

ORIGINAL



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

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE THE ATTACHED
MOTION TO CALL REBUTTAL FACT WITNESSES
IN EXCESS OF THE WORD COUNT**


In accordance with Rule 3.22(f), Complaint Counsel moves the Court to extend the applicable word count limit for Complaint Counsel's attached Motion for Leave to Call Rebuttal Fact Witnesses ("Motion for Leave"). For three reasons, Complaint Counsel requests leave to file the attached motion of approximately 5400 words:

- Complaint Counsel's motion consolidates two requests to call rebuttal fact witnesses, which could be filed separately.
- In compliance with the Court's requirements, the motion includes substantial citations to and quotations from the transcript, which add length to the brief; and
- In compliance with the Court's requirements, the motion includes a proffer regarding the fact witnesses' potential testimony, which adds additional length to the brief.

For these reasons, good cause exists for the Court to permit Complaint Counsel to file the attached motion.

Dated: August 25, 2014

Respectfully submitted,



Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
Phone: 202-326-2185; -2551; -2747
Fax: 202-326-2558

Vertical stamp: AUG 25 2014 571614

STATEMENT REGARDING MEET AND CONFER

On August 24, 2014, Complaint Counsel emailed Respondent's counsel requesting that Respondent consent to this motion for the reasons stated herein. Later that day, Respondent's counsel replied that it opposed the relief sought in this motion. Earlier this morning, we further conducted an in-person meet and confer regarding the issues this motion raises.

Dated: August 25, 2014



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Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
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Fax: 202-326-2558

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I caused a true and correct copy of the foregoing to be served as follows:

Two electronic copies (on CDs) to the **Office of the Secretary**, and one hard copy:

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

Two electronic copies (on CDs) 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**:

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Eric J. Awerbuch
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: eawerbuch@emord.com

Date: August 25, 2014



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Jonathan Cohen (jcohen2@ftc.gov)
Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
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ATTACHMENT

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BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International**

Docket No. 9358

PUBLIC

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL
REBUTTAL FACT WITNESSES**

In accordance with Rule 3.43(d) and the Court's instructions, Complaint Counsel moves to present brief rebuttal fact witness testimony from (1) Paul McDonald, Product Manager for Google Consumer Surveys ("GCS"), and (2) Tarang Shah, who worked previously as Corporate Materials and Applications Manager for Myers Industries. Good cause exists to hear short testimony—likely thirty minutes or less—from each witness because both have personal knowledge directly contrary to specific factual claims ECM has asserted.¹

With respect to Mr. McDonald, ECM challenges GCS' validity partly based on a new theory that GCS respondents or potential respondents employ various "masking" techniques such as private browsing, hidden cookies, and "dynamic" or hidden IP addresses.² Furthermore, ECM makes other new challenges to GCS, including the hypotheses that many users cannot access GCS surveys through mobile devices, and that Google allegedly distributes surveys across

¹ In accordance with the Court's instructions, Complaint Counsel reserves the right to move to call Dr. Shane Frederick as an expert rebuttal witness after Dr. David Stewart testifies. Additionally, Complaint Counsel will call Dr. Frederick Michel to as a rebuttal expert (Complaint Counsel previously disclosed Dr. Michel's expert rebuttal testimony in accordance with the Court's deadline).

² ECM also raised various unsupported challenges to GCS earlier. In response, among other things, Professor Shane Frederick testified (1) that it is unnecessary to know specific demographic information about each survey respondent to draw valid conclusions about the results, see Tr. 1079-1080:20-18, (2) an independent study PEW Research performed confirms that the demographics of GCS users match those of internet users generally, see Tr. 1069-1070:8-18 (discussing CCX-874); and (3) the consistency between APCO, Synovate, and GCS establishes convergent validity with respect to the separate studies' conclusions regarding the substantial minority of consumers who believe products labelled "biodegradable" will biodegrade in one year or less, see Tr. 1173:1-15.

participating websites in a manner that somehow skews results.³ For two reasons, good cause exists to permit this testimony. First, Mr. McDonald's potential testimony satisfies the four-factor test that courts employ when evaluating motions to call unlisted rebuttal witnesses.⁴ Second, Mr. McDonald's testimony is very important given the significance of consumer perception issues to this case. Rendering a decision concerning GCS on an incomplete record would disserve the public interest.⁵

With respect to Mr. Shah, ECM's purported expert Dr. Ron Sahu opined for the first time at trial that Myers Industries may not have manufactured the samples it provided to Professor Frederick Michel in accordance with ECM's instructions, rendering Professor Michel's conclusions allegedly unreliable.⁶ For two reasons, good cause exists to permit Mr. Shah to respond. First, Mr. Shah's proposed testimony satisfies the operative four-factor test. Second, the testimony is important because—despite the dozens of tests now before the Court—Professor Michel's analysis is the only published, peer-reviewed study of the ECM additive.

Alternatively, although good cause exists to grant this motion (thereby completing the record), if the Court precludes some or all of the proposed testimony, we request leave to present an appropriate offer of proof pursuant to Rule 3.43(i). However, in light of the Court's oral order this morning, we also provide written offers of proof.

³ As discussed further below, we anticipate that ECM will continue to attack GCS on these grounds through Dr. David Stewart's testimony, although Dr. Stewart's report references various "masking" techniques in only the most opaque manner. See RX-856 at 11 (observing that Google's inferred demographics are "based on information associated with or that resides on a computer, such as an IP address or cookies," and that such information may be unavailable or inaccurate). Dr. Stewart's report does not mention anything about mobile devices, or anything about the manner in which Google distributes surveys across participating websites.

⁴ See *infra* at 4.

⁵ Because Google will testify regarding how its survey technology works, and such information is unavailable to the public, Google's proposed testimony should receive *in camera* treatment. Specifically, if Google explains publically how its product functions behind-the-scenes (including how Google addresses hidden IP addresses or deleted cookies), other parties could steal Google's technology. This would "likely result in a clearly defined, serious injury" to Google, rendering *in camera* treatment appropriate. See Rule 3.45(b). Complaint Counsel understands that Google will file a motion seeking *in camera* treatment later today, and we join that motion.

⁶ See Tr. V9, 200:4-16 (volume 9 ("V9") rough); *id.* at 218:20-219:11.

BACKGROUND

A. Background and Testimony Concerning Google Consumer Surveys

On June 4, Yale Marketing Professor Shane Frederick produced an expert report disclosing results of GCS research showing that substantial percentages of consumers believe that plastic products labelled “biodegradable” will biodegrade in one year or less.⁷ As Professor Frederick opined in his report and later testified,⁸ his GCS results conformed with an earlier telephone survey conducted by APCO and an earlier internet study conducted by Synovate.

On June 18, ECM’s consumer perception expert, Dr. David Stewart, issued a report responding to Professor Frederick’s work. Dr. Stewart’s report criticized GCS in a number of respects, calling it an “unproven research tool” that “is just terrible.”⁹ Dr. Stewart alleged that a GCS respondent could be a child “or a male pretending to be a woman.” *Id.* at 11. Dr. Stewart also opined generally that the GCS sample population is “unknown and unknowable” because:

The only demographic information about a sample is that provided by respondents or “inferred” by Google based on other information associated with or that resides on a computer, such as an IP address or cookies, that may be available for a given respondent. Such information is often not available and when there are multiple users of the same computer the information that is present may be an amalgam of information about multiple users.¹⁰

Significantly, Dr. Stewart’s report does not mention alleged “masking” techniques such as private browsing, hidden cookies, and “dynamic” or hidden IP addresses. The report also does not assert that (allegedly) many internet users cannot access GCS surveys through mobile devices, nor does the report claim that (allegedly) Google allegedly distributes surveys across participating websites in a manner that somehow affects survey results.

⁷ See CCX-890 at 1; see also CCX-860 at 1 (amended report). The Court is familiar with the testimony regarding GCS and the role it plays in this case; as such, we only summarize a few relevant facts here.

⁸ CCX-860 at ¶¶ 19; 24; Tr. at 1043:8-20; *id.* at 1055-1060:24-12; *id.* at 1145:3-14; *id.* at 1155-1156:9-4; *id.* at 1173:7-15.

⁹ RX-856 at 14.

¹⁰ *Id.* at 10-11.

On June 23, ECM deposed Professor Frederick. Although ECM asked various questions regarding GCS, ECM curiously never asked Professor Frederick what he did to research GCS.¹¹

On June 30, Professor Frederick issued a rebuttal report that affirmatively disclosed his communications with Google generally and Mr. McDonald in particular:

One of Dr. Stewart's primary critiques of my GCS studies is that they did not sample a representative population. . . . Through two telephonic meetings with Google representatives, including one with GCS Product Manager Paul McDonald, I have confirmed the mechanics and methodology behind GCS. Such interviews with data collectors are regularly conducted in my field to ascertain the reliability of data-gathering techniques.¹²

ECM apparently took no action following this disclosure.

At trial, ECM's cross-examination of Dr. Frederick wrongly implied (1) that various "masking" techniques rendered GCS allegedly unreliable;¹³ (2) that GCS data is invalid because

¹¹ See RX-858 (deposition of Professor Shane Frederick).

¹² CCX-865 at 3 (internal citations and footnote omitted) (emphasis added).

¹³ Tr. at 1335:11-12 ("Do you know what percentage of internet users mask their identities online?"); *id.* at 1332:14-16 ("Do you know the difference between a static IP address and a dynamic IP address?"); *id.* at 1332:14-15 ("Does Google survey report data from dynamic IP addresses or only from static IP addresses?"); *id.* at 1333:1-2 ("Are you familiar with dynamic host configuration protocol?"); *id.* at 1333:4-5 ("Do you happen to know how dynamic host configuration protocol assigns IP addresses?"); *id.* at 1333:7-9 ("Do you know whether a dynamic IP address changes once or innumerable times?"); *id.* at 1334:6-7 ("Does Google survey require that browsers accept cookies in order for a participant to take the survey?"); *id.* at 1334:9 ("Can a user turn off cookies?"); *id.* at 1334:15-16 ("Are there commercially available programs that enable a user to block his identity or her identity?"); *id.* at 1334:21-22 ("Do you know whether Google surveys relies on a browser's cache files[?]"); *id.* at 1334:25-1335:1 ("Does Google Chrome have a feature that allows you to browse privately?"); *id.* at 1335:5-6 ("Do you know what percentage of Internet users avail themselves of options to prevent cookies?"); *id.* at 1335:8-9 ("Do you know what percentage of Internet users block cookies?"); *id.* at 1335:14-16 ("Do you know what percentage of Internet users rely on Google Chrome's feature that allows you browse privately?"); *id.* at 1337:8-9 ("[R]egarding Google's surveys, do you know if a respondent or a response to a survey question is accepted from a person who is surfing anonymously or using a cloaking feature?") (question from the Court).

GCS posts surveys on websites in some fashion that renders the results allegedly unreliable;¹⁴ and (3) GCS data is allegedly unreliable because meaningful percentages of internet users cannot access GCS surveys through mobile devices.¹⁵ Complaint Counsel expects ECM's consumer perception expert, Dr. David Stewart, to testify regarding these three issues.¹⁶ We further anticipate that Google's limited rebuttal testimony will address these specific questions.

¹⁴ *See, e.g.*, Tr. at 1208:7-9 ("you did not know where the question was posted in front of a specific site; correct?"); *id.* at 1209:17-25 ("you don't have the IP address of the news site, the travel site, the YouTube site or the other entertainment site or the reference site" on which Professor Frederick's GCS surveys were posted); *id.* at 1260:2-8 ("So you don't know whether that popup appears before a news story that let's say concerns mismanufacture of toys, for example. You wouldn't know whether your popup was on a news Web site that hand an article about, let's say, Consumer Product Safety Commission investigating manufactured toys; right? You wouldn't know."); *id.* at 1261:20-24 ("So these are your suspicions, but as to exactly where your Google Consumer Surveys appeared, you can't recite for use today that content that was on those sites when those questions appeared; right?"); *id.* at 1321:9-13 ("What empirical evidence do you possess that establishes that people who visited that fraction of sites, the 340 sites, included in their Google Consumer Survey are in fact representative of all people who use the internet?").

¹⁵ *See, e.g.*, Tr. 1328:21-23 ("Would you agree with me that a lot of people access the Internet these days using mobile devices such as iPhones, iPads and Android devices?"); *id.* at 1329:11-13 ("Do you know whether without a specific app added to a mobile device whether Google surveys appear on mobile devices?"); *id.* at 1329:16-19 ("Do you know what percentage of Internet users access the internet through their mobile devices?"); *id.* at 1330:12-14 ("Do you know what percentage of people in the United States under the age 50 access the Internet exclusively through mobile devices?"); *id.* at 1330:16-18 ("Do you know what percentage of global mobile Web users use mobile as their primary or exclusive means of going online?"); *id.* at 1331:18-21 ("Have you investigated whether there is a correlation between mobile device use and age?"); *id.* at 1331:22-23 ("Have you investigated whether there is a correlation between fixed PCs and laptops and age?").

¹⁶ Complaint Counsel is aware that ECM's counsel's questions are not evidence. Indeed, as of this filing, other than Dr. Stewart's opaque report, the only record evidence regarding GCS' representativeness is from Professor Frederick, who opined, among other things: (1) with respect to the population of American consumers, GCS is "highly representative both demographically and psychographically," Tr. at 1410:13-21; (2) Google has "high incentives" to get "basic demographic information reasonably accurate," including the fact that Google derives income from advertising revenue, *id.* at 1398:6-22; and (3) GCS' representativeness is established in various ways, including the PEW research study, *see* CCX-874, Tr. at 1068:19-1070:18, and GCS' performance in predicting the 2012 election results, *see* CCX-872, Tr. at 1074:16-1075:2. It is precisely because ECM also knows that its counsel's questions are not evidence that we anticipate Dr. Stewart will push (if not exceed) the limits of the scope of his report, in an attempt to rectify the current non-existence of any record evidence that GCS is somehow unrepresentative.

Notably, ECM concluded its cross-examination of Dr. Frederick on August 12, and Complaint Counsel issued a subpoena to Google on August 13 (copying ECM).¹⁷ On August 14, ECM requested an immediate meet-and-confer regarding the Google subpoena, and indicated it would seek relief from the Court: “Because of the urgency of this matter, should you not provide us with proof that you have withdrawn the [Google] subpoena by 1 PM EST today [August 14], we will seek relief from the Court promptly.”¹⁸ Although the meet and confer occurred and we did not withdraw the subpoena, ten days have passed, and ECM has not sought relief.

B. Background and Testimony Concerning Professor Michel’s Study

Through the testimony of consultant Dr. Ron Sahu, ECM elicited testimony challenging Dr. Frederick Michel’s published paper finding the ECM additive completely ineffective.¹⁹ Specifically, in response to ECM’s question, Dr. Sahu testified:

QUESTION: What do you know about the test plastics that were tested in that study?

SAHU: I think he [Professor Michel] had a number of them if I recall. There was really no discussion of how he obtained the test plastics, if I can remember. What I do remember is it was reported that they had 2 percent ECM additive that was the loading rate of the plastic—rather, the additive into the plastic. But I don’t recall a discussion of where he obtained the plastics, how they’re manufactured, how they’re made and certainly no discuss of all these other details of important properties that will affect the biodegradation rate. But I do remember the loading rate.²⁰

Dr. Sahu gave similar testimony on cross-examination: “We don’t know how the plastic was provided to Dr. Michel . . . [I]n other words, the chain of custody issues, how it came about and who—what was the composition of the plastic . . . if there are any antimicrobials, how it had

¹⁷ Ex. A hereto, Subpoena to Google (Aug. 13, 2014).

¹⁸ Ex. B hereto, Email from E. Awerbuch (Aug. 14, 2014) (emphasis added).

¹⁹ See CCX-905 (E. Gomez & F. Michel, *Biodegradability of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion and Long-Term Soil Incubation*, 98 POLYMER DEGRADATION & STABILITY 2583-91 (2013)).

²⁰ V9, 200:4-16.

been processed in the batch blending because it[] was unusually more than the particular recommended 1 percent it kind of raised a red flag[.]”²¹

Dr. Sahu’s report never contended that the ECM plastic Professor Michel tested was allegedly improperly manufactured in some way that would impair the additive’s alleged functionality. While employed at Myers Industries, Mr. Shah manufactured the plastic Professor Michel tested. Mr. Shah’s proposed rebuttal testimony will address the narrow question regarding the manufacture of Professor Michel’s test material.

LEGAL STANDARD

Under Rule 3.43(d)(1), “[a] party is entitled to . . . submit rebuttal evidence . . . as, in the discretion of the Commission or the Administrative Law Judge, may be required for a full and true disclosure of the facts.”²² The Court requested that, if Complaint Counsel sought leave to call rebuttal fact witnesses, we do so in writing, and “upon a showing of good cause.”²³ Courts follow a four-factor balancing test when considering motions to call unlisted fact witnesses:

²¹ *Id.* at 219:3-8.

²² Notably, a party may call fact rebuttal witnesses to respond to the factual underpinnings of the adverse party’s expert’s testimony (such as the testimony Dr. Stewart is expected to give). For instance, in *POM Wonderful, LLC*, No. 9344, the Court granted Complaint Counsel’s Motion to Call Rebuttal Fact Witness Dr. Philip Kantoff to rebut Respondents’ expert Dr. David Heber’s **factual** testimony regarding whether there was a consensus among participants at meetings convened by Respondents regarding the significance of POM’s prostate cancer research. *POM Wonderful* Tr. (Oct. 14, 2011) at 3244:28-3247:3. The Court specifically instructed Complaint Counsel that Dr. Kantoff would be permitted only to rebut Respondents’ expert’s **factual** testimony, and that Complaint Counsel would not be permitted to offer Dr. Kantoff’s expert opinions. *Id.* at 3246:2-19. See also *Fish v. Guevara*, 12 Cal. App. 4th 142, 145 (Cal. App. Dist. 1993) (stating that an undisclosed rebuttal witness “may testify to facts which contradict the factual basis for the opinions of other experts but may not give opinion testimony which contradicts the opinions of other experts”); *Elmer v. Dupnik*, No. 2 CA-CV 2002-0181, 2003 Ariz. App. Unpub. LEXIS 393, *5-*6 (Ariz. Ct. App. 2003) (trial court did not abuse its discretion by admitting factual deposition testimony to rebut appellants’ police practice expert’s factual testimony regarding Santa Monica P.D.’s routine practices).

²³ Tr. 1425:5-7. The Court also stated that our motion “shall be made as soon as possible.” *Id.* at 1425. With respect to Google, we expect Dr. Stewart to offer testimony hostile to GCS, but ECM has also represented that it will close its case with Dr. Stewart’s testimony. Thus, practically speaking, we cannot wait until after the defense case concludes to seek leave to present rebuttal testimony. With respect to Mr. Shah, he would respond to Dr. Sahu’s testimony, and Dr. Sahu testified last week. It also took Complaint Counsel a brief period to ascertain whether Mr. Shah had relevant personal knowledge.

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
- (2) the ability of that party to cure the prejudice;
- (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;
- (4) bad faith or willfulness in failing to comply with the court's order.²⁴

Grove Fresh Distrib., Inc. v. New England Apple Prods. Co., 969 F.2d 552, 559 (7th Cir. 1992); see also *Summers v. Missouri Pacific R.R. Sys.*, 132 F.3d 599, 604 (10th Cir. 1997) (same four factors); *Morfeld v. Kehm*, 803 F.2d 1452, 1456 (8th Cir. 1986) (same); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 555 F.2d 894, 904-05 (3d Cir. 1977) (same), *overruled on other grounds*, *Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir. 1985).

Significantly, “[a]n important final consideration is the importance of the excluded testimony to the proffering party’s case.” *Astrazeneca AB v. Mutual Pharm. Co.*, 278 F. Supp.2d 491, 504 (E.D. Pa. 2003) (quotation and citations omitted); see also *Gibson v. National R.R. Passenger Corp.*, 176 F.R.D. 190, 192 (E.D.Pa.1997) (“The importance of the excluded testimony is an important final consideration.”).

Finally, the pretrial witness disclosure rule “should be applied flexibly and pragmatically and **should seldom be used to bar a party's use of a witness not disclosed unless bad faith is involved.**” *Morfeld*, 803 F.2d at 1456 (emphasis added); see also *Gibson*, 176 F.R.D. at 192 (“The exclusion of witnesses is an extreme sanction, however, which is not normally imposed absent a showing of willful or flagrant violation of court orders.”)

²⁴ These are sometimes referred to as the *Meyers* factors. See *Meyers*, 555 F.2d at 904-05. Notably, the four-factor test is a balancing test, so the presence or absence of any one factor is not dispositive. See, e.g., *Exxon Corp. v. Halcon Shipping Co., Ltd.*, 156 F.R.D. 589, 591 (D.N.J. 1994) (“Contrary to Exxon's characterization, *Meyers* advocates the balancing of these four factors.”).

ARGUMENT**I. The Court Should Hear Narrow Rebuttal Testimony From Mr. McDonald.****A. Mr. McDonald's Proposed Testimony Meets the Four-Factor Balancing Test.**

First, testimony from Mr. McDonald should come as no surprise to ECM. As discussed above, Professor Frederick disclosed that he confirmed the validity of Google's methodology through two interviews with Google representatives, including one with GCS Product Manager Paul McDonald.²⁵ Furthermore, ECM's own expert on consumer perception surveys has not yet testified, and the fact that Complaint Counsel would seek to rebut his expected testimony can hardly surprise ECM.²⁶

Second, there is no prejudice to "cure." ECM cross-examined Professor Frederick at length regarding the three specific areas of GCS' methodology that the proffered testimony will address. Assuming ECM had a good faith basis for its cross-examination and was not simply guessing about how GCS disseminates surveys, about internet "masking" techniques, and about GCS' interplay with mobile devices, then ECM is already prepared to address these issues.²⁷

Third, allowing no more than an hour of testimony from Mr. McDonald will not affect the orderly and efficient trial of this matter. The negligible possible disruption is even less relevant in a bench trial. *See Meyers*, 559 F.2d at 905 (disruption to the trial schedule caused by

²⁵ *See* CCX-865 at 3.

²⁶ The narrow scope of the proposed testimony also helps establish the absence of surprise or prejudice. *See, e.g., Grove Fresh*, 969 F.2d at 559 (affirming decision that party would not be "surprised or prejudiced" if testimony from rebuttal fact witness was permitted where "the trial judge carefully limited [the witness'] testimony to rebuttal topics").

²⁷ For precisely this reason, no deposition of Mr. McDonald is necessary. Furthermore, if ECM wanted to depose Mr. McDonald, it should have sought leave to do so no later than June 30, when Professor Frederick explained his interview with Mr. McDonald, and certainly no later than ten days ago, when ECM affirmatively represented it would file a motion regarding Google's testimony (but mysteriously failed to do so). However, if the Court does permit ECM to depose Mr. McDonald, Complaint Counsel requests that the Court limit the deposition to two hours (at least twice the expected length of his rebuttal testimony), restrict the deposition's scope to the scope of the proposed testimony, and further order that the deposition take place shortly before Mr. McDonald testifies (to minimize travel). Additionally, any deposition would need to be marked confidential, for the same reasons that the proposed testimony should receive *in camera* treatment under the Commission's rules. *See* Protective Order (Oct. 22, 2013).

allowing a previously undisclosed witness to testify was less significant in a bench trial). Furthermore, the Court has already allowed ECM multiple days with less than a full day's worth of testimony (and often **much** less) because ECM did not have its next witness available. To whatever extent adding Mr. McDonald's brief testimony lengthens this proceeding by some relatively small amount, ECM has no grievance.

Finally, there is no evidence of bad faith. As the Court is aware, ECM regularly jumps at the opportunity to allege Complaint Counsel's supposed bad faith, yet ECM did not allege bad faith in either its written meet and confer request preceding its never-filed motion about the Google subpoena nor the conference itself. *See Citizens Bank of Batesville, Ark. v. Ford Motor Co.*, 16 F.3d 965, 967 (8th Cir. 1994) (affirming court's decision to allow unlisted witnesses in part because "the Court found that the record was devoid of any evidence which might indicate bad faith or intentional late disclosure of the witnesses"); *see also Morfeld*, 803 F.2d at 1456 (stating that the pretrial witness disclosure rule "should seldom be used to bar a party's use of a witness not disclosed unless bad faith is involved").

B. Mr. McDonald's Proposed Testimony Concerns an Important Issue.

Consumer perception issues are critical to this case, and the parties disagree sharply regarding whether a significant minority of consumers believe that plastic products labelled "biodegradable" will biodegrade in one year or less. As the Court is aware, Professor Frederick performed considerable work through GCS, which makes the representativeness of the GCS sample a critical issue. This is why we anticipate ECM will attempt to offer evidence challenging GCS's representativeness through Dr. Stewart, and also why a rebuttal from Google on narrow issues is highly probative. Indeed, several courts have found that trial courts abused their discretion by excluding highly probative testimony. *See, e.g., Quinn v. Consol. Freightways Corp.*, 283 F.3d 572, 579 (3d Cir. 2002) (holding that the district court abused its discretion in prohibiting rebuttal testimony that had the potential to provide strong support for plaintiff's case); *Summers*, 132 F.3d at 604 ("Even according appropriate deference, we find reversible error in this case."); *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th

Cir. 1981) (finding it was reversible error to refuse to allow rebuttal witness testimony in light of the essential nature of the evidence); *see also Citizens Bank*, 16 F.3d at 967 (8th Cir. 1994) (affirming decision to allow testimony from unlisted witness that “was relevant to the heart of the case”); *Fed. Aviation Admin. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983) (affirming district court decision permitting rebuttal testimony of a witness not previously listed on the government’s witness list, that the government had indicated it would not call). Accordingly, the Court should permit Mr. McDonald’s brief rebuttal testimony.

II. The Court Should Hear Narrow Rebuttal Testimony From Mr. Shah.

A. Mr. Shah’s Proposed Testimony Meets the Four-Factor Balancing Test.

First, there is neither surprise nor prejudice. As the Court is aware, both parties have focused on Dr. Michel’s published, peer-reviewed study since February. ECM obtained subpoena responses from Dr. Michel in March. In June, ECM issued a since-withdrawn expert report that contained more than two dozen references to Mr. Shaw, including an intricate (if erroneous) analysis of his relationship with Dr. Michel.²⁸ The since-abandoned report asserted that Dr. Michel was “corresponding with Tarang Shah of Myers Industries since at least 2010” and recounted that correspondence in detail.²⁹ Certainly, Mr. Shaw’s potential testimony comes as no surprise to ECM.

Second, the fact that ECM abandoned the report does not mean ECM somehow lacks access to the pages of communications between Dr. Michel and Mr. Shah that ECM’s alleged expert analyzed. In fact, it is difficult to imagine a rebuttal witness that ECM is more prepared to examine than Mr. Shah. Third, as noted above, there is no reason to believe less than an hour of testimony from Mr. Shah will affect the orderly and efficient trial of this matter. Finally, there is no evidence of bad faith.

²⁸ RX-857 at 32-40 (withdrawn).

²⁹ *Id.* at 37.

B. Mr. Shah's Proposed Testimony Concerns an Important Issue.

Mr. Shah's proposed testimony is highly probative because it addresses Dr. Michel's test, which is the only published, peer-reviewed analysis of whether the ECM additive works. Significantly, because Dr. Michel conducted published study himself, he can address most of ECM's (weak) criticisms through his noticed expert rebuttal testimony. However, consistent with established scientific protocols, Dr. Michel relied on the manufacturer's representations concerning the test material (in this case, Meyers Industries preparation of a pot containing ECM additive). Because ECM has introduced testimony alleging the mismanufacture of the pot, rebuttal testimony from someone who personally manufactured the pot is highly probative. Accordingly, the Court should permit Mr. Shah's brief rebuttal testimony.

III. Alternatively, the Court Should Accept an Appropriate Offer of Proof.

Alternatively, if the Court will not accept the proposed testimony in evidence, the Court should permit Complaint Counsel to preserve the excluded testimony as an offer of proof. *See* Rule 3.43(i). Pursuant to the Court's oral order this morning, we also provide the following written offers of proof:

A. Mr. McDonald's Anticipated Testimony.

Complaint Counsel anticipates that Mr. McDonald will testify, from personal knowledge, about the following subjects:³⁰

- Generally, how GCS gathers and assesses survey responses, and how it operates to provide a reasonably reliable sample of American consumers;
- GCS' proprietary technology allows GCS to target survey respondents for whom Google has inferred demographic criteria that meet those requested by the survey's author;
- GCS proprietary technology involves a dynamic algorithm that uses, among other things, the IP address and non-personally identifiable browsing behavior of the user, to infer that user's geographic location and demographic information, respectively;
- GCS then proactively administers the survey to users whose demographic information is required to create a balanced survey population;

³⁰ We note that Complaint Counsel's ability to prepare a full and complete offer of proof is limited somewhat by the fact that the Court added the requirement of including a written offer of proof less than three hours ago, and that we have not yet heard Dr. Stewart's testimony.

- GCS also has additional proprietary features to validate the reliability of its product, including measures to cross-check and validate the algorithm's ability to infer demographic information;
- GCS reports survey data for which the user's demographic information cannot be ascertained as "unknown." This includes users who employ various technologies to intended to mask demographic characteristics, as well as circumstances in which GCS lacks sufficient information to infer the user's demographic information;
- GCS disseminates surveys such as Dr. Frederick's in a manner designed to create demographic balance that reasonably reflects the population of American internet users at large. GCS would not post a survey such as those Dr. Frederick conducted on the website of only one content provider. Rather, GCS posts surveys on multiple partner websites that provide widely-viewed content, such as many of the country's leading news, sports, and entertainment sites; and
- GCS has always been available on certain tablet devices, and earlier this year, GCS made it surveys available to users of certain mobile (cellphone-type) internet devices as well.

B. Mr. Shah's Anticipated Testimony.


Complaint Counsel anticipates that Mr. Shah will testify, from personal knowledge, that as a Myers Industries employee, he manufactured the ECM Plastic test material provided to Dr. Michel in accordance with ECM's instructions.

CONCLUSION

For the foregoing reasons, the Court should hear limited rebuttal evidence from two proposed witnesses.

Dated: August 25, 2014

Respectfully submitted,


Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
Phone: 202-326-2185; -2551; -2747;
Fax: 202-326-2558

MEET AND CONFER CERTIFICATION

Complaint Counsel hereby certifies that we conducted a meet and confer with ECM's counsel on the issues raised herein via electronic mail, and additionally through an in person meeting with ECM's counsel this morning.


Jonathan Cohen

DATED: August 25, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 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**, one hard copy, 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

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**:

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Eric J. Awerbuch
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: eawerbuch@emord.com

Date: August 25, 2014



Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
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Fax: 202-326-2558

Exhibit A



**SUBPOENA AD TESTIFICANDUM
ADJUDICATIVE HEARING**

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO</p> <p>Paul McDonald c/o Google, Inc. 1600 Amphitheatre Parkway Mountain View, CA 94043</p>	<p>2. FROM</p> <p align="center">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to attend and give testimony at an adjudicative hearing, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF ADJUDICATIVE HEARING</p> <p>Federal Trade Commission 600 Pennsylvania Avenue, NW, Room 532 Washington, DC 20580</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>The Chief Administrative Law Judge</p> <hr/> <p>5. DATE AND TIME OF ADJUDICATIVE HEARING</p>
--	--

6. SUBJECT OF PROCEEDING

In re: ECM Biofilms, Inc., Docket No. 9358

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Complaint Counsel Katherine Johnson (202) 326-2185 Jonathan Cohen (202) 326-2551 Arturo DeCastro (202) 326-2747</p>
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<p>DATE SIGNED</p> <p>8/13/2014</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

Exhibit B

Decastro, Arturo

From: Eric Awerbuch <EAwerbuch@emord.com>
Sent: Thursday, August 14, 2014 10:12 AM
To: Johnson, Katherine; Cohen, Jonathan; Decastro, Arturo
Cc: Peter Arhangelsky; Jonathan Emord
Subject: Subpoena to Google

Counsel,

I called this morning and left separate voicemails for each of you. We would like to speak this morning to discuss the subpoena you apparently issued to Google last night.

That subpoena is improper under the Commission's rules, the scheduling order, and Judge Chappell's instructions regarding rebuttal witnesses. It is inconsistent with your statement on the record that "[t]he government does rest with of course the reservation to call rebuttal expert that we've identified." 8/12/14 Tr. at 130:17-19. Among other critical deficiencies, you made no attempt to confer on this matter before issuing the subpoena. We disagree that you can unilaterally add a rebuttal fact witness without leave of court, particularly one that has never been listed in your witness lists, and would serve only to support your case-in-chief, which you have closed.

Because of the urgency of this matter, should you not provide us with proof that you have withdrawn the subpoena by 1 PM EST today, we will seek relief from the Court promptly. Urgent resolution of this matter is essential to prevent prejudice stemming from this unfair surprise, unnecessary costs and burdens on non-parties, and to promote judicial economy. Please feel free to call me directly on my cell phone to discuss: (248) 568-1856.

Thank you,

Eric Awerbuch, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste. 4 | Chandler, AZ 85286
Firm: (602) 388-8899 | Direct: (602) 388-8902 | Facsimile: (602) 393-4361 | www.emord.com

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