PUBLIC DOCUMENT

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

ORIGINAL

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

RESPONDENT ECM BIOFILM'S MOTION TO EXTEND PAGE COUNT IN RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL REBUTTAL FACT WITNESSES AND MOTION TO PROHIBIT DR. MICHEL FROM TESTIFYING AS A REBUTTAL EXPERT WITNESS

Pursuant to Rule 3.22(f), ECM BioFilm's hereby moves the Court to extend the word count in Opposition to Complaint Counsel's motion for leave to call rebuttal witnesses ("Motion for Leave"). For the following reasons, and for good cause shown, ECM hereby requests leave to file its opposition with approximately 5,983 words:

- Complaint Counsel's original motion for leave was filed with 5,400 words, which was a consolidation of supposedly two separate motions for leave.
- ECM's opposition must include a substantial fact section necessary to give missing context to the issues before this court.
- The issues are a matter of exceptional importance, as Complaint Counsel's motion, if granted, would substantially expand the time for this hearing, and the prejudice to ECM

from Complaint Counsel's case strategy necessitates a thorough briefing of the issues.[1]

- Finally, because Complaint Counsel now indicates that they "will call" Dr. Frederick Michel as a witness, without first seeking leave of Court, ECM requires additional words to address the impropriety of Dr. Michel's rebuttal testimony.

For the foregoing reasons, good cause exists for grant of this motion and for the file and receipt of the accompanying motion.

Dated: August 26, 2014.

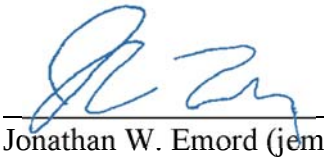
/s/ Jonathan W. Emord
Jonathan W. Emord
Peter A. Arhangelsky
Eric J. Awerbuch
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937

[1] This hearing has already been extended once by the Commission by 45 days. As explained in ECM's accompanying Opposition pleading, because ECM would require additional discovery from the new rebuttal fact witnesses, the hearing would need to be extended considerably if this Court permits the rebuttal witnesses.

STATEMENT CONCERNING MEET AND CONFER

Pursuant to 21 C.F.R. § 3.22(g), the undersigned counsel certifies on August 26, 2014, Respondent's counsel conferred via e-mail with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. Complaint Counsel did not respond to Respondent's counsel's e-mail.

Respectfully submitted,



Jonathan W. Emord (jemord@emord.com)
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

DATED: Tuesday, August 26, 2014

ATTACHMENT A

ECM OPPOSITION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

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

RESPONDENT ECM BIOFILM'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL REBUTTAL FACT WITNESSES AFTER COMPLAINT COUNSEL RESTED ITS CASE AND OPPOSITION TO COMPLAINT COUNSEL'S CALL OF DR. MICHEL AS A REBUTTAL EXPERT WITNESS

Respondent ECM BioFilms, Inc. ("ECM") hereby opposes Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses ("Motion"). Complaint Counsel seeks leave to call Paul McDonald, an employee of Google, Inc. and Tarang Shah, a former employee of Myers Industries, and, without leave, announces it "will call" Dr. Frederick Michel, an FTC consultant. For the foregoing reasons, Complaint Counsel has failed to prove that the fact witnesses it seeks to call will in fact be "rebuttal" witnesses, wherein they would provide "[i]n-court contradiction of an adverse party's evidence." In particular, there is no statement of fact, as opposed to expert opinion, that Complaint Counsel identifies as the source for its fact witness rebuttal. Moreover, Complaint Counsel has not demonstrated that there is new or unanticipated testimony that it seeks to rebut. Indeed, as explained below it was aware of all issues before and during its case in chief. Consequently, Complaint Counsel have failed to meet their basic requirement for presenting rebuttal, but their burden is not that basic. On August 12, Complaint Counsel rested its case in chief. Having rested, they must now not only prove that the testimony to be given is

strictly rebuttal but also meet a high "good cause" burden establishing that they were incapable of discerning in advance the precise testimony given in ECM's case in chief, a burden they fail entirely to meet.

Complaint Counsel did not list either Paul McDonald or Tarang Shaw on any of its prior witness lists. They first announced these witnesses to the Court thirteen days after they rested their case in chief on August 12. A party seeking to call a witness not listed on its witness list, and long after it has rested its case, must prove, in pertinent part, that it could not through reasonable diligence have identified the witnesses or known of the need for their testimony due to surprise or new information presented in the opposing party's case. Good cause cannot lie where, as here, the issue for which testimony is to be given was plainly before the court throughout the proceedings and directly concerns the fundamental underpinnings of Complaint Counsel's case in chief, thus improperly using rebuttal as a means to buttress that case-in-chief. Indeed, if the issues for which testimony is to be given were reasonably foreseeable, that suffices to defeat the requisite good cause, as Complaint Counsel sat on its rights and, thereafter, could only inequitably, with disruption to the proceedings, and in violation of the Due Process rights of the respondent suddenly expand its case in chief through the improper rebuttal.

Despite his Honor's order in open court directly to the contrary, Complaint Counsel in its motion cites specific pages and lines not of *factual* testimony its fact witnesses will rebut, but instead to *expert witness opinion* testimony which it says its fact witnesses Shah and McDonald will rebut. The motion is incompetent. Fact witnesses are not proper rebuttal for expert opinion testimony. Adding to the incompetence of the request, Complaint Counsel include page and line references to testimony offered by Complaint Counsel's <u>own expert witnesses</u>, meaning that the

"rebuttal" fact witnesses it intends to call will "rebut" Complaint Counsel's own expert witnesses' testimony.

In accordance with this Court's in-court orders, Complaint Counsel were forewarned that they cannot introduce fact witness testimony to rebut expert witness testimony. Aug. 25, 2014 Tr. (draft), at 4:3-6.

What is more, the Commission's rules make clear that an expert witness must disclose all materials relied upon by that expert and his Honor set June 11 (or June 30 for rebuttal experts) as the date for that disclosure in his Scheduling Order. Complaint Counsel's expert witnesses did not disclose in their expert reports that they relied on any material which is said to underlie the proposed testimony of Shah and McDonald.

ECM also asks this Court, in accordance with Rule 3.43(d), to prohibit Complaint Counsel from permitting Dr. Frederick Michel to testify as a "rebuttal" witness. Having identified in its motion its intent to call Dr. Michel, Complaint Counsel failed to present any argument in its motion that would satisfy this Court's instructions, not specifying what specific testimony Dr. Michel will rebut. In addition, Dr. Michel's proposed testimony, as detailed in his rebuttal report, is not rebuttal, as (1) it could and should have been presented during Complaint Counsel's case-in-chief, and (2) it does not rebut any of ECM's expert witnesses' actual testimony, but only buttresses Complaint Counsel's expert witnesses' testimony.

BACKGROUND

A. Frederick Michel &Tarang Shah

Complaint Counsel hired Dr. Frederick Michel in 2012 as a consulting witness in biodegradation/environmental marketing cases. RX-693–RX-695. Staff attorneys received Dr.

Michel's so-called "peer-reviewed" study of biodegradable on November 11, 2012. RX-695. Dr. Michel's report became an issue in this case as early as February 2014. CCX-819, at 367:4–5 (Sinclair Depo). Complaint Counsel was eventually sanctioned for failing to timely produce a copy of the Michel study before first revealing the document by confronting ECM's President, Robert Sinclair, with it at his deposition. *See* Order Granting in Part and Denying in Part Respondent's Motion for Sanctions (March 21, 2014). The Michel study has since been cited and discussed in Complaint Counsel's case in chief. Their own expert, Dr. Steven McCarthy wrote in his expert report (June 11, 2014) that the Michel study was "the only peer reviewed article that has addressed testing of the ECM additive." *See* CCX-891, at ¶ 72 (McCarthy Rep.). In May 2014, Complaint Counsel deposed the peer reviewer at Elsevier in a deposition that focused exclusively on the peer review process for the Michel Study. *See generally* CCX-808. The Elsevier witness testified that he had never reviewed raw data for the Michel test, or anything other than the naked article that was published. *Id.* at 20. Belying any claim of ignorance, Complaint Counsel *in May 2014* pointed out to the Elsevier witness that: "Are you aware that ECM Biofilms, the Respondent in this case, has challenged the study's validity?" *See Id.* at 17:1-6. Thus, Complaint Counsel knew as early as May 2014 that the reliabilty of the Michel study was in issue. Complaint Counsel cited the Michel study in their opening brief in support of their case-in-chief. *See* CC Brief at 32.

According to Complaint Counsel, Tarang Shah was the Corporate Materials and Applications Manager for Myers Industries, the ECM competitor that sponsored Dr. Michel's 2012 D5511 test. Although Shah worked alongside Dr. Michel during the D5511 test, and played an integral role in developing the products Michel tested, Complaint Counsel did not utter a peep about its intent to call him as a witness until 13 days after Complaint Counsel rested its

case in chief, informing his Honor for the first time on August 25. Therein Complaint Counsel employed a forbidden surprise tactic, seeking to call as "rebuttal," a person to bolster its case in chief, with no prior notice and after Complaint Counsel rested its case, thereby prejudicing Respondent by denying Respondent the opportunity to conduct full blown discovery related to this witness and to prepare a case in defense predicated on that discovery.

Complaint Counsel has also failed to move this Court for leave to call Dr. Michel as a "rebuttal" witness. They have not explained what information, let alone the hearing transcript page and line number, that Michel intends to rebut. Complaint Counsel suggests that Dr. Sahu somehow singled out Dr. Michel's study in a way that was new and unforeseeable. Not so. In fact, Dr. Sahu only testified generally with respect to the inconclusive studies he reviewed, and explained that for many of those studies, including Dr. Michel's Study, the lack of information concerning the test plastic made certain conclusions challenging:

> Q. What were some of the … factors that you … mentioned could be an indication or could be a cause of an inconclusive test?
>
> A. Well, there could be several. I mean, of course again you have to look at the totality of the tests and the blanks and the positive and negative controls and the behavior of the test… There will be questions on whether the additive was in fact properly mixed and was properly present in the plastic to begin with, is there a way in which the plastic that would have been manufactured with the additive made the additive ineffective or made the additive not function properly, both in the way it was blended or the conditions of the blend. That blending is difficult in some plastics more so than others so you have to inquire into that.

Aug. 18, 2014 Tr. (draft) at 198–99 (Sahu testimony, talking generally about all tests). His testimony concerning Dr. Michel's study thus fits within that general conclusion. How that testimony was unforeseen or new is not explained in Complaint Counsel's motion, nor could it be without disingenuousness given the above quoted statement from Complaint Counsel at the Elsevier deposition. *See* CCX-808 at 17:1-6 (Elsevier Tr.). Moreover, Dr. Sahu wrote in his

expert report, and testified at his deposition, about the manufacturing processes used in the making of plastics, and explained at length that additives other than the ECM product and impurities arising in the process affect biodegradability of the test sample.[2] But, more fundamentally, the test methodology and properties of the test substance are foundational issues for use of the test, and so are reasonably foreseeable as case in chief material.

B. Paul McDonald

In early February, 2014, Complaint counsel retained Dr. Frederick to perform Google Consumer Surveys. RX-858, at 123–124. Google surveys have never been accepted in any court of law or administrative proceeding to support consumer perception. That fact could not escape Complaint Counsel who, of course, are presumed to know the law and, in particular, the decisions of the Commission. In any event, as with any survey, representativeness of the survey population, and the accuracy of the survey methodology, are foundational elements that must be established, pointedly so when a survey method is novel in the judicial forum. Critically, Dr. Frederick testified plainly at trial as he did at deposition on June 23, 2014 that he did not rely on any of the information that Google's representative intends to testify to in drafting his expert report, thus revealing its total irrelevance and failure to fall within the scope of expert witness testimony. 16 C.F.R. § 3.31A(c). More to the point, none of Respondent's witnesses at deposition or at hearing have testified predicated on the information the Google representative intends to testify about (nor could they, as the Google representative seeks *in camera* review of trade secrets of Google not available to the public!).

[2] For instance, at his deposition at pg. 308–09, Dr. Sahu explained that an inconclusive test may not be a "negative" test because he would first need to know if there was an additive or impurity that would make it impossible "to establish biological activity." *See* CCX-842 (Sahu Tr.), at 308–09 ("You would expect that there would be no biological activity, and, therefore, there would be no biodegradation").

Now, long after the fact, and *before* ECM's expert witness on surveys even testifies, Complaint Counsel has moved to call a "rebuttal" fact witness ostensibly to bolster Dr. Frederick's unpersuasive testimony.

Under this Court's Scheduling Order, June 11, 2014 was the final deadline specified for identification of witnesses by Complaint Counsel. *See* Third Revised Scheduling Order. Complaint Counsel never identified any representative of Google or any representative from Myers Industries as a fact witness. *See* Complaint Counsel's Final Proposed Witness List.[3] On August 12, 2014, the same day Complaint Counsel rested its case, this Court stated that "[a] rebuttal witness or rebuttal exhibit not previously listed will be considered only upon a showing of good cause." Tr. 1426:4–6. On August 25, 2014, the day Complaint Counsel first informed the Court of the intention to call McDonald and Shah as rebuttal witnesses, the Court further emphasized that Complaint Counsel may not call fact witnesses to rebut expert witnesses. *See* August 2014 Tr. (draft) at 4:3–6. This Court also made clear that, in order to call a rebuttal witness, Complaint Counsel must demonstrate that they were not aware of any of the issues relating to the proposed rebuttal testimony. *Id.* at 5:11–14.

ARGUMENT

I. GOOD CAUSE EXISTS ONLY WHERE THE REBUTTAL WITNESS WILL REBUT NOVEL AND UNPREDICTABLE FACTS

When a party rests its case, it relinquishes the opportunity to present additional affirmative evidence in support of its case in chief. *See In the Matter of LabMD,* Docket No. 9357, Order Denying Complaint Counsel's Motion for Leave to Issue Subpoenas for Rebuttal Evidence (F.T.C. July 23, 2014) (explaining that evidence needed to support Complaint

[3] Those witnesses had also never been listed on any of Complaint Counsel's prior witness lists.

Counsel's case-in-chief is not proper evidence for rebuttal) (attached as Exhibit 1); *see also* Black's Law Dictionary (9th ed. 2009), defining "case-in-chief" as "[t]he part of a trial in which a party presents evidence to support the claim or defense" and defining "rebuttal" as "[i]n-court contradiction of an adverse party's evidence." The "principal objective of rebuttal is to permit a litigant to counter **new, unforeseen** facts brought out in the other side's case." *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir.1999) (emphasis added); *Goldfinger, Hawaii, Inc. v. Polynesian Resources, Inc.*, 869 F.2d 1497 (9th Cir. 1989) ("[r]ebuttal evidence is evidence introduced by a plaintiff to meet new facts brought out in a defendant's case-in-chief").

Likewise, this Court has made it clear that in order for a party to call a rebuttal witness, the party has the burden of "demonstrating that [the moving party was] not aware of any [of the rebuttal issues] before [the moving party] rested [its] case." August 25, 2014 Tr. (draft) at 5:11–14. All issues Complaint Counsel has identified as the source for testimony from its rebuttal witnesses have been known and the subject of controversy in the pre-hearing discovery phase as well as in Complaint Counsel's case in chief.

II. COMPLAINT COUNSEL CANNOT DEMONSTRATE GOOD CAUSE FOR SHAH OR MCDONALD TO TESTIFY

At the conclusion of the testimony of Dr. Shane Frederick, the FTC rested its case in this proceeding.[4] *See* Tr. at 1429:12–14. Under well-settled doctrine and case law, after a party rests, it may not present any new affirmative evidence to support its case in chief. *See Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir. 1996). A "plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case (as distinct from an affirmative

[4] Complaint Counsel did explicitly reserve the right to call Dr. Frederick Michel as a rebuttal witness, but, as explained below, has failed, in accordance with this Court's unambiguous order to request Dr. Michel's proposed rebuttal testimony "in writing, in the form of a motion, to request a rebuttal witness . . ." Tr. at 1425:13–16. That motion would be futile anyway, because Dr. Michel's testimony is not fair rebuttal, as explained herein.

defense) must put in his evidence on the issue as part of his case in chief." *Id.* (explaining that, "[o]therwise the plaintiff could reverse the order of proof, in effect requiring the defendants to put in their evidence before the plaintiff put in his"); *Bronk v. Ineichen*, 54 F.3d 425, 432 (7th Cir. 1995). That effective reversal of the order of proof, combined with the extreme prejudice suffered by the respondent in not having a full and fair opportunity to engage in all related discovery and to prepare its own case in chief in light of the evidence adduced, creates substantial prejudice, for, quite obviously, the Respondent cannot at the near completion of its own case in chief be able to rewrite the record to take into account all facts and circumstances it would otherwise have presented to the Court throughout its case in chief.

Finality depends on an end to the presentation of affirmative case evidence at the time a party rests; otherwise there can neither be orderly process nor any end to judicial proceedings. In cases involving government prosecutions, the adverse impact and prejudice suffered by the respondent is tremendous for if the government prosecutor can be allowed to flout the rules of finality, the respondent must be allowed that same abuse to arrest what is an inherently arbitrary, unjust allowance for the government to prove its case after a fair opportunity to do so. *See* VI *Wigmore on Evidence* (rev. ed. 1976) at 672:

> [*Wigmore* explains that] "interminable confusion . . . would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning, [and concludes that] the usual rule will exclude all evidence which has not been made necessary by the opponent's case in reply.

A. Complaint Counsel Was on Notice That the Reliability or Weight of Dr. Michel's Study Was In Issue

There is no sound reason why Complaint Counsel could not have listed Shah on their witness list and could not have called Shah to testify in their case-in-chief. As

Complaint Counsel readily concedes, "**both** parties have focused on Dr. Michel's published, peer-reviewed study since February." Motion, at 11 (emphasis added). Similarly, Complaint Counsel readily concedes that it was aware of ECM's recently withdrawn expert report which contained an intricate analysis of Shah's relationship with Dr. Michel. *Id.* In fact, during Complaint Counsel's deposition of Elsevier, Complaint Counsel acknowledged its awareness that ECM was challenging the weight and reliability of Dr. Michel's study. *See id.* at 17:1–6. In addition, Complaint Counsel's expert Dr. McCarthy cited to Dr. Michel's study in his expert report as does Dr. Sahu in his expert report. *See* CCX-891; RX-855 (Dr. Sahu responding to Dr. McCarthy's reliance on the test). Of course, Dr. Michel's rebuttal report is entirely predicated on his own study, and he cited it multiple times. *See* CCX-895. Therefore, Complaint Counsel were well aware of Dr. Michel's study, presented the study during their case-in-chief, and cannot now establish good cause why they did not present any foundational testimony concerning the study during their case-in-chief.

In addition, Shah's proposed testimony is limited to the process of manufacture of the purported ECM plastic that he provided to Dr. Michel; Shah did not test the article, Michel did. Motion, at 13. The manufacture of the sample material is not germane to what Dr. Michel did with the material because it is Michel, not Shaw, who tested it. Moreover, there is no explanation that Shah (who apparently no longer works for Myers) possesses any relevant information about the creation of the test article for a test performed four years prior. Further, in

light of the dozens of tests evidencing biodegradation of plastics infused with the ECM additive, Dr. Michel's study is but one inconclusive test among many other positive tests.[5]

Complaint Counsel has not demonstrated, and cannot post hoc, that it was unable to secure a witness from Myers Industries before it rested or that it somehow could not have reasonably foresaw the need for such a witness after February, 2014 but before this Court's applicable deadline, June 11, 2014—a span of 4 months, or at least before Complaint Counsel rested its case. In addition, considerable hubris attends the attempt to present affirmative case evidence after Complaint Counsel has rested its case, not to mention the extreme prejudice suffered by Respondent. The Michel Study is apparently significant to Complaint Counsel's crumbling scientific theories against ECM's products. How can it be that Complaint Counsel never appreciated the need to support that study in its case-in-chief?

B. Complaint Counsel Was On Notice That Its Google Consumer Surveys Were Novel And At Issue

McDonald's proposed testimony concerns the confidential mechanics of Google surveys, which is foreseeable case-in-chief testimony that ordinarily is not proper for rebuttal in a case that plainly deals with survey evidence on both sides. The foundational testimony for any survey, let alone a novel one, is imminently foreseeable as foundational in the case in chief. *See, e.g.* RX-856 (Stewart Rep.) at 10–11 (served on Complaint

[5] Complaint Counsel falsely states that Dr. Michel's study is the only peer reviewed one of an ECM plastic. Not so, all of the Eden Labs, Northeast Labs, and other tests of the ECM plastic, of which there are about three dozen, were reviewed by peers, including experts in this case; they just were not the subject of publication. Moreover, the peer-reviewer of the Michel test, Elsevier, testified at Complaint Counsel's deposition that Elsevier never looked at raw data, test materials, the inoculum composition, or anything other than the draft article itself. *See* CCX-808 at 20-23 (Elsevier Tr.). Because Dr. Michel simply followed a D5511 protocol (not original research), there were few, if any, issues to examine in the peer-review process. Dr. Michel's study is thus just one of many D5511 studies at issue in this case. Opening the door to this level of collateral evidence would mean that equitable allowance should be afforded ECM to open the door to countless witnesses in support of the over thirty positive tests.

Counsel on June 18, 2014 and arguing against the validity of Dr. Frederick's Google Consumer Surveys); *see, e.g., Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978) (a proper survey must have "a proper universe" and "a representative sample"). Competent recognition of that fact would arise immediately upon the commissioning of Frederick to do the work which occurred in February, 2014. *See* Tr. at 1114:11–14. The attempt to call a Google representative at this late stage is a clear effort to correct errors or omissions committed by Complaint Counsel in its case in chief, not to be true rebuttal.

Complaint Counsel has not demonstrated, and cannot *post hoc*, that it was unable to secure a witness from Google before it rested or that it somehow could not have reasonably foresaw the need for such a witness after February 2014 but before this Court's applicable deadline, June 11, 2014—a span of 4 months, or at least before Dr. Frederick concluded his testimony and Complaint Counsel rested its case, just two days before issuing the Google subpoena.

Even were the Court to excuse Complaint Counsel from compliance with the Court's scheduling order and contort the law to allow a Google representative as a rebuttal witness, it is black letter law that rebuttal testimony is testimony that rebuts that given by the party opponent. *See* Black's Law Dictionary (9th ed. 2009), defining "rebuttal" as "[i]n-court contradiction of an adverse party's evidence." Rebuttal by definition is not testimony that conflicts with or explains further the testimony given by one's own witness. *Id.* In this case, no person who testified for Respondents thus far in the case even uttered the word "Google." The only person who testified about Google Consumer Surveys was Dr. Shane Frederick. Thus, any testimony given by Google would necessarily not be rebuttal but rather affirmative case evidence in support of

Complaint Counsel's own expert witness (thus constituting case in chief material). Consequently, it is not "rebuttal" and cannot be given after Complaint Counsel rested, nor can it reasonably be argued to be within the scope of rebuttal.

Moreover, Dr. Frederick testified in open court that he knew very little, if anything, about computer science or how Google Consumer Surveys actually function. Indeed, nothing in his expert report or in his testimony relays more. Moreover, McDonald from Google defines his testimony as concerning that very matter which Frederick testified he did not know about. Because Frederick neither knew of nor relied upon the matter in his expert report, it cannot serve as the basis for opposing testimony in this case. What is more, McDonald seeks to present this information *in camera*, revealing it to be secret! It is thus so kept from all comers, Frederick and ECM's witnesses included. Thus, the information McDonald seeks to impart to the Judge is not, nor could it be, part of the case and can only serve as extraneous extra-record material designed to bolster Complaint Counsel's case in chief after it has rested.

Moreover, the major methodological flaws in Frederick's Google Consumer Surveys are the product of Frederick's, not Google's, choices. For example, it is plainly irrelevant whether or not Google Consumer Surveys has the facility to ask multiple questions of individual respondents or ask respondents screening questions because Dr. Frederick chose to do neither. The case hinges on what Dr. Frederick did in his online surveys, not the fact that he chose Google as the vendor. No testimony from McDonald can save Frederick from his own poor choices and, given his testimony of near absolute ignorance of Google Consumer Surveys' algorithms and methodologies, no upcoming testimony from ECM will go to those very matters which McDonald's lawyers say will be McDonald's testimony.

To permit case in chief testimony to continue after a party rests not only violates the rules, the limits on arbitrary and capricious agency action, the legal definition of "rebuttal" and the precedent governing the limited use of rebuttal, it also violates the constitutional limits of Due Process, leaving courts confronted with similar attempts to condemn them as seeking to institutionalize invidious burden-shifting. *Braun*, 84 F.3d at 237.

In addition, ECM now faces the substantial risk that McDonald, obviously a sophisticated witness, will present what is actually expert testimony under the cover of a fact witness. McDonald's testimony would unavoidably read like an expert in computer science, creating substantial prejudice because ECM would be obliged to perform substantial discovery and, perhaps, employ a surrebuttal witness to address the nuanced technical points presented. The level of prejudice experienced by ECM is considerable, imposed solely because of Complaint Counsel's negligent omission of an obvious fact witness from its witness lists and case-in-chief.

III. COMPLAINT COUNSEL CANNOT CALL SHAH AND MCDONALD AS FACT WITNESSES TO REBUT THE TESTIMONY OF EXPERT WITNESSES

This Court made clear that the parties cannot call fact witnesses "to rebut facts that came from an expert." August 25, 2014 Tr. (draft) at 4:3–6. Regarding McDonald, Complaint Counsel specifically identifies only the testimony of its own expert, Dr. Frederick, which McDonald will purportedly rebut. Motion, at 4–5. Aside from the gross incompetence of "rebutting" one's own witness, Complaint Counsel also leaps outside of the record to presume knowledge of what Dr. Stewart will testify to, and then to opine that McDonald, a fact witness, is appropriate rebuttal for Dr. Stewart, an expert. Motion, at 5. Similarly, regarding Shah, Complaint Counsel only cites to testimony from ECM's expert, Dr. Sahu, which Shah will

purportedly "rebut." Motion, at 6. As articulated by the Court, these are not proper grounds for a rebuttal fact witness.

IV. SHAH'S AND MCDONALD'S TESTIMONY IS WHOLLY IRRELEVANT AND INCOMPETENT "REBUTTAL" INSOFAR AS IT IS USED TO SUPPORT THE OPINIONS OF COMPLAINT COUNSEL'S OWN EXPERTS

Commission Rule 3.31A(c) requires that each expert report "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions. . ." 16 C.F.R. § 3.31A(c). Dr. Frederick did not report that he relied upon data, materials, or other information obtained from McDonald in his initial expert report. *See generally* CCX-890. Similarly, Michel did not disclose that that he relied upon any information obtained from Shah regarding the manufacturing of the testing samples in his expert report. *See generally* CCX-895. Therefore, if the Court were to consider the testimony of McDonald or Shah to provide support for Dr. Frederick's or Dr. Michel's expert reports, the Court would in essence be relying upon extrinsic information which the experts themselves did not rely upon in forming their opinions and in drafting their expert reports.

V. IN THE ALTERNATIVE, SHOULD THIS COURT ALLOW EITHER SHAH OR MCDONALD TO TESTIFY, ECM REQUESTS A POSTPONEMENT OF THE HEARING TO OBTAIN RELEVANT DOCUMENTS FROM BOTH WITNESSES AND OTHERS POSSESSED OF INFORMATION GERMANE AND TO DEPOSE BOTH WITNESSES

There is no way to avoid the substantial prejudice and disruptive effects of the surprise announcement, after Complaint Counsel rested its case, of two new fact witnesses who would testify in "rebuttal." Had Complaint Counsel identified these individuals as fact witnesses on its witness lists exchanged under the Scheduling Order (which it did not), the discovery rules would have provided ECM ample opportunity to obtain discovery from the proposed witnesses and

from any sources relied upon by the proposed witnesses. ECM's present inability to collect that information creates a profound prejudice to its rights of self-defense, resulting in a clear violation of procedural due process. "There can be no doubt … that this due process requires that [the parties] are entitled to appropriate discovery in time to reasonably and adequately prepare themselves, and their defenses, before facing the charges in the administrative 'trial.'" *See, e.g., Standard Oil Co. v. FTC,* 475 F.Supp. 1261, 1275 (N.D. Inc. 1979) (citing *Morgan v. United States*, 304 U.S. 1 (1938)). To the extent this Court permits the rebuttal fact witnesses proposed by Complaint Counsel, the hearing would have to be postponed to permit ECM a full and fair opportunity to take discovery through all means permissible under 16 CFR Part 3, including subpoenas *duces tecum* and through deposition, not only of these witnesses but also of the sources upon which these witnesses rely. Without that critical information, ECM cannot meaningfully address the issues raised in the proposed testimony and meaningfully defend the interests of its client against these surprise witnesses. What is more, wrangling can be expected when ECM endeavors to obtain all of Google's confidential algorithms in issue and have them evaluated by its own experts.

That procedure, quite obviously, will require a significant recess in these proceedings, and expose ECM to extraordinary hardship solely because Complaint Counsel failed to call foundational witnesses in its case in chief. This case has already been delayed by 45 days to allow Complaint Counsel to complete the very steps they should have completed initially. There is no good cause for Complaint Counsel's motion.

VI. THIS COURT SHOULD PROHIBIT COMPLAINT COUNSEL FROM CALLING DR. FREDERICK MICHEL TO TESTIFY AS A REBUTTAL EXPERT WITNESS

Complaint Counsel brazenly declares in its motion, without leave of court, that they "will call Dr. Michel." ECM is therefore obliged to address that call in this opposition.

Complaint Counsel has not disclosed Dr. Michel's rebuttal testimony in accordance with this Court's August 12, 2014, order:

> If any party wishes to offer a rebuttal witness in this case or offer rebuttal evidence, the request shall be made in writing in the form of a motion to request a rebuttal witness or rebuttal evidence, and that shall be made as soon as possible. That motion shall include the name of any witness being proposed or a detailed description of the rebuttal evidence being offered. That motion shall also include a cite to the record by page and line number to the evidence that you intend to rebut.

Tr. at 1425:13–23. Therefore, having not filed an appropriate motion asking this Court for permission to call Dr. Michel as a rebuttal witness, Dr. Michel can be prohibited from being called as a rebuttal witness without further ado.

On the underlying merits, however, we now know that Dr. Michel's proposed testimony is not "rebuttal" at all. He is to provide further expert opinion designed to buttress Complaint Counsel's case-in-chief which includes the Michel study and includes its other expert's testimony concerning that study. This Court has made it clear that in order for a party to call a rebuttal witness, the party has the burden of "demonstrating that [the moving party was] not aware of any [of the rebuttal issues] before [the moving party] rested [its] case." August 25, 2014 Tr. (draft) at 5:11–14. Moreover, the content of the rebuttal testimony must respond with specificity (by hearing transcript page and line number) to information raised in ECM's case. That is not what Complaint Counsel proposes with Dr. Michel. Rather, Dr. Michel's report simply affirms the opinions of Complaint Counsel's other experts, and then presents pure case-

in-chief testimony concerning his own D5511 test which is contained in the Michel and Gomez study that Complaint Counsel introduced into evidence, CCX-164, and to which Dr. McCarthy opines in his expert report, CCX-891 at ¶ 72. Because Dr. Michel's testimony either concerns the report which Complaint Counsel presented in its case in chief or is cumulative of other testimony given by its experts in its case in chief, the testimony was foreseeable, imminently capable of being presented in the case in chief, and ultimately not proper rebuttal.

There was nothing "unforeseen" or new in ECM's case that would merit rebuttal testimony from Dr. Michel. Moreover, Dr. Michel is a consultant to the FTC and helped in the preparation of this very case since 2012, so FTC was well aware of the information long before the hearing. *See* RX-213.

A review of Dr. Michel's "rebuttal" report proves that his proffered testimony has been presented during the case-in-chief, and is not appropriate for rebuttal. On page 8 of his rebuttal report, Dr. Michel critiques the BioPVC test completed by Dr. Barber, RX-254, a test reviewed by both Dr. McCarthy and Complaint Counsel's expert Dr. Tolaymat, and specifically and extensively critiqued by Dr. Tolaymat. *See* CCX-893 (Dr. Tolaymat's Expert Rep.), at 25–27. Dr. McCarthy testified regarding the priming effect and C_{14} radio labeling testing. *See, e.g.,*Tr. at 412–413, 418, 424, 449, 473, 476–477. Moreover, Dr. Tolaymat already testified regarding landfill conditions, such as temperature and moisture. *See, e.g.,*Tr. at 50, 51, 56, 123, 142, 143, 174, 176. Therefore, Complaint Counsel was well aware of these issues before beginning its case-in-chief and had every opportunity to elicit expert testimony during its case-in-chief on the issues. Moreover, much of Dr. Michel's rebuttal report, at pages 12, 14, and 15, contains support for Dr. McCarthy's testimony on his theory that C_{14} radio labeling is necessary to prove biodegradation—a theory first propounded by Complaint Counsel through Dr.

McCarthy's Expert Report and complemented by his testimony at hearing. CCX-891, at ¶¶ 59–60; Tr. at 377, 380, 389, 424, 473, 475.

Throughout his rebuttal report, Dr. Michel simply attempts to buttress Complaint Counsel's other experts, rehashing their theories just through a separate voice. *See, e.g.*,CCX-893 at 9 ("as noted in reports by FTC expert Dr. Thabet Tolaymat. . ."); *id.* at 10 ("As described by Dr. McCarthy in his report …"). In sum, nothing in Dr. Michel's rebuttal report is true rebuttal and all of it is cumulative of testimony already given by its other experts before Complaint Counsel rested.

Allowing Dr. Michel to testify on these issues, which Complaint Counsel's experts already testified to, is not fair rebuttal because it is necessarily part of their case-in-chief as evidenced by the fact that their own experts testified to these issues during their case-in-chief. By definition and precedent, "rebuttal" is only allowed insofar as it actually rebuts new and unforeseen information brought out during the opposing party's case-in-chief. *Faigin v. Kelly,* 184 F.3d 67, 85 (1st Cir.1999) (emphasis added); *see also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, (8th Cir. 2006);*Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991); *Goldfinger, Hawaii, Inc. v. Polynesian Resources, Inc.*, 869 F.2d 1497 (9th Cir. 1989) ("[r]ebuttal evidence is evidence introduced by a plaintiff to meet new facts brought out in a defendant's case-in-chief").

CONCLUSION

For the foregoing reasons, ECM respectfully requests that this Court deny Complaint Counsel's motion for leave to call Mr. Shah and Mr. McDonald as fact witnesses. ECM also requests that this Court prohibit Dr. Frederick Michel from testifying as a rebuttal expert witness.

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord (jemord@emord.com)
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

DATED: August 26, 2014.

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy to the **Office of the Secretary** through the e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy to the **Office of the Administrative Law Judge**:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to **Counsel for Complainant**:

Katherine Johnson (kjohnson3@ftc.gov)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580

Arturo DeCastro (adecastro@ftc.gov)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580

Jonathan Cohen (jcohen2@ftc.gov)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580

I certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.

DATED: August 26, 2014

/s/ Jonathan W. Emord
Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937

EXHIBIT 1

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
LabMD, Inc., a corporation, Respondent.	)	DOCKET NO. 9357

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE

I.

On July 8, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to Issue Subpoenas for Rebuttal Evidence ("Motion"). Respondent filed an opposition to the Motion on July 18, 2014 ("Opposition").

Having fully considered the Motion and Opposition, the Motion is DENIED, as explained below.

II.

Under the Revised Scheduling Order in this case, the deadline for the completion of fact discovery was March 5, 2014. Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014.

Complaint Counsel asks for leave to take further discovery, as follows: (1) to issue deposition subpoenas to Tiversa Holding Corporation ("Tiversa") and its employee, Keith Tagliaferri, and (2) to issue a document subpoena to Tiversa. The proposed deposition subpoena to Tiversa, attached to the Motion, requests testimony as to the "times, dates, Internet Protocol ['IP'] addresses, geographic locations, and networks" on which, or from which, Tiversa located and/or obtained copies of an "insurance aging report" of LabMD's, referred to herein as the "1718 file," and how Tiversa obtained and maintained that information. Motion Exhibit D at 2. Complaint Counsel's proposed document subpoena to Tiversa requests "all documents" pertaining to the above, as well as Tiversa's "personnel files" and other documents relating to Mr. Richard Wallace, a former employee of Tiversa and a designated fact witness for Respondent, and/or relating to Mr. Wallace's termination from Tiversa. Motion Exhibit E at 5. Complaint Counsel argues that information regarding "how, when, and where" Tiversa found the 1718 file on P2P networks is for the purpose of rebutting proffered testimony of Mr. Wallace, as to which Complaint Counsel claims it had no knowledge until June 12, 2014 when Respondent's counsel made a proffer in court. Motion at 3-4.

Respondent counters that the Motion should be denied because Mr. Wallace has not yet testified, and therefore, what constitutes rebuttal cannot be determined at this time. In addition, Respondent argues that discovery ended months ago, that there is no authority for "rebuttal discovery," and that Complaint Counsel should have sought discovery related to Mr. Wallace much earlier in the proceedings, given that Complaint Counsel itself identified Mr. Wallace in its Initial Disclosures as a "person with knowledge," and that Mr. Wallace was included on Respondent's final witness list.

III.

On June 12, 2014, after Complaint Counsel had closed its case-in-chief and during Respondent's case, Respondent proposed to call Mr. Wallace. However, counsel for Mr. Wallace appeared and stated that, due to a pending Congressional investigation of Tiversa, including Tiversa's work with government agencies, JX3, Mr. Wallace would be invoking his Fifth Amendment rights against self-incrimination in response to any substantive questions. Counsel for Mr. Wallace also stated that Mr. Wallace was seeking immunity in exchange for his testimony regarding Tiversa's activities. In an *in camera* bench conference, Respondent's counsel made a proffer of Mr. Wallace's expected testimony. Thereafter, Mr. Wallace was called to testify, and invoked his Fifth Amendment rights. A recess was ordered to allow Mr. Wallace to continue his effort to obtain immunity for his testimony, including immunity for any testimony to be provided for the instant case.

Complaint Counsel's Motion is based on the assumption that Mr. Wallace will testify in this case and, also, on the additional assumption that Mr. Wallace will testify as asserted in the Motion. However, Mr. Wallace has not yet testified and, indeed, he may not testify if he is unable to obtain the desired immunity or for other unknown reasons. It cannot be assumed that Mr. Wallace will testify, or that his testimony will be in accordance with that proffered by Respondent's counsel and cited by Complaint Counsel in the Motion. Thus, on the present record, it cannot properly be determined what might constitute permissible rebuttal or impeachment evidence, much less whether there is good cause to reopen discovery, at this late stage of proceedings, to obtain such evidence. The issues presented by the Motion, to the extent they become relevant and valid, could only be appropriately addressed in the context of Mr. Wallace's actual testimony, if any.[1] Accordingly, for these reasons, Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 23, 2014

[1] Notwithstanding the foregoing, it must be noted that Complaint Counsel's assertion that further discovery into "how, when, and where" Tiversa found the 1718 file on P2P networks is designed to rebut Mr. Wallace's expected testimony is questionable at best. Complaint Counsel elicited substantial evidence on this issue, over the objections of Respondent's counsel, at the trial deposition of Mr. Boback on June 7, 2014, which took place days before June 12, 2014 – the date that Complaint Counsel asserts it first learned of Mr. Wallace's expected testimony. Moreover, evidence regarding "how, when, and where" Tiversa found the 1718 File on P2P networks is part of Complaint Counsel's case-in-chief, which has concluded. *See, e.g.*, Complaint ¶¶ 17-19, 22; Complaint Counsel's Pre-hearing Brief at 49 (asserting that the 1718 File has been found on a public P2P network as recently as November 2013 and has been downloaded from four different IP addresses), citing CX0742 (Report of Complaint Counsel's proffered expert Rick Kam) at 19; CX0703 (Tiversa Dep.) at 9, 52, 58, 61-64.