftc.gov](mailto:adecastro@ftc.gov)

I 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.

Respectfully submitted,

*/s/ Jonathan W. Emord*

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: July 17, 2014