PUBLIC DOCUMENT

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS

Pursuant to Rule 3.38, Complaint Counsel respectfully requests that the Court order Respondent to immediately produce documents responsive to Complaint Counsel's November 27 Request for Production of Documents ("RFPD"), CCX-A:1. As of this writing, ECM's response is nearly a month late (and fact discovery closes on April 3). Nevertheless, ECM informed us that it will only mete out certain responsive information in periodic increments (on its own timetable) as the close of fact discovery approaches—and ECM will not produce vast quantities of responsive material at all. Despite Complaint Counsel's repeated attempts to negotiate and our significant concessions, ECM has steadfastly resisted compromise. ECM's unjustified dilatory tactics and obstinate disregard for its obligations are impairing Complaint Counsel's ability to develop its case—and the Court's ability to review a complete record. Accordingly, Complaint Counsel respectfully requests the Court to order ECM to comply immediately with either the RFPD or our final compromise proposal (outlined herein and in CCX-A:3).

BACKGROUND

A. ECM's Refusal To Produce Most Responsive Documents.

The RFPD requested, among other things, documents relating to ECM-customer communications and to the functioning of, substantiation for, and perception of the additive technology. CCX-A:1. ECM had 30 days to respond. *See* Rule 3.38(b). Significantly, ECM

has at least two repositories of responsive documents: (1) a Microsoft Access database that contains summaries of communications with customers ("Summary Database") with approximately 142,000 potentially responsive entries, and (2) an archive of emails in PDF format ("Email Archive"). CCX-A ¶ 2. On December 27, ECM produced a 1200-page PDF excerpt from the Summary Database containing summaries of communications with **prospective** customers—and ECM redacted current customers' names.

On January 10, the Court ordered ECM to disclose its customer list. *See* Order at 8. Nevertheless, ECM has not produced an unredacted copy of the PDF excerpt.[1] On January 20, ECM produced 25 pages of marketing documents (that could easily have been produced when the response was due), and the useless revenue list that is the subject of the sanctions motion filed yesterday. ECM has produced nothing further.

B. Complaint Counsel's Attempts to Negotiate.

Complaint Counsel made numerous concessions in a futile effort to entice ECM to produce at least a meaningful portion of its responsive documents with reasonable dispatch. First, we agreed to accept ECM's production in native format (*i.e.*, the format in which the records are kept), while converting our own production into the format ECM requested.[2] CCX-A:4 at 1. Second, we offered to limit discovery to documents responsive to 50 search terms.[3] CCX-A:2 at 2. Third, we withdrew Request 13 (customer communications) after ECM objected. *Id.* at 1. Fourth, we agreed to narrow the timeframe. CCX-A:3 at 2. Fifth, we agreed that ECM need not produce duplicate copies. *Id.* at 1. Sixth, after ECM argued that searching its Email Archive was *per se* unduly burdensome, we made an extraordinary offer—to accept the

---

[1] Given the Court's order, it is not clear on what possible basis ECM could withhold customer names.

[2] On January 13, Complaint Counsel produced approximately 62,000 documents to ECM.

[3] This approach is consistent with the Court's order. Specifically, the Court rejected ECM's argument that Complaint Counsel's request for customer communications was overbroad, because "appropriate search terms" would ameliorate any burden. *See* Order at 8.

Summary Database in native format (no processing required) **in lieu of** production from the Email Archive.[4] CCX-A:3 at 1-2.

These efforts culminated in Complaint Counsel's final proposal, which ECM rejected notwithstanding the fact that it would reduce ECM's effort substantially from what the law requires:

- Complaint Counsel would waive its right to responsive customer communications from the Email Archive. In exchange, ECM would agree to waive any evidentiary objection we reasonably could have met if ECM had produced actual documents rather than summaries.
- ECM would produce its database summarizing customer communications. ECM would merely need to copy it (or we would copy it for ECM). To address the unlikely event that it contains privileged material, Complaint Counsel proposed a detailed clawback agreement.
- We agreed to narrow the timeframe for all requests by one year.
- We agreed that, with respect to all other outstanding requests—including all requests for scientific and technical communications, and all responsive communications between employees—documents responsive to 50 search terms would satisfy ECM's obligations completely.

See CCX-A:3 at 1-2. In essence, rather than produce all responsive documents (or anything close), ECM would merely produce the Summary Database (in lieu of customer emails) plus documents responsive to 50 search terms.

C. ECM's Position.

Weeks after ECM's discovery was due, Complaint Counsel requested a final meet and confer. During the conference, ECM proposed:

- To produce the Summary Database in native format, but with the following caveats: (1) ECM would have two employees (including the CEO) review the database for "confidential" information;[5] (2) ECM would disclose segments

[4] Complaint Counsel offered this substitution with reasonable conditions: (1) stipulation to the authenticity of the Database records; (2) waiver of objections that we reasonably could have met if ECM had produced the original correspondence; and (3) waiver of any right to use such correspondence. To alleviate ECM's concerns about privilege, we offered a clawback agreement.

[5] ECM stated that only employees could review the database and assemble its production because it cannot trust third parties with its confidential information. ECM further stated that it

on a rolling basis beginning on January 31 with the "intent" of completion "four to six weeks" from that point; (3) ECM would commit to completing its production only by the close of fact discovery (April 3); and (4) ECM would not produce documents dated before January 1, 2009.

- ECM would not necessarily produce any underlying documents and reserved the right to raise evidentiary objections regardless of whether Complaint Counsel would need the underlying documents to meet those objections. However, ECM offered to negotiate further with Complaint Counsel if we requested underlying documents with respect to specific customers.

- ECM had not yet searched for responsive scientific and technical documents, but might produce them around the time of expert discovery (no specific date); and

- Responsive communications between ECM employees would be produced eventually if they exist; ECM was "looking into it."

CCX-A ¶ 3. Suffice it to say, Complaint Counsel declined this proposal.

LEGAL STANDARD

Rule 3.31(c)(1) provides that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." As relevant here, the Court will only limit discovery when "[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." *Id.* § 3.31(c)(2)(iii). Significantly, the party resisting discovery bears the burden of establishing undue burden,[6] and conclusory assertions are insufficient.[7]

---

cannot accept any clawback agreement because it does not trust Complaint Counsel to implement it honestly.

[6] *See, e.g.*, *Sunnergren v. Cate*, No. C 12-979 LHK, 2013 U.S. Dist. LEXIS 1068, *2 (N.D. Cal. Jan. 2, 2013) (reciting majority rule that party resisting discovery bears burden); *see also Lockwood v. Shands Jacksonville Med. Ctr., Inc.*, No. 3:09-cv-376-J-20MCR, 2010 U.S. Dist. LEXIS 50565, *10 (M.D. Fla. May 21, 2010); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 361 (N.D. Ill. 2005); *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 661-62, 666 (D. Kan. 2004).

[7] *See, e.g.*, *Sulfuric Acid*, 231 F.R.D. at 361 (explaining that "undue burden" requires "affirmative proof in the form of affidavits or record evidence, and that "the ipse dixit of counsel" was "not sufficient"); *cf. In re POM Wonderful LLC*, 2011 FTC LEXIS 42, at *7 (Mar. 16, 2011) (noting failure to cite "authority for contention that providing the requested information presents an undue burden").

ARGUMENT

A. The Information Sought Is Critical To This Case.

Not only are the requests at issue manifestly relevant, ECM's responses are necessary to develop the record fully and fairly. For instance, our requests regarding substantiation, scientific, and technical information bear directly on whether ECM's product functions as advertised, and whether ECM had substantiation for its advertising claims. *See* CCX-A:1 at 4-6 (Requests 1, 3-5, 7-8). Our requests regarding advertising are relevant to the nature, prevalence, and effect of ECM's deceptive claims (*i.e.*, both to the merits and remedies). *See* CCX-A:1 at 5-7 (Requests 2, 6, 9-11). Our requests regarding communications with customers are relevant to the merits (*e.g.*, deception) as well as ECM's sophisticated-customer defense. *See* CCX-A:1 at 7 (Requests 12, 14). Indeed, as the Court observed, the "nature of Respondent's representations to its customers and distributors is a key issue in the case . . . ." Order (Jan. 10) at 6.

Despite the centrality of these requests, other than a redacted PDF summarizing communications with non-customers, ECM has produced almost nothing. Accordingly, this is not a dispute over whether ECM must produce some peripheral set of documents or respond to a particular subset of requests. Rather, Complaint Counsel seeks relief from a strategy calculated to force it to prepare its case without any material discovery at all.

B. ECM's "Burden" Objection Is Baseless.

ECM apparently makes three "burden" arguments, none of which has any merit. First, ECM claims it cannot produce emails because the Email Archive is in PDF format and PDFs purportedly are difficult to search. However, this argument is meaningless because PDFs can be converted into other formats, and ECM elected to maintain its files this way—any alleged burden is not "undue" where it results purely "from a recipient's chosen method of operating." *In re W. L. Gore & Assocs.*, 151 F.T.C. 687, 691 (2011); *Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D.D.C. 1991); *Crabbs v. Scott*, No. 2:12-cv-1126, 2013 U.S. Dist. LEXIS 113414, 11-12 (S.D. Ohio Aug. 9, 2013) ("[T]he mere fact that a party's records may not be geared to the demands of discovery does not alone insulate those records from all discovery efforts[.]"). Simply put, if

companies could thwart discovery by maintaining files in difficult-to-search formats, much less discovery would take place.

Second, ECM essentially contends that its status as a relatively small company excuses noncompliance. However, nothing in the Commission's Rules reduces discovery obligations for companies with relatively few employees. Nor does the burden analysis change: the question remains "whether the demand is **unduly** burdensome or **unreasonably** broad"— which is when it "threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (D.C. Circuit's emphasis) (enforcing FTC's subpoena); *accord W. L. Gore*, 151 F.T.C. at 691 (applying *Texaco* to enforce subpoena). Importantly, "'expected' and 'necessary' costs" associated with discovery response do not constitute undue burden. *W.L. Gore*, 151 F.T.C. at 690-91; *see also Fagan*, 136 F.R.D. at 7 ("[The] mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden."). ECM has certainly not proven that complying with the RFPD[8] would "seriously hinder [its] normal operations."[9]

Third, ECM claims it cannot timely respond because only its CEO and one other employee can discern responsive information while protecting confidences. Put differently, ECM refuses to engage a litigation support firm because it does not trust any firm not to steal its trade secrets. But companies with trade secrets vastly more valuable than ECM's routinely

---

[8] Significantly, it might be disruptive (or expensive) to give an expedited response to the RFPD **now**. But ECM created this circumstance. Burden must be measured against the time available to respond when the request was served, not the time available now, with the close of fact discovery approaching.

[9] Indeed, ECM has never given any reason for its purported burden other than its own unjustifiable choices to use PDF records, task the CEO with searches, and not hire a litigation support firm. To the extent ECM attempts to assert this now, unsupported and conclusory assertions do not establish burden. *See* Order (Jan. 10, 2014) at 7 (rejecting the "unsupported opinion" in a declaration of ECM's CEO that contacting more than ten customers would cause "severe financial losses" or "financial insolvency," where declaration failed to "cite financial records" or "set forth any particular factual basis").

engage such firms, and ECM's paranoia is irrelevant to its legal obligations. Indeed, discovery would cease if courts credited the claim that the CEO must review every document.

Finally, whatever other *post hoc* arguments ECM drums up will not excuse its wholesale noncompliance.[10] The requested information is not duplicative—we already agreed that ECM need not produce duplicates, and substantively, there is little ECM's production could duplicate given that it has produced so little so far. Furthermore, this core discovery is not readily obtainable elsewhere. Even assuming that some customers or other third parties have copies of material ECM possesses, it makes no sense to serve dozens of subpoenas in an unwieldy, piecemeal attempt to recreate ECM's files.

C. The Commission's Rules Establish When ECM Must Respond.

Finally, Rule 3.38(b) requires document productions within 30 days. Although circumstances may require reasonable extensions, ECM has already awarded itself a very lengthy *de facto* extension. Worse still, what ECM now proposes is extreme. As noted above, ECM's "intent" is to produce whatever it feels appropriate by around March, and ECM's only promise is to complete its production before fact discovery closes. It is beyond dispute, though, that the documents at issue are necessary to guide further fact discovery. The Commission's Rules will not countenance a production so late as to defeat a significant portion of their purpose. *See In re Basic Research LLC*, 2004 FTC LEXIS 248 (Dec. 29, 2004) (granting motion to compel where "rolling production" led to several-month delay).

---

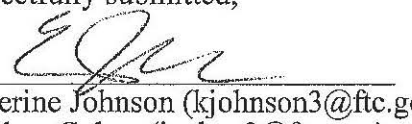
[10] ECM also argues that it needed to await the Court's resolution of the parties' customer list dispute, but this claim is nonsensical. First, even if ECM initially had grounds to delay discovery, they disappeared when the Court resolved the issue on January 10. Second, as the Court noted, it is "curious" that ECM vociferously opposes our contacting customers—and also opposes our obtaining customer communications directly from ECM. *See* Order at 8. ECM's real—and meritless—argument is that any customer-related discovery is *per se* burdensome. Third, with respect to each of our non-customer-related requests, this argument is (and always has been) a red herring. The customer list dispute had no bearing on requests related to substantiation and scientific and technical information.

CONCLUSION

For these reasons, Complaint Counsel respectfully asks the Court to order Respondent to comply immediately with either the RFPD or our final compromise proposal.

Dated: January 23, 2014

Respectfully submitted,



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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSDENT TO PRODUCE DOCUMENTS

This matter having come before the Administrative Law Judge on January 23, 2014, upon a Motion to Compel ("Motion") filed by Complaint Counsel pursuant to Commission Rule 3.38(a) for an Order compelling Respondent ECM Biofilms, Inc. ("ECM") to produce documents responsive to Complaint Counsel's Request for Production of Documents;

And having considered Complaint Counsel's Motion and all supporting and opposing submissions, and for good cause appearing, Complaint Counsel's Motion is hereby GRANTED. As an alternative to ordering full compliance with Complaint Counsel's outstanding document requests, the Court ORDERS:

(1) Respondent shall produce its customer correspondence summary database in native format in three days. If the customer correspondence database contains privileged information, Respondent may redact it, but Respondent may not redact anything else. Complaint Counsel must return any inadvertently produced privileged material immediately upon discovery, and such inadvertent production shall not waive any privilege. Respondent may not challenge the database's authenticity or assert any evidentiary objection at trial regarding database summaries if Complaint Counsel reasonably could have met that objection with access to the underlying documents.

(2) Complaint Counsel will provide Respondent with a list of 50 words, phrases, or Boolean sets of words and phrases. No more than ten days after receiving the list, Respondent will produce all non-privileged documents containing one or more of these 50 search terms.

(3) The timeframe governing paragraphs (1) and (2) is January 1, 2009 through the present.

(4) ECM's compliance with this Order will satisfy its obligations under Complaint Counsel's outstanding document requests.

SO ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Motion to Compel Respondent to Produce Documents. On December 27, January 8, 9, 10, 13, 16, 17, 20, 2014, Complaint Counsel (Katherine Johnson, Jonathan Cohen, and Elisa Jillson) and Respondent's Counsel (Jonathan W. Emord, Peter A. Arhangelsky, and Lou Caputo) communicated by email about the issues that gave rise to these motions. Complaint Counsel and Respondent's Counsel communicated by telephone on January 14, 16, and 21, 2014. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Dated: January 23, 2014

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2014, I caused a true and correct copy of the foregoing to be filed via the FTC E-File system and served as follows:

One emailed courtesy copy to the **Office of the Secretary:**

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

One emailed 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 emailed courtesy copy to **Counsel for the Respondent**:

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Lou Caputo
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: lcaputo@emord.com

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

Dated: January 23, 2014

Respectfully submitted,

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

Complaint Counsel Exhibit A

CCX-A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF ELISA JILLSON IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS

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

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

2. Counsel for ECM Biofilms, Inc. ("ECM") explained that ECM has at least two repositories of documents responsive to Complaint Counsel's First Set of Requests for Production of Documents, dated November 27, 2013. The first is a Microsoft Access database that contains summaries of communications with and regarding customers. This database has approximately 142,000 potentially responsive entries. The second is an archive file that contains emails saved in PDF format.

3. On January 21, 2014, Complaint Counsel and counsel for ECM conducted a final meet and confer by telephone. During this call, counsel for ECM proposed the following in response to our November Requests for Production:

- ECM would produce the Summary Database in native format in segments beginning on or about January 31, 2014. ECM's intent would be to complete this production within four to six weeks from the date of the first production. In any event, ECM would complete this production by the close of fact discovery on April 3, 2014. ECM would have two employees (including the CEO) review the database for confidential information. ECM would not produce documents dated before January 1, 2009. ECM would reserve the right to raise evidentiary objections.

- ECM would not produce any customer emails as part of its production. If Complaint Counsel were to request specific customer emails (by identifying the customer by name), ECM would negotiate producing requested documents.

- ECM is looking into whether responsive scientific and technical documents exist. ECM would expect to produce any such documents around the time of expert discovery. ECM did not provide a specific date.

- ECM is looking into whether responsive communications between ECM employees exist and would produce any that exist.

4. Attachment A:1 hereto is a true and correct copy of Complaint Counsel's First Set of Requests for Production of Documents, dated November 27, 2013.

5. Attachment A:2 hereto is a true and correct copy of an email string among Peter Arhangelsky, Jonathan Emord, Lou Caputo, Katherine Johnson, Jonathan Cohen, and Elisa Jillson, with emails dated January 16, 2014 (top email) to December 27, 2013 (bottom email).

6. Attachment A:3 hereto is a true and correct copy of an email from Jonathan Cohen to Peter Arhangelsky, Jonathan Emord, and Lou Caputo, with copies to Katherine Johnson and Elisa Jillson, dated January 17, 2014.

7. Attachment A:4 hereto is a true and correct copy of an email string among Peter Arhangelsky, Jonathan Emord, Lou Caputo, Katherine Johnson, Jonathan Cohen, and Elisa Jillson, with emails dated December 24, 2013 (top email) to December 23, 2013 (bottom email).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 22nd day of January 2014 in Washington, DC.

Elisa Jillson
Complaint Counsel

Complaint Counsel Exhibit A Attachment 1

CCX-A:1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOUMENTS

Pursuant to Rule 3.37 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Complaint Counsel hereby request that ECM Biofilms, Inc. ("ECM") respond to these Requests within the time prescribed by the Federal Trade Commission's Rules of Practice, and produce the following documents and/or tangible things for inspection and copying at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, M-8102B, Washington, DC 20580, or at such time and place as may be agreed upon by all counsel.

INSTRUCTIONS

1. These instructions and definitions should be construed to require responses based upon the information available to ECM as well as your attorneys, representatives, investigators, and others acting on your behalf.

2. If you are unable to produce a document or property requested, state in writing why you cannot produce the document or the property and, if your inability to produce the document or the property is because it is not in your possession or the possession of a person from whom you could obtain it, state the name, address, and telephone number of any person you believe may have the original or a copy of any such document or property.

3. If you object to a portion or an aspect of any Request, state the grounds of your objection with specificity and respond to the remainder of the Request.

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

5. Where a claim of privilege is asserted in responding or objecting to any discovery requested in these Requests and information is not provide on the basis of such assertion, you shall, in your response or objection, identify the nature of the privilege (including work product) which is being claimed. When any privilege is claimed, you shall indicate, as to the information requested, whether (a) any documents exist, or (b) any communications took place, and (c) also provide the following information for each such document in a "privileged documents log" or similar format:

a. the type of document;

b. the general subject matter of the document;

c. the date of the document;

d. the author(s) of the document;

e. the addressee(s) and any other recipient(s) of the document; and

f. the custodian of the document, where applicable.

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

7. These Requests for Production seek documents not already produced by you pursuant to the FTC's letter requests. To the extent responsive documents have already been produced by you, you should so indicate and include the Bates Number identifying the

documents responsive to that Request. If the document previously produced by you was wholly or partially redacted, please provide an unredacted copy, or the basis for claiming privilege or other protection as described in Instruction No. 5. If the document includes charts or graphs, provide color copies of such documents.

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

DEFINITIONS

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

1. "All" means and includes "any and all."

2. "Advertisement" means any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears on the Internet, in email, on packaging, in a brochure, newspaper, magazine, pamphlet, leaflet, webinar, circular, mailer, book insert, free standing insert, letter, catalog, poster, chart, billboard, point of purchase material (including, but not limited to, a display or an item worn by salespeople), fact sheet, film, slide, radio, broadcast or cable television, audio program transmitted over a telephone system, program-length commercial, or in any other medium.

3. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request any information that might otherwise be construed to be outside its scope.

4. "Any" means and includes "any and all."

5. "Document" or "documents" are synonymous in meaning and equal in scope to the usage of the terms as defined by 16 C.F.R. 3.34(b), and includes, without limitation, any written material, whether typed, handwritten, printed or otherwise, and whether in draft or final form, of any kind or nature, or any photograph, photostat, microfilm or other reproduction thereof, including, without limitation, each note, memorandum, letter, release, article, report, prospectus, memorandum of any telephone or in-person conversation, any financial statement, analysis, drawing, graph, chart, account, book, notebook, draft, summary, diary, transcript, computer database, computer printout, or other computer-generated matter, contract or order, laboratory report, patent, trademark or copyright, and other data compilations from which information can be obtained. Electronic mail is included within the definition. A draft or non-identical copy is a separate document.

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

7. "ECM Additive" means the plastic additive manufactured by ECM, including but not limited to "Masterbatch Pellets."

8. "ECM Plastics" means plastics that contain ECM Additives.

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

REQUESTS

Request 1

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

Request 2

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

Request 3

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

Request 4

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

Request 5

Provide all documents regarding ASTM D5511 or ASTM D5526.

Request 6

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

a. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
b. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time in a landfill;
c. ECM Plastics will completely break down and decompose into elements found in nature within a nine months to five years in a landfill;
d. ECM Plastics will completely break down and decompose into elements found in nature within one year in a landfill; and

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

Request 7

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

Request 8

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

Request 9

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

Request 10

Provide copies of any materials relating to any ECM Additive made available to any ECM Additive distributor or customer, including, but not limited to: packaging, clipart, seals, logos, other marketing materials, instructions or suggestions regarding making marketing claims, or instructions for the use or marketing of the ECM Additive.

Request 11

Provide all documents, whether prepared by or for ECM or any other entity, including any advertising agency, regarding consumer perception, comprehension, or recall (including, but

not limited to, copy tests, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, and communication tests) of:

a. any advertisement, whether disseminated or not, that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic; and/or

b. biodegradability in general.

Request 12

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

Request 13

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

Request 14

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

Dated: November 27, 2013

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, I caused a true and correct copy of the paper original of the foregoing *Complaint Counsel's First Set of Requests for Production of Documents* to be served as follows:

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

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Lou Caputo
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: lcaputo@emord.com

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

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

Complaint Counsel Exhibit A Attachment 2

CCX-A:2

Jillson, Elisa

From: Peter Arhangelsky <PArhangelsky@emord.com>
Sent: Thursday, January 16, 2014 5:24 PM
To: Johnson, Katherine
Cc: Jonathan Emord; Lou Caputo; Cohen, Jonathan; Jillson, Elisa
Subject: ECM Response to FTC First Set of Requests for Production of Documents
Attachments: ECM Supplemental Response to FTC First Set of Interrog, Jan. 16, 2014.pdf

Katherine,

We hereby provide ECM's customer list in accord with the Court's January 10, 2014 Order. Please note that this information is designated highly confidential under the Protective Order. We provide this information subject to the Court's instruction that you cooperate to limit ECM's discovery burden. *See* ALJ Op. Dec., at 4 ("Complaint Counsel ... offers that 'if ECM produces its entire customer list, Complaint Counsel will limit its contacts to a subset of customers; give Respondent advance notice of such contacts; and negotiate search terms to reduce the number of customer communications responsive to discovery requests.'"). You also represented to the ALJ that you would "limit [the discovery] in a manner that conserves both parties' resources." *Id.* at 7; *see also id.* at 8 ("Complaint Counsel responds that it is prepared to negotiate appropriate search terms to reduce the number of responsive materials, provided that it first receives a complete customer list").

In our Tuesday call, you agreed to withdraw your Document Request No. 13 from your first set of document requests. We are also in receipt of your second set of document production requests. We have explained the significant burden your proposal imparts on ECM generally. Given the nature of ECM's business and its limited resources, and your representations to the ALJ, we propose the below limitations that will "reduce the number of responsive materials" to a reasonable level. We reject your proposed limitations from Monday, January 13, 2014, wherein the only material limitation you offered was a "list of 50 search terms or phrases" that would apply to ECM's files globally. While we agree that ECM should review its files based on keyword searches, and that those keywords must be limited in number, we think your offer does not provide the discovery protections contemplated in the Court's January 10th Order. We propose the following:

1. Customer Contacts: Complaint Counsel will be limited to contacting (formally or informally through compulsory process) up to 10 current ECM customers. Upon a showing of good cause, and having received information from those initial customers, Complaint Counsel and Respondent may negotiate additional contacts. Complaint Counsel will provide notice before contacting customers sufficient to give ECM an opportunity to object or seek appropriate relief.

2. Temporal Limitation: Complaint Counsel will limit its discovery requests for documents to a reasonable time period through 2009, which therefore includes responsive information over a period greater than 5 years.

3. Customer Correspondence: Complaint Counsel will select up to 50 of ECM's current customers, from which ECM will produce responsive information found within ECM's Microsoft Access Database records. ECM will produce the database records in a native format. ECM will retrieve and produce responsive email correspondence from its archived correspondence files pertaining to those 50 ECM customers, by using keywords negotiated by the parties in good faith. ECM will stipulate to the authenticity of records produced from its Microsoft Access Database. ECM will also waive any objection to the admissibility of those records on grounds of "best evidence" or "completeness," only to the extent such an objection depends on a potential or actual variation between the original document and the summary of same appearing in its database. However, ECM will not waive objections to hearsay and other evidentiary positions, which must be assessed on a document-by-document basis.

4. Scientific, Internal, and Otherwise Responsive Documents: Subject to the above temporal limitation, ECM will search its general files for information responsive to Complaint Counsel's First and Second Sets of Requests For Production of Documents, using keywords that are appropriate for that task. ECM will not search for, or produce, information that has already been provided to Complaint Counsel during the pre-complaint investigation, or which ECM has already searched for during that phase.

Subject to those limitations, which are reasonable given ECM's discovery burdens, ECM would promptly begin its production of responsive files. ECM rejects the suggestion that they hire an independent consulting firm solely to comply with discovery requests that are otherwise overbroad and objectionable.

Best,

Peter A. Arhangelsky, Esq. | **EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

---

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

Peter,

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

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

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

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

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

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

Katherine

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

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

Katherine,

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

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

The number 142,078 reflects the total number of entries in ECM's database. For our initial production, ECM screened its notes by selecting only prospective customers. The entries were not screened or retrieved using keywords and, so, those notes reflect the sum total of all material correspondence reported in the database for the entities selected. The

balance of the 142,078 entries includes information concerning all of ECM's former customers, inactive customers, and active customers. ECM can provide those records, subject to some agreement that will limit the breadth of information as per the Judge's ruling today. We assume from your representations before the ALJ that you will honor your offer to limit the scope of discovery and, to the extent that assumption is incorrect, we intend to file a motion for reconsideration.

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

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

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

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

Best,

Peter A. Arhangelsky, Esq. | **EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

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

Peter:

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

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

Katherine

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

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

Katherine,

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

To the extent the original emails exist, production of all such files imposes a considerable burden. Bob Sinclair is essentially the only ECM employee who can perform this task. While ECM logs its correspondence in the notations we

produced, it does not sort the original files that are ultimately archived (which are rendered unnecessary to ECM by the summary notations). All original email files are initially transferred to a global correspondence folder where they remain for a short time, and then eventually archived for backup. To produce an email referenced in the notations, someone must manually search all archived folders for keywords that hit on the original file. That process is incredibly time consuming, and would eventually yield volumes of cumulative documents (in the tens of thousands). Production of "all responsive documents" could therefore require weeks of Bob's time at a substantial loss for ECM.

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

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

Best,

Peter A. Arhangelsky, Esq. | **EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

---

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

Lou and Peter:

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

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

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov
From: Lou Caputo [mailto:lcaputo3@gmail.com]
Sent: Friday, December 27, 2013 4:54 PM
To: Johnson, Katherine; Jillson, Elisa; Cohen, Jonathan
Cc: Jonathan Emord; Peter Arhangelsky
Subject: ECM Response to FTC First Set of Requests for Production of Documents

Dear Katherine,

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

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

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

Please let us know if you have any questions.

Thanks,

Lou Caputo | **EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

Complaint Counsel Exhibit A Attachment 3

CCX-A:3

Jillson, Elisa

From: Cohen, Jonathan
Sent: Friday, January 17, 2014 2:13 PM
To: 'Peter Arhangelsky'; 'Jonathan Emord'; 'Lou Caputo'
Cc: Jillson, Elisa; Johnson, Katherine
Subject: ECM: Document Requests & Other Outstanding Issues
Attachments: Complaint Counsel's Preliminary Witness List.pdf

Counsel,

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

With respect the specifics of your proposal:

1. Customer Contacts – This issue is separate from whether ECM has to comply with our document requests. We received your customer list yesterday evening. We'll let you what subset we intend to contact after we've had an opportunity to review and analyze the list and, potentially, after we've had an opportunity to review and analyze your document production. In all events, we'll give ECM enough time to notify its customers or seek emergency relief from the Court before we contact any customer on the list you produced yesterday evening. Again, however, the customer contacts issue has nothing to do with ECM's obligation to produce its own responsive documents.

2. Temporal Limitation – As you know, our pre-complaint investigation covers the period from January 1, 2008 forward. In the interest of accommodation, we'll incorporate your proposed January 1, 2009 limit into our final proposal.

3. Customer Correspondence – Your proposal is replete with problems; we'll simply note that, even if an "email only" production was satisfactory (and it isn't), you aren't proposing to produce these documents by any particular time. Even if you believe that these are the only documents we're entitled to, it's still the case that they're three weeks overdue (with no end in sight).

4. Scientific, Technical, & Otherwise Responsive Documents – There's some room for negotiation here; we agree that you don't have to produce to us anything you've produced already during the pre-complaint investigation (in fact, you don't even have to negotiate that, we volunteer that you don't have to re-produce anything, with respect to these subjects or otherwise). And keywords may be appropriate for finding responsive scientific, technical and other responsive documents.

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

(1) From the outset, accepting this offer would discharge your obligations under all outstanding document requests.

(2) Subject to the "Enhanced Clawback" agreement described below, you give us the entire MS Access correspondence database (in native form) by January 24. ECM does not need to search its archives for original correspondence. We'll take the summaries. If you want, you can remove from the database anything you believe in good faith is non-responsive or privileged (in fact, you should have started this process some time ago, and maybe you have).

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

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

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

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

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

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

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

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

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

Thanks,

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

Complaint Counsel Exhibit A Attachment 4

CCX-A:4

Jillson, Elisa

From: Cohen, Jonathan
Sent: Tuesday, December 24, 2013 2:14 PM
To: 'Lou Caputo'
Cc: Johnson, Katherine; Jillson, Elisa; 'Jonathan Emord'; 'Peter Arhangelsky'
Subject: ECM: Document Production

Lou,

We're not thrilled with what you propose, as it seems to involve all of the conversion effort being done on our end (and at the FTC's expense). We do not maintain our documents in PDF form (that isn't the industry standard), but, as an accommodation, and in the interest of moving things forward, we will convert our production to PDF for you. We will do that as quickly as possible, but it's the holiday week, and it will take additional time to meet your request.

With respect to your production, we'll have to convert it to a form readily usable to us (Concordance load-ready files, again, consistent with the industry standard). So that we can prepare for that potentially significant undertaking on our part, can you please provide us with some details? Specifically, we need to know:

(1) What types of files do you intend to produce?
(2) What is the approximate volume of each file type?
(3) How will you produce metadata?

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: Lou Caputo [mailto:lcaputo3@gmail.com]
Sent: Monday, December 23, 2013 6:14 PM
To: Cohen, Jonathan; Jonathan Emord; Peter Arhangelsky
Cc: Johnson, Katherine; Jillson, Elisa
Subject: Re:

Thanks Jonathan. As for our production, we expect to provide documents in the format they are ordinarily maintained and provided to us by the client. If an issue were to arise, we are happy to discuss.

Best,

Lou

On Mon, Dec 23, 2013 at 3:50 PM, Cohen, Jonathan <jcohen2@ftc.gov> wrote:

Lou,

We'll make arrangements to provide you with a PDF production, subject to your agreement to provide us with Concordance-load ready files. I'll assume this is fine, but if not, please let me know promptly.

As far as your earlier email goes, I don't doubt that you sent it, but none of us received it. My understanding is that there is something wrong with your email server, and there have been multiple instances in which your emails haven't reached us. We'll work with you the best we can, but this is likely to cause problems down the road, and we can't be held responsible for a problem with your server. It may make sense for you to continue using alternate email accounts until you resolve the issue.

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: Lou Caputo [mailto:lcaputo3@gmail.com]
Sent: Monday, December 23, 2013 4:27 PM
To: Cohen, Jonathan
Subject:

Hi Jonathan,

We replied earlier that PDF would be fine. I am not sure if you received that message, but I sent it to Elisa at 11:31 AZ time this morning. Regardless, PDF is preferred for the documents.

Thank you,

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