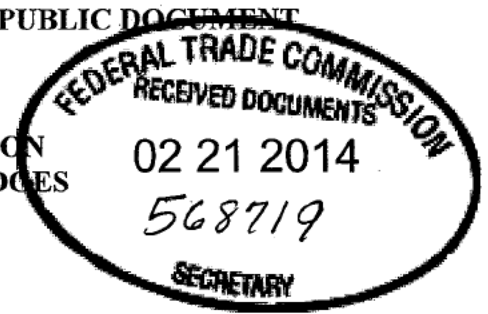


ORIGINAL

PUBLIC DOCUMENT

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



In the Matter of

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

Respondent.

Docket No. 9358

PUBLIC

RESPONDENT ECM BIOFILM'S MOTION FOR PROTECTIVE ORDER

Respondent, ECM BioFilms, Inc. ("ECM"), hereby moves this Court for an Order establishing reasonable limits on Complaint Counsel's issuance of subpoenas to ECM customers.

The order sought is necessary [REDACTED]

The order sought prevents imposition of an undue burden on ECM's business while preserving Complaint Counsel's legitimate need for discovery of relevant information.

In ruling on a prior ECM motion to limit customer based discovery, his Honor deemed the harms recited speculative. *See* Jan. 10, 2014 Order, at 7. The proof is no longer speculative.

[REDACTED] The information Complaint Counsel is obtaining by its customer subpoenas is redundant of what ECM is producing to Complaint Counsel.

Complaint Counsel plans to subpoena 35 more ECM customers immediately and an additional 15 thereafter. *See* Exhibit RX-A:5. [REDACTED]

[REDACTED] without which it cannot remain a going concern. *See* RX-A:1.

ECM does not here oppose customer subpoenas in their entirety; rather ECM seeks a reasonable limit to their total number and an exclusion therefrom of ECM's [REDACTED] customer accounts. ECM seeks a limit of 35, inclusive of the 11 already sent, and excluding ECM's [REDACTED]

[REDACTED]. This is a measured reduction, calculated to avoid loss of relevant information while ensuring that ECM may remain financially solvent during these proceedings (such that it may continue to finance its own legal defense against the charges brought). [REDACTED]

[REDACTED], but also agreeing despite an extraordinary production burden to produce all of the underlying emails and faxes themselves, representing in excess of 100,000 pages of documentation painstakingly extracted from PDF files.

The information that has been produced and is being produced is substantially redundant of what Complaint Counsel has requested in subpoenas issued to ECM customers. *See* Exh. RX-D (demand requests contained in every one of Complaint Counsel's customer subpoenas to date). On February 5, 2014, ECM agreed to provide Complaint Counsel additionally all of its emails, attachments, facsimiles, and other responsive files, consisting of [REDACTED] [REDACTED], thus negating the need for the subpoenas. That production is taking place now and embraces a universe of over 100,000 pages of documents. On February 6th, ECM supplied Complaint Counsel with the customer specific revenues that were the subject of contest ruled upon by the Court on February 4th.

On February 3rd, Complaint Counsel informed ECM that it intends to subpoena an additional 35 ECM customers. *See* RX-A:5. Following Complaint Counsel's pre-complaint

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investigation, two ECM customers, American Plastic Manufacturing, Inc. and MacNeill Engineering Company, ceased doing business with ECM (that before Complaint Counsel entered into consent orders with those companies). On February 3rd, as a direct result of Complaint Counsel's issuance of its first 11 subpoenas to ECM customers, [REDACTED] [REDACTED]. That pattern is destined to continue imperiling ECM unless this Court imposes reasonable limits on Complaint Counsel's customer subpoenas.

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

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

In the Matter of

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

Respondent.

Docket No. 9358

CONFIDENTIAL

**RESPONDENT ECM BIOFILM'S MEMORANDUM IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER**

Respondent ECM BioFilms, Inc. ("ECM") hereby moves for an Order placing reasonable limits on Complaint Counsel's subpoenas to ECM customers, limits tailored to prevent devastating financial losses to ECM that will threaten its economic survival and its ability to finance a legal defense in these proceedings. Despite pledging to self-impose reasonable limits on discovery, Complaint Counsel has widened its scope of discovery [REDACTED]. [REDACTED]. Complaint Counsel plans to subpoena 35 more ECM customers immediately atop 11 it subpoenaed the week of January 29th. Of the 11 subpoenaed, [REDACTED]. [REDACTED]. That loss comes atop the loss of two additional accounts, American Plastic Manufacturing, Inc. and MacNeill Engineering Company, in the pre-Complaint stage directly following contacts by Complaint Counsel (and before those same companies entered into consent agreements with the agency) and the production of the Sigma Plastics Group for all their US customers. In ruling on a prior ECM motion to limit customer based discovery, this Court denied relief deeming the harms recited speculative. *See*

Jan. 10, 2014 Order, at 7; *c.f.* Exh. RX-A:4. The loss of [REDACTED] directly from Complaint Counsel's subpoenas proves the harms no longer speculative, but real.

To prevent further ECM financial losses without sacrificing Complaint Counsel's opportunity to obtain probative evidence, ECM asks the Court to order Complaint Counsel not to subpoena ECM's [REDACTED] and to limit the overall number of customer subpoenas Complaint Counsel issues to 35, inclusive of the 11 already served.

ECM therefore seeks a protective order that bars Complaint Counsel from subpoenaing the following [REDACTED] ECM accounts: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] ECM also seeks an overall limit of 35 customer subpoenas, inclusive of the 11 served to date.

Rule 3.31(c)(2) contemplates just this sort of tailored relief to avoid undue burden.

FACTS:

In 2013, [REDACTED]

[REDACTED]

[REDACTED]. Its

2013 sales data reveal that those customers are essential for ECM to remain a going concern.

See Exh. RX-A, at ¶¶ 3-6. That is confirmed by ECM's Chief Financial Officer. *See* Exh. RX-

C, at ¶¶ 4-13 (Decl. of Ken Sullivan). [REDACTED]

[REDACTED]

On January 29, 2014, Complaint Counsel began serving 11 subpoenas on ECM's prospective and former customers. *See* RX-A:3. A few days thereafter (*see* Exh. RX-C), one end user of an ECM customer, [REDACTED] notified ECM's customer by email that it would no longer order products made with ECM's additives as a direct result of its receipt of Complaint Counsel's subpoena:

[REDACTED]

[REDACTED]

On February 3, 2014, Complaint Counsel notified ECM of its intent to subpoena an additional 35 customers. *See* Exh. RX-A:5. And on February 4th, Complaint Counsel informed ECM that it would subpoena 15 more. *See* Exh. RX-B:2 at 7. ECM hereby objects specifically to four (4): those Complaint Counsel plans to serve immediately upon [REDACTED]

[REDACTED]

[REDACTED]

Three of those customers rank in the top five ECM accounts. The loss of any one will cause irreparable financial injury, imperiling ECM's business and denying ECM the financial wherewithal it needs to defend itself in these proceedings. *See* RX-A, at ¶¶ 3-6; Exh. RX-C, at ¶¶ 4-13.

ECM has opened up all of its [REDACTED] to Complaint Counsel, having produced all of its extensive contemporaneous data base summations of all emails, faxes, and phone [REDACTED] [REDACTED], but also agreeing despite an extraordinary production burden to produce all of the underlying emails and faxes themselves,

representing in excess of 100,000 pages of documentation painstakingly extracted from PDF files. The information that has been produced and is being produced is substantially redundant of what Complaint Counsel has requested in subpoenas issued to ECM customers. *See* Exh. RX-D (demand requests contained in every one of Complaint Counsel's customer subpoenas to date).

On February 5, 2014, ECM agreed to provide Complaint Counsel additionally all of its emails, attachments, facsimiles, and other responsive files, consisting of all ECM correspondence [REDACTED], thus negating the need for the subpoenas. That production is taking place now and embraces a universe of over 100,000 pages of documents. On February 6th, ECM supplied Complaint Counsel with the customer specific revenues that were the subject of contest ruled upon by the Court on February 4th, and on February 17th, ECM cooperatively worked with Complaint Counsel to supplement that production with customer specific revenues from every account outside the United States.

In short, the information ECM is producing to Complaint Counsel will include substantially the same information Complaint Counsel seeks in its third party subpoenas, to wit, [REDACTED]; marketing materials provided by ECM; and testing materials or science provided by ECM. *See* Exh. RX-D (Subpoena to Down to Earth).

ECM has agreed with Complaint Counsel, and hereby reiterates its willingness, to extend the discovery deadlines as necessary to March 20, 2014, to ensure that Complaint Counsel has adequate time to evaluate the massive correspondence production ECM now has underway. At a minimum, that production should be received and evaluated by Complaint Counsel before it proceeds en masse in subpoenaing ECM's customers.

At ECM's request, Complaint Counsel has represented that it will refrain from serving ECM customers with subpoenas pending this Court's resolution of the instant dispute.

LEGAL STANDARD:

Commission Rule 3.31(d) authorizes the court to issue protections for "a party or other person" against improper discovery, including subpoenas. *See* 16 C.F.R. § 3.31(d). Respondents have standing to challenge nonparty discovery to the extent that discovery threatens to harm the respondent. *See In re Horizon Corp.*, 88 F.T.C. 208, at 4 n.5 (July 28, 1976). The Commission most recently explained in November that "the scope of discovery is limited and a court is obliged to enforce such limitations to protect the rights of a party, even where the discovery is directed at nonparties." *See In the Matter of LabMD, Inc., A Corp., Respondent.*, 9357, 2013 WL 6327986 (F.T.C. Nov. 22, 2013).

Rule 3.31(c)(2) explains that the "... use of the discovery methods otherwise permitted under these rules *shall be limited* by the Administrative Law Judge if he or she determines that: (i) [t]he discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; ... or (iii) [t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." *See* 16 C.F.R. § 3.31(c)(2) (emphasis added). Courts should thus limit discovery where compliance "threatens to unduly disrupt or seriously hinder normal operations of a business." *See F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

ARGUMENT:

A. The discovery sought from ECM Customers Is Obtainable from ECM Directly

Complaint Counsel served 11 subpoenas on ECM's prospective and former customers. The document requests in those subpoenas were identical with minor variations. *See, e.g.*, Exh. RX-C. In short, Complaint Counsel seeks all documents possessed by ECM customers that are related to ECM BioFilms. *See* RX-B:2.

As of February 17, Complaint Counsel has received from ECM all of ECM's database summations, including every one of 20,000 [REDACTED] [REDACTED], from January 1, 2009 to December 31, 2013. Among those records are ones pertaining to [REDACTED] ECM has provided Complaint Counsel with more than 20,000 pages [REDACTED]. By agreement, ECM will produce the remainder of its [REDACTED] (totaling over 100,000 pages) in rolling production as rapidly as the documents can be retrieved and prepared by counsel.

In a February 5 meet and confer with Complaint Counsel, ECM specifically offered to supply Complaint Counsel in addition to its database summations for these accounts all of its underlying email [REDACTED], despite the extraordinary production burden (the underlying documents must be extracted from PDF files). Complaint Counsel accepted that approach in fulfillment of ECM's outstanding discovery obligations. *See* RX-B:3. In customer subpoenas, Complaint Counsel seeks "communications with ECM," "marketing materials provided by ECM," "testing materials or scientific or product information provided by ECM," and "testing documents regarding the ECM Additive." *See* Exh. RX-D. That is the very same information contained in ECM's files that are being produced by ECM to

Complaint Counsel. ECM's production of its email files includes all such communications [REDACTED]. It includes all marketing and promotional material exchanged with all its customers (not just those identified by Complaint Counsel for subpoena). It includes all testing and scientific data conveyed to ECM's sophisticated consumers in support of ECM claims. In sum, the information contained within ECM's own files is every piece of material content exchanged with its customers. All information sought by Complaint Counsel in subpoenas from ECM's customers is thus redundant and cumulative.

B. The Probative Value of Discovery from the [REDACTED] Customers Is Substantially Outweighed by the Undue Burden Imposed on ECM

The [REDACTED] customers that ECM seeks to exclude from Complaint Counsel's subpoenas are financially indispensable to ECM, and all correspondence from ECM to those [REDACTED] customers and from those [REDACTED] customers to ECM is being supplied to Complaint Counsel by ECM as rapidly as possible. *See* Exh. RX-B:2 (by February 21, 2014). That less burdensome alternative is precisely of the kind contemplated by Rule 3.31(c)(2) (discovery "shall be limited" when "the discovery sought from a party is ... obtainable from some other source that is more convenient, less burdensome, or less expensive"). The rules specifically provide for the limitation of discovery even when the targeted information is otherwise accessible under Rule 3.31(c)(1).

The loss of any of ECM's [REDACTED] will harm ECM irreparably and will deny ECM the financial wherewithal it needs to afford a legal defense in these proceedings. *See* Exh. RX-A, at ¶¶ 3-11.

C. It is Reasonable to Impose an Overall Limit on the Number of Subpoenas Complaint Counsel May Serve on Existing ECM Customers

Given the fact of business loss as a direct result of Complaint Counsel's first 11

subpoenas, it is reasonable to impose an overall numerical limit on the number of subpoenas issued (here 35 inclusive of the 11 already served) and to exclude [REDACTED] ECM accounts essential for its financial survival and its financing of a legal defense. Indeed, one would be hard pressed to conceive of a higher degree of proof needed to justify imposition of limits under FTC Rule 3.31(c)(2) & (d) and, if no limits are prescribed given this circumstance, Rule 3.31(c)(2) will be rendered a nullity.

CONCLUSION:

For the foregoing reasons, ECM hereby requests that this Court order that the following [REDACTED] customer accounts upon which ECM depends for financial survival not be the subject of subpoenas and that, instead, discovery related to those accounts be exhausted from the correspondence files possessed by ECM relative to each (and by volitional means by ECM obtaining additional information from those customers as a proxy for FTC if necessary): [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. ECM also asks that his Honor impose an overall numerical limit on the number of subpoenas Complaint Counsel may issue to ECM customers, recommending that the number not exceed 35, inclusive of the 11 already served and not to include the aforementioned top [REDACTED] accounts.

Respectfully submitted,

/s/ Jonathan W. Emord
Jonathan W. Emord (jemord@emord.com)

PUBLIC DOCUMENT

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

DATED this 17th day of February 2014.

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Respondent's counsel conferred with Complaint Counsel in a good faith effort to resolve by agreement the issues raised by Respondent's Motion for a Protective Order dated February 17, 2014. On February 4th and 5th, Respondent's Counsel (Peter A. Arhangelsky and Jonathan W. Emord) and Complaint Counsel (Katherine Johnson) communicated by email about this motion. On February 5th, Respondent's Counsel (Peter A. Arhangelsky) and Complaint Counsel (Katherine Johnson, Elisa Jillson, and Jonathan Cohen) corresponded by telephone. The parties further negotiated the issues presented in the foregoing motion through email correspondence, and they have been unable to reach an agreement on the issue raised in the attached motion.

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

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

In the Matter of

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

Respondent.

Docket No. 9358

PUBLIC

**[PROPOSED] ORDER GRANTING RESPONDENT ECM BIOFILMS, INC.'S MOTION
FOR A PROTECTIVE ORDER**

This matter having come before the Administrative Law Judge on February 17, 2014, upon a Motion for a Protective Order ("Motion") filed by Respondent ECM BioFilms, Inc. ("ECM") pursuant to Commission Rule 3.31(d), 16 C.F.R. § 3.31(d), for an Order protecting ECM from Complaint Counsel's discovery requests.

Having considered ECM's Motion and all supporting and opposing submissions, and for good cause appearing, it is hereby ORDERED that ECM's Motion is granted and a protective order is issued limiting Complaint Counsel as follows: Complaint Counsel shall not serve nonparty discovery on (1) ECM's top ten customer accounts, as set forth in ECM's motion and memorandum; and (2) Complaint Counsel is limited in the number of nonparty subpoenas that may be served on ECM customers to thirty-five (35) such subpoenas, inclusive of the 11 customer subpoenas Complaint Counsel has already served.

ORDERED:

Date:

D. Michael Chappell
Chief Administrative Law Judge

STATEMENT CONCERNING CONFIDENTIALITY

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

DATED: February 21, 2014.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 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 to the **Office of the Secretary:**

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

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

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

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

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

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

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

I 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: February 21, 2014

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

EXHIBIT A (RX-A)

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

REDACTED

EXHIBIT B (RX-B)

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
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In the Matter of

**ECM BioFilms, Inc.,
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Respondent.

Docket No. 9358

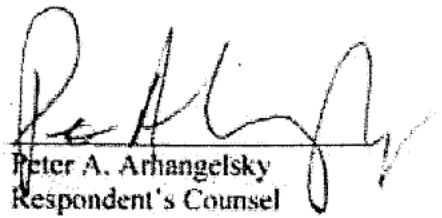
PUBLIC

**DECLARATION OF PETER ARHANGELSKY IN SUPPORT OF RESPONDENT
ECM'S MOTION FOR PROTECTIVE ORDER**

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

1. I am over the age of eighteen years and I make this affidavit on personal knowledge of its contents and in further support of Respondent's Motion for a Protective Order.
2. I am employed by the law firm Emord & Associates, P.C., which represents ECM BioFilms in matters before the Federal Trade Commission. I am an attorney of record in the above-captioned case.
3. Attached hereto are true and correct copies of emails between counsel on February 4, 2014 and February 7, 2014 with respect to ECM's proposed motion for a protective order.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2014 in Chandler, Arizona.



Peter A. Arhangelsky
Respondent's Counsel

ATTACHMENT RX-B:1

Peter Arhangelsky

From: Peter Arhangelsky
Sent: Thursday, February 06, 2014 9:03 AM
To: 'Johnson, Katherine'
Cc: 'Jillson, Elisa'; 'Cohen, Jonathan'; jemord@emord.com; Lou Caputo
Subject: No. 9358; ECM Revenues
Attachments: ECM-FTC-004363-4366.pdf

Counsel,

Please find attached Respondent's customer-specific revenue list supplied to you in advance of the deadline specified in the court's February 4th Order.

Sincerely,

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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ATTACHMENT RX-B:2

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

REDACTED

ATTACHMENT RX-B:3

Peter Arhangelsky

From: Jonathan Emord
Sent: Friday, February 07, 2014 8:33 AM
To: Johnson, Katherine; Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Katherine, I thank you for that courtesy. If you deem particular correspondence necessary for expert preparation, I will work with you to ensure a prompt response is given by us to achieve your preparatory objective in a way that will eliminate or reduce anti-competitive effects. Sincerely, Jonathan

From: Johnson, Katherine [mailto:kjohnson3@ftc.gov]
Sent: Friday, February 07, 2014 10:28 AM
To: Jonathan Emord; Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Jonathan: While I don't believe we have an obligation to expurgate that information, I see no reason why we would need to share this with our experts, so in light of your client's concerns, we will agree to do so. However, if there is a particular correspondence that we believe should be shared with our experts, then we will have to revisit this issue.

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: Jonathan Emord [mailto:JEmord@emord.com]
Sent: Friday, February 07, 2014 10:19 AM
To: Johnson, Katherine; Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358
Importance: High

Katherine: We will send the following notice to the clerk momentarily in light of your decision to withdraw the motion to compel:

Following a meet and confer with Complaint Counsel, we are informed that Complaint Counsel intends to file a notice of withdrawal of its motion to compel by the end of today. In light of receipt of that representation from Complaint Counsel, the need for ECM to file a surreply is obviated and no further ECM pleading will be submitted.

Concerning tests by ECM customers or tests, studies, and analyses relied upon by ECM, we agree that evidence of that sort may be shared with your experts, provided that you limit the experts' access to that very information and expurgate all associated customer correspondence which is not a part of the test, study, and analyses. When in doubt on this point, we welcome hearing from you and will respond promptly with our view of the matter.

Sincerely,

Jonathan W. Emord

From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Friday, February 07, 2014 10:08 AM
To: Jonathan Emord; Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Jonathan:

Thank you for the clarification. Based on the corrections and clarifications below, we agree to withdraw our motion to compel. I can't promise it will be done by noon, but we can notify the Court by the end of the day.

However, we need clarify one point. By designating the material confidential it becomes "attorneys eyes only." This includes, under paragraph 7 of the protective order, "personnel retained by the Commission as experts or consultants for this proceeding." Thus, to the extent that the Email Archive yields documents that our experts in this case would need to consider in forming their opinions, *e.g.*, tests conducted by ECM customers, they will be shared with our experts.

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: Jonathan Emord [<mailto:JEmord@emord.com>]
Sent: Friday, February 07, 2014 9:56 AM
To: Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Johnson, Katherine; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358
Importance: High

Dear Jonathan:

Concerning your interest in obtaining international customer correspondence, we have conferred with our client and can represent on ECM's behalf that it will be providing you with all of its correspondence with international customers and all of its customer specific revenue information with those customers, to the extent not already supplied, for the period between January 1, 2009 and the present. We hereby correctively amend our email of yesterday to delete the word "domestic."

Second, to the extent ECM still has internal email files, those will be included in the email archives that will be produced. If ECM employees did not include their emails in the archived correspondence PDFs, ECM will not have those records. Furthermore, as Peter stated, ECM's internal written correspondence is generally limited.

Please note, under the protective order in this case, we designate all of the correspondence between ECM and its customers as well as the revenue listings as highly confidential. We note, in particular, that this information cannot be shared with experts, particularly in light of the fact that almost all experts in this field have direct or indirect fiduciary duties to or financial ties with competitors of ECM.

I hope this answers your questions. Please let me know on or before Noon Eastern today if you will withdraw the pending motion to compel. If you decide against that course, or if we do not hear from you by Noon Eastern, we will file the surreply shortly thereafter.

Sincerely,

Jonathan W. Emord

From: Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]
Sent: Thursday, February 06, 2014 8:12 PM
To: Peter Arhangelsky
Cc: Jillson, Elisa; Johnson, Katherine; Jonathan Emord; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Peter,

Two quick questions (and my co-counsel may have others):

- (1) What's the basis for limiting the production to "domestic" ECM customers? You didn't mention that limit this afternoon.
- (2) I understand you've indicated that there may be very few internal communications. However, to the extent they exist, are they all included within the "customer correspondence files" you describe in the second paragraph?

Thanks,

Jonathan Cohen
Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

From: Peter Arhangelsky [<mailto:PARhangelsky@emord.com>]
Sent: Thursday, February 06, 2014 7:42 PM
To: Cohen, Jonathan
Cc: Jillson, Elisa; Johnson, Katherine; Jonathan Emord; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Counsel:

We agree to the terms of the joint motion, even if the court will not accept it. You also have our consent to withdraw the joint motion.

As we discussed this afternoon, I have attached our discovery letter. Please inform us if you have questions. Should we fail to agree by tomorrow at Noon Eastern, we will be obliged to file our Surreply. However submission of that brief should not limit our ability to reach an agreement on these points.

Sincerely,

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: Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]

Sent: Thursday, February 06, 2014 4:32 PM

To: Peter Arhangelsky; Jonathan Emord

Cc: Jillson, Elisa; Johnson, Katherine

Subject: RE: ECM Biofilms, No. 9358

Counsel,

(1) Do we have your agreement to the terms of the joint motion (along with Peter's clarification at 1:47 EST this afternoon), even if the Court will not accept the motion now?

(2) As it's a joint motion, do we have your consent to withdraw it?

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

From: Pelzer, Lynnette

Sent: Thursday, February 06, 2014 5:23 PM

To: Cohen, Jonathan; Jillson, Elisa; Johnson, Katherine; Arhangelsky, Peter; Emord, Jonathan

Cc: Arthaud, Victoria; Gebler, Hillary; Gross, Dana

Subject: RE: ECM Biofilms, No. 9358

Dear Counsel,

Per Judge Chappell, the above pending joint motion is too speculative or uncertain at this time to be granted. However, to alleviate the parties' concerns, in the event the discovery deadline needs to be extended at some point, a joint motion at that time will be considered favorably. Accordingly, the best practice at this time would be for the parties to file a Notice of Withdrawal of this pending joint motion.

From: OALJ

Sent: Thursday, February 06, 2014 3:52 PM

To: Arthaud, Victoria; Gebler, Hillary; Pelzer, Lynnette

Subject: FW: ECM Biofilms, No. 9358

Exh. RX-B:3

From: Cohen, Jonathan
Sent: Thursday, February 06, 2014 3:51:37 PM
To: OALJ
Cc: Jillson, Elisa; Johnson, Katherine
Subject: ECM Biofilms, No. 9358
Auto forwarded by a Rule

Please see the attached Joint Motion To Reset the Fact Discovery Deadline, and an accompanying transmittal letter. We have forwarded hard copies as well.

Thanks,

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

EXHIBIT C (RX-C)

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

REDACTED

ATTACHMENT RX-C:1

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

REDACTED

ATTACHMENT RX-C:2

**CONFIDENTIAL DOCUMENT SUBJECT
TO PROTECTIVE ORDER**

REDACTED

EXHIBIT D (RX-D)

United States of America
FEDERAL TRADE COMMISSION



Katherine Johnson
600 Pennsylvania Ave. NW, M-8102B
Washington, DC 20580
(202) 326-2185; kjohnson3@ftc.gov

Elisa Jillson
600 Pennsylvania Ave. NW, M-8102B
Washington, DC 20580
(202) 326-3001; ejillson@ftc.gov

Jonathan Cohen
600 Pennsylvania Ave. NW, M-8102B
Washington, DC 20580
(202) 326-2551; jcohen2@ftc.gov

January 29, 2014

VIA FEDERAL EXPRESS

Down to Earth
c/o Mark Fergusson, CEO
2525 South King Street
Honolulu, HI 96826
(808) 947-7678

Re: ***In the Matter of ECM BioFilms, Inc, Dkt. No. 9358***
Subpoena Duces Tecum to Down to Earth

Dear Mr. Fergusson:

The Federal Trade Commission ("FTC") has recently initiated an adjudicative proceeding against ECM BioFilms, Inc., Docket No. 9358. The Commission Rules of Practice state that "counsel for a party may sign and issue a subpoena on a form provided by the Secretary of the Commission, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things. 16 C.F.R. § 3.34(b). This letter is to notify you that Complaint Counsel has issued a subpoena *duces tecum* for certain of Down to Earth's documents. The subpoena with attached schedule and exhibits is enclosed.

On October 22, 2013, the Federal Trade Commission's Office of the Administrative Law Judges issued a Protective Order Governing Discovery Material ("Protective Order") in the above-referenced action. The Protective Order protects confidential materials from discovery in the case. A copy of the Protective Order signed by Chief Administrative Law Judge D. Michael Chappell is enclosed as an exhibit to the subpoena's schedule.

Any documents you produce to the Commission that are confidential must include the notice "CONFIDENTIAL – FTC Docket No. 9358" in accordance with the Protective Order. If you produce confidential documents in electronic or other media, you may place the "CONFIDENTIAL – FTC Docket No. 9358" designation on the CD.

Please call at your earliest convenience to discuss any issues regarding production. You may reach me at (202) 326-3001.

Sincerely,

A handwritten signature in black ink, appearing to read "Elisa Jillson", with a long horizontal flourish extending to the right.

Elisa Jillson
Complaint Counsel

Enclosures



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 Mark Fergusson CEO Down to Earth 2525 South King Street Honolulu, HI 96826	2. FROM <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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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 Federal Trade Commission 600 Pennsylvania Ave, NW, Mailstop M-8102B Washington, DC 20580	4. MATERIAL WILL BE PRODUCED TO Elisa Jillson 5. DATE AND TIME OF PRODUCTION February 12, 2014 at 9:00 A.M.
--	--

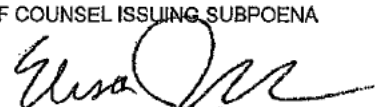
6. SUBJECT OF PROCEEDING

In the Matter of ECM Biofilms, Inc., Docket No. 9358

7. MATERIAL TO BE PRODUCED

See documents and materials identified on the attached Schedule, and Exhibits, including the Protective Order Governing Discovery Material.

8. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580	9. COUNSEL AND PARTY ISSUING SUBPOENA Complaint Counsel Katherine Johnson (202) 326-2185 Jonathan Cohen (202) 326-2551 Elisa Jillson (202) 326-3001
--	---

DATE SIGNED 1/29/2014	SIGNATURE OF COUNSEL ISSUING SUBPOENA 
------------------------------	---

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.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

By Federal Express overnight mail, pursuant to Rule 4.4(a)(2) of the Federal Trade Commission's Rules of Practice.

by registered mail.

by leaving copy at principal office or place of business, to wit:

on the person named herein on:

January 29, 2014

(Month, day, and year)

Elisa Jillson

(Name of person making service)

Attorney, Federal Trade Commission

(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

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

Docket No. 9358

PUBLIC

**COMPLAINT COUNSEL'S SCHEDULE FOR PRODUCTION OF DOCUMENTS
PURSUANT TO SUBPOENA**

Pursuant to Complaint Counsel's attached Subpoena *Duces Tecum* issued January 29, 2014, under Commission Rule of Practice § 3.34(b), Complaint Counsel requests that the following materials be produced to the Federal Trade Commission, 600 Pennsylvania Ave, NW, Mailstop M-8102B, Washington, DC 20580.

DEFINITIONS

- A. "And," as well as "or," shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any Specification all information that otherwise might be construed to be outside the scope of the specification.
- B. "Any" shall be construed to include "all," and "all" shall be construed to include the word "any."
- C. "Communication" includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it was accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
- D. "Document" shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. "Document" shall also include Electronically Stored Information.
- E. "ECM" shall mean ECM Biofilms, Inc., including without limitation, its agents, employees, officers, or anyone else acting on its behalf.

- F. **"ECM Additive"** means the plastic additive manufactured by ECM, including but not limited to "Masterbatch Pellets."
- G. **"ECM Plastic"** means any plastic treated with or incorporating an ECM Additive.
- H. **"Electronically Stored Information"** or **"ESI"** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any information created, manipulated, communicated, stored, or utilized in digital form, requiring the use of computer hardware or software. This includes, but is not limited to, text messages, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media. "ESI" also includes such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
- I. **"Include"** and **"including"** mean "without limitation," or "including but not limited to," so as to avoid excluding any documents or information that might otherwise be construed to be within the scope of any specification.
- J. **"Referring to," "relating to,"** or **"related to"** shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- K. **"You"** and **"Your"** means Down to Earth.

INSTRUCTIONS

- A. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from January 1, 2007, until the date of full and complete compliance with this subpoena.
- B. **Petitions to Limit or Quash:** Pursuant to Commission Rule of Practice 3.34(c), any motion to limit or quash this subpoena must be filed within ten days of service hereof.
- C. **Protective Order:** On October 22, 2013, the Court entered an order governing discovery material in this matter. A copy of the Protective Order is attached hereto as Exhibit A with instructions on the handling of confidential information.
- D. **Sensitive Personally Identifiable Information:** If any material called for by these Specifications contains sensitive personally identifiable information or sensitive health information of any individual, please contact us before sending those materials to discuss ways to protect such information during production or whether it would be appropriate to redact the sensitive information.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

- E. **Scope of Search:** This subpoena covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, partners, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.

Document Production: You shall produce the documentary material to Katherine Johnson, Federal Trade Commission, 600 Pennsylvania Ave., NW, M-8102B, Washington, DC 20580. Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Please see the attached Bureau of Consumer Protection Production Guide for detailed instructions for submitting ESI or digitally imaged hard copies. Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- F. Documents that may be responsive to more than one specification of this subpoena need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this subpoena have been previously supplied to the Commission, you may comply with this subpoena by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.
- G. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this subpoena. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request.

- H. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the request. The document shall not be edited, cut, or expunged in any way and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- I. Each request includes any and all copies of the responsive document and, to the extent applicable, preliminary drafts or documents that differ in any respect from the original or final draft or from each other (e.g., by reason of differences in form or content or by reason of handwritten notes or comments having been added to one copy of a document but not the original or other copies thereof).
- J. In the event that any document covered by this subpoena was in your possession or actual or constructive custody or control and has been lost or destroyed, the document is to be identified in writing as follows: addressee, person who prepared or authored the document, date of preparation or transmittal, substance of the document and its subject matter, number of pages, attachments, or appendices, all persons to whom distributed, shown or explained, date of loss or destruction, and, if destroyed, the manner of destruction, the reason for destruction, the persons authorizing destruction, and the persons who destroyed the document.
- K. If an objection is made to any request herein, all documents covered by the request not subject to the objection should be produced. Similarly, if an objection is made to production of a document, the portion of that document not subject to objection should be produced with the portion objected to redacted and clearly indicated as redacted.
- L. All objections to these requests or to any individual request must be raised in the initial response or are otherwise waived.
- M. **Claims of Privilege:** Pursuant to Federal Trade Commission Rules of Practice 3.38A, 16 C.F.R. § 3.38A, if any documents are withheld from production on a claim of privilege or any similar claims, you shall provide, not later than the date set for production of materials, a schedule that describes the nature of the documents, communications, or tangible things not produced or disclosed with sufficient detail to enable Complaint Counsel to assess the claim of privilege. The schedule shall state individually for each item withheld:
1. The custodian of the document;
 2. The type of document, including any attachments (e.g., letter, memorandum);
 3. The date of the document;
 4. The general subject matter of the document;
 5. The sender, author, and all recipients of the document; and
 6. The basis on which you contend you are entitled to withhold the document from production.

If only a part of a responsive document is privileged, all non-privileged parts must be submitted.

- N. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish admissibility of the documents produced in response to this subpoena. You are asked to execute this certification and provide it with your response.

SPECIFICATIONS

Demand is hereby made for the following documents:

- (1) Provide all documents regarding ECM and the ECM Additive, including:
- a. any communications with ECM;
 - b. any marketing materials provided by ECM;
 - c. any testing materials or scientific or product information provided by ECM;
 - d. any testing documents regarding the ECM Additive;
 - e. any internal communications regarding the ECM Additive;
 - f. any communications with third parties regarding the ECM Additive;
 - g. any marketing materials for your products containing the ECM Additive regarding biodegradability.

Respectfully submitted,



Katherine Johnson
Jonathan Cohen
Elisa Jillson
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

OMITTED