

ORIGINAL

PUBLIC DOCUMENT

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
Envioplastics International,

Respondent.

Docket No. 9358

PUBLIC

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL**

Respondent, ECM BioFilms, Inc. ("ECM") hereby opposes Complaint Counsel's Motion to Compel Respondent to Produce Documents filed January 23, 2014. On January 14, Complaint Counsel withdrew its Document Production Request No. 13, *see* CCX-A:2, the only one seeking customer correspondence documents subject to its present motion. Moreover, ECM's response to Complaint Counsel's second set of requests, served on January 15, is not yet due (and will not be due until February 17, *see* Rule 3.37(b)). Accordingly, Complaint Counsel's motion to compel is deniable summarily because it lacks an essential factual predicate: a pending document request for which production was refused.

Moreover, although material to its motion, Complaint Counsel has omitted therefrom the fact that ECM has pledged to Complaint Counsel, and is committed to disclose in production scheduled for January 31 and March 15, its entire database of contemporaneous summations of every customer email, facsimile, and phone call from January 1, 2009 to the present. Further, ECM has pledged to Complaint Counsel, and is committed to disclose, any archived email referenced in the summations, provided Complaint Counsel takes the time to examine the

summations, identify the emails that are relevant, and requests their production. ECM continues to search internal files for responsive information, of which it has already produced hundreds of documents during Complaint Counsel's pre-complaint investigation. To date, ECM has produced, in addition to over 500 documents in the pre-complaint stage, a total of 1,904 pages of documents. By January 31, that figure will rise by at least 2,500 pages, and by March 15, that figure will rise yet again. ECM is committed to produce all responsive documents it possesses by the April 3 close of discovery.

For the reasons set forth more fully below, Respondent respectfully requests that the Court deny Complaint Counsel's premature and incompetent Motion to Compel.

BACKGROUND

On January 10, 2014, this Court ordered ECM to produce to Complaint Counsel its customer list. *See* Jan. 10 Or *See* Compl. Mot. to Compel, at 2. Contrary to the representations made in Complaint Counsel's motion, ECM produced its complete, unredacted customer list to Complaint Counsel on Thursday, January 16, 2014. We attach here a complete copy of that production. *See* Exh. CCX-A:2. To be sure, that complete list was appended to Complaint Counsel's previously filed motion for sanctions as Exh. CCX-A:1 flatly belying the representation in its motion of non-production. The false representation made to this Court comes without any prior discussion as to the alleged non-production in a meet and confer preceding the filing of the motion, thus violating, yet again, Rule 3.22(g).¹

¹ We note that this is the second instance in which Complaint Counsel has filed a motion precipitously without the requisite meet and confer in violation of Rule 3.22(g). *See* ECM's Opposition to Compl. Counsel's Motion to Place Discovery Motions on the Public Docket (Jan. 9, 2014) wherein we explain the first such instance.

Next, Complaint Counsel admits that it “withdrew” its Document Request No. 13 on January 14, 2014. *See* Compl. Mot. at 2. Complaint Counsel do not tell the Court the material fact that Request No. 13 was the only one for which response would otherwise now be due that called for bulk production of ECM’s customer correspondence. *See* Compl. Exh. CCX-A:1 (copy of Complaint Counsel’s document demand). Complaint Counsel’s knee-jerk filing of its motion to compel is inept because it lacks the necessary factual predicate of the pendency of Request No. 13. To be sure, Complaint Counsel served additional document requests on January 15, 2014, but under Rule 3.37(b) ECM’s response to those requests is not due until Monday, February 17. *See* Exh. RX-D.

Respondent timely responded on December 27 pursuant to Rule 3.37(b) to the aforementioned Complaint Counsel document demands of November 27, 2013. *See* Exh. RX-F (ECM response). Complaint Counsel falsely pleads to this Court that “[a]s of [Jan. 23, 2014], ECM’s response is nearly a month late...” Compl. Mot. at 1 (citing Rule 3.38(b)); *see also* Rule 3.37(b). Rule 3.37(b) requires a “response” within 30 days, which ECM timely served. Therein, ECM objected to the scope of Complaint Counsel’s discovery requests, including the only request (Document Request No. 13) that sought ECM’s customer correspondence. In Request No. 13, Complaint Counsel sought without limit as to time and scope “all communications with customers, distributors, potential customers, or potential distributors regarding ECM Additives.” *Id.* at 7. That request sought every document possessed by ECM over the past 10-plus years. Over 40 days after serving its document demands on ECM, Complaint Counsel unceremoniously withdrew the overbroad Request No. 13, after refusing to withdraw it for the prior 39 consecutive days. *See* Exh. RX-G, Complaint Counsel’s Jan. 9, 2014 Email (“[w]e stand by our position that we are entitled to all of the underlying communications with potential

customers...”). It thereby removed the only request to ECM otherwise due for customer correspondence, mooting the necessary foundation for the instant motion.

In addition, hypocrisy belies Complaint Counsel’s argument of undue delay. On December 3, ECM served Complaint Counsel with document production requests. Thirty days later, on January 2, Complaint Counsel served ECM with a written “response” to those requests along with an initial document production (just as ECM has done), *see* Exh. RX-I. Complaint Counsel later served the vast majority of its responsive documents to ECM on January 13.² Apparently Complaint Counsel believes ECM must abide by a 30 day timetable for production (rather than response) that neither Rule 3.37(b) nor its own practice dictates.

Moreover, Complaint Counsel conveniently omits the fact that ECM explained to Complaint Counsel that customer discovery was premature until his Honor ruled on ECM’s then-pending motion for a protective order, filed December 13, which motion sought to impose limits on customer disclosures. Contrary to their protestations, Complaint Counsel has made no “concessions ... to entice ECM to produce” discovery (*see* Compl. Mot. at 2). Rather, outside of Court, Complaint Counsel has adamantly insisted that ECM produce all of its files regardless of relevance or privileged content. Complaint Counsel has not agreed to limit the universe of potentially responsive documents, as it promised this Court it would. *See* Jan. 10, 2014 Order, at 7, 8 (Complaint Counsel would “limit [the discovery] in a manner that conserves both parties resources” and “reduce the number of responsive materials”). Indeed, every time ECM has asked Complaint Counsel to honor that pledge to the Court, Complaint Counsel has refused.

² Despite counsel’s implication, nothing in Rule 3.37(b) requires a party to produce all responsive documents within 30 days and, in fact, the rule expressly contemplates that document production or inspection will occur after an initial written response (supplied within that 30 day timeframe).

Complaint counsel argues that it “made an extraordinary offer—to accept the Summary Database in native format ... in lieu of production from the email archive.” Compl. Mot. at 2-3. In fact, Complaint Counsel insisted that ECM produce not only the complete ECM database summaries (to which ECM agreed!) *but also* all email files from January 1, 2009 forward, which Complaint Counsel claims must be located through massive keyword searches. *See* Exh. RX-G (Katherine Johnson Jan. 9, 2014 email). Moreover, ECM explained to Complaint Counsel that its database is kept in the ordinary course in Adobe PDF format, not native format. *See, e.g.*, Exh. RX-G. Complaint Counsel insisted that ECM reproduce its raw data not in the format in which it is kept but in native format, despite the fact that Rule 3.7 expressly does not require Respondent to produce its files in any form other than how they are kept in the ordinary course of business or how ECM may conveniently produce same.³

ECM does not sort or organize archived email files. *See* Exh. RX-A, Decl. of R. Sinclair, at ¶¶ 3-5. ECM has its employees contemporaneously log all emails, facsimiles, and phone calls in the Microsoft Access Database summations. *Id.* at ¶¶ 4-5. Although emails are referenced in the database summations, ECM ordinarily does not archive original emails. *Id.* at ¶¶ 5-6. ECM employees periodically store original emails in master PDF files, which files usually contain several days of communications all comingled. *Id.* at ¶¶ 6-7. Those master PDF files are then uploaded periodically to server folders for long-term storage. *Id.* at ¶ 8. To procure all responsive email files under Complaint Counsel’s overbroad requests, ECM must search each global PDF for the specific file named in the database summations, and then manually extract specific pages from the large files. *Id.* at ¶ 10. That process is time consuming and laborious,

³ ECM notes that Rule 3.7(c)(ii) & (iii) do not require ECM to specially format information for Complaint Counsel, or produce the information in more than one format.

and it is entirely unnecessary because the contemporaneously recorded database summations to be supplied to Complaint Counsel on January 31 and March 15 subsume the substantive email, facsimile, and phone content for every customer. *Id.* at ¶¶ 4-6. ECM implemented its database summation system to do that very thing (to eliminate the need for the PDF files). The summations remain the best contemporaneous source of all interactions (email, facsimile and phone, not just email) had with every customer every day. To accommodate Complaint Counsel's additional demand for all emails, ECM simply asked Complaint Counsel to perform one simple function: Identify relevant emails from the database summations and ECM would then retrieve those specific ones, if available.

On January 31, ECM will provide Complaint Counsel with over half of ECM's contemporaneous database summations and by March 15 with all of the rest of them, dating from January 1, 2009 to the present. ECM has been gathering and preparing that data for weeks. ECM has already provided Complaint Counsel with detailed notations concerning customer contacts with all of its prospective customers. *See, e.g.*, Exh. RX-E (excerpt of database production).

Finally, Complaint Counsel misrepresents the content of meetings with ECM counsel. Complaint Counsel states "ECM would not necessarily produce any underlying documents" and "ECM had not yet searched for responsive scientific and technical documents." *See* Compl. Mot. at 4. To the contrary, ECM has repeatedly offered to provide relevant emails but has asked Complaint Counsel to select specific relevant emails from the database summations or to ask for them based on Complaint Counsel's selection of a subset of customers (a limitation it pledged to this Court it would accept, as quoted by this Court's Order, *see* Jan. 10 Order at 8, but has refused to accept out of court). *See* Decl. of Arhangelsky, Exh. RX-B, at ¶ 3. Complaint

Counsel has not explained why, despite soon having ECM's *entire summation database* of emails, facsimiles, and phone calls, they cannot agree to any reasonable method to honor the pledge Complaint Counsel made to this Court to ease the production burden.

ARGUMENT

The information sought is overbroad, not reasonably calculated to lead to relevant information, and not critical to the case. Complaint Counsel does not inform the Court that it has "demanded" nearly every document ECM possesses, without regard to privilege or to whether it leads to the adduction of relevant evidence. Complaint Counsel's requests are intended to be unbridled fishing expeditions, designed to inundate ECM with discovery expense and burden, turning discovery from a search for truth into a means to impose unjustifiable financial burden on a party opponent. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 37 (D.D.C. 2012) ("although Courts should read 'relevance' broadly, they should not endorse 'fishing expeditions,' discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests") (collecting cases). "Courts ... frequently deny discovery when the party requests voluminous discovery where only a small fraction . . . may be relevant." *Id.* FTC Rule 3.31(c)(2) specifically *requires* limitations on discovery where the information sought is "unreasonably cumulative or duplicative" or the "burden and expense of the proposed discovery on a party ... outweigh its likely benefit." *See* 16 C.F.R. § 3.31(c)(2)(i), (ii). ECM has committed to produce every one of its database summations of all email, facsimile and phone interactions with every one of its customers from January 1, 2009 forward, a trove of information that virtually no other company in any FTC proceedings has produced or has had the wherewithal to produce (indeed, it is remarkable that this small company instituted such a system

of contemporaneous recordation nearly from its inception). Moreover, ECM has committed to produce individual emails referenced therein upon Complaint Counsel's reasonable effort to identify specific relevant emails, but Complaint Counsel refuses to cooperate and instead demands every email communication regardless of privilege, relevance, or burden. It does so while promising the opposite to this Court (that it would choose a subset of customers and relieve ECM of unnecessary burden). *See* Compl. Counsel's Jan. 7th Reply at 4.

Finally, Complaint Counsel argues that ECM has not been fully forthcoming with production of "scientific and technical information." Compl. Mot. at 5. To the contrary, ECM provided almost every such responsive document in the pre-complaint investigation. ECM is searching its files for any remaining responsive information, and it intends to provide such information if it discovers same before the close of discovery on April 3. ECM has not withheld any information.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that his Honor deny Complaint Counsel's Motion to Compel.

Respectfully submitted,

/s/ Jonathan W. Emord
Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

DATED this 31th day of January 2014.

STATEMENT CONCERNING CONFIDENTIALITY

The undersigned Respondent's Counsel hereby states that the content of certain exhibits referenced in the foregoing Opposition contain information properly designated "confidential" under the standing Protective Order in this case. Accordingly, ECM submits a public version with the exhibit content redacted.

DATED: January 31, 2014.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 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

Elisa Jillson (ejillson@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: February 4, 2014

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

EXH. RX-A

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**

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
Envioplastics International,

Respondent.

Docket No. 9358

CONFIDENTIAL

DECLARATION OF ROBERT SINCLAIR

I, ROBERT SINCLAIR, under penalty of perjury, hereby state as follows:

1. I am over the age of eighteen years and I make this affidavit on personal knowledge of its contents and in further support of Respondent's Opposition to Complaint Counsel's Motion to Compel.

2. I am the President and Chief Executive Officer of ECM BioFilms, Inc., an Ohio company which was founded in 1998. As President and CEO, I have personal knowledge of ECM's daily operations.

3. ECM is a small company with [REDACTED]

[REDACTED] As a small company, ECM has developed its own unique method for organizing and archiving emails, facsimiles, and phone calls with third parties.

4. Since ECM's founding in 1998, ECM employees have contemporaneously logged summations of every email, facsimile, and phone call had with every customer in the ordinary course of business through a Microsoft Access database. Each data base entry includes the name of the contact, the initials of the employee completing the entry, and a description of the matters discussed.

5. Employees are instructed to carefully and accurately record all email, facsimile, and phone interaction with customers. ECM uses those database entries to archive, sort, and manage prior customer correspondence and maximize customer satisfaction. Because ECM itself relies on the accuracy of those entries to maintain business operations, the database entries closely mirror the material content of all actual communications with customers. An excerpt of ECM's database reports is attached as Attachment A.

6. ECM relies on its database summations in the ordinary course of business to manage all customer interactions and, so, it has kept the underlying emails, letters, facsimiles and other documents in an archive form only referred to when it has been felt necessary to see exact wording or other details not entailed in the notes. Concerning emails which make up the bulk of written correspondences, employees are instructed to create master PDF files which contain up to several days of email correspondence. Those master PDF files, which contain comingled information, are then moved into a correspondence file folder.

7. The master PDF files thus contain a large number of emails, including personal and privileged communications with counsel. [REDACTED]

8. Because ECM employees log the substantive information in the database, ECM only maintains correspondence files in accessible folders for approximately 30 days. After that time period, ECM generally moves its bulk files into an archive folder.

9. ECM's server shows over [REDACTED]

10. To search individual archived email correspondence, ECM or its agents must therefore search each of the over [REDACTED], and selectively excerpt responsive communications from those files.

11. To search and extract documents from a master PDF file typically requires between 5 and 10 minutes, depending on the volume of responsive information. Thus, to manually search and extract responsive documents from archived files will require over [REDACTED] [REDACTED] That time does not include the number of hours ECM's counsel must spend reviewing the responsive documents.

12. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

13. [REDACTED]
[REDACTED]
[REDACTED]

14. ECM's attorneys assess a [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

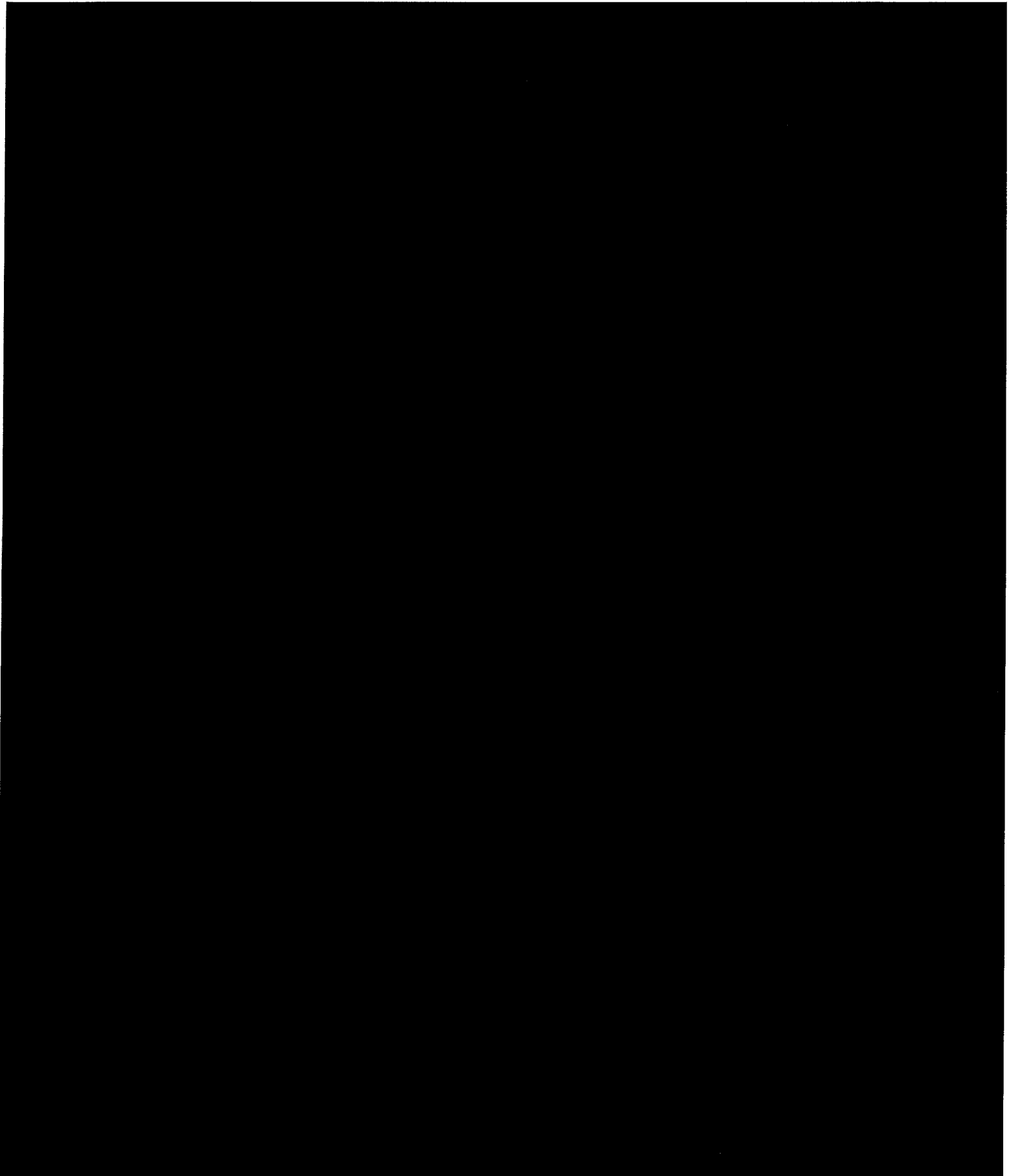
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of January, 2014.

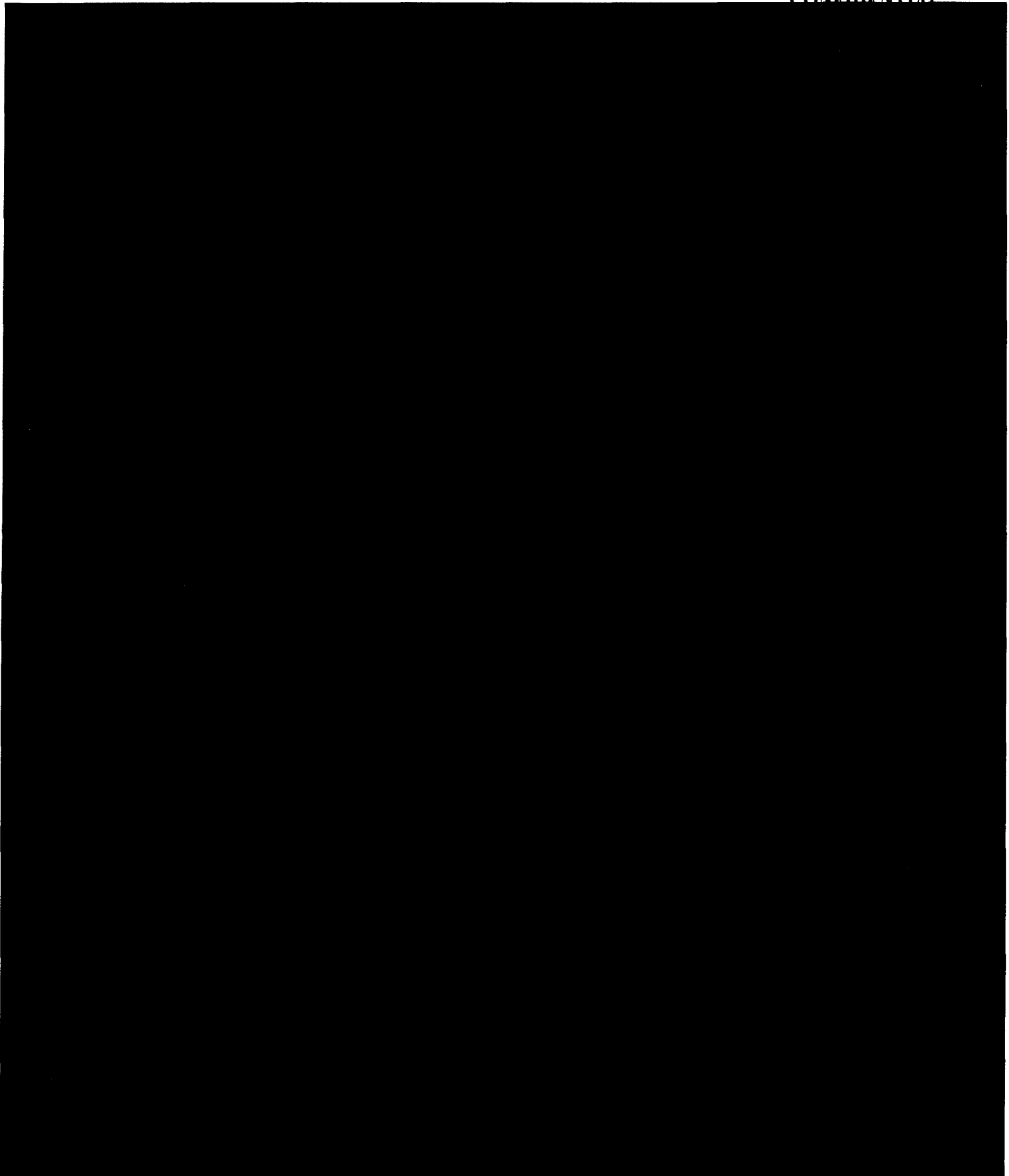

Robert Sinclair

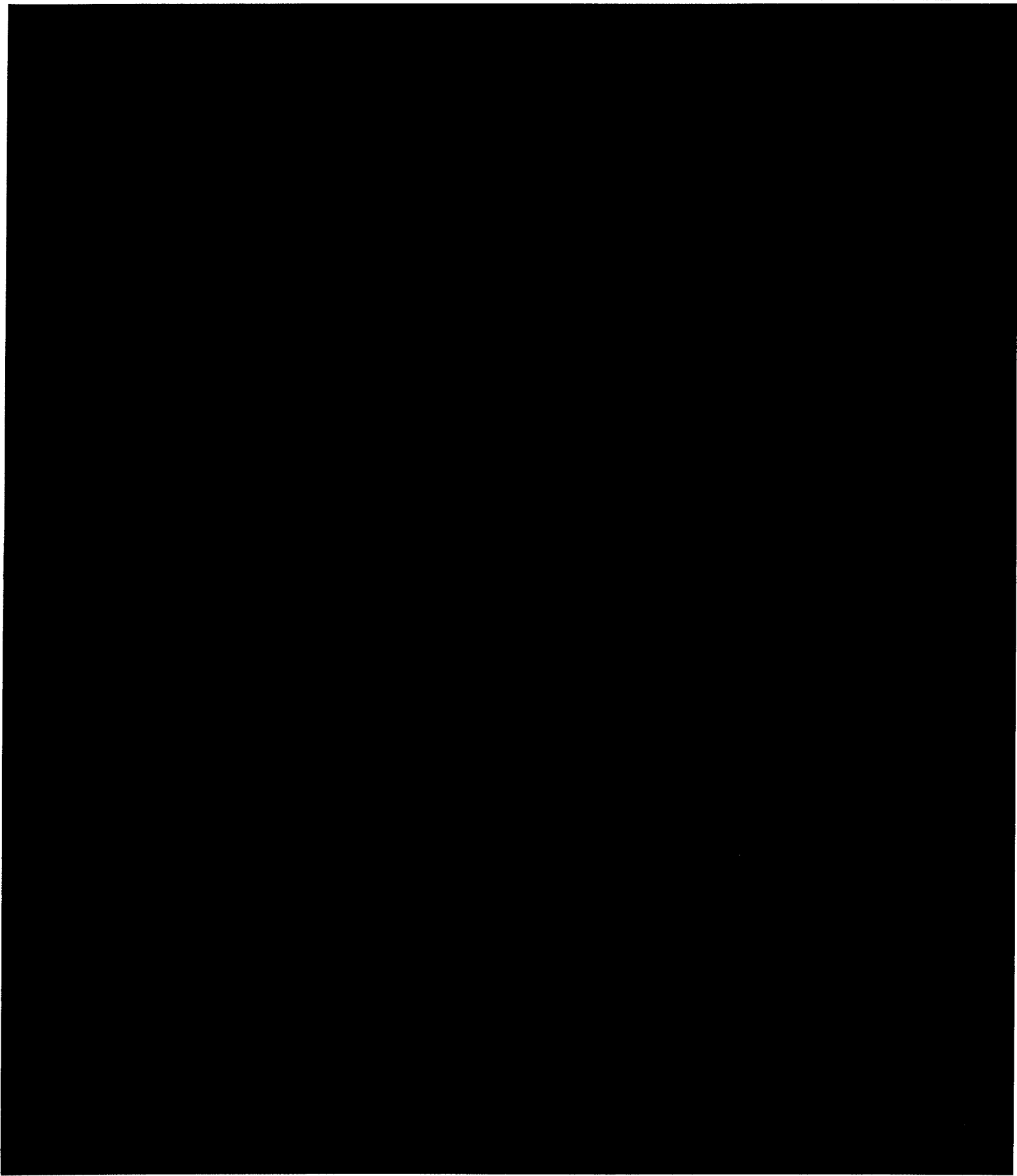
Exh. RX-A:1

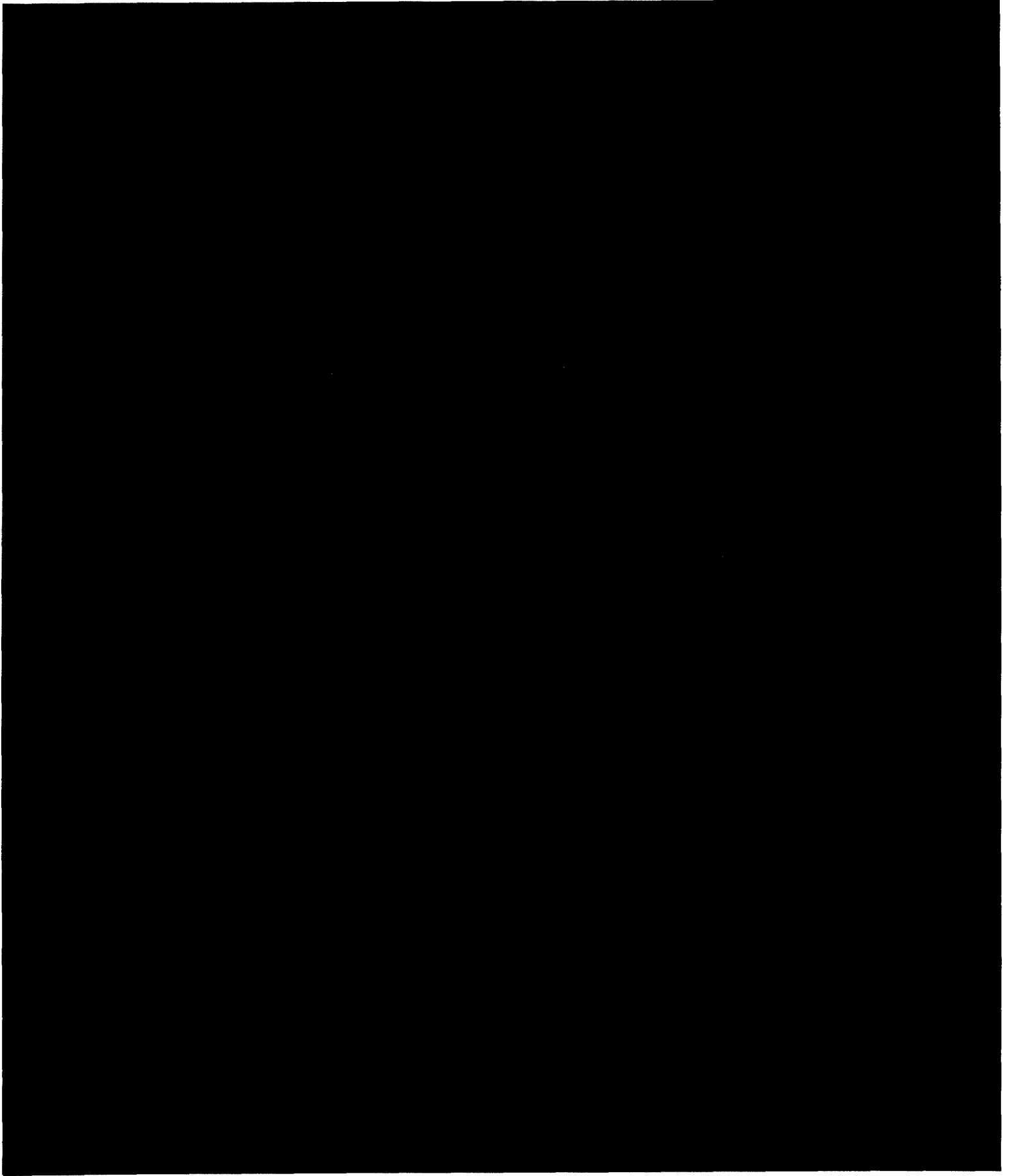
ATTACHMENT 1

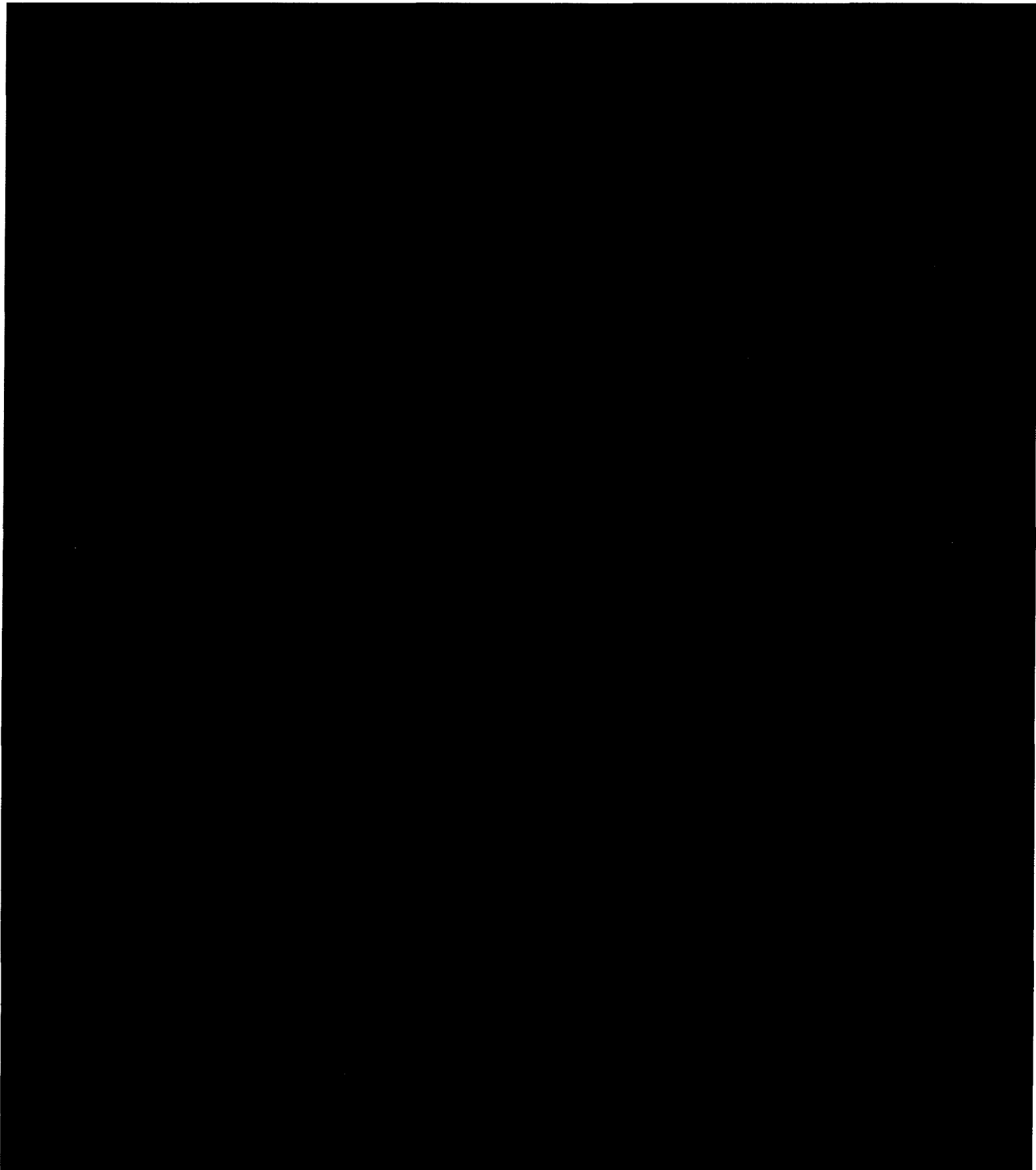
**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**

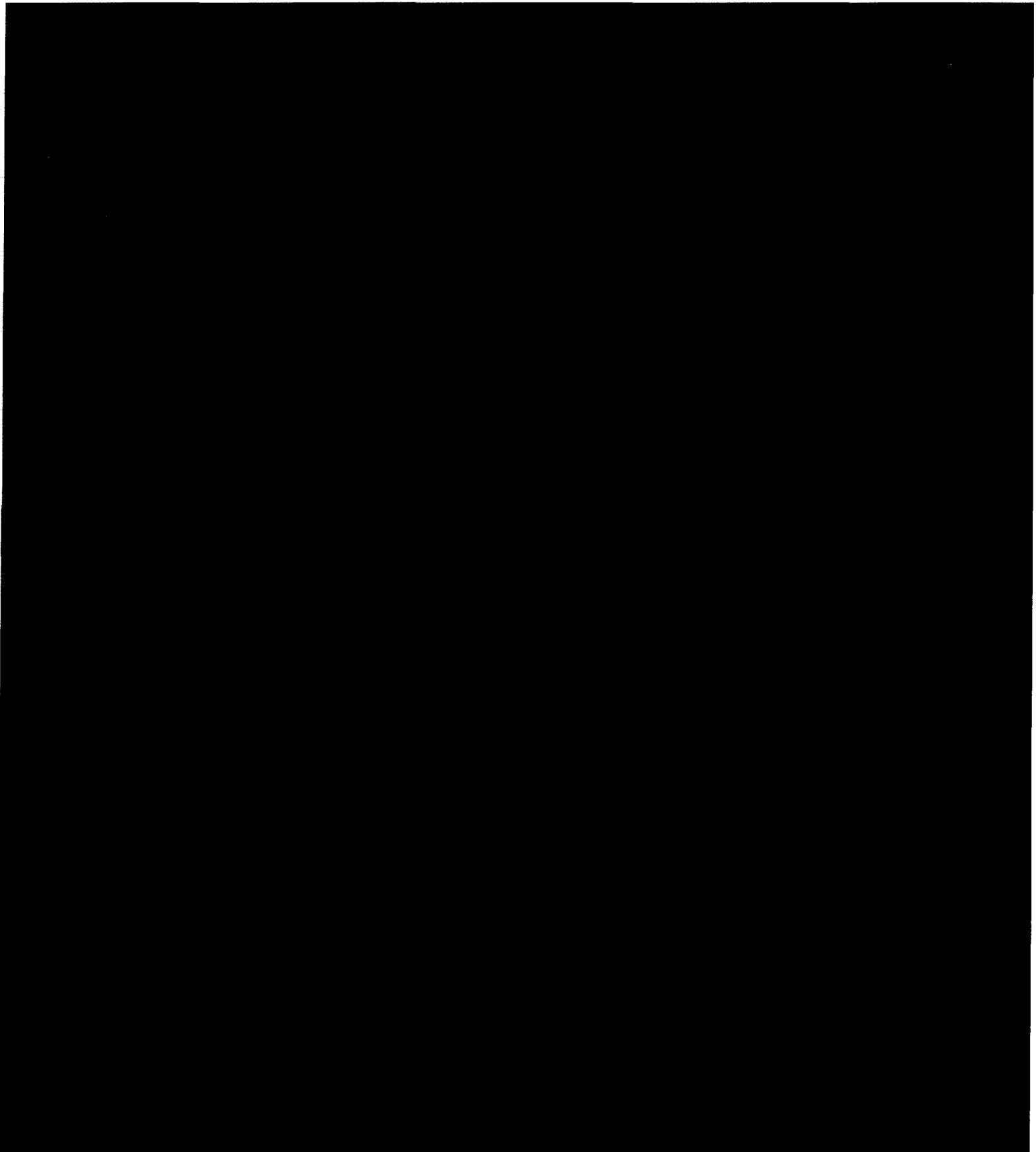


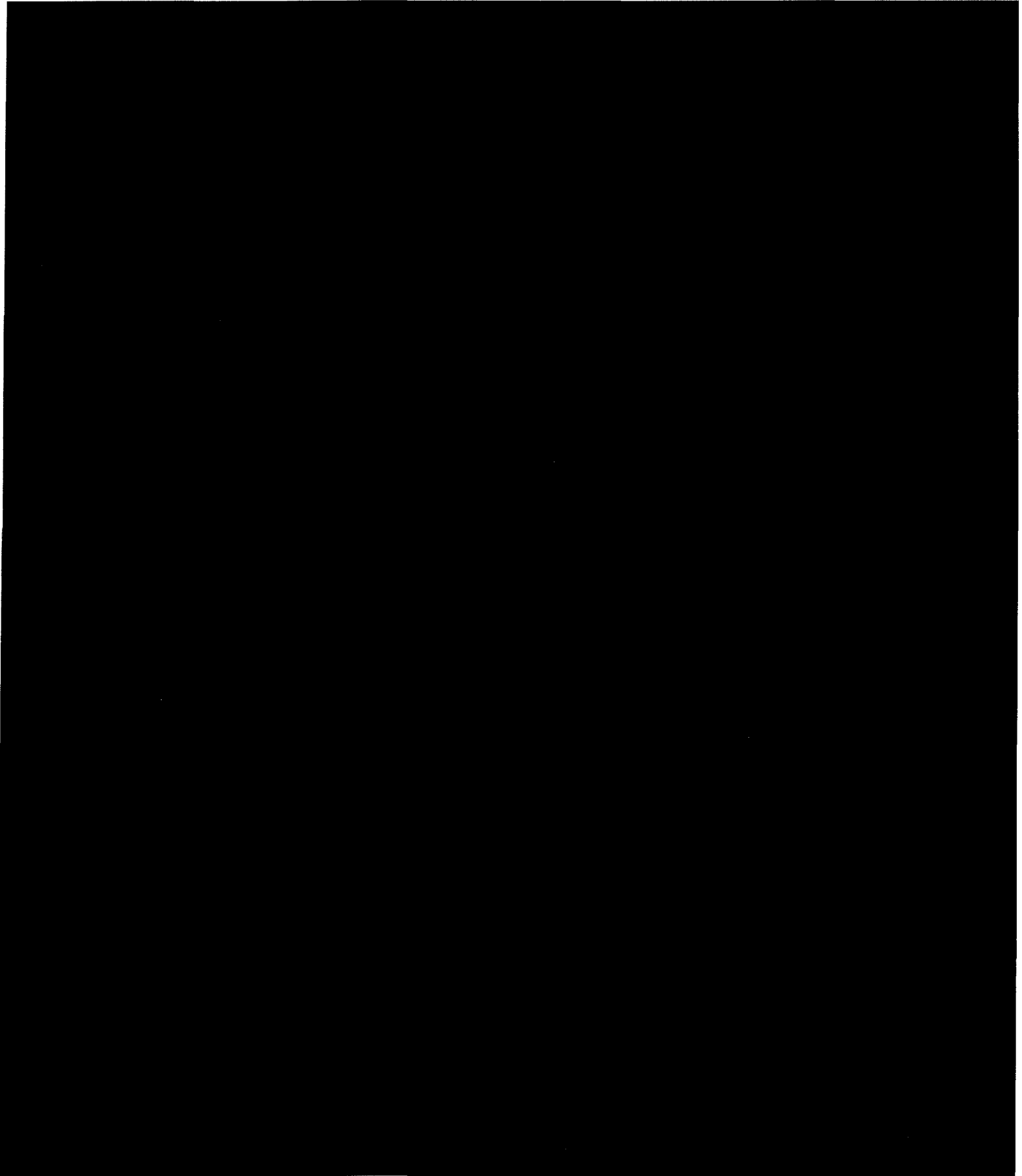


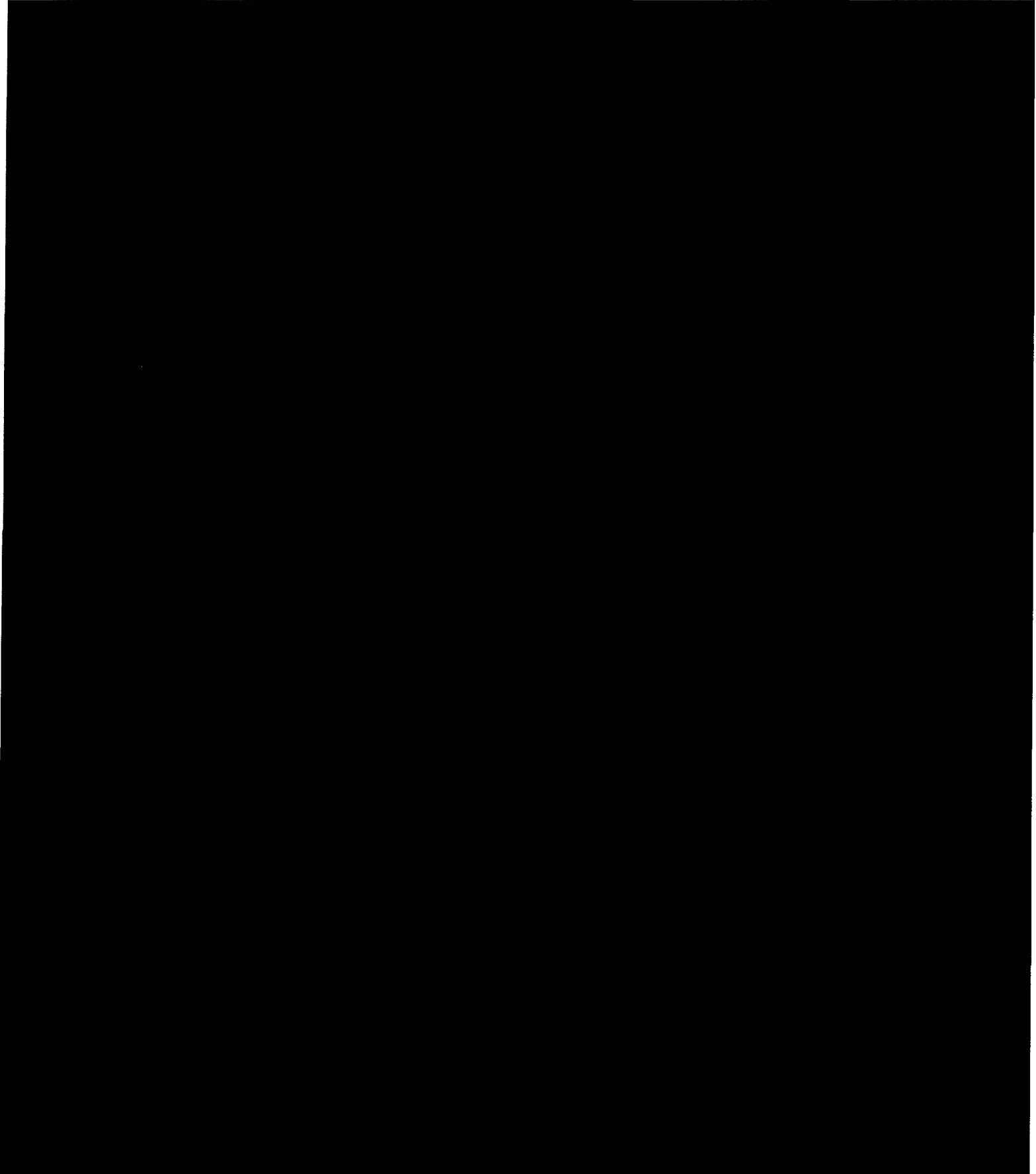


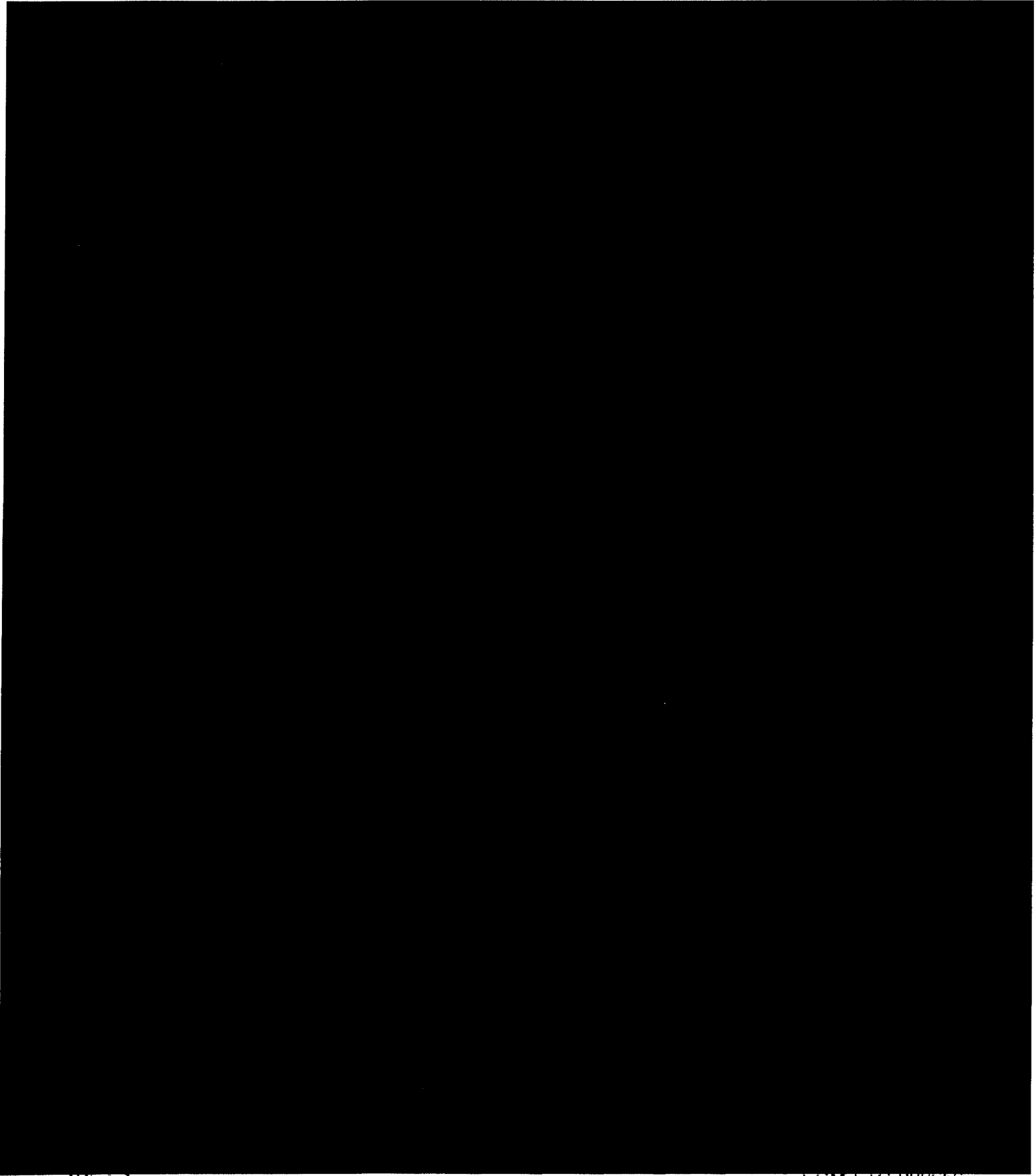


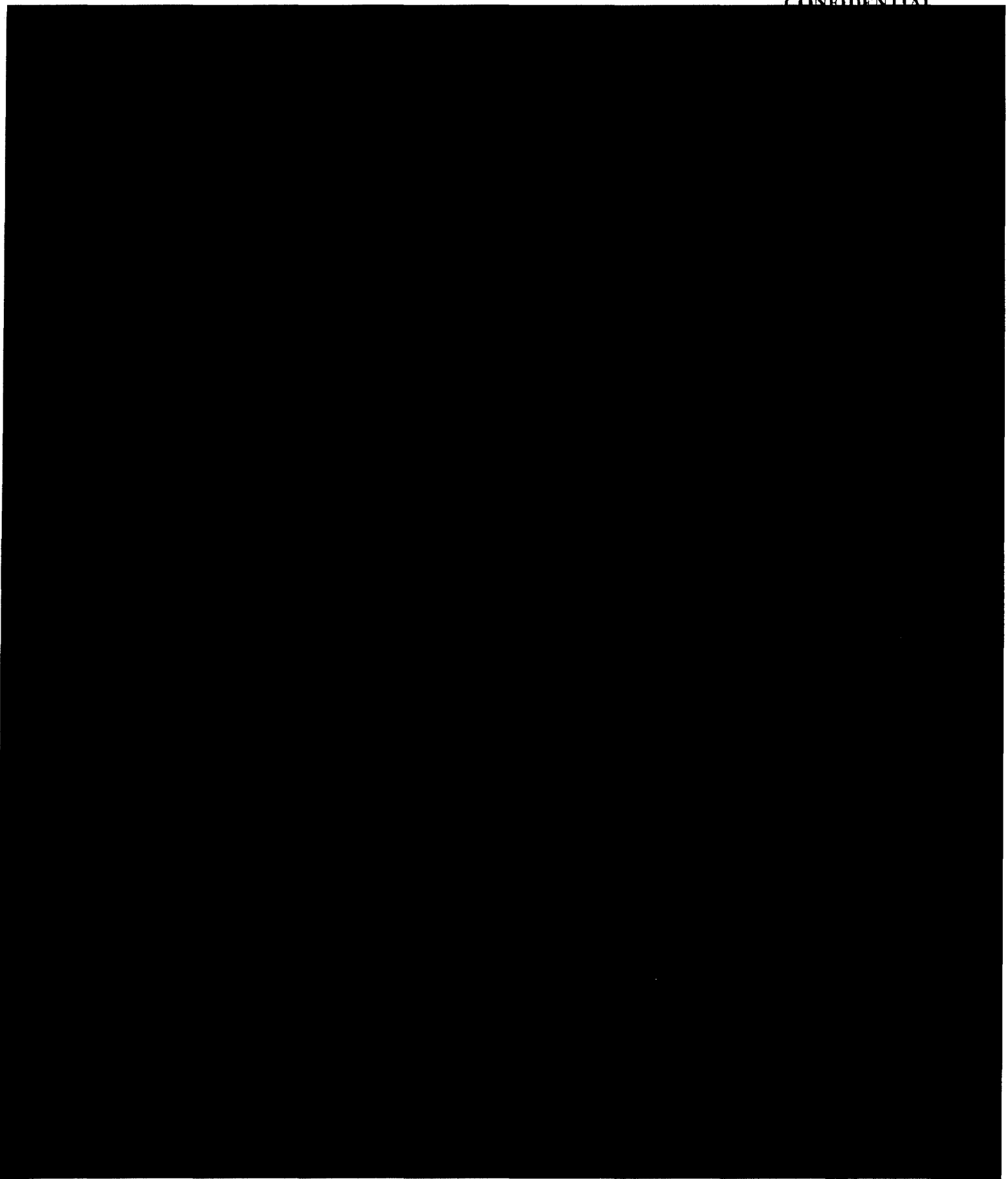












EXH. RX-B

**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

CONFIDENTIAL

**DECLARATION OF PETER ARHANGELSKY IN SUPPORT OF RESPONDENT
ECM'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENT TO PRODUCE DOCUMENTS**

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

1. I am over the age of eighteen years and I make this affidavit on personal knowledge of its contents and in further support of Respondent's Opposition to Complaint Counsel's Motion to Compel.
2. I am employed by the law firm Emord & Associates, P.C., which represents ECM BioFilms in matters before the Federal Trade Commission. I am an attorney of record in the above-captioned case.
3. In a January 21, 2014 telephone call involving counsel for Respondent (Peter Arhangelsky, Lou Caputo, and Jonathan Emord) and Complaint Counsel (Katherine Johnson, Elisa Jillson, and Jonathan Cohen,), ECM discussed limitations it sought for document discovery in light of Complaint Counsel's overbroad requests:
 - ECM offered to produce its entire contemporaneously recorded email, facsimile, and phone customer summation database in a native format, beginning with a

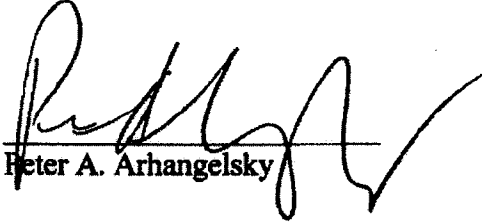
substantial production of information by January 31, 2014. ECM explained that reviewing the relevant information would take time before production could occur, and that prompt work would allow a substantial production by January 31, 2014 with full production not later than 4 to 6 weeks thereafter (i.e., by no later than March 15). The parties purported to agree on a start date of January 1, 2009 for electronic discovery files.

- ECM offered to produce email correspondence with third parties (e.g., customers) as part of its production, provided Complaint Counsel would limit its request for the archived files to a chosen subset of ECM customers after reviewing the information available in ECM's database notes. Because production of all email correspondence would include attorney-client privileged communication, work product communication, irrelevant material and substantial labor to identify and retrieve all responsive emails, ECM invited Complaint Counsel to review all of the contemporaneous summations logged and to choose from them specific emails desired for production, thus lessening the burden. Complaint Counsel refused to accept any limit on email file production. Complaint Counsel has demanded all emails contained in ECM's database, subject to extensive keyword searches.
- ECM has produced responsive scientific and technical documents in its production to Complaint Counsel during the pre-complaint investigation. ECM is reviewing all of its files to find any additional responsive scientific and technical documents and is committed to complete that search on or before February 28 and supply whatever responsive documents it has found, as it finds them. ECM

understands that it is not required to search for and produce information that has already been supplied to Complaint Counsel.

- To the extent that they exist and do not contain privileged information, ECM is committed to providing internal emails, if any, that are responsive to Complaint Counsel's requests upon their discovery with complete production by no later than the discovery cut-off date of April 3.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of January, 2014.


Peter A. Arhangelsky

Exh. RX-C

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**

REDACTED IN FULL

Exh. RX-D

4. If, in answering these Requests, you encounter any ambiguities when construing a request, instruction, or definition, your response shall set for the matter deemed ambiguous and the construction used in responding.

5. Where a claim of privilege is asserted in responding or objecting to any discovery requested in these Requests and information is withheld on the basis of such assertion, you shall, in your response or objection, identify the nature of the privilege (including work product) which is being claimed. When any privilege is claimed, you shall indicate, as to the information requested, whether (a) any documents exist, or (b) any communications took place, and (c) also provide the following information for each such document in a "privileged documents log" or similar format: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s) of the document; (v) the addressee(s) and any other recipient(s) of the document; and (vi) the custodian of the document, where applicable.

6. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

7. These Requests for Production seek documents not already produced by you pursuant to the FTC's letter requests. To the extent responsive documents have already been produced by you, you should so indicate and include the Bates Number identifying the documents responsive to that Request. If the document previously produced by you was wholly or partially redacted, please provide an unredacted copy, or the basis for claiming privilege or other protection as described in Instruction No. 5. If the document includes charts or graphs, provide color copies of such documents.

8. Every Request for Production herein shall be deemed a continuing Request for Production, and Respondent is to supplement its answers promptly if and when you obtain responsive documents which add to or are in any way inconsistent with Respondent's initial production.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the FTC's Rules.

1. "All" means and includes "any and all."
2. "Advertisement" means any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears on the Internet, in email, on packaging, in a brochure, newspaper, magazine, pamphlet, Powerpoint Presentation, leaflet, webinar, circular, mailer, book insert, free standing insert, letter, catalog, poster, chart, billboard, point of purchase material (including, but not limited to, a display or an item worn by salespeople), fact sheet, film, slide, radio, broadcast or cable television, audio program transmitted over a telephone system, program-length commercial, or in any other medium.
3. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request any information that might otherwise be construed to be outside its scope.
4. "Any" means and includes "any and all."
5. "ASTM Documents" include any Document: (a) prepared for ASTM (American Society of Testing and Materials), for any ASTM committee, or for any ASTM vote, election, or decision-making process (including, without limitation, standard-setting); (b) regarding any ASTM committee, or any ASTM vote, election, or decision-making process (including, without limitation, standard-setting); (c) prepared for dissemination to ASTM, ASTM members, or the representatives of ASTM members; or (d) drafts or versions of any of the foregoing.
6. "Document" or "documents" are synonymous in meaning and equal in scope to the usage of the terms as defined by 16 C.F.R. 3.34(b), and includes, without limitation, any written material, whether typed, handwritten, printed or otherwise, and whether in draft or final form, of any kind or nature, or any photograph, photostat, microfilm or other reproduction thereof, including, without limitation, each note, memorandum, letter, release, article, report,

prospectus, memorandum of any telephone or in-person conversation, any financial statement, analysis, drawing, graph, chart, account, book, notebook, draft, summary, diary, transcript, computer database, computer printout, or other computer-generated matter, contract or order, laboratory report, patent, trademark or copyright, and other data compilations from which information can be obtained. Electronic mail is included within the definition. A draft or non-identical copy is a separate document.

7. "ECM" shall mean ECM Biofilms, Inc., including without limitation, its agents, employees, officers, or anyone else acting on its behalf.

8. "Regarding" means and includes affecting, concerning, constituting, dealing with, describing, embodying, evidencing, identifying, involving, providing a basis for, reflecting, relating to, respecting, stating, or in any manner whatsoever pertaining to that subject.

REQUESTS

Request 1

Provide all Documents that constitute drafts or different versions of any logo or certificate that ECM provided to any customer or considered providing to any customer. For purposes of this request, ECM need not produce drafts or versions in which the only difference between the responsive document and a document ECM has already produced is the customer's name or the document's date.

Request 2

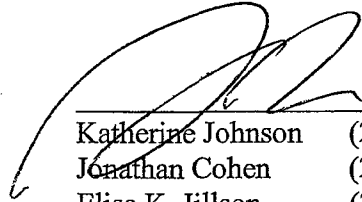
Provide all Documents that constitute drafts or different versions of any presentation, Advertisement, or marketing material of any sort that ECM provided to any customer or considered providing to any customer. For purposes of this request, ECM need not produce drafts or versions in which the only difference between the responsive document and a document ECM has already produced is the customer's name or the document's date.

Request 3

Provide all ASTM Documents including, without limitation, drafts or versions of such Documents.

Dated: January 15, 2014

Respectfully submitted,



Katherine Johnson (202) 326-2185
Jonathan Cohen (202) 326-2551
Elisa K. Jillson (202) 326-3001

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop M-8102B
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2014, I caused a true and correct copy of the paper original of the foregoing document to be served as follows:

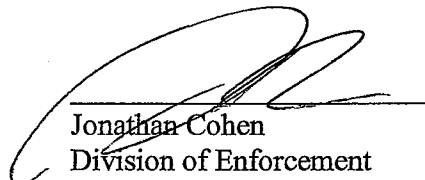
One electronic copy to **Counsel for the Respondent:**

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

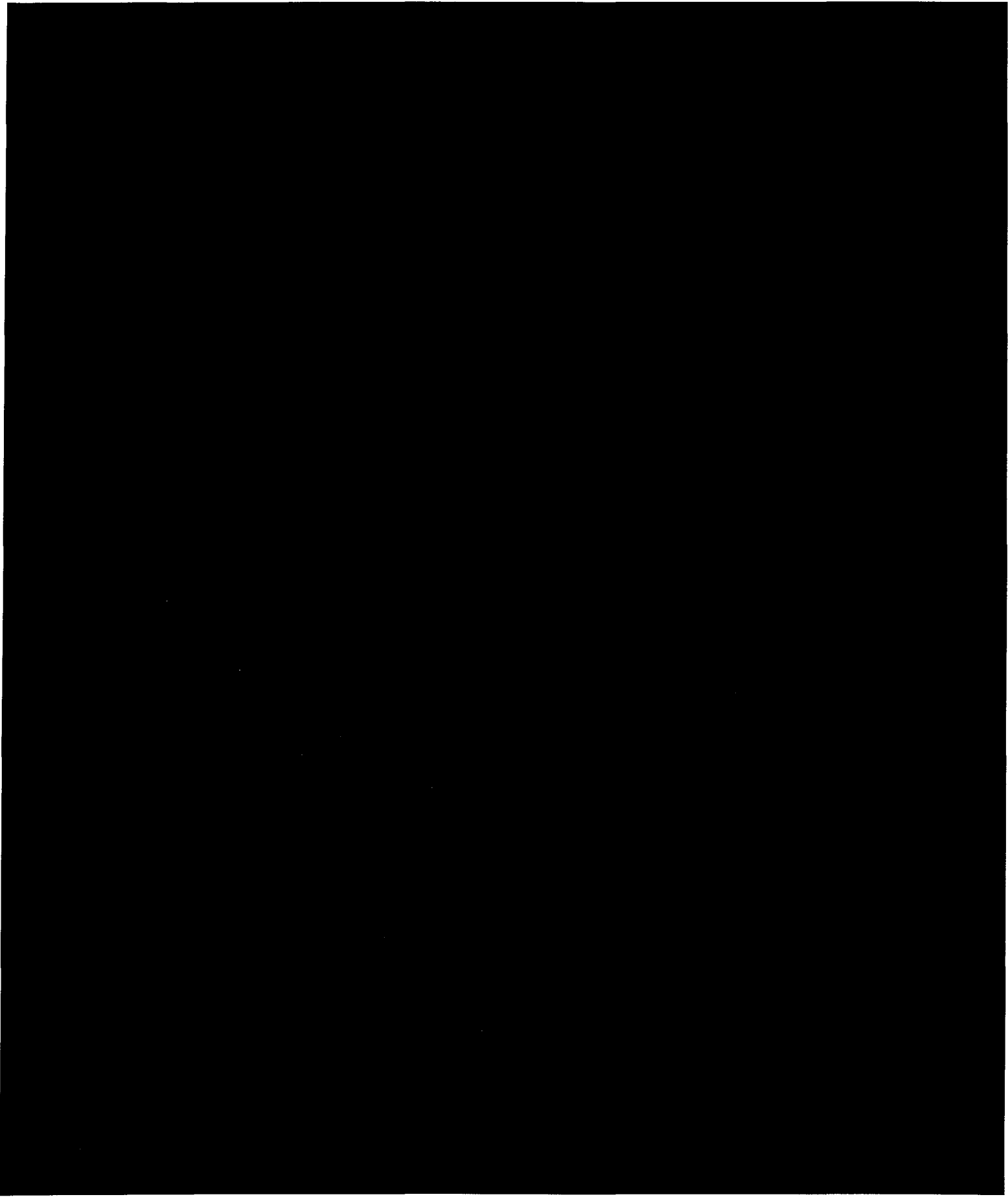
I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

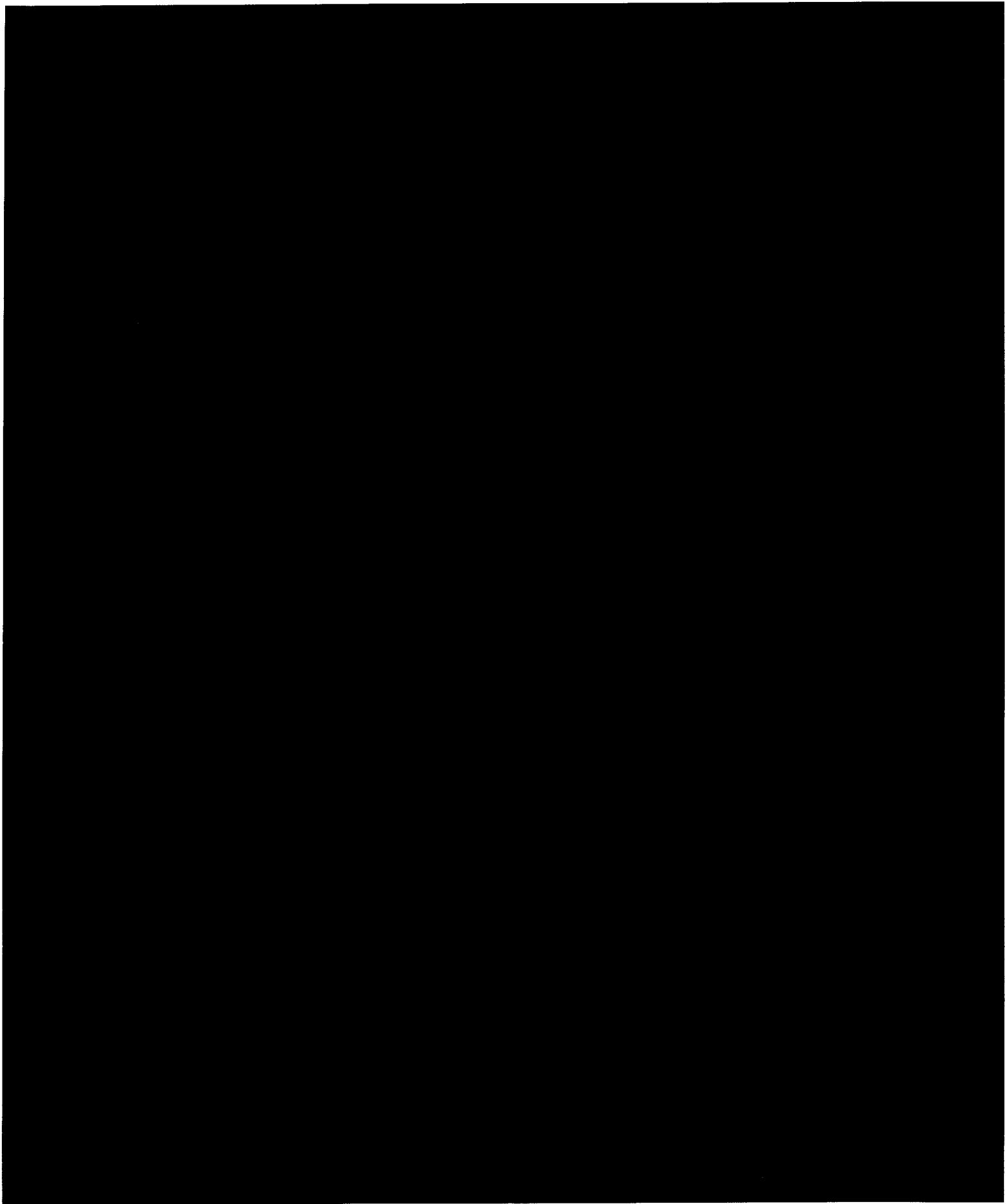


Jonathan Cohen
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW, M-8102B
Washington, DC 20580
Telephone: (202) 326-2551
Facsimile: (202) 326-2558
Email: jcohen2@ftc.gov

Exh. RX-E

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**





Exh. RX-F

**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
Envioplastics International,**

Respondent.

Docket No. 9358

**RESPONDENT'S RESPONSES AND OBJECTIONS TO
COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. 3.37, Respondent ECM BioFilms, Inc. ("ECM") submits its Responses and Objections to Complaint Counsel's First Set of Requests for Production of Documents ("Requests").

ECM objects generally to the proposed breadth and scope of Complaint Counsel's Requests. They are overbroad and overly burdensome in that they seek materials and information that are cumulative, redundant, and irrelevant. Further, they seek information at issue in ECM's Motion for Protective Order, which is currently before the ALJ. ECM maintains a small workforce and does not have the resources to discover, review, and categorize such massive volumes of information within the response time requested. Notwithstanding, ECM recognizes the need for disclosure on topics under the Rules and endeavors in good faith to comply. To that end, ECM discloses Attachment A with this Response.

ECM has consistently explained that its sales are generally made through personal communication. Attachment A contains summaries of interactions between ECM and prospective customers with which ECM has not entered a confidentiality agreement from January 1, 2006 – December 31, 2011. Attachment A includes 8,540 separate notes. There are approximately 142, 078 other such entries total in ECM's records. Compiling the entries in Attachment A and reviewing them consumed significant employee time at the sacrifice of work for ECM. Attachment A is responsive to nearly all areas of Complaint Counsel's Request. ECM continues to search its records for additional responsive data and will provide it under reasonable circumstances soon after it is discovered. ECM proposes that Complaint Counsel review Attachment A, ascertain which individual records it finds relevant and about which they desire further information and/or documentation. Complaint Counsel can then describe precisely those records about which they seek more information. ECM will then proceed to discover and disclose the responsive documents and information to Complaint Counsel.

GENERAL OBJECTIONS

1. ECM objects to Complaint Counsel's Requests to the extent that they call for information, materials, and documents protected from disclosure pursuant to sections 3.31(c)(2)-(4) of the Rules.
2. ECM objects to Complaint Counsel's Requests to the extent that they call for information, materials, and/or documents protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege.
3. ECM objects to the Instructions and Definitions to the extent they purport to impose greater obligations on ECM than those imposed by the Rules, including, but

not limited to Rule 3.31 and/or Rule 3.37. ECM will provide answers and responses consistent with the Rules when the Instructions and Definitions deviate from the Rules.

4. ECM objects to Complaint Counsel's Requests to the extent they call for disclosure of its trade secrets and/or confidential and proprietary commercial and financial information. ECM will provide responses containing its confidential and proprietary information subject to the terms of the Protective Order Governing Discovery Material issued by Judge Chappell on October 22, 2013.

5. ECM objects to Complaint Counsel's Requests to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.

6. ECM objects to Complaint Counsel's Requests to the extent that they call for information previously provided to Complaint Counsel or information that may be less onerously obtained through other means.

7. ECM objects to Complaint Counsel's Requests to the extent they are not relevant to the pending proceeding against ECM.

8. ECM reserves all of its evidentiary objections or other objections to the introduction or use of any response at any hearing in this action and does not, by any response to any Request, waive any objections to that Request, stated or unstated.

9. ECM does not, by its response to any Request, admit to the authenticity or validity of any document.

10. ECM objects to Complaint Counsel's Requests on the ground that ECM's discovery and analysis are ongoing, and ECM reserves the right to assert additional objections, as appropriate, and to amend or supplement these objections and responses as appropriate.

11. ECM's objections and responses are based on its understanding or interpretation of Complaint Counsel's Requests and the language used therein. To the extent Complaint Counsel challenges those interpretations, or to the extent ECM derives a different understanding or interpretation of the language used, ECM reserves the right to supplement any of these objections or responses accordingly.

12. ECM objects to Complaint Counsel's Requests to the extent that such inquiries seek production of information, materials, and documents precluded from disclosure under Rule 3.31A(e), including information derived from consulting experts. Similarly, ECM objects to the Requests to the extent they seek premature disclosure of expert discovery. Consistent with Rules 3.31 and 3.31A, and the standing Protective Order in this case, ECM will provide such information at an appropriate time.

13. ECM objects to the definition of the term "plastic" to the extent that Complaint Counsel seeks to limit the universe of scientific facts, products, and polymers, in any way that narrows the generally accepted scientific definition or understanding of the term.

14. ECM objects to these document requests to the extent they are qualified with words such as "all" or other similar expansive language, because such language causes the requests to be overly broad and global, vague and ambiguous, and unduly burdensome.

15. ECM objects to these Requests due to their use of the inherently ambiguous phrases “within a reasonably short period of time after customary disposal” and “within a reasonably short period of time within a landfill” which render the requests including the phrases incomprehensible. ECM objects to these Requests due to their use of the term “biodegradable” and other similar and/or related terms. Such terms are vague and ambiguous. This includes, but is not limited to, the fictive notion that consumers interpret the term “biodegradable” to mean that a product must completely break down within a one-year period.

The foregoing general objections shall apply to each of the following Requests whether or not restated in the response to any particular response.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1

Provide all documents regarding the efficacy of the ECM Additive in initiating, causing, enabling, promoting, or enhancing the biodegradation of plastics containing the ECM Additive.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061

- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 2

Provide all documents regarding whether or how to market ECM Additives as capable of initiating, promoting, causing, enhancing, or enabling the biodegradation of plastic.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000059
- ECM-FTC-000022 - ECM-FTC-00006
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000493 - ECM-FTC-000496
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 3

Provide all documents regarding the duration of time for complete biodegradation of a plastic product containing the ECM Additive.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230

- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000390 - ECM-FTC-00040
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 4

Provide all documents regarding whether and how plastics containing ECM Additives will biodegrade in different disposal conditions.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the

parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 5

Provide all documents regarding ASTM D5511 or ASTM D5526.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000017
- ECM-FTC-000058 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000483
- ECM-FTC-000487
- ECM-FTC-000497 - ECM-FTC-000509

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered.

REQUEST NO. 6

Provide all documents regarding any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive, and specifically including the following representations:

- a. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because the phrase “within a reasonably short period of time after customary disposal” is so ambiguous as to be incomprehensible; it therefore renders the request incompetent. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351

- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- b. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time in landfill.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because the phrase "within a reasonably short period of time in landfill" is

so ambiguous as to be incomprehensible; it therefore renders the request incompetent.

Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the

disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- c. ECM Plastics will completely break down and decompose into elements found in nature within nine months to five years in a landfill.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000334
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- d. ECM Plastics will completely break down and decompose into elements found in nature within one year in a landfill.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged documents responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

e. ECM Plastics have been shown to perform as stated in (a) through (d) under various scientific tests including, but not limited to, ASTM D5511.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000058 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000483
- ECM-FTC-000486
- ECM-FTC-000497 - ECM-FTC-000509

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the

disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 7

Provide all documents that tend to call into question or disprove any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows. There are no documents that “call into question or disprove any express or implied claims” referenced in this request.

ECM has provided responsive documents, and such documents speak for themselves concerning their nature or content. ECM will provide additional responsive documents at a time and place mutually convenient to the parties, and consistent with the ALJ’s ruling on ECM’s pending motion for a protective order.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM’s Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 8

Provide all documents regarding any tests conducted on ECM Additives or plastics containing ECM Additives purporting to show biodegradability of ECM Additives or plastics containing ECM Additives.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's

Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 9

Provide all copies of each different ECM advertisement (including those disseminated to or by ECM distributors) that represents, expressly or by implication, that ECM Additives initiate, cause, enable, promote, or enhance biodegradation of plastic.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM objects to the request for “advertisements” as that term calls for a legal conclusion the sufficiency of which is in controversy. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to the extent that such request implies that ECM possesses or exerts any degree of control over such advertisements displayed, produced, or endorsed by third-party distributors. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows: ECM has provided responsive documents, and such documents speak for themselves concerning their nature or content. ECM will provide additional responsive documents at a time and place mutually convenient to the parties, and consistent with a final and binding Order on ECM’s pending motion for a protective order.

REQUEST NO. 10

Provide copies of any materials relating to any ECM Additive made available to any ECM Additive distributor or customer, including, but not limited to, packaging, clipart,

seals, logos, other marketing materials, instructions or suggestions regarding marketing claims, or instructions for the use or marketing of the ECM Additive.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000001 – ECM-FTC-000012
- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000243
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 11

Provide all documents, whether prepared by or for ECM or any other entity, including any advertising agency, regarding consumer perception, comprehension, or recall (including, but not limited to, copy tests, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, and communication tests) of:

- a. Any advertisement, whether disseminated or not, that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic; and/or
- b. Biodegradability in general.

RESPONSE: Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

ECM objects to such Request to the extent that it seeks production of information, materials, and documents precluded from disclosure under Rule 3.31A(e), including information derived from consulting experts. Similarly, ECM objects to the Requests to the extent they seek premature disclosure of expert discovery. Consistent with Rules 3.31 and 3.31A, and the standing Protective Order in this case, ECM will provide such information at an appropriate time.

REQUEST NO. 12

Provide all documents that support or call into question your contention that your customers or distributors are sophisticated purchasers.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000243
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000352 - ECM-FTC-000355
- ECM-FTC-000356 - ECM-FTC-000361

- ECM-FTC-000363 - ECM-FTC-000380
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000493 - ECM-FTC-000496

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 13

Provide all communications with customers, distributors, potential customers, or potential distributors regarding ECM Additives.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM objects to disclosure of any such documents that would fall outside the limitations that ECM requested in its Motion for a Protective Order, filed on

December 13, 2013. ECM further objects to the Request because it is overly burdensome, and would impose an expense that substantially outweighs any benefit. ECM objects to the extent that such Request implies that ECM possesses or exerts any degree of control over such customers, distributors, potential customers, or potential distributors. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000243
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000352 - ECM-FTC-000355
- ECM-FTC-000356 - ECM-FTC-000361
- ECM-FTC-000363 - ECM-FTC-000380
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000493 - ECM-FTC-000496

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

REQUEST NO. 14

Provide all documents regarding your strategy for selling the ECM Additive to customers or distributors, including any documents used for verbal sales communications or in preparation for verbal sales communications.

RESPONSE: ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483

- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

DATED this 27th day of December 2013

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2013, I caused a true and correct copy of the paper original of the foregoing **RESPONDENT'S RESPONSES AND OBJECTIONS TO COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** to be served as follows:

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

Katherine Johnson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580
Email: kjohnson3@ftc.gov

Elisa Jillson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580
Email: ejillson@ftc.gov

Jonathan Cohen
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580
Email: jcohen2@ftc.gov

I further 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.

/s/ Jonathan W. Emord
Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

Exh. RX-G:1

Peter Arhangelsky

From: Johnson, Katherine <kjohnson3@ftc.gov>
Sent: Monday, January 13, 2014 11:08 AM
To: Peter Arhangelsky
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Peter,

First, we will negotiate search terms to reduce the number of responsive materials, but we want to begin that process expeditiously. We recognize your right to "exhaust all avenues of review" with respect to the Court's decision, but we view attempts to seek further review as frivolous, and we want to ensure that the process moves quickly once "all avenues of review" are exhausted. Our proposal is simple:

- we will provide you with a list of 50 search terms or phrases, and you'll produce the responsive documents in native form; and
- we will reach a stipulation regarding the evidentiary ramifications of your limited production.

With respect to the stipulation, it's necessary because we're agreeing to accept vastly less than what Respondent is actually obligated to produce, and it's virtually certain that we'll never see a significant amount of highly probative information. This is a big "win" for your client, but precisely because we'll have incomplete information, there are a lot of potential evidentiary objections that we can't fairly meet because we won't have the necessary documents. Specifically: we'll need you to stipulate: (1) to the authenticity of your production; (2) that you will not object to the admissibility of any portion of your production on "completeness," "best evidence" or other similar grounds that we could correct if we had everything we're entitled to; and (3) that nothing in your production constitutes inadmissible hearsay (again, because we won't have a complete production, we'll be impaired in our ability to admit statements as adoptive admissions or under hearsay exceptions that require context that we may lack). All of Respondent's other objections would be expressly preserved (including, for instance, Respondent's right to object to the admissibility of its production, or portions thereof, on relevance grounds).

Second, the above proposal should limit Respondent's costs. However, we are not responsible for Respondent's odd decision to store documents in a manner that makes them atypically difficult to search and retrieve. If you're right that Respondent's poor document management processes insulate it from discovery, then no company facing likely litigation would have much incentive to maintain information in an accessible manner. In short, the fact that Respondent made it unusually difficult to search and access its own materials isn't relevant to what Respondent is obligated to produce.

Third, with respect to the Microsoft Access issue, there should be no dispute here. Respondent is obligated to produce information in the manner it stores that information. We don't doubt your current claim that Microsoft Access "generates reports in PDF format," but that's not what Lou told us before. Previously, Lou represented that Respondent "ordinarily maintained" its information in PDF – which isn't the same thing. More important, you're incorrect that "the content of those [PDF] documents does not differ in any respect to the information contained within the database." As you know, the database information (native files) contain metadata, whereas your PDF production to us did not. And most important, the giant 1200-page PDF you sent us is unwieldy and difficult for us to use, whereas we can sort and search through Microsoft Access data easily. We understand that you've requested that documents be exchanged in PDF, and we have converted (and will convert) our production to PDF for you at your request, but we don't understand why you cannot provide us with the Microsoft Access data Respondent actually has.

We would like to discuss these issues at the meet and confer tomorrow at 4 p.m.

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Peter Arhangelsky [mailto:PARhangelsky@emord.com]
Sent: Friday, January 10, 2014 4:35 PM
To: Johnson, Katherine
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Katherine,

I respond here to your email from yesterday and Jonathan's email from January 9th at 2:24pm Eastern, both concerning electronic discovery. We have reviewed the ALJ's Order issued today, and we intend to exhaust all avenues of review with respect to certain portions of that decision. However, as applicable here, Judge Chappell predicated part of his ruling on your willingness to "negotiate search terms to reduce the number of responsive materials..." See ALJ Opp. at 8. The information I provide below should further that purpose.

As for the Microsoft Access database, the program generates reports in PDF format. We were provided with the PDF reports, and those are what we disclosed. Because the PDF files are generated directly from the database program (e.g., printed to PDF), the content of those documents does not differ in any respect to the information contained within the database.

The number 142,078 reflects the total number of entries in ECM's database. For our initial production, ECM screened its notes by selecting only prospective customers. The entries were not screened or retrieved using keywords and, so, those notes reflect the sum total of all material correspondence reported in the database for the entities selected. The balance of the 142,078 entries includes information concerning all of ECM's former customers, inactive customers, and active customers. ECM can provide those records, subject to some agreement that will limit the breadth of information as per the Judge's ruling today. We assume from your representations before the ALJ that you will honor your offer to limit the scope of discovery and, to the extent that assumption is incorrect, we intend to file a motion for reconsideration.

As I mentioned in my prior email, ECM does not sort its archived email files. ECM employees preserve their emails by printing into PDF files at the end of each day (or occasionally after several days). Each single archived PDF thus contains information among various contacts and subjects, i.e., a day's worth of unsorted information. Employees do this for inbound and outbound messages separately and, so, each day results in two archived files. To provide you with the original email files referenced in our recent 1,200 page disclosure, someone must search each archived PDF file (which number in the thousands), and then manually extract every responsive page from the larger PDF documents which also contain unrelated messages. We can generally estimate that of the 142,078 database notations (including files already produced), at least two-thirds to three-quarters of those entries will correlate with email files. So take the 8,540 notes from our recent production as an example. Even if only 5,600 of those notes represent email correspondence, ECM would need to manually search each master PDF file from the days in question to find and then extract each of the 5,600 specific emails. The dates involved spanned from 2006 and 2011, which might therefore involve thousands of archived master PDF files. If these discovery demands continue with ECM's other customers, ECM would be required to search for and manually extract perhaps over one hundred thousand emails.

That task alone could require weeks to complete at substantial cost to ECM, even with a team of staffers assigned. As it stands, ECM's [REDACTED] Rule 3.31(c)(2) specifically guards against the harms from this type of massive discovery burden, particularly when the "burden and expense of the proposed discovery on a party ... outweigh its likely benefit." That seems quite applicable here, given that you can examine the notations, and maybe compare those notes with a sampling of actual email files to verify completeness. To be clear, ECM is not stating that it refuses to provide original email files or attachments. However because the discovery burden is so substantial, ECM needs you to narrow your discovery requests within reasonable limits, as contemplated by the Judge's Order. For instance, ECM can extract and disclose certain files or documents that relate to specific issues or contacts (e.g., through global keyword inquiries). That work remains burdensome, but far less so than a comprehensive production of all files.

ECM will not provide its entire archived folder for your review because those comingled files contain highly sensitive, irrelevant, and privileged information, which would include documents and correspondence between attorneys and personal contacts. The best means to limit ECM's burden is to prepare narrow discovery requests that fit within Rules 3.37(a) and 3.31(c)(2). In this instance, your requests fail under Rule 3.31(c)(2)(i) and (iii) because the burden on ECM is extraordinary when compared to the relative benefit you get from documents that only confirm the notes in ECM's database.

I hope this sheds light on our concerns so that we can develop a joint resolution. Please let us know if you have any questions, or if you would like to discuss.

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

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Thursday, January 09, 2014 1:02 PM
To: Peter Arhangelsky
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Peter:

I appreciate the clarification that this document was not prepared for litigation, and reflects records as maintained in the ordinary course of ECM's business. The reason I described them as "unrepresentative" is because you informed us that the document contains only 8,540 separate notes out of 142,078. We have no idea how you or ECM selected the 8,540 notes that were produced. Do these represent the complete log of all communications with all of ECM's potential customers during that timeframe? If not, what subset does this represent and how was it selected?

We stand by our position that we are entitled to all of the underlying communications with potential customers, not just the summaries of those communications. We are not trying to increase the burden on ECM or you. One way to reduce the burden is for ECM to produce its entire archived database subject to a clawback agreement for privileged or protected documents. If there is no way to partition the archive to give us only the portion that pertains to prospective/non-current customers, then I think we need further discussion to understand how ECM maintains its archived files.

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Peter Arhangelsky [<mailto:PARhangelsky@emord.com>]
Sent: Thursday, January 09, 2014 10:39 AM
To: Johnson, Katherine
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Katherine,

Preliminarily, we note that our December 27th production was an initial disclosure. As we stated in our response, we intend to supplement that production with responsive documents, particularly after the ALJ resolves the pending discovery dispute. The summaries we produced come from ECM's Microsoft Access database, and reflect the system by which ECM logs files. ECM employees are instructed to accurately input all relevant information from verbal and written correspondence into the database. ECM relies on those notations, not the original emails, to log activities and discussions with external parties. The summaries in ECM's database were therefore entered in the ordinary course of business. I am confused by your use of the term "unrepresentative" to describe those entries. Can you explain what you meant before we reply directly on that point? For instance, if you suggest that the summaries were prepared in anticipation of litigation, or for litigation purposes, we can clarify that they were not.

To the extent the original emails exist, production of all such files imposes a considerable burden. Bob Sinclair is essentially the only ECM employee who can perform this task. While ECM logs its correspondence in the notations we produced, it does not sort the original files that are ultimately archived (which are rendered unnecessary to ECM by the summary notations). All original email files are initially transferred to a global correspondence folder where they remain for a short time, and then eventually archived for backup. To produce an email referenced in the notations, someone must manually search all archived folders for keywords that hit on the original file. That process is incredibly time consuming, and would eventually yield volumes of cumulative documents (in the tens of thousands). Production of "all responsive documents" could therefore require weeks of Bob's time at a substantial loss for ECM.

If anything, our initial production evidences the exceptionally overbroad nature of your discovery requests. We have discussed this issue with you before, to wit, the fact that your overbroad requests reach every document in ECM's control. You requested all documents related to "ECM Additives." Part of our pending motion for a protective order seeks to limit the expansive nature of your document requests to a manageable level. We had hoped that our recent production would provide you enough information to narrow your requests, balancing your need for information with ECM's discovery burdens. Your instant request for production of tens of thousands of documents, regardless of their relevance, and at considerable expense to ECM, only supports our motion for a protective order. For instance, rather than select from a subset of the 900+ prospective customers disclosed, or a subset of documents by file type or keyword, you have demanded everything, including emails that have nothing to do with the core issues in controversy. That approach also belies any claim that you would reasonably limit discovery of ECM's existing customers if given complete access.

We are happy to discuss at some point this week. Our position is that we have already sought relief from your document requests and, until the ALJ rules on this pressing issue, your requests that are governed by that motion are unwarranted. If, on the other hand, you can suggest limiting principles designed to reach specific information, we can discuss with our client the feasibility of proceeding. I see no reason why we cannot agree to narrow discovery with respect to the potential customers ECM just disclosed.

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

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Wednesday, January 08, 2014 1:45 PM
To: 'Lou Caputo'; Peter Arhangelsky
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Lou and Peter:

After reviewing the document production ECM-FTC-000648-001859, we understand that these are summaries of communications between individuals at ECM and potential customers. You have requested that we select from this incomplete, and potentially unrepresentative set of information to "ascertain which individual records [Complaint Counsel] finds relevant and about which they desire further information and/or documentation." ECM must produce all responsive documents and make available the actual communications, not just the summaries.

If you think this requires further discussion over the phone, please let me know what your availability is like tomorrow.

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Lou Caputo [<mailto:lcaputo3@gmail.com>]
Sent: Friday, December 27, 2013 4:54 PM
To: Johnson, Katherine; Jillson, Elisa; Cohen, Jonathan
Cc: Jonathan Emord; Peter Arhangelsky
Subject: ECM Response to FTC First Set of Requests for Production of Documents

Dear Katherine,

Please find attached ECM's Responses and Objections to your First Set of Requests for Production of Documents. Attachment A is also included. Attachment A contains material responsive to most all of your requests and is described further in ECM's pleading. Attachment A is over 1200 pages. ECM continues, however, to search for additional materials responsive to your Requests.

I left a voicemail with Jonathan (Cohen) earlier this morning, but have not heard back. I wanted to speak with him about file formatting and his concerns noted in prior emails. The files produced in Attachment A are in PDF, which is how ECM maintains such records in the course of its regular business.

I will be out of the office next week, but Peter is available to discuss how best to resolve file conversion issues.

Please let us know if you have any questions.

Thanks,

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

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Exh. RX-G:2

Peter Arhangelsky

From: Cohen, Jonathan <jcohen2@ftc.gov>
Sent: Friday, January 17, 2014 12:13 PM
To: Peter Arhangelsky; Jonathan Emord; Lou Caputo
Cc: Jillson, Elisa; Johnson, Katherine
Subject: ECM: Document Requests & Other Outstanding Issues
Attachments: Complaint Counsel's Preliminary Witness List.pdf

Counsel,

We served most of the document requests at issue on November 27, and your production is now three weeks overdue (and counting). The Court's January 10 order compelled ECM to produce its customer list – which you did late yesterday. But nothing in the Court's order requires us to accept vastly less than what the FTC's Rules entitle us to. Furthermore, nothing in the Court's order allows you to produce whatever you intend to produce *whenever* convenient for you. We're extremely concerned that the effect of your proposal will be that, whatever you produce, you will produce it shortly before discovery closes. Accordingly, we respectfully decline your proposal for the reasons articulated below, but offer our last, best accommodation, with the sincere hope that you'll accept. As I suspect we've already made clear, we'd obviously rather move forward quickly than have to return to the Court again.

With respect the specifics of your proposal:

1. Customer Contacts – This issue is separate from whether ECM has to comply with our document requests. We received your customer list yesterday evening. We'll let you what subset we intend to contact after we've had an opportunity to review and analyze the list and, potentially, after we've had an opportunity to review and analyze your document production. In all events, we'll give ECM enough time to notify its customers or seek emergency relief from the Court before we contact any customer on the list you produced yesterday evening. Again, however, the customer contacts issue has nothing to do with ECM's obligation to produce its own responsive documents.
2. Temporal Limitation – As you know, our pre-complaint investigation covers the period from January 1, 2008 forward. In the interest of accommodation, we'll incorporate your proposed January 1, 2009 limit into our final proposal.
3. Customer Correspondence – Your proposal is replete with problems; we'll simply note that, even if an “email only” production was satisfactory (and it isn't), you aren't proposing to produce these documents by any particular time. Even if you believe that these are the only documents we're entitled to, it's still the case that they're three weeks overdue (with no end in sight).
4. Scientific, Technical, & Otherwise Responsive Documents – There's some room for negotiation here; we agree that you don't have to produce to us anything you've produced already during the pre-complaint investigation (in fact, you don't even have to negotiate that, we volunteer that you don't have to re-produce anything, with respect to these subjects or otherwise). And keywords may be appropriate for finding responsive scientific, technical and other responsive documents.

Here's our last, best offer, and a bit about why we think you should at least consider it seriously:

- (1) From the outset, accepting this offer would discharge your obligations under all outstanding document requests.
- (2) Subject to the “Enhanced Clawback” agreement described below, you give us the entire MS Access correspondence database (in native form) by January 24. ECM does not need to search its archives for original correspondence. We'll take the summaries. If you want, you can remove from the database anything you believe in

good faith is non-responsive or privileged (in fact, you should have started this process some time ago, and maybe you have).

(3) In light of the fact that we're agreeing to take only summaries, you: (a) stipulate to the authenticity of the documents produced; (b) waive any objection that we reasonably could have met if ECM had produced the original correspondence; and (c) waive any right to use any document from the archives.

(4) You get an "Enhanced Clawback" agreement with respect to the MS Access database. The only reason you've given us as to why you can't produce the database with customer communications is that it might also contain privileged information. Accordingly, we would agree to the following terms, in addition to whatever rights you have under the FTC Rules and other authority: (a) if you discover that you produced anything privileged, ECM is entitled to claw it back immediately (we'll delete it from the database and certify to you that we've done so); (b) if we discover anything that a reasonable attorney might consider privileged, we'll "claw it back" to you immediately, even if its reasonably debatable whether it's privileged or not (again, we'll delete it from the database and certify to you that we've done so); (c) the presence of an arguably privileged document in the database will not constitute a waiver of any sort; (d) we'll store the documents in a manner that limits access to case team members only, as opposed to FTC staff generally; (e) subject to applicable law, we'll destroy the database as soon as possible when this litigation concludes; and (f) we'll consent to having the Court enter this Enhanced Clawback agreement as a stipulated order.

(5) With respect to our requests for scientific or technical information—and every other outstanding document request—we'll give you 50 words, phrases, or Boolean sets of words or phrases to search. No negotiation, no time-consuming back-and-forth (although if you want to add to our list, you're welcome to do so). You search everything ECM has for scientific and technical information, and all other outstanding document requests, and give us the results by the end of the month. You agree that ECM can't use anything it doesn't produce at that time.

(6) Everything above is limited to January 1, 2009 forward – exactly as you've requested.

As I mentioned, we hope you'll accept this proposal. Initially, with respect to the correspondence that's been at the center of this dispute, ECM's burden is—literally—near zero. All ECM has to do is copy its database and send it to us. If ECM needs help uploading the database to an FTP site, we'll ask our technical support staff to help you (at our expense). Depending on how smoothly things go, we're talking about an hour or two of effort and potentially no expense to ECM. Even at worst, the time and expense to ECM will be negligible. We'll do all the hard work on our end. Mr. Sinclair can walk away knowing that he got a much better deal than the law entitles him to, or than most other litigants receive. Furthermore, ECM gets the date restriction it wants. ECM gets to avoid searching its archives for correspondence. And ECM gets to limit its production on all other outstanding requests to whatever the 50 search terms hit—which means we'll never see potentially tens of thousands of responsive documents.

Although we believe that both sides discharged their "meet and confer" obligation through Tuesday's lengthy call about the issue, we're happy to speak with you again at 10:00 AM Tuesday. If we're unable to reach an agreement by that time, we'll promptly seek relief.

There are three other issues. First, ECM has not responded to our interrogatory seeking annual revenues per customer (or distributor), although ECM's response was due several weeks ago. On January 10, the Court held that ECM "has failed to demonstrate that ECM's revenues by customer should not be disclosed in discovery." Order at 8. There's no point to moving to compel this same information a second time, so we're really out of options. Although we will meet and confer with you about this on Tuesday morning, we assume you won't consent to the imposition of sanctions against ECM, so we anticipate seeking such sanctions on Tuesday afternoon. Obviously, if you have a change of heart about this, please let us know.

Second, with respect to your proposed redactions, we have no objection, subject to your agreement that we're not waiving or limiting any right to object to any improper redactions in the future. Assuming we're in agreement, please go ahead and inform the Court accordingly.

Third, after we noticed ECM's corporate deposition on January 24, you objected to that date. On our call Tuesday, we were close to an agreement to move the deposition back almost a month, to February 18. You told us that you would confirm that date with Mr. Sinclair, ECM's designee, and get back to us Wednesday, but it's Friday afternoon, and we haven't heard from you. Although our February 18 offer remains open, the January 24 deposition notice remains effective.

Thanks,

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

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

_____)
In the Matter of)

ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Envioplastics International)
_____)

Docket No. 9358

**COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT ECM BIOFILMS, INC.'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 3.37 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Complaint Counsel hereby submits the following objections and responses to Respondent ECM Biofilms, Inc.'s ("ECM's") First Set of Requests for Production of Documents and Things.

GENERAL OBJECTIONS

1. Complaint Counsel reserves the right to assert additional objections to production of information or documents as appropriate and to supplement these objections and responses. As to each request where Complaint Counsel has stated that it will produce or make responsive documents available for inspection, such a statement does not imply or represent that responsive documents are known to exist or do, in fact, exist. Complaint Counsel objects to the Document Requests to the extent they seek information that is not relevant to the subject matter of the litigation and/or not reasonably calculated to lead to the discovery of relevant information.

2. Complaint Counsel's willingness to provide information or documents notwithstanding the objectionable nature of the Document Request shall not be construed as (a) an acknowledgment or admission that the material is relevant; (b) a waiver of the General

Objections or the Objections asserted in response to specific document requests; or (c) an agreement that requests for similar information will be treated in a similar manner.

3. Complaint Counsel objects to each document request to the extent that it calls for information or the production of any document that is protected from disclosure by the attorney-client privilege, the attorney work-product privilege, the deliberative process privilege, the law enforcement privilege, the investigative privilege, the government informant privilege, the non-testifying expert privilege, the joint prosecution privilege, the common interest doctrine, that is exempt from disclosure pursuant to confidentiality provisions set forth in the FTC Act, that is protected from disclosure by the privilege for information given to the FTC on a Pledge of Confidentiality, that is protected from disclosure under principles of financial privacy, that is subject to a protective order from another litigation, or that is subject to any other applicable legal protection or privilege. The inadvertent production of any privileged documents shall not be deemed a waiver of any applicable privilege with respect to that document or any other document or information.

4. Complaint Counsel objects to each document request to the extent that it calls for materials generated and transmitted between Complaint Counsel and non-testifying Federal Trade Commission employees, as outside the scope of discovery pursuant to Rule 3.31(c)(2).

5. Complaint Counsel objects to each document request to the extent it seeks information that is not relevant to the subject matter of the litigation and/or not reasonably calculated to lead to the discovery of information relevant to the allegations of the complaint, to the proposed relief, or to Respondent's defenses.

6. Complaint Counsel objects to each document request to the extent that it is overly broad, unduly burdensome, vague, and ambiguous.

7. Complaint Counsel objects to each document request to the extent that it seeks documents that are not in the possession, custody, or control of Complaint Counsel.

8. Complaint Counsel will not produce documents responsive to this request that Respondent previously has produced to Complaint Counsel at any point during the investigation or litigation in this matter.

9. Complaint Counsel will not produce documents responsive to this request that have been provided to Respondent previously.

10. This response addresses only documents collected or reviewed in the course of the investigation and prosecution of this case and that are in the possession, custody or control of the FTC Bureau of Consumer Protection. *See* FTC Rule 3.31(c)(2). Complaint Counsel objects to the Requests to the extent they seek documents outside this scope, and such documents will not be produced.

11. Each of the foregoing General Objections is incorporated in each of the Responses hereinafter set forth. Subject to and without waiving any of such objections, Complaint Counsel responds as follows:

OBJECTIONS AND RESPONSES TO REQUESTS

Request for Production 1: Provide all documents that concern whether plastics in general and ECM Plastics in particular will break down and decompose into elements found in nature after customary disposal or in a landfill.

Response: Complaint Counsel objects to Request for Production 1 on the grounds that a request for documents concerning plastics in general is overly broad, vague, and ambiguous. Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 2: Provide all documents, whether prepared by or for the Commission or any other entity, concerning consumer perception, comprehension, or recall (including, but not limited to, copy tests, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, and communication tests) of plastics biodegradability; biodegradability in general; landfill composition; or conditions of customary waste disposal.

Response: Complaint Counsel objects to Request for Production 2 on the grounds that it is overly broad, vague, and ambiguous. Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 3: Provide all documents that support or call into question your conclusion that ECM's biodegradable claims for degradation are false.

Response: Complaint Counsel objects to Request for Production 3 on the grounds that the request is overly broad, vague, and ambiguous. Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 4: Provide all documents that support or call into question your conclusion that consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within one year after customary disposal.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 5: Provide all documents relating to your contention that express or implied representations made in or implied by ECM BioFilm's written advertising or promotional materials are false or misleading.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 6: Provide all correspondence between FTC and ASTM and ASTM present and past members, officers, directors, or agents.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 7: Provide all documents pertaining to the ASTM standards which concern plastics biodegradability, or concern ASTM policies, membership, or revisions to standards.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 8: Provide all documents that relate to your contention that end-consumers (as opposed to ECM's trade customers) view, understand, or rely on ECM's written advertising materials.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 9: Provide all documents relating to any investigation conducted by you or on your behalf relating to any advertising claims or representations concerning the ECM MasterBatch Pellets, or any other ECM plastics additive.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 10: Produce all documents concerning your contention that landfills are generally anaerobic environments that lack oxygen and that restrict the amount of liquid infiltration or moisture content.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 11: Provide all documents concerning plastics chemistry, formation, polymerization, formulation, mineralization, enzymatic degradation, or depolymerization in biodegradable and non-biodegradable polymers.

Response: Complaint Counsel objects to Request for Production 11 on the grounds that it is overly broad, vague, and ambiguous. Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 12: Provide all documents relating to your contention that ECM's tests were not designed to support its claims, and that the data from ECM's testing is invalid or cannot support reliable conclusions.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 13: Produce all documents concerning the period of time under which conventional plastics generally biodegrade, including documents supporting your contention that plastics will normally require hundreds of thousands of years to biodegrade.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 14: Produce all documents concerning your definition of “competent and reliable” scientific evidence as that definition concerns biodegradation claims for plastics in general and ECM’s express and/or implied claims challenged by the FTC.

Response: Complaint Counsel objects to Request for Production 14 on the grounds that it is overly broad, vague, and ambiguous. Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 15: Provide all documents relating to any advertisement or promotional material for the ECM MasterBatch pellets, other than documents produced by Respondents in pre-complaint disclosures or discovery.

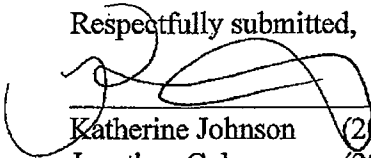
Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Request for Production 16: Produce all documents identified in any answer to an Interrogatory propounded by ECM or on which you rely in answering any Interrogatory propounded by ECM.

Response: Subject to and without waiving the foregoing objections, Complaint Counsel will produce responsive, non-privileged documents.

Dated: January 2, 2014

Respectfully submitted,



Katherine Johnson (202) 326-2185
Jonathan Cohen (202) 326-2551
Elisa K. Jillson (202) 326-3001
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop M-8102B
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2014, I caused a true and correct copy of the paper original of the foregoing *Complaint Counsel's Response to Respondent ECM Biofilms, Inc.'s First Set of Requests for Production of Documents or Things* to be served as follows:

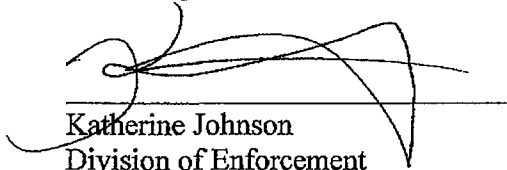
One electronic copy to **Counsel for the Respondent:**

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.


Katherine Johnson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW, M-8102B
Washington, DC 20580
Telephone: (202) 326-2185
Facsimile: (202) 326-2558
Email: kjohnson3@ftc.gov