

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**

**OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO SERVE SUBPOENAS  
ON COMPLAINT COUNSEL’S EXPERTS OUT OF TIME**

Shortly after this Court’s June 2 Order, Respondent ECM Biofilms, Inc. (“ECM”) informed Complaint Counsel “that the Court’s order is in error,”<sup>1</sup> and that ECM would seek leave to re-serve our experts with subpoenas—despite the fact that the deadline for serving subpoenas *duces tecum* expired almost two months ago, on April 11.<sup>2</sup> For several reasons, ECM has not established the good cause necessary for the Court to grant this *de facto* motion for reconsideration. First, ECM is solely responsible for the delay from which it now seeks relief, and forcing Complaint Counsel’s experts to respond to document discovery at this late stage is unfairly prejudicial. Second, subpoenas are not a proper means to take discovery from a party’s agents, nor can parties use subpoenas to circumvent the limits the Commission’s rules place on expert discovery (at least without “demonstrat[ing] a need”).<sup>3</sup> Third, even if the Court allows subpoenas as a means to circumvent Rule 3.31A’s limits and take document discovery from a party’s experts, these particular subpoenas are unduly burdensome.

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<sup>1</sup> CCX-A:1 at 2.  
<sup>2</sup> See Second Revised Scheduling Order (Apr. 10, 2014).  
<sup>3</sup> See *In the Matter of Basic Research*, 2004 FTC LEXIS 237, \*9 (Dec. 9, 2004) (denying expert discovery beyond that provided by the FTC’s Rules, the Scheduling Order, and *In re Dura Lube*, 1999 FTC LEXIS 254 (Dec. 15, 1999), where the movant had not “demonstrated a need” for broader discovery).

**BACKGROUND**

On April 7—four days before the deadline for serving subpoenas *duces tecum*—ECM attempted to serve facially invalid subpoenas on our experts.<sup>4</sup> Via electronic mail, Complaint Counsel agreed to accept service on its experts’ behalf, and reserved all rights other than the right to object based on service.<sup>5</sup> We received hard copies (missing the physically raised seal) the following day.<sup>6</sup> Contrary to ECM’s assertion that we “express[ed] no reservation that the subpoenas were invalid do to an absence of the Commission seal,”<sup>7</sup> on April 11, we warned ECM that we might “object on the grounds that **the subpoenas lack the Commission’s seal.**”<sup>8</sup> Furthermore, on April 25, Complaint Counsel timely objected to ECM’s subpoenas. Most important here, the first objection stated: “Complaint Counsel objects to the Subpoena to the extent that it is invalid and unenforceable **for lack of Commission Seal.**”<sup>9</sup>

Significantly, at that point (April 25), ECM could have moved to enforce the subpoenas. However, ECM elected to wait nearly a month—until May 20—to seek this relief.<sup>10</sup> During the

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<sup>4</sup> See RX-A-1; RX-A-2; RX-A-3.

<sup>5</sup> CCX-A:2 at 1.

<sup>6</sup> Complaint Counsel has not received hard copies of any subpoena ECM served on third parties.

<sup>7</sup> Mtn. at 2.

<sup>8</sup> RX-D at 1 n.1 (emphasis added). As an aside, ECM does not explain how the fact that the rules no longer require the Secretary to sign subpoenas renders the seal requirement improper—particularly when Rule 3.34(a) still requires that subpoenas issue “on a form provided by the Secretary.”

<sup>9</sup> RX-F-1—F-3 (emphasis added). ECM’s assertion that we “respond[ed] in part to one of the requests” in the subpoenas is incorrect. Complaint Counsel served a single document (one expert’s resume) which was inadvertently omitted from our initial expert disclosure.

<sup>10</sup> Notably, ECM waived the baseless argument that requiring the Secretary’s seal violates the Administrative Procedure Act (“APA”). Because Complaint Counsel did, in fact, raise the lack of the Commission’s seal multiple times before ECM filed its motion to enforce the subpoenas, ECM should have asserted its APA argument then. Additionally, our Opposition to that motion raised the seal argument yet again, and the Court granted ECM’s motion for leave to file a Reply to our Opposition. ECM’s Reply could have raised this argument, but did not. Finally, ECM cites *Alabama v. Centers for Medicare & Medicaid Services*, 780 F. Supp. 2d 1219 (M.D. Ala. 2011). See Mem. at 16. This case involved an agency letter issued without notice and comment, yet purporting to mandate that states suing for Medicaid fraud must disburse a portion of their recovery to the federal government. See *Alabama*, 780 F. Supp. at 1224-25. Unlike *Alabama*, The Rule 3.34(a) seal requirement is an interpretive rule, not a legislative rule.

interim, the parties negotiated an expert deposition schedule. Although Complaint Counsel offered to make its experts available in early July, after their rebuttal reports are due, ECM curiously requested alternative dates “between June 16-27” (before our experts’ rebuttal reports are due).<sup>11</sup> Complaint Counsel met this request, and depositions will now commence earlier than they would have otherwise. Thus, ECM—which complains about timing—filed its motion to enforce the subpoenas more than three weeks later than necessary, and also moved its depositions several weeks earlier than necessary.

### **LEGAL STANDARD**

The Court will not extend the deadline for issuing subpoenas *duces tecum* without “a showing of good cause.” *See* Rule 3.21(c)(2). Alternatively, to the extent the pending motion is a *de facto* motion to reconsider, the Court grants motions to reconsider only “where it appears the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice.” *In re Intel Corp.*, 2010 FTC LEXIS 47, \*5-\*6 (May 28, 2010).

### **ARGUMENT**

#### **I. ECM Is Solely Responsible for the Delay, Which Prejudices Complaint Counsel.**

Initially, because ECM is responsible for the delay in raising this issue, any prejudice due to the inability to serve untimely subpoenas is attributable solely to ECM. ECM could have sought the expert discovery at issue weeks or months earlier. ECM also could have moved to enforce its subpoenas immediately, rather than waiting almost a month. ECM’s own delay is not good cause to extend the deadline for issuing subpoenas *duces tecum*.

Additionally, the untimeliness of ECM’s request enhances the prejudice to Complaint Counsel. If the Court grants the pending motion (which it should not), then our experts will be compiling document productions when they should be preparing for their depositions, drafting rebuttal reports, or preparing for trial. Like most courts, this Court’s Scheduling Order sensibly

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<sup>11</sup> CCX-A:3 at 1.

segregates document discovery from the expert deposition and trial preparation period. Forcing our experts to respond to subpoenas long after the proper deadline is prejudicial, and ECM has not established good cause outweighing this prejudice.<sup>12</sup>

**II. Parties Cannot Use Subpoenas To Circumvent the Limits the Court’s Rules Place on Expert Discovery.**

Because the relief ECM seeks—the right to subpoena Complaint Counsel’s experts—is procedurally improper, there is no good cause to permit these untimely subpoenas. In support of asserted right to subpoena Complaint Counsel’s experts, ECM quotes Rule 3.31A(d) regarding expert depositions.<sup>13</sup> Specifically, the quoted sentence provides: “**Upon motion**, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.” (Emphasis added). If parties may obtain whatever additional discovery they wish beyond the deposition and what the rules otherwise afford **without a motion**—simply by subpoenaing the expert—then Rule 3.31A(d) would be superfluous. *Cf. Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 111 (1991) (“[O]f course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”).

Although ECM has now (belatedly) filed such a motion, the proper procedure would be to seek leave to issue discovery asking Complaint Counsel to produce documents beyond what Rule 3.31A requires, rather than attempting to subpoena experts as though they were third parties.<sup>14</sup> Notably, Complaint Counsel explained that subpoenas to experts are improper in part

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<sup>12</sup> Indeed, ECM has not established that it needs the requested material at all, let alone badly enough that good cause exists to modify the Scheduling Order. As the Court explained, its June 2 Order “does not preclude Respondent from inquiring into information germane to expert qualifications, knowledge, training, and experience, as well as information germane to expert bias, conflicts of interest, or lack of independence, at the designated expert witnesses’ depositions.” *See* Order at 3. Furthermore, ECM already requested and obtained many of the documents at issue from other sources. *See, e.g., Opp.* (May 28, 2015) at 2 n.5.

<sup>13</sup> *See* Mem. at 11.

<sup>14</sup> Given that Complaint Counsel made this position clear long ago, *see* CCX-A:2 at 2; and RX-D at 2, it is unclear why ECM now seeks leave to issue subpoenas as opposed to leave to issue document requests to Complaint Counsel. This latter approach would have at least avoided one of the many problems with ECM’s pending motion.

because experts are a party's agents.<sup>15</sup> However, citing inapposite authority, ECM initially challenged this position. *See* RX-E at 2 (“[Y]our experts are not your agents for purposes of litigation.”). Now, ECM adopts the correct view. *See* Mtn. at 2 (“Here, the party receiving the subpoena is, in fact, **an agent of the Federal Trade Commission**[.]”) (Emphasis added). Suffice it to say, discovery from a party's agents should be conducted through the party (pursuant to Rule 3.37(a)), not via third-party subpoena.

Significantly, a ruling permitting parties to obtain discovery directly from the opposing party's agents (such as experts) would both run contrary to federal practice generally and have far-reaching implications in Part III litigation. As the Court is aware, Rule 3.31(e) strictly limits discovery of “communications between another party's attorney and any of that other party's testifying experts[.]” An expert who receives a subpoena could disclose this protected material without his or her employer (*i.e.*, the party) having the opportunity to intercede. It makes no sense to allow a party to deal directly with its adversary's experts, thereby cutting the opposing party out of the process. Additionally, testifying experts routinely receive confidential materials parties obtained via subpoena, the disclosure of which could harm third party subpoena respondents. Testifying experts may not know which responsive materials should be designated confidential, or how to do so. In this respect, allowing parties to deal directly with their adversary's agents (such as experts) also imperils interests in confidentiality important to both third party subpoena respondents and the Commission.

In short, the Commission's Rules limit the scope of expert discovery, at least without a showing of substantial need, *see, e.g.*, Rule 3.31A, which is consistent with federal authority limiting the use of subpoenas to circumvent the expert discovery limits Rule 26 imposes,<sup>16</sup> *see*,

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<sup>15</sup> *See* RX-D at 2.

<sup>16</sup> *See also Morriss v. BNSF Ry. Co.*, No. 8:13-cv-24, 2014 WL 128393, \*6-\*7 (D. Neb. Jan. 13, 2014) (“The court finds that absent some threshold showing of need, the broad discovery provisions of Rules 34 and Rule 45 cannot be used to undermine the specific expert witness discovery rules in Rule 26(a)(2) and (b)(4). The expert disclosure and discovery limitations of Rule 26 represent a reasoned balance between sufficient expert disclosures and unfettered expert discovery as expressed in case law and the documented discussions of the Rules Committee. As referenced repeatedly in the advisory notes to Rule 26, the provisions of the rule were adopted to

*e.g.*, *Marsh v. Jackson*, 141 F.R.D. 431, 432 (W.D. Va. 1992). ECM has not shown substantial need to circumvent Rule 3.31A, nor has it established the propriety of issuing subpoenas to opposing experts. For these reasons, there is no good cause to grant the relief requested.

### III. The Proposed Subpoenas Are Unduly Burdensome.

The undue burden these subpoenas would impose further underscores the absence of good cause to grant the relief ECM seeks. Specifically, Rules 26(a)(2) and (b)(4)—analogues to Commission Rule 3.31A—“were adopted to limit the undue burden and cost of expert discovery.” *Morriss*, 2014 WL 128393 at \*6. However, the proposed subpoenas increase both burden and expense to a degree that would be unjustified at any time, let alone nearly two months after the last day to issue subpoenas *duces tecum*.

Complaint Counsel has already provided the Court with declarations from its experts detailing the substantial burden compliance would entail.<sup>17</sup> The subpoenas are exceptionally overbroad, seeking the experts’ personal financial information, obviously irrelevant information, information ECM already possesses, and information ECM could readily obtain from other sources.<sup>18</sup> Among other things, the subpoenas seek documents disclosing stock or other “ownership interests” in companies “associated with plastics,”<sup>19</sup> although anyone with an index fund in his or her retirement savings has an interest in one of many large American corporations “associated with plastics.” This is precisely the sort of invasive request that *Basic Research* rejected. *See* 2004 FTC LEXIS 237, \*8 (Dec. 9, 2004).

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limit the undue burden and cost of expert discovery. . . . The plaintiff has shown no compelling reason for expanding the expert discovery obtained from the defendants' experts—whether testifying or not. Therefore, as to each of these requests, the defendant's objection that the requests exceed the scope of permissible discovery under Rule 26 will be sustained.”) (citing *Marsh*, 141 F.R.D. 433).

<sup>17</sup> *See* Opp. (May 28, 2014), CCX-A:7-9 (responding to the subpoenas’ demands would require more than twenty hours of each expert’s time).

<sup>18</sup> *See* Opp. at 2-3 (citing specific requests seeking these categories of information).

<sup>19</sup> *See* RX-A-1 (No. 16); RX-A-2 (No. 8); RX-A-3 (No. 8).

The subpoenas also seek an enormous quantity of information, which adds to their substantial burden.<sup>20</sup> For instance, the proposed subpoena to Professor Stephen McCarthy seeks contracts, “grant documents,” and proposals associated with sixteen different research projects.<sup>21</sup> Including their various discrete subparts, the three subpoenas collectively demand responses to at least sixty-six requests. Moreover, many of the requests seek “all documents,”<sup>22</sup> or material “regardless of the date.”<sup>23</sup> Simply put, ECM has not established good cause to impose this degree of burden nearly two months after the deadline to issue subpoenas *duces tecum*.<sup>24</sup>

### CONCLUSION

For these reasons, we respectfully ask the Court to deny ECM’s motion.

Dated: June 5, 2014

Respectfully submitted,

  
 Katherine Johnson (kjohnson3@ftc.gov)  
 Jonathan Cohen (jcohen2@ftc.gov)  
 Elisa Jillson (ejillson@ftc.gov)  
 Federal Trade Commission  
 600 Pennsylvania Ave., N.W. M-8102B  
 Washington, DC 20580  
 Phone: 202-326-2185; -2551; -3001  
 Fax: 202-326-2551

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<sup>20</sup> The information ECM seeks leave to subpoena is in addition to the thousands of pages of material Complaint Counsel produced yesterday along with its expert reports.

<sup>21</sup> RX-A-1 (No. 9).

<sup>22</sup> *See, e.g.*, RX-A-3 (No. 2).

<sup>23</sup> *See, e.g., id.* (No. 3).

<sup>24</sup> To provide a final example, the subpoenas seek all documents (“complaints, answers, motions, and transcripts (deposition, hearing and trial)”) in any proceeding involving Professor Shane Frederick in his “professional capacity” whether related to this case or not. *See* RX-A-3 (No. 12). Because these court documents are publically-available, ECM simply could have asked Complaint Counsel to produce a list of cases involving our experts. This sort of request typifies the subpoenas as a whole, which seem calculated to occupy our experts’ time rather than identify information genuinely necessary to their fair cross-examination.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 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**:

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

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

Lou Caputo  
Emord & Associates, P.C.  
3210 S. Gilbert Road, Suite 4  
Chandler, AZ 85286  
Email: [lcaputo@emord.com](mailto:lcaputo@emord.com)

Date: June 5, 2014

  
Katherine Johnson ([kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov))  
Jonathan Cohen ([jcohen2@ftc.gov](mailto:jcohen2@ftc.gov))  
Elisa Jillson ([ejillson@ftc.gov](mailto:ejillson@ftc.gov))  
Federal Trade Commission  
600 Pennsylvania Ave., N.W. M-8102B  
Washington, DC 20580  
Phone: 202-326-2185; -2551; -3001  
Fax: 202-326-2551



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

<b>In the Matter of</b>	)	
	)	
<b>ECM BioFilms, Inc.,</b>	)	<b>Docket No. 9358</b>
<b>a corporation, also d/b/a</b>	)	
<b>Enviroplastics International</b>	)	<b>PUBLIC DOCUMENT</b>
	)	

**EXHIBITS IN SUPPORT OF COMPLAINT COUNSEL'S  
OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO SERVE  
SUBPOENAS ON COMPLAINT COUNSEL'S EXPERTS OUT OF TIME**

# **Complaint Counsel Exhibit A**

**CX-A**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

_____ )	
In the Matter of )	
ECM BioFilms, Inc., )	Docket No. 9358
a corporation, also d/b/a )	PUBLIC DOCUMENT
Envioplastics International )	
_____ )	

**DECLARATION OF JONATHAN COHEN IN SUPPORT COMPLAINT COUNSEL'S  
OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO SERVE  
SUBPOENAS ON COMPLAINT COUNSEL'S EXPERTS OUT OF TIME**

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:


1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as an attorney in the Division of Enforcement in the Bureau of Consumer Protection. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. Attachment 1 hereto is a true and correct copy of an email exchange between Peter Arhangelsky and Complaint Counsel, dated June 2 and June 3, 2014.

3. Attachment 2 hereto is a true and correct copy of an email exchange between Lou Caputo and Complaint Counsel, dated April 7, 2014.

4. Attachment 3 hereto is a true and correct copy of an email exchange between Peter Arhangelsky and Complaint Counsel, dated May 12 and May 13, 2014.

Executed this 5<sup>th</sup> day of June, 2014 in Washington, D.C.

  
Jonathan Cohen  
Complaint Counsel

**Complaint Counsel  
Exhibit A  
Attachment 1**

**CX-A:1**

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**From:** Cohen, Jonathan  
**Sent:** Tuesday, June 03, 2014 7:15 PM  
**To:** 'Peter Arhangelsky'  
**Cc:** 'Lou Caputo'; 'Jonathan Emord'; Johnson, Katherine; Decastro, Arturo  
**Subject:** RE: Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Peter,

Your characterization of our proposal is only partly correct; we're willing to go beyond what we offered in April, as we explained. And we may be willing to go further than we articulated on our call, depending on what particular requests are involved, and whether the result of reaching such an agreement would save the Court, the parties, and the experts time.

You indicated that, in effect, anything other than agreeing to respond to the subpoenas in full wouldn't be acceptable to your client, and as such, both sides politely concluded the conversation. If there is a "meet-in-the-middle" compromise that you'd consider, we'd like to continue talking. If not, we respect your position.

Best,

**Jonathan Cohen**

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., CC-9528 Washington, D.C. 20580  
(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

---

**From:** Peter Arhangelsky [<mailto:PARhangelsky@emord.com>]  
**Sent:** Tuesday, June 03, 2014 7:07 PM  
**To:** Cohen, Jonathan  
**Cc:** Lou Caputo; Jonathan Emord; Johnson, Katherine; Decastro, Arturo  
**Subject:** RE: Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Counsel,

This afternoon we discussed ECM's Motion for Leave to Serve Subpoenas following the Court's July 2, 2014 Order. In addition to the material offered in your April 11, 2014 letter, you now offer to provide correspondence between the Commission and your experts predating the time when those experts contracted to be consultants or experts in this case. Please inform us if our understanding of that proposal is inaccurate.

We think the parties are still far apart. ECM is entitled to information requested in its Rule 3.34 subpoenas, and that information exceeds the scope of information Complaint Counsel is presently willing to produce. The information you offer is not significantly more than what the mandatory disclosures in Rule 3.31A already provide. That information does not include critical documents and information necessary to ECM's defense and, so, ECM cannot proceed based on that alone. Moreover, to the extent ECM is deprived of its discovery abilities, the court should address those significant legal issues in a written opinion. Because we understand that the parties are not in agreement, we intend to file our Motion for Leave shortly.

Please let me know if you wish to discuss this further.

Best,

**Peter A. Arhangelsky, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286**  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

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**From:** Peter Arhangelsky  
**Sent:** Monday, June 02, 2014 4:28 PM  
**To:** 'Cohen, Jonathan'  
**Cc:** Lou Caputo; Jonathan Emord; Johnson, Katherine; Decastro, Arturo  
**Subject:** RE: Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Jonathan,

Let's talk at 4pm Eastern tomorrow. I am available then.

Best,

**Peter A. Arhangelsky, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286**  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Monday, June 02, 2014 4:15 PM  
**To:** Peter Arhangelsky  
**Cc:** Lou Caputo; Jonathan Emord; Johnson, Katherine; Decastro, Arturo  
**Subject:** RE: Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Peter,

We don't agree that a meet and confer would be redundant at all, or a mere formality. We urge you to comply with your obligation to speak with us. Last time, we proposed a "meet in the middle" alternative, and we'd like the opportunity to pitch something like that to you again. It's still possible to save the Court and the parties unnecessary additional effort (not to mention our experts' time and effort as well).

Someone will be available to speak with you tomorrow at 4:00 EST, if not earlier if we can arrange it.

**Jonathan Cohen**  
Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580  
(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

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**From:** Peter Arhangelsky [<mailto:PArhangelsky@emord.com>]

**Sent:** Monday, June 02, 2014 6:24 PM

**To:** Johnson, Katherine

**Cc:** Cohen, Jonathan; Lou Caputo; Jonathan Emord

**Subject:** FW: Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Counsel,

Following the Court's Order today, ECM plans to file a Motion for Leave to issue subpoenas *duces tecum* to Drs. McCarthy, Tolaymet, and Frederick. While we think the Court's order is in error, the most efficient resolution is to seek timely leave to serve subpoenas that comply with all procedural elements, both official and unofficial. Testimonial discovery alone is inadequate under the circumstances. We intend to file that motion promptly, as time is of the essence. Our reading of the Scheduling Order ¶14 suggests that this type of motion may require a meet and confer. Please advise of the next available opportunity to discuss. As we have discussed our respective positions several times before, we understand that a conference may be of little benefit presently. Indeed, our position remains unchanged since our last meet and confer on this point, and if yours remains unchanged as well, with your agreement we will dispense with the formality of a redundant meet and confer. Please advise.

Sincerely,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

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**From:** Gross, Dana [<mailto:DGROSS@ftc.gov>]

**Sent:** Monday, June 02, 2014 12:01 PM

**To:** Peter Arhangelsky; Jonathan Emord; Jillson, Elisa; Johnson, Katherine

**Cc:** Arthaud, Victoria; Gebler, Hillary; Pelzer, Lynnette; Clark, Donald S.; Tabor, April; Frankle, Janice Podoll; McCoy Hunter, Crystal; Wade, Fenice

**Subject:** Docket 9358 - 060214 Order Denying Respondent's Motion to Compel Expert Witnesses' Responses to Subpoenas Duces Tecum

Dear Counsel,

Attached is a courtesy copy of the above order issued today by Judge Chappell.

Sincerely,

*Dana L. Gross*

Legal Support Specialist  
Office of Administrative Law Judges  
Direct:(202) 326-3723  
Main: (202) 326-3637

**Complaint Counsel  
Exhibit A  
Attachment 2**

**CX-A:2**



**From:** Cohen, Jonathan  
**Sent:** Monday, April 07, 2014 7:48 PM  
**To:** 'Lou Caputo'; 'Jonathan Emord'; 'Peter Arhangelsky'  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Docket No. 9358, Subpoenas Duces Tecum

Lou,

Your prior email does not state that your “subpoenas are **to be dispatched** today.” Rather, you wrote: “Please find the attached subpoenas *duces tecum* dispatched today.” Obviously, we can’t accept service of subpoenas you already sent to our experts via Federal Express. If, in fact, the subpoenas were not “dispatched today,” but are merely scheduled to be dispatched, then yes, we will accept service on our experts’ behalf.

I note that this acceptance reserves all rights other than the right to object to the subpoenas based on their service.

We’ll give you a call tomorrow at 4:30 EST to discuss our objections.

**Jonathan Cohen**

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580  
(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

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**From:** Lou Caputo [<mailto:LCaputo@emord.com>]  
**Sent:** Monday, April 07, 2014 7:28 PM  
**To:** Cohen, Jonathan; Jonathan Emord; Peter Arhangelsky  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Docket No. 9358, Subpoenas Duces Tecum

Jonathan,

We assume by your comments that Complaint Counsel will accept service on behalf of Drs. McCarthy, Tolaymet, and Frederick. Please confirm. **As previously stated, our subpoenas are to be dispatched today.** If you are stating that Complaint Counsel will not accept service of a subpoena on behalf of its own experts, please inform us of this immediately. Further, subpoenas to retained experts are permissible. *See All W. Pet Supply Co. v. Hill's Pet Products Div., Colgate-Palmolive Co.*, 152 F.R.D. 634, 639 (D. Kan. 1993) (“With regard to nonparties such as plaintiff’s expert witness, a request for documents may be made by subpoena *duces tecum* pursuant to Rule 45”); *Expeditors Int’l of Washington, Inc. v. Vastera, Inc.*, 04 C 0321, 2004 WL 406999 (N.D. Ill. Feb. 26, 2004) (rejecting blanket prohibition of subpoenas to retained experts under *Marsh v. Jackson*).

Please confirm whether you will accept service. We are available for a call to hear more of your position tomorrow after 3:00 PM EST.

Thank you,

Lou

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Monday, April 07, 2014 3:00 PM  
**To:** Lou Caputo; Jonathan Emord; Peter Arhangelsky  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Docket No. 9358, Subpoenas Duces Tecum

Counsel,

These subpoenas to our experts are grossly improper. Both the FRCP Commentary and case law make plain that you cannot subpoena experts directly, and nothing in FTC Rule 3.34 suggests otherwise. *See, e.g.*, FRCP 45, 1991 Amendment, Subsection (c) Advisory Committee Notes; *Marsh v. Jackson*, 141 F.R.D. 431, 432 (W.D. Va. 1992) (mag. op.).

Please withdraw these subpoenas and re-submit your proposed discovery as document requests directed to Complaint Counsel. We will then respond or object accordingly.

Alternatively, if you will not withdraw the subpoenas, please provide us with times tomorrow afternoon when you are available to meet and confer.

**Jonathan Cohen**

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580  
(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

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**From:** Lou Caputo [<mailto:LCaputo@emord.com>]  
**Sent:** Monday, April 07, 2014 4:59 PM  
**To:** Johnson, Katherine  
**Cc:** Jillson, Elisa; Cohen, Jonathan; Jonathan Emord; Peter Arhangelsky  
**Subject:** Docket No. 9358, Subpoenas Duces Tecum

Counsel,

Please find the attached subpoenas *duces tecum* dispatched today.

Thank you,

**Lou Caputo | EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 |  
Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**Complaint Counsel  
Exhibit A  
Attachment 3**

**CX-A:3**

**From:** Peter Arhangelsky <PARhangelsky@emord.com>  
**Sent:** Tuesday, May 13, 2014 2:21 PM  
**To:** Cohen, Jonathan  
**Cc:** Jonathan Emord; Lou Caputo; Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Expert Deposition Schedule

Jonathan,

Thanks for your proposal. We will discuss the schedule with our experts and report back shortly. Having discussed this with our team, we have conflicts the first week of July which will require changes to the proposed schedule. **Please inform us when your experts are available between June 16-27.** We will need to schedule your experts during that window in June.

Best,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Tuesday, May 13, 2014 11:43 AM  
**To:** Peter Arhangelsky; Lou Caputo; Jonathan Emord  
**Cc:** Jillson, Elisa; Johnson, Katherine; Decastro, Arturo  
**Subject:** RE: Expert Deposition Schedule

Peter,

One change with respect to the dates we propose for your experts:

July 2 – McCarthy (Washington, DC)  
July 3 – Thabet (Cincinnati, OH)  
July 8 – Frederick (New Haven, CT)  
July 9 – Burnette (Washington, DC)  
July 10 – Stewart (Los Angeles, CA)  
July 11 – Sahu (Los Angeles, CA)  
July 15 – Volokh (Atlanta, GA)  
**July 16 – Barlaz (Raleigh, NC)**

**Jonathan Cohen**

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580  
(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

**From:** Cohen, Jonathan  
**Sent:** Monday, May 12, 2014 5:43 PM  
**To:** 'Peter Arhangelsky'; 'Lou Caputo'; 'Jonathan Emord'  
**Cc:** Jillson, Elisa; Johnson, Katherine; Decastro, Arturo  
**Subject:** ECM: Expert Deposition Schedule

Peter,

Per our call, we have cleared dates with our experts. Based on those dates, we propose the following overall schedule:

July 2 – McCarthy (Washington, DC)  
July 3 – Thabet (Cincinnati, OH)  
July 8 – Frederick (New Haven, CT)  
July 9 – Burnette (Washington, DC)  
July 10 – Stewart (Los Angeles, CA)  
July 11 – Sahu (Los Angeles, CA)  
July 14 – Barlaz (Raleigh, NC)  
July 15 – Volokh (Atlanta, GA)

Please let us know whether this works. Hopefully, getting this set soon will make the process easier on everyone.

Thanks,

**Jonathan Cohen**

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(202) 326-2551 | [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)