

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 RESPONSE TO RESPONDENT'S CROSS-MOTION TO
MODIFY PROTECTIVE ORDER**

ECM's Cross-Motion indicates, for the first time, that Mr. Sinclair will not merely be attending, but plans to conduct portions of the depositions himself. *See* Resp. at 3. Even if the Court modifies the Protective Order (which it should not for the reasons explained below), it should not allow Mr. Sinclair to appear both *pro se* and by counsel in this case.¹ Respondent offers no authority for such "hybrid" representation in the administrative context. Such dual representation implicates a number of troubling ethical issues, such as communication with a represented party and possible violation of the lawyer-as-witness rule. Allowing Mr. Sinclair to "attend the deposition, conduct a deposition, or even represent ECM at the hearing," when he already has counsel, and when he is a primary witness would be disruptive and complicate the depositions and these proceedings generally. *See* CX-A (Email from Respondent's Counsel).

Complaint Counsel objects to ECM's request to modify the Protective Order as unnecessary and unworkable. If the documents contain competitively sensitive information, then the materials should not be disclosed to ECM—particularly without notice to the third party that relied on the Protective Order in responding to Complaint Counsel's subpoena.² If the documents are materials that have been authored or received by ECM, then the standing order

¹ The Commission Rules authorize corporate representatives to appear on their own behalf. *See* Commission Rule 4.1(a)(2). But Respondent chose to appear by counsel. *See* Notice of Appearance filed November 1, 2013 (identifying Jonathan Emord, Peter Arhangelsky, and Lou Caputo as counsel and not listing a corporate representative).

² We note that Respondent did not attempt to meet and confer with Complaint Counsel under Rule 3.22 before filing its cross-motion to modify the Protective Order.

already provides for their disclosure to ECM even if they have been marked confidential. *See* Protective Order ¶ 7(e).

CONCLUSION

For these reasons, we respectfully request the Court deny Respondent's cross motion.

Dated: April 23, 2014

Respectfully submitted,

/s/ Katherine Johnson
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

MEET AND CONFER CERTIFICATION

Complaint Counsel conferred with opposing counsel in a good faith effort to resolve by agreement the issues raised by the opposition and cross-motion, but the parties were unable to reach such an agreement. The conference took place by email on April 23, 2014. Katherine Johnson participated on Complaint Counsel's behalf. Peter Arhangelsky participated on ECM's behalf.

DATED: April 23, 2014

/s/ Katherine Johnson
Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 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

One electronic 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

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

I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: April 23, 2014

/s/ Katherine Johnson
Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
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600 Pennsylvania Ave., N.W. M-8102B
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Complaint Counsel Exhibit A

CX-A

From: [Peter Arhangelsky](#)
To: [Johnson, Katherine](#)
Cc: [Cohen, Jonathan](#); [Jillson, Elisa](#); [Jonathan Emord](#); [Lou Caputo](#)
Subject: RE: Dkt No. 9358, In re ECM BioFilms
Date: Wednesday, April 23, 2014 1:26:54 PM

Hi Katherine,

Bob will be appearing at the depositions with plenary authority to represent the corporation under Rule 4.1(a)(2)(i). As we have stated, he will excuse himself from the deposition room for any testimony involving Attorneys Eyes Only information, at which point we are prepared to participate in a narrow capacity by telephone so that ECM remains represented at all times in the deposition. We do not expect that to occur often, if at all. FP International and Island Bags have already represented that they would waive the "confidential" issue for the limited purpose of their depositions. We have yet to reach the remaining parties, but we hope to receive similar feedback.

As you rightly observed in your motion on Monday, FTC Rule 4.1(a) changes the traditional principle that corporations must be represented by counsel. We think that rule clearly permits Bob to attend the deposition, conduct a deposition, or even represent ECM at the hearing. The rule gives him all the authority that we, as ECM's counsel, currently have. Furthermore, there is no corresponding rule that limits a party to just one attorney or representative during an adjudication. In fact, the rules even allow for an expert to question another expert witness "in an adjudicative proceeding." See Rule 4.1(a)(2)(ii). Certainly if that non-party, non-lawyer witness can participate, so can Bob as ECM's President and CEO.

If you prefer to discuss this I am available today, however we consider this issue fully briefed before the Court. Concerning your ethical concerns, we take no position as we cannot opine or advise you on those matters. We do note, however, that the ethical rules are subject to exceptions. For instance, D.C. Rule 4.2 prohibits communication with a represented party "unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so." If Bob chooses to appear pro se at the depositions, it would certainly appear that ECM and its counsel have consented to your communication with Bob as an advocate. Nonetheless, please note that any such consent is limited to Bob's appearance at the deposition, and ECM remains represented by outside counsel for all other matters in this case.

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

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.

From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Wednesday, April 23, 2014 6:45 AM
To: Peter Arhangelsky
Cc: Cohen, Jonathan; Jillson, Elisa; Lou Caputo; Jonathan Emord
Subject: RE: Dkt No. 9358, In re ECM BioFilms

Peter,

If I understand the response correctly, Mr. Sinclair will be representing himself, *pro se*, for the non-confidential portions of the depositions? If so, can you please point us to what authority you believe allows a litigant to appear both *pro se* and by counsel in an administrative proceeding?

Obviously, if Mr. Sinclair appears *pro se* at the depositions, it will raise a variety of issues, not the least of which would be those related to ethical issues related to us communicating with a litigant who is represented by counsel.

Please advise so that we can have a meet and confer about this today if necessary.

Katherine

Katherine E. Johnson, Attorney
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From: Peter Arhangelsky [<mailto:PArhangelsky@emord.com>]
Sent: Tuesday, April 22, 2014 4:21 PM
To: Johnson, Katherine
Cc: Cohen, Jonathan; Jillson, Elisa; Lou Caputo; Jonathan Emord
Subject: Dkt No. 9358, In re ECM BioFilms

Counsel:

Please see the attached confidential filing.

Sincerely,

Peter A. Arhangelsky, Esq. | **EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
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