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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9358  
PUBLIC DOCUMENT



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

Pursuant to Rule 3.21(c)(2), Complaint Counsel requests leave to take the deposition of Alan Johnson, a fact witness whom Respondent, ECM Biofilms, Inc. ("ECM"), identified on its final proposed witness list. For the reasons set forth below, good cause exists to allow Complaint Counsel to take Mr. Johnson's deposition.

**BACKGROUND**

Mr. Johnson is the Laboratory Director for Northeast Laboratories, Inc. ("Northeast"). ECM identified Mr. Johnson and another employee of Northeast on its preliminary witness list. Accordingly, on May 9, 2014, pursuant to Rule 3.33(c)(1), Complaint Counsel took the deposition of Northeast Labs' corporate designee, Alyssa Ullman.

On its final proposed witness list, Respondent indicated that rather than rely on Northeast's deposition testimony, Respondent intends to introduce the testimony of Mr. Johnson. Complaint Counsel would like to notice Mr. Johnson's deposition for mid-July. Mr. Johnson is available for a deposition at this time.

**ARGUMENT**

Rule 3.21(c)(2) provides, in relevant part, that the Administrative Law Judge "may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this

scheduling order. . . .” 16 C.F.R. § 3.21(c)(2). When assessing whether good cause exists, 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.” *Id.* Good cause exists to allow a deposition after the discovery deadline where the extension will not impact the trial date (or other deadlines), and where “the fact-finding process . . . will be better served by enabling the parties to develop a complete record.” *In re LabMD, Inc.*, No. 9357, 2014 FTC LEXIS 87, at \*2 (Apr. 11, 2014). *See also In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2004 FTC LEXIS 158, at \*2 (Sept. 21, 2004) (granting motion to take deposition of non-party after fact discovery cut-off).


Good cause exists here, for three reasons. First, taking Mr. Johnson’s deposition will not impact any of the deadlines in this matter. Second, Mr. Johnson’s deposition is important to develop a complete record. Complaint Counsel understands that Mr. Johnson may offer testimony significantly different from the testimony of Northeast on complex issues involving biodegradation testing that are relevant to ECM’s substantiation (or lack thereof) for its biodegradable claims. Exploring any such differences via deposition will ensure a complete record and facilitate an efficient hearing in this matter. Third, Complaint Counsel acted with reasonable diligence by taking the deposition of Northeast itself well within the discovery deadline, and could not reasonably have foreseen that Mr. Johnson might offer testimony different from his employer’s.

CONCLUSION

For these reasons, we respectfully ask the Court to grant Complaint Counsel's motion for leave to take the deposition of Alan Johnson.

Dated: July 3, 2014

Respectfully submitted,



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STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel on July 2 and July 3, 2014 in a good faith effort to resolve by agreement the issues raised in Complaint Counsel's Motion to Take the Deposition of Alan Johnson. Complaint Counsel understands that Respondent's counsel opposes the taking of Mr. Johnson's deposition.

Dated: July 3, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 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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