

ORIGINAL



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

In the Matter of

ECM BioFilms, Inc.
a corporation, also d/b/a
Enviroplastics International
Respondent

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT TO
THIRD PARTY SUBPOENAED BY RESPONDENTS
AND AFFIDAVIT OF STEVEN MOJO**

The Biodegradable Products Institute ("BPI") hereby moves for cost reimbursement with respect to locating and producing documents in compliance with the subpoena served upon it by Respondents, ECM BioFilms, on or about January 24, 2014. In support thereof BPI submits herein the Affidavit of Steven Mojo, the Executive Director BPI specifying the costs involved in responding to the subpoena, which include, inter alia, invoices from BPI's attorney who assisted in the response, and the time devoted to such response by Mr. Mojo.

More specifically:

1. Respondents directed a subpoena to BPI requesting production of documents relating to the Respondent (**Exhibit A**).
2. Michael Zall, Counsel for the BPI conferred with BPI on numerous occasions in January and February, 2014 and had several discussions with Respondent's attorney, Jonathan Emord and/or Lou Caputo, clarifying what was needed and lengthy discussions with Mr. Mojo. BPI produced 4357 pages of documents (**Exhibit B**).
3. On February 28, 2014, Counsel to BPI, Michael Zall submitted the attached invoice for \$3260. (**Exhibit C**) to BPI for services rendered to BPI in responding to the

subpoena. This invoice was promptly paid by BPI.

4. Additionally, Mr. Mojo spent about 24 hours of time collecting and reviewing documents and transferring them to his Counsel. It is estimated that the costs for his services and/or the fair market value is about \$50/hour for a total cost of \$1200.

5. On February 20, 2014, Counsel for BPI sent an Invoice for \$5060 to Counsel for Respondent (**Exhibit D**). Subsequently there was telephone conversations and correspondence between Michael Zall and Counsel for Respondent (**Exhibit E**). This did not result in the payment of such Invoice.

4. Third party witnesses may be compensated to cover the cost of producing voluminous records in response to a subpoena. *FTC Manual*, §10.13.6.4.7.8. The Federal Rules of Civil Procedure may be consulted for guidance and interpretation of FTC rules where no other authority exists. *FTC Manual*, §10.7. FRCP 45 requires the court to protect a non-party by requiring the party seeking discovery to bear enough of the expenses of complying with a subpoena so that compliance with the subpoena does not impose significant expense on the non-party. *Linder v. Calero-Portocarrero*, 251 F. 3d 178, 182 (D.C. Cir. 2001).

WHEREFORE, BPI respectfully requests that an order be entered requiring Respondents to reimburse BPI for its costs incurred in locating the subpoenaed documents, assembling and delivering them to Respondent.

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, declares that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated: 11/13/14

The Biodegradable Products Institute

By: Steven Mojo, Executive Director

Signature: SA Mojo

Box 1481

Cotuit, MA 02635

(774) 521-3202

exec.director@bpiworld.org

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2014, a copy of the foregoing Motion For Cost Reimbursement was served by overnight courier delivery on:

Jonathan Emord
jemord@emord.com
Emord & Associates, P.C.
11808 Wolf Rune Lane
Clifton, VA 20124
Phone Number: 202-466-6937
Fax Number: 202-466-6938

Peter Arhangelsky
parhangelsky@emord.com
Lou Caputo
lcaputo@emord.com
Emord & Associates, P.C.
3210 S Gilbert Rd Ste 4
Emord & Associates, P.C.
Chandler, AZ 85286
Phone Number: 602-388-8899
Fax Number: 602-393-4361

Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room 172
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
Room H-113
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT
TO THIRD PARTY SUBPOENAED BY
RESPONDENTS**

EXHIBIT A



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO Biodegradable Products Institute 331 West 57th Street, Suite 415 New York, NY 10019	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
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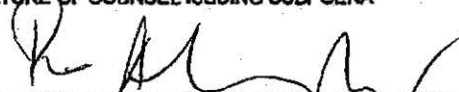
This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION Emord & Associates, P.C. 3210 South Gilbert Road, Suite 4 Chandler, AZ 85286	4. MATERIAL WILL BE PRODUCED TO Peter Arhangelsky 5. DATE AND TIME OF PRODUCTION March 3, 2014, 5:00 PM EST
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6. SUBJECT OF PROCEEDING In the matter of ECM BioFilms, Inc., Docket No. 9358

7. MATERIAL TO BE PRODUCED See Attached Schedule A for description of all documents and materials.
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8. ADMINISTRATIVE LAW JUDGE Chief Administrative Law Judge D. Michael Chappell Federal Trade Commission Washington, D.C. 20580	9. COUNSEL AND PARTY ISSUING SUBPOENA Jonathan W. Emord, Peter Arhangelsky Emord & Associates, P.C. for Respondent, ECM BioFilms, Inc.
---	--

DATE SIGNED 1/24/2014	SIGNATURE OF COUNSEL ISSUING SUBPOENA 
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**SCHEDULE "A" TO SUBPOENA DUCES TECUM DIRECTED TO
BIODEGRADABLE PRODUCTS INSTITUTE ("BPI")**

INSTRUCTIONS

- A. Unless otherwise specified, the time period covered by a numbered request shall be limited to the time period extending from January 1, 2007 until the present date, unless differently stated therein.
- B. Documents must be delivered to Counsel for Respondent at the following address:
- Emord & Associates, P.C.
3210 South Gilbert Road, Suite 4
Chandler, AZ 85286
- C. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the numbered request. The document shall not be edited, cut or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- D. All information submitted shall be clearly and precisely identified as to the numbered request(s) to which it is responsive. Pages in the submission should be numbered consecutively, and each page should be marked with a unique "Bates" document tracking number.
- E. Documents covered by these numbered requests are those which are in your possession or under your actual or constructive custody or control, whether or not such documents were received from or disseminated to any other person or entity, including attorneys, accountants, directors, officers and employees.
- F. Documents that may be responsive to more than one numbered request need not be submitted more than once. However, your response should indicate, for each document submitted, each numbered request to which the document is responsive. Identification shall be by the Bates number if the documents(s) were so numbered when submitted or by author and subject matter if not so numbered.
- G. If any of the documentary materials requested in these numbered requests are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the documents involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print the information in readable form and state the name, title, business address and telephone number of each person who is familiar with the program.
- H. All objections to these numbered requests, or to any individual request, must be raised in the initial response or otherwise waived.
- I. The Federal Trade Commission's Rules of Practice describes withholding requested material responsive to a subpoena under Rule 3.38A. For your convenience, Rule 3.38A states:

(a) Any person withholding material responsive to a subpoena issued pursuant to §3.34 or §3.36, written interrogatories requested pursuant to §3.35, a request for production or access pursuant to §3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in §3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

(b) A person withholding material for reasons described in §3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

- J. The Federal Trade Commission's Rules of Practice describes motions to quash and/or limit subpoenas under Rule 3.34(c). For your convenience, Rule 3.34 states in relevant part:

(c) *Motions to quash; limitation on subpoenas.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by §3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with §§3.31(c)(2) and 3.36.

- K. Some documents that you are requested to provide may be confidential. In the Protective Order dated October 22, 2013, Chief Administrative Law Judge D. Michael Chappell ordered that a party conducting discovery from third parties shall provide such third parties a copy of the Protective Order so as to inform third parties of his, her, or its rights. See ALJ Protective Order at 2, ¶4. Accordingly, a copy of the Protective Order is attached with this subpoena.
- L. If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld. For each item withheld, the schedule should state: (a) the item's type, title, specific subject matter and date; (b) the names, addresses, positions and organizations of all authors or recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive document is privileged, all non-privileged portions of the document must be submitted.

DESCRIPTION OF DOCUMENTS REQUESTED

Please produce the original or copies of the following documents (the term "documents" shall include all records, books of account, worksheets, checks, instructions, specifications, manuals, reports, books, periodicals, pamphlets, publications, raw and refined data, memoranda, graphs, drawings, notes, lab books, advertisements, list studies, meeting minutes, working papers, transcripts, magnetic tapes or discs, punch cards, computer printouts, letters, correspondence¹, agreements, drafts of agreements, telegrams, email, drafts, proposals, employee records, customer records, log files recommendations, and any other data recorded in readable and/or retrievable form, whether typed, handwritten, reproduced, magnetically recorded, coded, or in any other ay made readable or retrievable):

1. All documents concerning² the biodegradability of plastics generally and in Municipal Solid Waste Landfills in particular whether or not in the presence of other biodegradable material.
2. All documents concerning ECM BioFilms, Inc.
3. All correspondence from any BPI employee, member, representative, BPI Executive Director Steve Mojo, or Dr. Ramani Narayan, of or concerning ECM BioFilms, Inc. or any of ECM's employees, officers, and representatives.

¹ The term "correspondence" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice. Such term includes, but is not limited to embrace emails, documents appended to emails, reports and any other written or electronic document of any kind that is communicated from the subpoena recipient or its agents to any and all other persons and entities.

² The term "concerning" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice and should be considered to be synonymous with regarding, relating to, mentioning, discussing, referencing, implicating, explaining, or about the documents subject to any and all individual requests in this subpoena.

4. All documents concerning the Federal Trade Commission's ("FTC") "Revised Green Guides" published in October 2012
5. All correspondence between any BPI employee, member, representative of BPI, BPI Executive Director Steve Mojo, or Dr. Ramani Narayan, of, concerning, to, or from the Federal Trade Commission or any Federal Trade Commission employee or agent.
6. All documents concerning or related to any version of the American Society of Testing and Materials' ("ASTM") testing methods D5511 and D5526.
7. All correspondence between any BPI employee, member, or representative and the American Chemistry Council ("ACC").
8. All documents concerning the study performed in 2006 by APCO Insight ("APCO Study") for the ACC concerning public perception of the term "biodegradable" and related topics.
9. All documents concerning or supporting the following statement from the BPI website: "The key point is that only a portion of the additive will biodegrade and there is no data to show that the remaining 95 to 99% of the plastic package will also biodegrade." *See* Attachment A (BPI webpage: "Background on Biodegradable Additives" at 2.³
10. All documents concerning or supporting the following statement from the BPI website: "Extrapolation of test data should not be a basis for meeting these criteria." *See* Attachment A at 4
11. All documents specifically identifying sources for the following statement, and concerning or supporting the following statement, from the BPI website: "Further, based on a study by the American Chemistry Council, when consumers see the word 'biodegradable' on a

³ Available at <http://tinylink.net/070xo> (last checked January 21, 2014).

package, they believe that the package will completely disappear in 12 to 18 months..." See Attachment A at 3.

12. All documents concerning or related to the definition of "biologically active landfill," "biologically inactive landfill" as the terms are used in any and all versions and reproductions of ASTM D5511 and D5526.

INSTRUCTIONS FOR COMPLIANCE BY DELIVERY OF DOCUMENTS

If documents are delivered by hand, overnight delivery service, certified mail, or any other means your response shall be accompanied by an affidavit, executed by you that provides:

The names, addresses, positions, and organizations of all persons whose files were searched and all persons who participated in or supervised the collection of the documents⁴, and a brief description of the nature of the work that each person performed in connection with the collecting the documents.

A statement that the search was complete and that responsive documents are being produced.

A statement as to whether the documents were made and kept in the course of your regularly conducted business, whether it was your regular practice to make and keep such documents, and the custodian of records and/or other executive(s) and/or employees of BPI who have knowledge of such matters and who can testify to such matters.

A statement as to whether any document called for by the subpoena has been misplaced, lost or destroyed. If any document has been misplaced, lost, or destroyed, identify: type of documents the date (or approximate date) of the documents, subject matter of the documents, all persons to whom it was addressed, circulated, or shown; its date of destruction, or when it was lost or misplaced; the reason it was destroyed, lost or misplaced; and the custodian of the documents on the date of its destruction, loss, or misplacement.

⁴ "Document" and "documents" as used in this Attachment are defined in this subpoena's "Description of Documents Requested" section.

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord, Esq.
EMORD & ASSOCIATES, P.C.
11808 Wolf Rune Lane
Clifton, VA 20124
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Fx: 202-466-6938
Em: jemord@emord.com
Counsel to ECM BioFilms, Inc.

This document summarizes the Biodegradable Products Institute's comments on the use of additives to promote "biodegradation" in traditional polymers, such as PE, PP, PS and PVC.

Background

There are a number of manufacturers who claim that when their products are mixed at 1-5% concentrations with traditional polymers, the resultant formulation/s become "biodegradable". Further, these manufacturers maintain that their additives will make polymers "biodegradable" in aerobic environments (such as composting and litter), as well as anaerobic environments (typically found in landfills).

Today, these additives fall into two broad classes , "oxo-biodegradables" and "additives with organic materials":

1. **Oxo-biodegradables:** These consist of transition metals (some of which are regulated) that theoretically foster oxidation and chain scission in plastics when exposed to heat, air and/or light. Based over 20 analyses over the past 4 years by the BPI, these metals include but are not limited to cobalt, manganese, magnesium, iron and zinc. The theory behind chain scission is that it is supposed to shorten the polymer chains to the point where they can be consumed by microorganisms found in the disposal environment and used as a food source.

Research has shown that moisture retards the oxidation process, delaying the potential onset of biodegradation. In addition, for landfills, no data has been presented to support complete biodegradation in anaerobic environments.

Testing has shown that in arid climates with sunlight and high heat, oxo-biodegradable additives will accelerate the fragmentation of traditional polymers. Data has shown that at high temperatures in conjunction with UV in arid conditions, that fragmentation can be achieved in 2 to 3 months. However, **fragmentation is not a sign of "biodegradation"** and there is no data to show how long these plastic fragments will persist in the soils or marine environments. Further, data has also shown that moisture will retard this fragmentation process for months or longer.

From a practical perspective, this means that a plastic bag that is littered in the desert will probably fragment in a few months. Yet, these fragments will persist for years or longer. Moreover, if the same bag is littered in a cold, dark wet forest, it is unlikely that the bag will fragment for months or years.

EPI (EPI Environmental Technologies), Wells/Bioxo, Addiflex, Symphony are some of the suppliers of oxo-biodegradable additives. However, some converters using these additives do not cite specific manufacturers. Rather, they may say that they are using "oxo-biodegradable" concentrates or additives.

2. Additives with Organic Materials: In this class of materials, some portion of the additive itself will biodegrade and generate carbon dioxide or methane. The biodegradable portion of the additive pellets can be natural materials, such as cellulose and starch or it can consist of resins, which are known to biodegrade, such as EVA or PVOH. The key point is that only a portion of the additive will biodegrade and there is no data to show that the remaining 95 to 99% of the plastic package will also biodegrade. In some ways, this class of additives is similar to the original "biodegradable plastics" where the starch would biodegrade and the remaining plastic just fragmented.

Based on data that the BPI has reviewed, manufacturers with this type of technology include (but are not limited to) ECM BioFilms, Bio-Tec Environmental's EcoPure, BioBatch, Green Films and Good Earth.

Latest Labeling Developments:

Claims by additive suppliers are difficult to interpret, as they typically quote a variety of ASTM tests and other documents.

Given the increasing level of claims, (many of which are unsupported), the State of California has decided to step in, by passing 2 pieces of legislation. These pertain to plastic bags and foodservice items (both paper and plastic) and became effective in January, 2009. The impact of this legislation is to make the use of the labels "biodegradable" and "degradable" more rigorous. Further, in order to use the term "compostable" plastic bags and foodservice items must meet either ASTM D6400 or D6868.

- ASTM D6400: Standard Specification for Compostable Plastics
- ASTM D6868: Standard Specification for Biodegradable Plastics Used as Coatings on Paper and Other Compostable Substrates

Additionally, the Federal Trade Commission (FTC) requires that prior to making any unqualified "biodegradable" claims, that suppliers have scientific data to prove:

- 1) That the entire product (not just the additive) will biodegrade into elements found in nature;
- 2) In a short period time after customary disposal (which is landfilling for most plastics).

Additionally on June 9, 2009, the FTC found that Kmart's claims of biodegradability of paper plates was misleading. Further, they questioned the ability of any materials to biodegrade in a landfill.

"Mr. Davis of the F.T.C. raised doubts. "Maybe a piece of produce could be labeled biodegradable if it's customarily disposed of through composting," he said, "but the statistics show that most household trash goes to landfills. So even a piece of produce might not biodegrade" in a reasonable period of time, he explained."

Source: <http://greeninc.blogs.nytimes.com/2009/06/11/ftc-sends-stem-warning-on-biodegradable-marketing-claims/?scp=3&sq=biodegradable%20ftc&st=Search>

Further, based on a study by the American Chemistry Council, when consumers see the word "biodegradable" on a package, they believe that the package will completely disappear in 12 to 18 months, no matter where it is thrown away (either in landfills, streams or as litter). Consumers think nothing will be left at the end of the process.

Science of Biodegradation:

Biodegradation takes place when microorganisms utilize carbon substrates to extract chemical energy that drives their life processes. The carbon substrates become "food", which microorganisms use to sustain themselves. Under aerobic conditions, the carbon is biologically oxidized to carbon dioxide inside the cell releasing energy that is harnessed by the microorganisms for its life processes. Under anaerobic conditions, CO₂ + Methane are produced. Thus, a measure of the rate and amount of CO₂ or CO₂+CH₄ evolved as a function of total carbon input to the process is a direct measure of the amount of carbon substrate being utilized by the microorganism (percent biodegradation). This forms the basis for various National (ASTM, EN) and international (ISO) standards for measuring biodegradability or microbial utilization of chemicals, and biodegradable plastics

Recommendations for purchasing and packaging professionals

Given consumer expectations, the FTC's direction and new California legislation, the BPI recommends that organizations wishing to use "biodegradable additives" ask the suppliers for the "scientific data" to address the following questions:

- 1) For "compostable" products, does the entire application (film or package) meet all the requirements of ASTM D6400 or ASTM D6868?
- 2) For "marine biodegradable", does the entire application (film or package) meet all the requirements of ASTM 7081?
- 3) There are no ASTM specifications that dictate the overall level of biodegradation that must be achieved to make other "biodegradable" claims. However, the BPI recommends that the supplier demonstrate that 90% of the entire plastic film or package (not just the additive) be converted to carbon dioxide under aerobic conditions (like soil burial) or carbon dioxide and methane under anaerobic conditions (as in an anaerobic digester, or a landfill) based upon weight and carbon content

relative to the positive control using the following internationally recognized test methods as shown below:

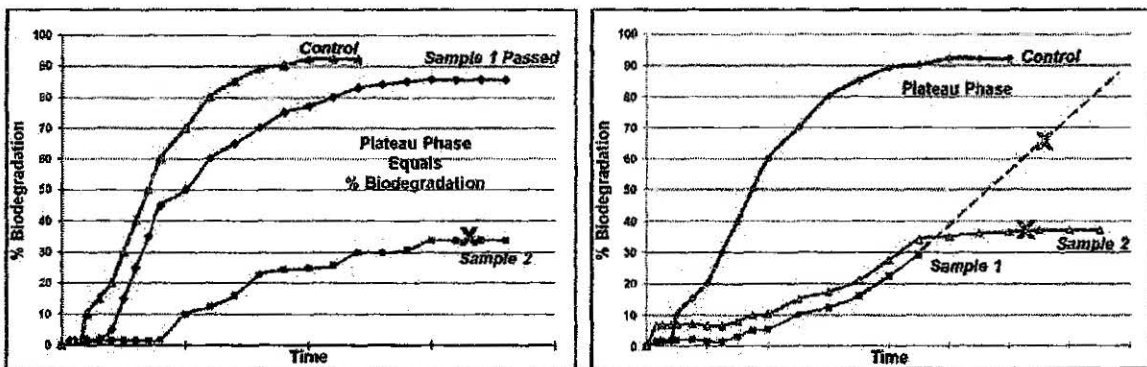
Claim	Appropriate Test Methods	Recommended Pass/Fail Threshold	Time Limit
"Biodegradable" or "Biodegrades in a Landfill" (anaerobic environment)	ASTM D5526 or ASTM D5511 or ASTM D6776	Based on correspondence to the BPI from the FTC, it is likely that any unqualified "biodegradable" claim will be judged as deceptive, regardless of the testing data. http://www.ftc.gov/os/adjpro/d9336/091218dynaletter.pdf	
"Biodegrades in landfills" claims are not recommended given recent FTC findings.			
"Biodegrades in Soils" or as Litter Aerobic environment	ASTM D5988	90% conversion of test materials carbon to carbon dioxide relative to the positive control in the test	12-18 months

Note: Only one of the test methods needs to be used to verify the "biodegrades" or landfill claims.

The 90% threshold relative to the positive control will insure that the entire plastic product can be consumed by the microbes (i.e. biodegraded) with no persistent residues. Additionally, the following conditions must be met:

- The positive control shall reach a minimum of 70% biodegradation as specified in the test method.
- Both the test and control samples must reach plateaus during the test. These plateaus represent the maximum level of biodegradation achieved.
- Extrapolation of test data should not be a basis for meeting these criteria.
- Test samples should not be subjected to "pre-conditioning" to promote or accelerate oxidation or degradation (such as high heat under dry conditions for long periods of time), especially for landfill claims.
- Manufacturers shall make all test reports available for review by interested parties.

Below are 2 charts the depict examples of what is expected when data is presented.



Comments on Biodegradation in Landfills

Manufacturers should understand that biodegradation that takes place in landfills can generate fugitive methane emissions which contribute to greenhouse gas production and climate change. Methane is 25 times more powerful as a greenhouse gas than carbon dioxide.

Additionally, the US Federal Trade Commission ruled on June 9, 2009 that "biodegradable" claims on paper plates were misleading, as noted earlier in this document. This direction was reinforced in a letter to the BPI in December, 2010, which stated it is likely that any unqualified "biodegradable" claim will be judged as deceptive, regardless of the testing data. The complete letter can be found at the link below:

<http://www.ftc.gov/os/adjpro/d9336/091218dynaletter.pdf>

For these reasons, the BPI supports the diversion from landfills of all potentially "biodegradable" materials.

Where to turn if you have questions:

The BPI will be happy to review and comment on any data provided to buyers, or packaging professionals by additive suppliers. (email: info@bpiworld.org).

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

In the Matter of)


ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Enviroplastics International,)
Respondent.)

DOCKET NO. 9358

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 22, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT
TO THIRD PARTY SUBPOENAED BY
RESPONDENTS**

EXHIBIT B

Michael E. Zall

ATTORNEY AT LAW

INTELLECTUAL PROPERTY

PATENTS

TRADEMARKS

COPYRIGHTS

Lou Caputo
Jonathan W. Emord
Emord & Associates, P.C.
3210 South Gilbert Road, Suite 4
Chandler, AZ 85286

jemord@emord.com

LCaputo@emord.com

February 13, 2014

TWO YORKSHIRE DRIVE
SUFFERN, NEW YORK 10901

Tel: (845) 357-6800

Fax: (845) 357-4616

E-mail: Mike@Zall-Law.com

www.Zall-Law.com

Re: FTC v ECM BioFilms, Inc. (Docket No. 9358)

Subpeona Duces Tecum Biodegradable Products Institute

Gentlemen:

Responsive to the *Subpeona Duces Tecum* to Biodegradable Products Institute, attached is a copy of our response. This response, along with flash drives (2) having pdf copies of all of the responsive documents (BPI#s 000001 through 0004357), has been Express Mailed to you (Tracking # 80003 1544 0199).

If you have any questions, cannot open the drives or need additional information, please do not hesitate to call.

Please note, although this has been sent for next day delivery, we have very heavy snow situation in New York. I suspect it will arrive in several days.

Very truly yours,


Michael E. Zall

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT
TO THIRD PARTY SUBPOENAED BY
RESPONDENTS**

EXHIBIT C

Michael E. Zall

ATTORNEY AT LAW

Fein#90-0868590

TWO YORKSHIRE DRIVE
SUFFERN, NEW YORK 10901
Tel: (845) 357-6800
Fax: (845) 357-4616
E-mail: Mike@Zall-Law.com
www.Zall-Law.com

February 28, 2013

Mr. Steven Mojo
Galatech
PO Box 1481
Cotuit, MA 02635

February 2014 Invoice

5.0-083 New License Agreement

6.0-12 ECM BioFilms

02/04 & 05-Review subpoena, tel call to Emord & Assoc., review court documents, tel conference with SM. (2)

02/06-Tel conf with SM, review BPI article, correspondence to client (3/4)

02/10-Review documents, unlock secure documents, convert to PDFs, and organize. (3)

02/11-Prepare draft response, corresp. To SM (1.5)

02/12-Prepare draft response, corresp. To SM (3.5)

02/13-Finalize response, correspondence to ECM attorney, research re compensation. (3)

Federal Express charge

\$3200.

\$ 60.

TOTAL DUE

\$

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT
TO THIRD PARTY SUBPOENAED BY
RESPONDENTS**

EXHIBIT D

Michael E. Zall

ATTORNEY AT LAW

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PATENTS
TRADEMARKS
COPYRIGHTS

February 20, 2014

TWO YORKSHIRE DRIVE
SUFFERN, NEW YORK 10901
Tel: (845) 357-6800
Fax: (845) 357-4616
E-mail: Mike@Zall-Law.com
www.Zall-Law.com

Lou Caputo
Jonathan W. Emord
Emord & Associates, P.C.
3210 South Gilbert Road, Suite 4
Chandler, AZ 85286

Re: FTC v ECM BioFilms, Inc. (Docket No. 9358)

Invoice for document collection and organization for Subpeona Duces Tecum
Biodegradable Products Institute

Attorney Fees, Michael E. Zall (02/04-02/13) \$3200.

Date	Description	Hrs.
02/04 & 05	Review subpoena, tel call to Emord & Assoc., review court documents, tele conference with SM	2
02/06	Tele conf with SM, review BPI article, correspondence to client	.75
02/10	Review documents, unlock secure documents, convert to PDFs, and organize.	3
02/11	Prepare draft response, correspondence to SM	1.5
02/12	Prepare draft response, correspondence to SM	3.5
02/13	Finalize response, correspondence to ECM attorney, legal research	3.5

Total 14.25 Hours. @ \$225/Hr. (discounted rate)

BPI time (02/02 – 02/13)

Steven Mojo 24 hrs. @ \$50./hour \$1800

Federal Express charge \$60.00

TOTAL DUE \$5060.

*MSJ
02/21/2014*

DOCKET NO. 9358

**MOTION FOR COST REIMBURSEMENT
TO THIRD PARTY SUBPOENAED BY
RESPONDENTS**

EXHIBIT E

Mike Zall

From: Mike Zall <mike@zall-law.com>
Sent: Tuesday, March 18, 2014 12:23 PM
To: 'Lou Caputo'
Subject: RE: BPI INVOICE

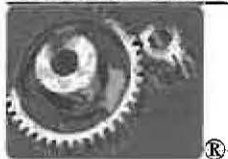
Reminder after our conversation.

Michael E. Zall

Attorney

Intellectual Property & Corporate Transactions

Two Yorkshire Drive
Suffern, NY 10901
Office: (845) 357-6800
Mobile: (914) 589-4828
Fax: (845) 357-4616
Mike@Zall-Law.com
www.Zall-Law.com



From: Mike Zall [<mailto:mike@zall-law.com>]
Sent: Monday, March 10, 2014 9:18 AM
To: 'Lou Caputo'
Subject: RE: BPI INVOICE

Reminder.

Michael E. Zall

Attorney

Intellectual Property & Corporate Transactions

Two Yorkshire Drive
Suffern, NY 10901
Office: (845) 357-6800
Mobile: (914) 589-4828
Fax: (845) 357-4616
Mike@Zall-Law.com
www.Zall-Law.com



From: Mike Zall [<mailto:mike@zall-law.com>]
Sent: Friday, February 21, 2014 1:08 PM
To: 'Lou Caputo'
Subject: RE: BPI INVOICE

Attached is a Supplemental and adjusted Invoice for \$5060.

Michael E. Zall

Attorney

Intellectual Property & Corporate Transactions

Two Yorkshire Drive
Suffern, NY 10901
Office: (845) 357-6800
Mobile: (914) 589-4828
Fax: (845) 357-4616
Mike@Zall-Law.com
www.Zall-Law.com



From: Lou Caputo [<mailto:LCaputo@emord.com>]
Sent: Thursday, February 20, 2014 2:52 PM
To: Mike Zall
Subject: RE: BPI INVOICE

Hi Mike,

Can you please send over an invoice that includes an itemization of the costs incurred?

Thank you very much,

Lou

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

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

From: Mike Zall [<mailto:mike@zall-law.com>]
Sent: Thursday, February 20, 2014 9:37 AM
To: Lou Caputo
Subject: BPI INVOICE

Lou:

Attached is BPI's invoice for the collection and organization of documents. Please send the check to me, made out to *International Biodegradable Product Institute*.

Thank you.

Michael E. Zall

Attorney

Intellectual Property & Corporate Transactions

**Two Yorkshire Drive
Suffern, NY 10901
Office: (845) 357-6800**