

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

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

**COMPLAINT COUNSEL’S MOTION TO CERTIFY SCHEDULING ISSUES TO THE
COMMISSION AND REQUEST FOR INTERIM RELIEF**

Due to Respondent’s calculated foot-dragging, Complaint Counsel cannot develop the record properly in the limited time remaining before trial. Therefore, Complaint Counsel has no choice but to ask the Court to: (1) certify to the Commission whether, pursuant to Rule 3.21(c)(1), it should move the evidentiary hearing back three months to allow Complaint Counsel the time minimally necessary to complete the discovery that a full and fair record requires; (2) issue findings and recommendations supporting this change; and (3) pursuant to Rule 3.21(c)(2), reset certain discovery deadlines to provide interim relief.

As of this filing, Respondent produced documents only a few days ago that it should have produced in December, and which it promised to produce in February. Additionally, as the Court correctly noted, “a ‘key issue’ in this case is the nature of Respondent’s representations to its customers.” Order (Mar. 13, 2014) at 5 (quoting Order (Jan. 10, 2014)). After overcoming two motions to dramatically limit customer subpoenas, we can finally serve customers today (March 18),¹ which leaves barely more than two weeks to receive responses, review them, schedule depositions as necessary, take those depositions, and otherwise complete fact discovery. This is impossible—which is precisely what Respondent intended. Furthermore, both sides

¹ Although the Court issued its order on Thursday, consistent with our agreement **in early December**, we afforded Respondent a brief period so that it could contact its customers first. See Complaint Counsel Exhibit (“CCX”) A ¶ 2.

would provide the fruits of this discovery to their experts, who need time to analyze it. Again, this cannot happen without resetting the trial.²

Finally, there is a significant public policy issue at stake. The Court's ability (and, ultimately, the Commission's ability) to adjudicate important matters correctly through Part III depends on the development of a full record. If the Court (and the Commission) allow ECM's deliberate delays to affect this proceeding's outcome, then every future respondent will follow ECM's roadmap.

BACKGROUND

A. Dilatory Tactics

From the very beginning, ECM failed to abide by the Commission's discovery rules, thereby effectively thwarting our ability to prosecute this case expeditiously. Although its customers have critical knowledge regarding ECM's representations to them, ECM refused to provide a customer list as part of its mandatory initial disclosures.³ ECM then refused to provide its customer list in response to interrogatories, and instead sought a protective order to limit severely Complaint Counsel's ability to contact its customers.⁴

After the Court rejected ECM's motion,⁵ ECM produced an alleged customer list—but one it knew was inadequate. Given ECM's "sophisticated customer" defense, Complaint Counsel sought discovery from a representative sample of customers, including those who purchased product at different times and in different amounts. Despite the fact that the Court

² As discussed further below, simultaneously conducting fact discovery, expert discovery, and trial preparation is impossible. Expert discovery depends on fact discovery, and most trial preparation cannot begin until discovery closes.

³ See Rule 3.31(b)(1); CCX-A:1.

⁴ See CCX-A ¶ 3, ECM Mem. (Dec. 13, 2013).

⁵ See Order (Jan. 10, 2014) at 6 ("Respondent's assertion that disclosure of ECM's customer list will inevitably result in a devastating loss of business is not sufficiently supported by the facts presented."). Additionally, ECM argued that its "sales representations . . . which are at issue in this proceeding, do not vary by customer." *Id.* at 4. ECM abandoned this position only after its CEO admitted that, its sales representations do, in fact, vary based on what customers ask. See Complaint Counsel ("CC") Mem. (Feb. 28, 2014) at 3.

concluded already that ECM's objections to producing its revenues per customer were "unpersuasive,"⁶ ECM's customer list omitted this critical information.⁷

After Complaint Counsel asked for this information again, ECM produced a list of revenues from numbered entities, but without any way to connect the numbers to specific customers.⁸ ECM's gimmick forced Complaint Counsel to seek relief from the Court, affording ECM an opportunity to relitigate its objections to producing revenue information.⁹ ECM lost, but continued to play the same game. Specifically, ECM filed a "second motion for a protective order directed at limiting Complaint Counsel's contact with ECM's customers."¹⁰

Unsurprisingly, ECM lost again, but not before delaying discovery by approximately another month.¹¹ Even now, ECM has kept its customer information opaque. On different occasions, ECM has identified three different numbers of "current" customers,¹² which slowed our ability to develop a representative sample.

Worse, ECM's approach to the customer list looks generous when compared with its document production tactics. Complaint Counsel served discovery requests on November 27, three business days after discovery began, and ECM should have produced documents 30 days later.¹³ In the interim, and in early January, we attempted to negotiate ways to narrow our

⁶ Order (Jan. 10, 2014) at 7.

⁷ CCX-A ¶ 4.

⁸ See Order (Feb. 4, 2014) at 2 ("The Revenues List, however, does not identify revenue by customer name, and the Customer List does not contain customer numbers. Thus, there is no way to tie the revenues figures disclosed to particular identified customers.").

⁹ See *id.* at 4 ("Respondent's attempt in its Opposition to the instant Motion to 'relitigate' the discoverability of customer-related revenue information is rejected.").

¹⁰ Order (Mar. 13, 2014) at 2. At various times, ECM offered to allow customer discovery in severely limited fashion, and always with the key restriction that Complaint Counsel not communicate with those customers that represent the overwhelming majority of its business. CCX-A ¶ 5.

¹¹ *Id.* at ¶ 6.

¹² The "customer list" ECM initially produced had one number of current customers. ECM's CEO later submitted a declaration providing a substantially different number. ECM's counsel subsequently provided a third number. See CC Mem. (Feb. 28, 2014) at 2-3.

¹³ See Rule 3.37(b); CCX-A ¶ 7.

requests and thereby expedite discovery, but ECM provided vague and sometimes contradictory information about how it maintained its documents (which impeded the dialogue).¹⁴

Remarkably, ECM also asserted that only its CEO was qualified to review ECM's documents and cull privileged material, and because he had to review (personally) every document produced, even a rolling production would take until mid-March to complete.¹⁵ Unwilling to accept a rolling production that would conclude less than three weeks before fact discovery closed (and that was subject to other limits as well),¹⁶ Complaint Counsel moved to compel on January 23.

After the filing, ECM ultimately agreed to terms and a production schedule that was roughly equivalent to the relief the pending motion sought. Complaint Counsel agreed to withdraw its motion, which we did promptly on February 7.¹⁷ In exchange, ECM's counsel provided us with a signed letter on firm letterhead committing ECM to complete its production no later than "February 21."¹⁸

On February 20, thirteen days after we withdrew our motion, counsel informed us that they would breach their agreement.¹⁹ This disclosure was provided late in the day on February 20, after Complaint Counsel had spent several days at ECM's offices taking depositions.²⁰ ECM

¹⁴ *Id.* at ¶ 8.

¹⁵ *Id.* at ¶ 9. At various times, ECM attributed this bizarre position to different alleged concerns: (1) only the CEO, an attorney with a lapsed bar license, could make privilege determinations, apparently due to his unique familiarity with the material; (2) third parties (such as contract attorneys or litigation support firms) cannot be trusted with ECM's proprietary information; and (3) the alleged cost. *See id.* at ¶ 10. With respect to cost, we note that—despite its periodic claims of poverty—ECM has engaged five experts, *see* CCX-A:2, along with its three outside attorneys.

¹⁶ There was extensive dialogue between the parties, and multiple points of disagreement. Most significantly, ECM sought to produce summaries of its communications with customers, rather than the communications themselves. CCX-A ¶ 11.

¹⁷ *See* CC's Withdrawal of Its Motion To Compel (Feb. 7, 2014).

¹⁸ CCX-A:3 (ECM's counsel's emphasis).

¹⁹ CCX-A ¶ 12.

²⁰ *Id.* at ¶ 13. The deposition of ECM's CEO was scheduled to begin at 9:00 AM, *see* CCX-A:4, but he and his attorneys arrived three hours late, CCX-A ¶ 14.

stated that it would not complete its production before March 14 (and that, somehow, it did not realize it would breach its agreement until hours before the deadline). ECM ultimately finished producing documents by March 14 (albeit under Court order).²¹

The production itself almost certainly violates Rule 3.37(c)(2), which, as relevant here, required ECM to produce electronic data “in a form in which it is ordinarily maintained or a reasonably usable form.” Contrary to this rule:

- ECM disclosed emails and attachments to those emails separately. By way of example, ECM sent many customers and potential customers logos, certificates, flyers, brochures and other marketing materials via email attachments.²² ECM produced emails to particular customers, and various apparent email attachments—but with no easy way to determine which email recipients received which attachments.²³ This is severely prejudicial, because it impedes our ability to determine how and when ECM provided customers with the “means and instrumentalities” (*i.e.*, certificates and logos) to deceive consumers. Furthermore, producing separate sets of emails and attachments is not producing data in a “reasonably usable form,” nor does it seem likely that ECM “ordinarily maintains” all emails separately from their attachments.
- Rather than produce documents in Concordance-ready load files (or another standard litigation format), ECM produced documents in giant PDFs.²⁴ For instance, ECM produced certain documents in one 20,000-page PDF, which is too large to search easily, and which will require an extensive (and very time-consuming) effort by litigation support to refashion into searchable, database-loadable pieces.²⁵ It is unlikely that ECM actually maintains its data this way, which is anything but “reasonably usable.”
- ECM failed to produce the overwhelming majority of documents in native format, which makes searching them significantly more difficult.²⁶ ECM maintains a substantial portion of its documents in an MS Access database

²¹ See Order (Mar. 11, 2014).

²² CCX-A ¶ 15.

²³ See, e.g., CCX-A:5 (example of an email produced without attachments that apparently contained representations); CCX-A:6 (Complaint’s Counsel’s surmise regarding the probable attachments, found elsewhere ECM’s production). Because ECM failed to produce many documents before its employees’ depositions, we could not ask them about many of the attachments potentially at issue.

²⁴ CCX-A at ¶ 16.

²⁵ *Id.* at ¶ 17.

²⁶ *Id.* at ¶ 18.

(which contains native material),²⁷ but produced almost everything in PDF form—despite our request that we receive documents in native format.²⁸

- Native files contain metadata, but ECM produced PDF documents sanitized or scrubbed (*i.e.*, with metadata removed).²⁹ This makes verifying when certain documents were created (or accessed) difficult or impossible.³⁰ Whether “in a form in which it is ordinarily maintained or a reasonably usable form,” the rules require ECM to produce its metadata (which Complaint Counsel requested).³¹

Furthermore, ECM’s rolling production disclosed documents in chronological order, with the most recent (and, thus, likely most probative) documents last.³²

Finally, ECM slowed the process in other ways. ECM designated essentially everything it produced as confidential,³³ thereby requiring more cumbersome treatment of documents and filings (indeed, ECM sought to keep its own filings confidential even when they plainly are not).³⁴ ECM also forced Complaint Counsel to address a frivolous sanctions motion alleging that

²⁷ Indeed, the failure to preserve documents in native format (and to preserve related metadata) would raise other questions, as litigation with the FTC has been reasonably foreseeable since August 30, 2011, CCX-A:7, when the FTC disclosed its investigation of ECM. *See John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (“As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI [Electronically Stored Information], when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.”); *see also Clarke v. Washington Metro. Area Transit Auth.*, 904 F. Supp. 2d 11, 19-20 (D.D.C. 2012) (“Once a party anticipates that it will be subject to litigation, the party has a duty to preserve any evidence that may be potentially relevant.”) (citing *Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995)).

²⁸ CCX-A ¶ 19. Although ECM refused to provide documents in the format we requested, Complaint Counsel responded to ECM’s document requests in the format it requested. *Id.* at ¶ 20. We ultimately agreed to accept documents from the MS Access database in PDF format as part of ECM’s offer that induced us to withdraw our motion to compel by promising the documents sooner, *see* CCX-A:3, but, as noted *supra*, at 4, ECM breached that agreement.

²⁹ CCX-A ¶ 21.

³⁰ CCX-A ¶ 22.

³¹ CCX-A:8 at 1.

³² CCX-A ¶ 23. This is not a minor point because ECM changed its key qualified claim when the Commission revised the *Green Guides* in October, 2012, and again almost a year later, right after the Commission issued the Complaint. *Id.* at ¶ 24. Thus, documents prepared over the past eighteen months address ECM’s current claims more directly than earlier-prepared material ECM disclosed in January and February. *Id.* at ¶ 25.

³³ *Id.* at ¶ 26.

³⁴ *See, e.g.*, Order (Jan. 14, 2014) at 4 (“Respondent seeks to shield from disclosure the very fact that Complaint Counsel has asked for Respondent’s customer list and the fact that Respondent has refused to provide the names of its customers. These facts do not constitute ‘confidential information.’”).

Complaint Counsel improperly failed to turn over a document received from a third party less than two business days earlier.³⁵

B. The Existing Schedule

As relevant here, the deadline to serve subpoenas expired on February 28, about two weeks before (on March 13) Complaint Counsel overcame ECM's second motion to limit these subpoenas.³⁶ As the schedule presently stands, practically speaking,³⁷ we cannot depose any ECM customers because fact discovery closes on April 3.³⁸ Other upcoming deadlines we likely cannot meet because of ECM's delays include Complaint Counsel's expert reports, due April 16. Additionally, on April 24, we must provide our final proposed witness and exhibit lists (with deposition designations), the basis for admissibility of each proposed exhibit, and a summary of the testimony of each witness.³⁹ Expert discovery closes a few weeks later, on May 16, and trial begins on June 18.⁴⁰

LEGAL STANDARD

Under Rule 3.21(c), given good cause, the Commission may reset the trial date and the Court may reset scheduling deadlines. "Good cause exists when a deadline in a scheduling order 'cannot be met despite the diligence of the party seeking the extension.'" *In the Matter of*

³⁵ See CC Opp. (March 10, 2014). ECM also urged sanctions in part because one particular attorney involved failed to show sufficient "remorse." ECM Filing (March 11, 2014) at 1.

³⁶ See Scheduling Order (Nov. 21, 2013).

³⁷ In theory, we could provide customers with arguably inadequate notice of their depositions, hope that they do not move to quash their subpoenas, and depose them without the benefit of their document subpoena returns. Such an alternative is unfair to Complaint Counsel, to the customers, and to the process itself.

³⁸ At various times, ECM offered to move discovery deadlines if we refrained from serving customers while the Court evaluated ECM's successive motions to block this discovery. As a courtesy, we obliged. Unfortunately, however, given ECM's breach of its written, signed agreement to produce documents by a date certain, we must file this motion no matter what accommodations ECM suggests it will accept voluntarily. Furthermore, only the Commission can move the trial date. See Rule 3.21(c)(1).

³⁹ See Scheduling Order (Nov. 21, 2013).

⁴⁰ See *id.*

Gemtronics, Inc., No. 9330, 2009 FTC LEXIS 193, *1 (Feb. 17, 2009) (quoting *In re Chi. Bridge & Iron Co.*, 2002 FTC LEXIS 69, *2 (2002)); see also *In the Matter of R.J. Reynolds Tobacco Co.*, No. 9285, 1998 FTC LEXIS 180, *5 (Sept. 30, 1998) (denying request for extension of trial date in part because an “extension of more than ten months had already [been] granted”); *In the Matter of Automotive Breakthrough Sciences, Inc.*, Nos. 9275-77, 1996 FTC LEXIS 410, *1-*3 (Sept. 11, 1996) (denying third request to reset the trial “[a]fter two extensions of the trial date” had been granted already, and because the party seeking a third extension faced a “predicament wholly of its own making”).

ARGUMENT

For two reasons, there is good cause to grant the relief requested. First, although there is no requirement that a party act intentionally to justify resetting the trial, the record here establishes deliberate delay. Second, even if Respondent were blameless (which it is not), the existing schedule is unworkable and contrary to the public interest.

I. The Record Establishes Intentional Delay.

A. Intentional Delay Is the Only Reasonable Inference.

Although one might fairly attribute some specific discovery issues to inadvertence or circumstances beyond ECM’s control, the totality of the record makes willful delay the only reasonable way to interpret ECM’s overall conduct. First, breaching a written, signed agreement to produce documents by a date certain is hard to explain, but ECM’s communication regarding this issue is even more important. Specifically, as explained *supra*, at 4, ECM waited until hours before the deadline to disclose that it would breach its agreement.⁴¹ This late disclosure prejudiced Complaint Counsel (by delaying our ability to seek relief), and it strongly implies that this incident was not a good faith miscalculation.

⁴¹ ECM’s counsel executed the agreement and had a duty to ascertain much earlier whether his client was likely to comply. It strains credulity to accept that ECM (or its lawyers) only became aware hours before the production was due that ECM needed three more weeks to finish.

Second, the notion that ECM's CEO needed to review every potentially responsive document personally is absurd. Maybe he reviewed them all (we have no idea),⁴² but he could have asked his attorneys for help, or engaged a litigation support firm.⁴³ ECM cannot excuse its months-late production by insisting upon a bizarre document review process that turns entirely on one individual.

Third, producing a customer list with only customer names (no numbers) and a revenue list with only customer numbers (no names) was bad faith,⁴⁴ not a sincere attempt to comply with the Court's ruling that ECM disclose "revenues by customer."⁴⁵ As the Court observed, ECM could have drafted a response to an outstanding interrogatory that correlated the two lists,⁴⁶ or produced the information in some other useful form. Its failure to do so is telling.

Finally, the fact that ECM filed a second motion to limit our communications with customers further reveals ECM's motive. ECM knows the critical importance of discovery from its customers (indeed, the Court held that "a key issue in this case is the nature of Respondent's representations to its customers").⁴⁷ Even so, ECM managed to block this discovery for nearly

⁴² Although there is reason to doubt the CEO's representations, even when made under oath. *See, e.g.*, CC Mem. (Feb. 28, 2014) at 3-4 (noting substantial discrepancy between CEO's declaration and deposition testimony); CC Mem. (Dec. 30, 2013) at 1, 5-6 (noting substantial discrepancy between CEO's declaration submitted in support of a motion and his statement to the media).

⁴³ As noted above, ECM can afford three attorneys and five experts. *See supra* at 4 n.15. Additionally, financial information ECM submitted debunks any notion that ECM lacked the resources to hire anyone to help review documents. *See* CC Mem. (Feb. 28, 2014) at 6 n.6.

⁴⁴ It is beyond dispute that "[l]itigants are expected to act in good faith in complying with their discovery obligations[.]" *Johnson v. J.B. Hunt Transp., Inc.*, 280 F.3d 1125, 1132 (7th Cir. 2002); *see also McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990) ("Counsel, as officers of the court, have an obligation to assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests."); *Akins v. State Farm Mut. Auto. Ins. Co.*, No. 10-CV-12755, 2011 U.S. Dist. LEXIS 82806, *3 (E.D. Mich. July 28, 2011) ("The parties have a duty to discharge their discovery obligations in good faith."); *New Medium Techs. LLC v. Barco, NV*, 242 F.R.D. 460, 464 (N.D. Ill. 2007) ("[L]awyers have a duty to act in good faith in complying with their discovery obligations and to cooperate with and facilitate forthright discovery.").

⁴⁵ *See supra* at 2-3.

⁴⁶ *See* Order (Feb. 4, 2014) at 5 ("Complaint Counsel has demonstrated that Respondent failed to fulfill its obligation to answer fully Complaint Counsel's Interrogatory 2.").

⁴⁷ Order (Mar. 13, 2014) at 5 (quotation omitted).

four months (specifically, from November 25—when its initial disclosures should have included a customer list—until March 13, when the Court dispatched ECM’s second motion on the issue). Whether these facts are viewed in isolation or along with the full history recounted above, they lead inexorably to the conclusion that ECM intentionally delayed discovery.

B. ECM’s Likely Counterarguments Are Meritless.

Complaint Counsel expects ECM to assert several baseless arguments in response. Initially, ECM will highlight the large volume of information it produced. In fairness, ECM ultimately produced a significant number of documents. ECM also eventually produced a usable customer list, including revenues by customer. The issue, however, is not how many documents ECM produced, but **when** they were produced. Likewise, the issue is not whether ECM disclosed other critical information, but when. That ECM eventually complied is irrelevant to whether it created the prejudicial scheduling bind that now exists—and it did.

Additionally, ECM may ask for sympathy or forgiveness (or both) as a small company. Small businesses, however, are not exempt from the Commission’s rules or the discovery obligations they create. Law and regulation determine a firm’s obligations, not its size. Furthermore, even if a certain businesses should receive somewhat greater leeway in some respects, that does not justify the extraordinary delay ECM caused. Nor should Complaint Counsel (or the process) be prejudiced because ECM refused to follow the Commission’s rules or its own attorneys’ agreement.

Last, ECM may attempt to *de facto* moot this motion by purporting to agree to at least some of the relief sought. This is problematic in several respects. First, only the Commission can move a trial date.⁴⁸ Second, given ECM’s prior breach of its counsel’s agreement, it is unreasonable to ask us to rely on any commitments ECM or its counsel make. Third, as discussed below, even if the Court or the Commission force ECM to accept a modified schedule

⁴⁸ See Rule § 3.21(c)(1).

that involves simultaneous fact discovery, expert discovery, and trial preparation, merging these tasks is impossible because the second cannot be completed before the first, and so forth.⁴⁹

II. The Existing Schedule Is Unworkable and Contrary to the Public Interest.

A. The Existing Schedule Is Impossible To Meet.

No amount of effort on nights, weekends and holidays can make the existing schedule work because, as it now stands, the schedule is impossible (unless neither party takes any additional fact discovery, including any discovery from ECM's customers). For instance:

- Scheduling customer depositions before obtaining responses to document subpoenas is irresponsible, and—assuming both extensive cooperation from third parties and no motions to quash—we can expect responses to document subpoenas in early April.⁵⁰ But fact discovery closes on April 3.⁵¹
- Even if we noticed the depositions of a selection of ECM's customers now, without the benefit of potentially critical documents, it is unlikely any significant number of depositions could occur before April 3, and even those that did occur arguably would place an unreasonable burden on third party customers with respect to scheduling and preparation.
- Even if we managed to take some modicum of discovery from ECM's customers by April 3, we cannot analyze that information, provide it to our experts, and have them complete their own analyses before their reports are due less than two weeks later (on April 16).⁵²
- Even if we managed to take a meaningful amount of discovery from ECM's customers by April 3 (which we cannot), and even if our experts could do everything necessary by April 16 (which they cannot), we cannot (1) prepare a final witness list; (2) prepare a final exhibit list; (3) prepare deposition designations; (4) provide the basis for admissibility for each proposed exhibit; and (5) summarize the testimony of each potential witness in the eight days between April 16 and April 24, when these five items are due.⁵³

Most important, it solves nothing to reshuffle deadlines so that fact discovery, expert discovery, and trial preparation occur simultaneously. Although it is commonplace for small amounts of discovery to take place past deadlines to address isolated situations, this circumstance

⁴⁹ See *infra* at 12.

⁵⁰ The subpoenas have a March 31 return date, but it is likely that most companies will request at least a short extension.

⁵¹ Scheduling Order (Nov. 21, 2013).

⁵² See *id.*

⁵³ See *id.*

is dramatically different. What lies ahead is conducting the majority (and the most important part) of fact discovery, all of expert discovery, and all trial preparation simultaneously. Because effective trial preparation cannot occur before all discovery closes, and because expert analyses depend on information learned through fact discovery, these three phases simply cannot occur at once. In short, we cannot meet the existing deadlines even with extraordinary effort, and deferring those deadlines solves little unless the Commission also moves the trial date.

B. The Existing Schedule Is Contrary to the Public Interest.

The public interest requires a record sufficiently developed so that the Court, and ultimately the Commission, can apply their expertise in a manner that reaches the correct result. Unfortunately, failing to reset the trial date ensures that critical documents will never be obtained (let alone reviewed), important depositions will never be taken, and experts will opine without the benefit of important fact discovery. The Court and the Commission may have to decide this case with little or no evidence regarding the customers who received ECM's representations, and deployed the means and instrumentalities we allege ECM provided to deceive consumers. This is simply not how Part III litigation should function.

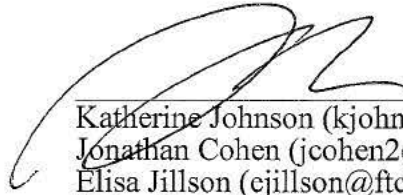
Equally important, if ECM successfully contorts the process through deliberate delay, future Part III respondents will follow ECM's precedent. Neither the Court nor the Commission should allow this to occur.

CONCLUSION

For the reasons explained above, we ask the Court to: (1) certify to the Commission whether it should move the evidentiary hearing back three months to allow Complaint Counsel the time minimally necessary to complete discovery; (2) issue findings and recommendations supporting that action; and (3) reset certain discovery deadlines to provide interim relief. With respect to interim relief in particular, we ask the Court to extend all deadlines from February 28 through April 30 by 45 days. This should give the Court and the Commission sufficient time to act, while enabling the parties to continue conducting fact discovery expeditiously.

Dated: March 18, 2014

Respectfully submitted,



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Elisa Jillson (ejillson@ftc.gov)
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Fax: 202-326-2551

MEET AND CONFER CERTIFICATION

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Motion To Certify Scheduling Issues to the Commission and Request for Interim Relief. On March 18, 2014, Complaint Counsel (Katherine Johnson, Jonathan Cohen, and Elisa Jillson) and Respondent's Counsel (Jonathan W. Emord and Lou Caputo) communicated by telephone regarding the issues this motion raises, but were unable to reach an agreement. Respondent's counsel indicated that they might agree to certain aspects of the relief sought herein and, if so, they would identify those points of agreement in ECM's response.

Dated: March 18, 2014

Respectfully submitted,



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Phone: 202-326-2185; -2551; -3001
Fax: 202-326-2551

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy through the FTC's e-filing system, and one electronic courtesy copy to the **Office of the Secretary:**

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

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

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

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

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

Date: March 18, 2014


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**EXHIBITS IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION TO CERTIFY SCHEDULING ISSUES TO THE
COMMISSION AND REQUEST FOR INTERIM RELIEF**

Complaint Counsel Exhibit A

CCX-A

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BEFORE THE FEDERAL TRADE COMMISSION**

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| ECM BioFilms, Inc., |) | Docket No. 9358 |
| a corporation, also d/b/a |) | |
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**DECLARATION OF JONATHAN COHEN IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION TO CERTIFY SCHEDULING ISSUES TO THE
COMMISSION AND REQUEST FOR INTERIM RELIEF**

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

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

2. Consistent with our agreement in early December, we afforded Respondent a brief period so that it could contact its customers first.

3. ECM refused to provide its customer list in response to interrogatories, and instead sought a protective order to limit severely Complaint Counsel's ability to contact its customers.

4. ECM's customer list omitted revenues by customer.

5. At various times, ECM offered to allow customer discovery in severely limited fashion, and always with the key restriction that Complaint Counsel not communicate with those customers that represent the overwhelming majority of its business.

6. ECM lost its second motion to limit Complaint Counsel's ability to contact customers, but ECM's second motion delayed the process by approximately one month.

7. Complaint Counsel served discovery on November 27, three business days after discovery began.

8. After serving discovery on November 27, and through early January, we attempted to negotiate ways to narrow our requests and thereby expedite discovery, but ECM provided vague and sometimes contradictory information about how it maintained its documents (which impeded the dialogue).

9. ECM asserted that only its CEO was qualified to review ECM's documents and cull privileged material, and because he had to review (personally) every document produced, even a rolling production would take until mid-March to complete.

10. At various times, ECM attributed this position to different alleged concerns: (1) only the CEO, an attorney with a lapsed bar license, could make privilege determinations, apparently due to his unique familiarity with the material; (2) third parties (such as contract attorneys or litigation support firms) cannot be trusted with ECM's proprietary information; and (3) the alleged cost.

11. With respect to ECM's document production, there was extensive dialogue between the parties, and multiple points of disagreement. Most significantly, ECM sought to produce summaries of its communications with customers, rather than the communications themselves.

12. On February 20, thirteen days after we withdrew our motion, counsel informed us that they would breach their agreement.

13. This disclosure was provided late in the day on February 20, after Complaint Counsel had spent several days at ECM's offices taking depositions.

14. The deposition of ECM's CEO was scheduled to begin at 9:00 AM, but he and his attorneys arrived three hours late.

15. ECM sent many customers and potential customers logos, certificates, flyers, brochures and other marketing materials via email attachments.

16. Rather than produce documents in Concordance-ready load files (or another standard litigation format), ECM produced documents in giant PDFs.

17. ECM produced certain documents in one 20,000-page PDF, which is too large to search easily, and which will require an extensive (and very time-consuming) effort by litigation support to refashion into searchable, database-loadable pieces.

18. ECM failed to produce the overwhelming majority of documents in native format, which makes searching them significantly more difficult.

19. ECM informed Complaint Counsel that it maintains a substantial portion of its documents in an MS Access database (which contains native material), but produced almost everything in PDF form, despite our request that we receive documents in native format.

20. Although ECM's refused to provide documents in the format we requested, Complaint Counsel responded to ECM's document requests in the format it requested.

21. Native files contain metadata, but ECM produced PDF documents sanitized or scrubbed (*i.e.*, with metadata removed).

22. This makes verifying when certain documents were created (or accessed) difficult or impossible.

23. Furthermore, ECM's rolling production disclosed documents in chronological order, with the most recent (and, thus, likely most probative) documents last.

24. ECM changed its key qualified claim when the Commission revised the *Green Guides* in October, 2012, and again almost a year later, right after the Commission issued the Complaint.

25. Thus, documents prepared over the past eighteen months address ECM's current claims more directly than earlier-prepared material ECM disclosed in January and February.

26. ECM designated essentially everything it produced as confidential.

27. **Attachment 1** hereto is a true and correct copy of Respondent's Initial Disclosures, dated November 25, 2104.

28. **Attachment 2** hereto is a true and correct copy of a letter from Respondent's counsel, dated February 6, 2014.

29. **Attachment 3** hereto is a true and correct copy of Respondent's Expert Witness List, dated March 12, 2014.

30. **Attachment 4** hereto are true and correct copies of (a) an email from Complaint Counsel to Respondent's Counsel, dated January 24, 2014, stating a new deposition schedule, (b) Complaint Counsel's revised personal deposition schedule, dated January 24, 2014, and (c) the original corporate designee deposition notice, dated January 10, 2014.


31. **Attachment 5** hereto is a true and correct copy of an email from Alan Poje containing attachments, dated March 11, 2010.

32. **Attachment 6** hereto is a true and correct copy of Certificate of Biodegradability issued by ECM Biofilms, Inc., dated January 16, 2007.

33. **Attachment 7** hereto is a true and correct copy of an August 30, 2010 letter from Katherine Johnson to ECM Biofilms, Inc.

34. **Attachment 8** hereto is a true and correct copy of an email exchange, beginning with an email from Katherine Johnson to Peter Arhangelsky, dated January 13, 2014.

Executed this 18th of March 2014 in Washington, D.C.


Jonathan Cohen
Complaint Counsel

**Complaint Counsel
Exhibit A
Attachment 1**

CCX-A:1

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

RESPONDENT'S INITIAL DISCLOSURES

Respondent ECM BioFilms, Inc. ("ECM"), pursuant to Rule 3.31(b)(1) and (2) of the Federal Trade Commission's Rule of Practice for Adjudicative Proceedings ("Rules"), hereby submits its Initial Disclosures to Complaint Counsel for the Federal Trade Commission:

I. Individuals and Organizations Likely to Have Discoverable Information

The individuals identified in Complaint Counsel's Initial Disclosures as "Current and Former ECM Employees" are believed by Respondent to possess direct knowledge of all discoverable information relevant to the allegations asserted in the Complaint, the proposed relief, or Respondent's defenses. Other individuals may exist who possess information redundant of that possessed by current and former ECM employees, which facts may become known through discovery and would then warrant supplementation of these disclosures.

Pursuant to Rule 3.31A(e), Respondent is not disclosing the identity of any non-testifying expert(s). Under § 3.31A(a), Respondent will disclose the identity of any testifying expert(s) at a later date based on Chief Administrative Law Judge Chappell's Scheduling Order.

II. Relevant Documents

Respondent has in its possession, custody, or control documents collected while conducting its investigation into this matter and in its effort to meet FTC investigative demands following the Commission's August 30, 2011 Inquiry Letter. It is believed that all documents germane to the case have been supplied to FTC with the exception of expert reports and attachments thereto which will be supplied together with those reports at the time designated in the Scheduling Order. All relevant documents are located at ECM's headquarters at Victoria Place, Suite 225, 100 South Park Place, Painesville, Ohio 44077. Subject to the limitations in Rule 3.31(b), to the extent not already supplied to Complaint Counsel in response to investigative requests or demands, a copy of all remaining nonprivileged documents will be provided to Complaint Counsel in this matter. Respondent will not resupply copies of documents that have already been supplied to Complaint Counsel.

Respondent is currently preparing copies of nonprivileged documents and materials for production. Respondent will provide Complaint Counsel such nonprivileged documents and materials as soon as possible. Respondent will not provide: (1) any documents, materials, or electronically stored information that are privileged as defined in § 3.31(c)(4); (2) that concern hearing preparation as defined in § 3.31(c)(5), or (3) that concern experts as defined in § 3.31.A.

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 AND ELECTRONIC FILING

I hereby certify that on November 25, 2013, I caused a true and correct copy of the foregoing **RESPONDENT'S INITIAL DISCLOSURES** 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

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
Email: jemord@emord.com

**Complaint Counsel
Exhibit A
Attachment 2**

CCX-A:2

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 ECM BIOFILM'S EXPERT WITNESS LIST

Respondent ECM BioFilms, Inc. ("ECM"), pursuant to the Court's November 21, 2013 Scheduling Order, hereby identifies those experts upon whom Respondent may call to testify in response to Complaint Counsel's case-in-chief, in defense of Respondent generally, or in support of Respondent's affirmative defenses.

1. Dr. Ranajit Sahu, Ph.D.

311 North Story Place
Alhambra, CA 91801

Dr. Sahu's anticipated testimony will be described in his expert report, which Respondent will produce to Complaint Counsel by the date set in the Court's Scheduling Order. The general subject matter of his anticipated testimony includes, but is not limited to, biodegradation of plastic polymers with and without ECM's additive; ASTM testing protocols and standards; and an evaluation of science related to, and ECM's substantiation for, ECM's biodegradability claims.

2. Dr. Ryan N. Burnette, Ph.D.

Alliance Biosciences
9011 Arboretum Parkway, Suite 310
Richmond, VA 23236

Dr. Burnette's anticipated testimony will be described in his expert report, which Respondent will produce to Complaint Counsel by the date set in the Court's Scheduling Order. The general subject matter of his anticipated testimony includes, but is not limited to, biodegradation of organic and inorganic matter, including plastic polymers;

microbiological metabolism, life cycles, colonization, and procreation in laboratory and environmental biota; testing protocols and standards; biochemical principles involved in plastics degradation; and an evaluation of Respondent's substantiation.

3. Dr. David W. Stewart, Ph.D.

Loyola Marymount University
College of Business Administration
1 LMU Drive
Los Angeles, CA 90045

Dr. Stewart's anticipated testimony will be described in his expert report, which Respondent will produce to Complaint Counsel by the date set in the Court's Scheduling Order. The general subject matter of his anticipated testimony includes, but is not limited to, consumer perception of biodegradable marketing claims and Respondent's biodegradability claims; materiality of Respondent's biodegradable marketing claims; and the Federal Trade Commission's reliance on consumer perception data in the field of biodegradable marketing claims.

4. Dr. Morton A. Barlaz, Ph.D., P.E.

North Carolina State University
Dept. of Civil, Construction & Environmental Engineering
Campus Box 7908
Raleigh, NC 27695-7908

Dr. Barlaz's anticipated testimony will be described in his expert report, which Respondent will produce to Complaint Counsel by the date set in the Court's Scheduling Order. The general subject matter of his anticipated testimony includes, but is not limited to, biodegradation of municipal solid waste under specific landfill conditions; conditions in various categories of municipal solid waste landfills, biodigestors, and bioreactors; and waste composition.

5. Dr. Alexander Volokh, Ph.D., J.D.

Emory Law School
1301 Clifton Rd.
Atlanta, GA 30322

Dr. Volokh's anticipated testimony will be described in his expert report, which Respondent will produce to Complaint Counsel by the date set forth in the Court's Scheduling Order. The general subject matter of his anticipated testimony includes, but is not limited to, the nature, extent, and importance of conflicts of interest present; the nature and extent of economic damages suffered by ECM; the materiality and economic significance of ECM's marketing claims.

DATED: March 12, 2014

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord (jemord@emord.com)

EMORD & ASSOCIATES, P.C.

11808 Wolf Run Lane

Clifton, VA 20124

Telephone: 202-466-6937

Facsimile: 202-466-6938

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2014, I caused a true and correct copy of the foregoing Respondent's Expert Witness List to be served on Complaint Counsel as follows:

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 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.

DATED: March 12, 2014

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

**Complaint Counsel
Exhibit A
Attachment 3**

CCX-A:3



11808 WOLF RUN LANE
CLIFTON, VA 20124

3210 S. GILBERT ROAD
SUITE 4
CHANDLER, AZ 85286
(602) 388-8899 | FAX (602) 393-4361

1050 SEVENTEENTH STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20036
(202) 466-6937 | FAX (202) 466-6938

February 6, 2014

VIA EMAIL:

Katherine Johnson (kjohnson3@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
U.S. Federal Trade Commission
600 Pennsylvania Ave., NW, M-8102B
Washington, D.C. 20580

Peter A. Arhangelsky, Esq.
602.334.4416
parhangelsky@emord.com

Re: No. 9358, In re ECM BioFilms; Document Production

Dear Counsel:

This letter follows our conversation of February 6, 2014 concerning Respondent ECM's discovery response. The production defined in this letter will render moot Complaint Counsel's pending Motion to Compel Production of Documents (filed January 23, 2014).

ECM shall produce the entirety of its customer correspondence files contained in its archived electronic storage for the period of January 1, 2009 through January 1, 2014. That production will include all files contained in ECM's electronic storage or database related to all domestic ECM customers. That production will be limited in the following ways. First, ECM will redact or expurgate its customers' confidential business information to the extent that information is defined by mutual confidentiality agreements executed with certain ECM customers. Second, ECM will redact or expurgate all information subject to privilege, including, e.g., the attorney work product privilege, the attorney-client privilege, and trade secret privileges. Third, because ECM will be required to produce bulk documents under short deadlines, ECM shall designate all correspondence with customers (and associated files) as confidential under the standing protective order. Thereafter ECM will refine its designations.

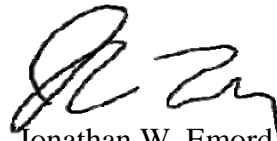
ECM will timely respond to Complaint Counsel's second set of discovery requests, and provide all responsive documents under Complaint Counsel's first set of discovery requests, subject to the aforementioned limitations. ECM will produce all scientific and technical documents responsive to your discovery demand if those documents (1) are possessed by ECM and (2) were not already produced in prior productions.

ECM will produce its archived files on a rolling basis, meaning as it is retrieved and immediately after it is reviewed by counsel, on or before February 21, 2014. Thus, ECM agrees to complete the production by February 21, 2014, subject to its obligation and right to amend or supplement discovery under 16 C.F.R. § 3.31(e). ECM will produce the remainder of its Microsoft Access database summations (encompassing all emails, faxes, and phone calls from January 1, 2009 to the present) on or before February 12, 2014. ECM will not produce the MS Access notations in native format because the program produces records in PDF format, which have been supplied to Complaint Counsel in a “reasonably usable form.” See 16 C.F.R. § 3.37(c)(ii); *see also* 16 C.F.R. § 3.37(c)(iii) (“[a] party need not produce the same electronically stored information in more than one form”).

ECM provides this proposal in a good faith effort to resolve outstanding discovery disputes. The Court has imposed a 1pm Eastern deadline on February 7, 2014 to consider any surreply ECM may file in response to Complaint Counsel’s pending Motion to Compel. ECM intends to file a Motion for Leave to File a Surreply no later than 12:00pm Eastern, February 7, 2014, unless Complaint Counsel agrees to withdraw or moot the pending motion before that time.

Please do not hesitate to contact us with any questions.

Sincerely,



Jonathan W. Emord
Peter A. Arhangelsky
Counsel to Respondent ECM BioFilms, Inc.

**Complaint Counsel
Exhibit A
Attachment 4**

CCX-A:4

Cohen, Jonathan

From: Jillson, Elisa
Sent: Friday, January 24, 2014 1:29 PM
To: 'Peter Arhangelsky'; 'Jonathan Emord'; 'Lou Caputo'
Cc: Johnson, Katherine; Cohen, Jonathan
Subject: ECM BioFilms, No. 9358, Notice of Depositions
Attachments: Notice of Despositions.pdf

Counsel:

Please find attached Complaint Counsel's Notice of Depositions.

As an accommodation to you, we noticed the depositions for Robert Sinclair and Ken Sullivan at ECM's offices in Painesville, to run consecutively after ECM's Rule 3.33(c)(1) deposition on February 18th. If Mr. Sinclair's deposition on the 19th ends early, we could take Mr. Sullivan's deposition on the 19th as well. We would make this adjustment only if time permits and if you agree to the change. Please make a phone available during the depositions at ECM's offices, as Complaint Counsel will be attending the deposition both in person and by phone.

Regards,

Elisa K. Jillson
Attorney
Division of Enforcement, Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW, M-8102B
Washington, DC 20580
Phone: 202.326.3001
Fax: 202.326.2558

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)
ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Enviroplastics International)

Docket No. 9358

COMPLAINT COUNSEL'S NOTICE OF DEPOSITIONS

PLEASE TAKE NOTICE that, pursuant to Rule 3.33 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Complaint Counsel will take the deposition, upon oral examination, of the following witnesses:

- 1. Robert Sinclair February 19, 2014 9:00 A.M.
- 2. Ken Sullivan February 20, 2014 9:00 A.M.
- 3. Thomas Nealis March 4, 2014 9:00 A.M.
- 4. Scott Fletcher March 5, 2014 9:00 A.M.
- 5. Michelle R. Leicher March 6, 2014 9:00 A.M.
- 6. Kristen A. Marineau March 6, 2014 1:30 P.M.

All depositions will commence on the specified date and time, before an officer authorized to take depositions. ~~The depositions of Robert Sinclair and Ken Sullivan will be conducted at the offices of ECM, Victoria Place - Suite 225, 100 South Park Place, Painesville, Ohio 44077.~~ The depositions of Thomas Nealis, Scott Fletcher, Michelle R. Leicher, and Kristen A. Marineau will be conducted at the offices of the Federal Trade Commission, East Central Region, 1111 Superior Avenue, Suite 200, Cleveland, Ohio 44114-2507.

Dated: January 24, 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, M-8102B
 Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, I caused a true and correct copy of the paper original of the foregoing *Complaint Counsel's Notice of Depositions* 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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

| | | |
|-------------------------------------|---|------------------------|
| |) | |
| In the Matter of |) | |
| |) | |
| ECM BioFilms, Inc., |) | Docket No. 9358 |
| a corporation, also d/b/a |) | |
| Enviroplastics International |) | |
| |) | |

**COMPLAINT COUNSEL’S NOTICE OF
RULE 3.33(c)(1) DEPOSITION**

To: ECM Biofilms, Inc.
Victoria Place, Suite 225
100 South Park Place
Painesville, OH 44077

PLEASE TAKE NOTICE that Complaint Counsel will depose ECM Biofilms, Inc. (“ECM”), upon oral examination, pursuant to Rule 3.33(c)(1) of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings, as to the matters set forth below. ECM is required to designate one or more officers, directors, managing agents, or other persons to testify on its behalf who have knowledge of the matters specified below. Pursuant to Rule 3.33(c)(1) and other applicable authority, ECM’s designee must testify regarding all information known or reasonably available to ECM.

1. The allegations in the Complaint.
2. The bases for ECM’s refusal to unequivocally admit every allegation in the Complaint that ECM did not unequivocally admit.
3. ECM’s affirmative defenses.
4. Any and all objections to the conduct relief Complaint Counsel seeks to obtain.
5. ECM’s basis for its refusal to unequivocally admit each Request for Admission that ECM did not unequivocally admit.
6. ECM’s claims that plastic products made with ECM’s additive are (a) biodegradable, (b) biodegradable in a landfill, (c) biodegradable in approximately nine months to five years, and (d) biodegradable in some period greater than a year.
7. ECM’s sales and marketing strategies related to the advertising claims identified in Topic 6.

8. ECM's communications with current, former, and potential customers and distributors related to the advertising claims identified in Topic 6.
9. ECM's substantiation, including, without limitation, various scientific tests such as ASTM D5511, for the advertising claims identified in Topic 6.
10. Other scientific tests relevant or potentially relevant to the biodegradability of plastic including, without limitation, ASTM 5209, ASTM D5511, ASTM D5526, ASTM D5338, ASTM D6400, SEM imaging, GPC, ISO 14855, and C-14 tagging, regardless of whether ECM relies upon the test for substantiation.
11. Every scientific test, report, or article related to biodegradability that ECM conducted, caused to be conducted, created, caused to be created, reviewed, or relied upon for any purpose, regardless of whether ECM relies upon it for substantiation.
12. All certificates of biodegradability (or other similar documents) that ECM issued, or considered issuing, to customers or potential customers.
13. All logos (or other similar marks) concerning or indicating biodegradability that ECM issued, or considered issuing, to customers or potential customers.
14. ECM's position with respect to consumer perception of claims that a product is (a) biodegradable, (b) biodegradable in a landfill, (c) biodegradable in approximately nine months to five years, and (d) biodegradable in some period greater than a year, including all facts, studies, or other evidence supporting ECM's position.
15. All facts, studies, surveys, or other evidence that ECM has ever received, reviewed, or relied upon regarding consumer perception of claims that a product is (a) biodegradable, (b) biodegradable in a landfill, (c) biodegradable in approximately nine months to five years, and (d) biodegradable in some period greater than a year, including all facts, studies, or other evidence supporting ECM's position.
16. ECM's position with respect to its customers' perception of claims that plastic products made with ECM's additive are (a) biodegradable, (b) biodegradable in a landfill, (c) biodegradable in approximately nine months to five years, and (d) biodegradable in some period greater than a year, including all facts, studies, or other evidence supporting ECM's position.
17. All facts, studies, surveys, or other evidence that ECM has ever received, reviewed, or relied upon regarding its customers' perception of claims that plastic products made with ECM's additive are (a) biodegradable, (b) biodegradable in a landfill, (c) biodegradable in approximately nine months to five years, and (d) biodegradable in some period greater than a year, including all facts, studies, or other evidence supporting ECM's position.
18. The representations made in the Declaration of Robert Sinclair executed December 12, 2013.

19. ECM's communications with the media.
20. ECM's communications with current, former, and potential customers and distributors regarding this action, or any other litigation or enforcement proceeding of any sort related in any way to biodegradability claims.
21. ECM's communications with any person or institution that has, or purports to have, any expertise regarding chemistry, biodegradability, or materials science.
22. ECM's communications with the FTC, NAD, or any other organization or public agency in any way responsible for or with jurisdiction over marketing claims.
23. ECM's contractual arrangements with its current and past customers and distributors.
24. The contents and usage of ECM's Website.
25. ECM's document retention policies and practices, and its compliance with document preservation obligations.
26. ECM's practices for archiving and maintaining records of customer-related communications and other customer-related documents.

The deposition will be held on Friday, January 24, 2014 at 9:00 A.M. at the offices of the Federal Trade Commission's Division of Enforcement, 1800 M St. NW, 8th floor, Washington, DC, before an officer authorized to take depositions.

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

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2014, I caused a true and correct copy of the paper original of the foregoing *Complaint Counsel's Notice of Rule 3.33(c)(1) Deposition* 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.

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

**Complaint Counsel
Exhibit A
Attachment 5**

CCX-A:5

PUBLIC DOCUMENT

Alan Poje

From: Alan Poje
Sent: Thursday, March 11, 2010 1:13 PM
To: [REDACTED]
Subject: ECM BioFilms' Additives for Manufacturing Biodegradable Plastic Packaging and Products
Attachments: TDS ECM6_0701 0806.pdf; Biodegradation Cert_Sample 070116.pdf; Biodegradation Mechanism 051028.pdf; Customer Certificate 070821.doc; ECM Flyer 070429.pdf; ECM Gen_Explanation 081203.pdf; ECM Gen_Explanation 081203a.pdf; ECM vs Alternatives 080617.pdf; Life Expectancy 070116.pdf; MSDS ECM6_0701 100113.pdf; Pricing Sheet ECM6_0701_D 100115.pdf; Pricing Sheet ECM6_0701_G 100115.pdf

[REDACTED]
Dear [REDACTED],

Attached are the documents I spoke of earlier today. If you should have any questions, please don't hesitate to contact us.

We look forward to your business.

Best regards,

Alan Poje
ECM BioFilms, Inc.

ECM BioFilms, Inc.

Victoria Place – Suite 225

100 South Park Place

Painesville, Ohio 44077 U.S.A.

Phone: (440) 350-1400 • Fax: (440) 350-1444 • Toll Free in U.S.: (888) 220-2792

e-mail: biodeg@ecmbiofilms.com

website: <http://www.ecmbiofilms.com>

CONFIDENTIALITY NOTICE

The information contained in these documents may be privileged and confidential and is intended for the exclusive use of the addressee designated above. If you are not the addressee, you are hereby notified that any disclosure, reproduction, distribution, or other dissemination or use of this communication is strictly prohibited. If you have received this transmission in error, please inform us and destroy the original message.

The opinions expressed in this correspondence are not necessarily those of ECM BioFilms, Inc.

Thank you.

**Complaint Counsel
Exhibit A
Attachment 6**

CCX-A:6



CERTIFICATE
 of
 the Biodegradability of Plastic Products Made by
 [REDACTED]
 that Incorporate the
 ECM MasterBatch Pellet Technology


This is to certify that numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic material.

A Degradable Plastic is defined (ASTM 1991) as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.

The biodegradation of the submitted plastic samples was tested using ASTM D5209-91, "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge", ASTM D5338.98, "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions", which is equivalent to CEN prEN WT 261085, and the ISO 14855 method, "Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions", ASTM 5511, "Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions." The results of these tests and the related biodegradation and ecological impact experiments in various environments are contained in the Ecological Assessment of ECM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable and safe for the environment.

This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been conducted since the publication of the Ecological Assessment, all of which use a one percent loading rate for the ECM MasterBatch Pellets rather than the higher additive levels used earlier, have been presented to [REDACTED], and may be used by it to validate its claims to the biodegradability and environmental safety of plastic products that it manufactures that are made consistent with the manufacturing guidelines for uses of ECM MasterBatch Pellets presented to it by ECM BioFilms, Inc.

Dated: January 16, 2007

Certified by: 
 Robert Sinclair, President
 ECM BioFilms, Inc.

**Complaint Counsel
Exhibit A
Attachment 7**

CCX-A:7



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20580

Division of Enforcement
Bureau of Consumer Protection

August 30, 2011

VIA FEDERAL EXPRESS

Robert Sinclair, President
ECM BioFilms, Inc.
Victoria Place, Suite 225
100 South Park Place
Painesville, Ohio 44077

Dear Mr. Sinclair:

Federal Trade Commission staff is conducting an inquiry into your company's marketing of biodegradation-promoting additives for plastics. The purpose of this inquiry is to determine whether ECM BioFilms, Inc. ("ECM") is engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This inquiry is undertaken pursuant to the provisions of Sections 6, 9, and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, and 50.

To facilitate this inquiry, we request that ECM submit the following documents and information, including any electronically stored information ("ESI"), identified below voluntarily and in lieu of compulsory process. Unless otherwise noted, your responses to the requests below should cover the period beginning January 1, 2008, through the date of full and complete compliance with this letter.

1. Identify and describe each product that ECM has represented, expressly or by implication, initiates, promotes, or enhances biodegradation of plastic. For each product identified, state the time period it was marketed or sold by ECM.¹
2. Provide five samples of each ECM Additive, including all packaging inserts.
3. Identify in what form, including, but not limited to, the type of media, ECM made or makes claims or representations about the purported biodegradability of ECM Additives

¹ In this letter, the products identified in response to request number 1 are collectively referred to as "ECM Additives," and each being an "ECM Additive."

Mr. Robert Sinclair

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and/or plastic containing ECM Additives.

4. Provide copies of each different ECM advertisement² (including those disseminated to or by ECM distributors) that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic.

For television advertisements, please submit a DVD or CD containing a video file in a standard format, as well as a photoboard and script for each advertisement. For radio advertisements, please submit a CD containing an audio file in a standard format, as well as a script for each advertisement. For print advertisements, please provide original print advertisements if available, or if not available, color copies of such advertisements. For foreign language advertisements, please provide the advertisements in the language in which they were disseminated as well as English translations. For email solicitations, please submit a hard copy of each different solicitation. For advertisements appearing on the Internet, World Wide Web, or any commercial online service, please submit a copy or transcript of each advertisement, *as well as documents showing metatags*, together with the uniform resource locator (URL) or other Internet location where the advertisement appeared.

5. To the extent not provided in response to request number 4, 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 making marketing claims, or instructions for the use or marketing of the ECM Additive.
6. For each item responsive to request numbers 4 and 5, indicate the dates of dissemination and describe where each item was disseminated.
7. Identify the individual or individuals, regardless of date, who determined what claims or

² In this letter, the word “advertisement” includes but is not limited to the following: 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, 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.

Mr. Robert Sinclair

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representations should be, or were, made about the purported biodegradability of ECM Additives and/or plastics containing ECM Additives, and state the basis for his, her or their decision to make these claims or representations.

8. Describe in detail ECM's technology for initiating, promoting, or enhancing biodegradation of plastic, including, but not limited to, facts relating to:
 - a. disposal method(s) required for complete biodegradation;
 - b. soil, air, moisture, or temperature conditions;
 - c. aerobic or anaerobic processes;
 - d. microorganisms involved;
 - e. end products, including, but not limited to, biomass, water, carbon dioxide, and methane;
 - f. duration of time for complete biodegradation.

With regard to ECM's claim that MasterBatch Pellets™, or any other ECM Additive, is a "proprietary" formulation, state whether the product label fully lists the complete formulation, and if it does not, identify each active and inactive ingredient and the respective amount of each.

9. Provide all documents, whether prepared by or for ECM or any other entity, including any advertising agency, referring or relating to 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: (1) any advertisement, whether disseminated or not, that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic; and/or (2) biodegradability in general.
10. Provide all communications, including, but not limited to, written memoranda, electronic communications, and written memorializations of oral communications (other than routine invoices), referring or relating to:
 - a. whether ECM Additives are biodegradable;
 - b. whether ECM Additives initiate, promote, or enhance biodegradation of plastic;
 - c. whether or how to market ECM Additives as capable of initiating, promoting, or enhancing biodegradation of plastic.
11. Provide all documents, including, but not limited to, tests, reports, studies, scientific literature, and written opinions, and state all facts that substantiate any express or implied claims that ECM Additives initiate, promote, or enhance biodegradation of plastic,

Mr. Robert Sinclair

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whether or not you believe ECM made such claim(s), including, but not limited to, the following claims:

- a. “The plastic products made with [ECM Additives] will break down in approximately 9 month [sic] to 5 years in nearly all landfills or wherever else they may end up.”
- b. “Our masterbatch fully biodegrades in home composts, commercial composts, buried in the ground or landfills, tilled into soil, or littered on land or sea.”
- c. “ECM’s technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.”
- d. “Material treated with ECM [Additives] has been tested and proved as biodegradable and safe for the environment by using the following . . . ASTM 5511.”
- e. “[P]lastic products that are manufactured with at least a one percent (1%) load, by weight, of our ECM MasterBatch Pellets will fully biodegrade”
- f. Plastics containing an ECM Additive that are disposed of in a landfill will biodegrade faster than organic material disposed of in the same landfill and exposed to the same conditions.
- g. The ASTM D-5511 test replicates conditions found in a typical landfill.

If no substantiation exists for any of the above claims, please so state. Please indicate, on each item submitted, the claim or claims that the material provided substantiates. If any portion of the material is in the form of oral expert opinion, please include: (1) a written statement of the opinion; (2) a full description of the basis therefor; (3) when the opinion was first rendered; (4) the name, occupation, and professional affiliation of the individual rendering the opinion, or name and professional affiliation of the entity rendering the opinion; and (5) the name, job title, and current address of the person to whom the opinion was rendered.

12. Provide all documents that tend to call into question or disprove any express or implied claims that ECM Additives initiate, promote, or enhance biodegradation of plastic, including, but not limited to, the claims identified in request number 11.
13. Identify all persons, regardless of date, upon whose data, information, documents, advice, opinion, or expertise ECM relied to substantiate or to determine whether there was substantiation for all claims made relating to the biodegradability of ECM Additives and/or plastics containing ECM Additives.
14. If any ECM express or implied claim referring or relating to the biodegradability of

Mr. Robert Sinclair

Page 5

plastics containing ECM Additives does not apply to a typical landfill environment (*i.e.*, a “dry tomb” or sanitary landfill):

- a. Identify the product(s) to which this fact applies;
 - b. Identify the environment(s) in which the claims do apply;
 - c. Explain how a consumer would become aware of this fact before purchasing any of the products you identified in response to request number 14.a; and
 - d. Identify any advertisements you provided in response to request number 4 that expressly disclose this fact.
15. For each of the years 2008, 2009, 2010, and 2011 through the date of full and complete compliance with this letter, provide the following sales and advertising expenditure information for each ECM Additive, including MasterBatch Pellets™:
- a. Annual gross sales, in units sold;
 - b. Annual gross sales, in dollar amount;
 - c. Total annual advertising and promotional expenditure.

If ECM maintains financial data on a fiscal year basis that differs from the calendar year, provide the requested data according to those fiscal years and identify the dates of the fiscal year.

16. For each of the years 2008, 2009, 2010, and 2011 through the date of full and complete compliance with this letter, provide a list of customers who have purchased MasterBatch Pellets™ or any ECM Additive, including through sales by distributors, and the intended end-use product, if known. For each customer identified, list ECM’s revenue per customer per year.
17. State the current or most recent average retail or wholesale price for each ECM Additive.

Although we hope to conduct our inquiry with as little inconvenience and cost to you as possible, we reserve the right to seek access to additional records and pursue such additional avenues of inquiry as may be deemed appropriate. Because the Commission at a later time may request all documents relating to any of the questions in this letter, please suspend any procedures for document destruction and take other measures to prevent the destruction of documents that are relevant to this investigation while it is pending.

Under Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. § 57b-2(f), all documents and information provided voluntarily in lieu of compulsory process in law enforcement investigations will be exempt from public disclosure under the Freedom of

Mr. Robert Sinclair

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Information Act, 5 U.S.C. § 552(b)(3)(B). Furthermore, under Commission Rule 4.10(d), any material you provide which is marked "CONFIDENTIAL" will be given the same confidential treatment as material provided in response to compulsory process. The Commission's procedures concerning public disclosure and confidential treatment can be found at 15 U.S.C. §§ 46(f) and 57b-2, and Commission Rules 4.10-4.11, 16 C.F.R. §§ 4.10-4.11.

Please have a responsible corporate officer or manager of ECM certify under penalty of perjury that the documents and other information produced or identified in response to this letter are complete and accurate and that the documents and information represent all documents and information responsive to this letter. In addition, please ensure that the submission of any ESI complies with the instructions outlined in **Attachment A**. The Bureau of Consumer Protection Guide included as **Attachment B** provides detailed directions for submissions responsive to this letter.

You are also advised that all claims based on privilege (*e.g.*, attorney-client privilege or the Fifth Amendment) or judicial order must be asserted on or before compliance with this request. If any responsive material is withheld, please submit a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

Please provide the requested documents and information via overnight courier, such as Federal Express, by September 14, 2011, to:

William Burton, Investigator Federal Trade Commission
600 Pennsylvania Ave., NW, Mailstop M-8102B
Washington, DC 20580
Telephone (202) 326-2724.

In advance of this deadline, I encourage you to contact me at (202) 326-2185 or Kathleen Pessolano at (202) 326-2029 as soon as possible to schedule a meeting (telephonic or in person) to be held within ten (10) days after receipt of this letter in order to confer regarding your response, including, but not limited to, a discussion of the submission of ESI and other electronic productions as described in this letter.

Mr. Robert Sinclair
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If you have any questions, please contact me or Kathleen Pessolano at the numbers provided above. Your prompt cooperation and assistance in this matter is appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Katherine Johnson". The signature is written in black ink and is positioned above the printed name.

Katherine Johnson
Staff Attorney

Enclosures.

**Complaint Counsel
Exhibit A
Attachment 8**

CCX-A:8

Cohen, Jonathan

From: Johnson, Katherine
Sent: Monday, January 13, 2014 1:08 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,

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 President, Bob Sinclair, is the only employee who can perform the bulk of this work. 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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